

**Aboriginal Legal Service of Western Australia
Limited**



**Submission to the Australian Law Reform
Commission's Discussion Paper on *Incarceration
Rates of Aboriginal and Torres Strait Islander
Peoples***

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ABOUT THE ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA

ALSWA is a community-based organisation, which was established in 1973. ALSWA aims to empower Aboriginal peoples and advance their interests and aspirations through a comprehensive range of legal and support services throughout Western Australia. ALSWA aims to:

- Deliver a comprehensive range of culturally-matched and quality legal services to Aboriginal peoples throughout Western Australia;
- Provide leadership which contributes to participation, empowerment and recognition of Aboriginal peoples as the First Peoples of Australia;
- Ensure that Government and Aboriginal peoples address the underlying issues that contribute to disadvantage on all social indicators, and implement the relevant recommendations arising from the Royal Commission into Aboriginal Deaths in Custody; and
- Create a positive and culturally matched work environment by implementing efficient and effective practices and administration throughout ALSWA.

ALSWA uses the law and legal system to bring about social justice for Aboriginal peoples as a whole. ALSWA develops and uses strategies in areas of legal advice, legal representation, legal education, legal research, policy development and law reform.

ALSWA is a representative body with executive officers elected by Aboriginal peoples from their local regions to speak for them on law and justice issues. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law, child protection and human rights law. Our services are available throughout Western Australia via 14 regional and remote offices and one head office in Perth.

BACKGROUND

Scope of the reference

ALSWA acknowledges that juveniles in detention are outside the scope of the Australian Law Reform Commission's (ALRC) inquiry. Nevertheless, ALSWA emphasises that reforms to laws and legal frameworks within the juvenile justice system have a huge potential to reduce the level of incarceration of Aboriginal adults. Decisions and actions made in relation to Aboriginal and Torres Strait Islander children within the justice system have a direct bearing on future outcomes within the adult justice system. Therefore, where particularly relevant, ALSWA refers to issues concerning the youth justice system in this submission.

Overrepresentation of Aboriginal and Torres Strait Islander peoples in Western Australia

Western Australia has the highest rate of overrepresentation of Aboriginal and Torres Strait Islander adults and juveniles in custody. As the ALRC observes, Aboriginal

and Torres Strait Islander people represent 3% of the population but constitute 27% of the adult prisoner population.¹ However, in Western Australia Aboriginal and Torres Strait Islander people make up almost 40% of the adult prisoner population and 73% of the juvenile detention population. Aboriginal and Torres Strait Islander women are also grossly overrepresented; as at 31 March 2017, 46% of female prisoners were Aboriginal or Torres Strait Islander women (compared to 34% nationally).² Sadly, Western Australia also has the highest level of overrepresentation of Aboriginal and Torres Strait Islander children in out-of-home care.³

As stated above, in terms of overrepresentation of Aboriginal and Torres Strait Islander peoples in custody, Western Australia is the worst jurisdiction in Australia. ALSWA urges the ALRC to be mindful of this reality when determining its final recommendations for reform. In simple terms, why is Western Australia doing so badly?

ALSWA SUBMISSION

For ease of reference, the structure of ALSWA's submission broadly follows the structure of the ALRC's Discussion Paper. ALSWA's extensive experience in representing Aboriginal and Torres Strait Islander peoples throughout the state of Western Australia on a daily basis as well as its longstanding research and expertise has informed this submission. Wherever possible, ALSWA refers to case examples to provide evidence of the numerous problems faced by Aboriginal and Torres Strait Islander people in the Western Australian justice system. Extremely busy and passionate ALSWA lawyers have provided these case examples. ALSWA thanks these lawyers for their valuable contribution. Many more examples exist but the tight timeframe for submissions coupled with the enormous workload of ALSWA lawyers has made it impossible to provide more. ALSWA asks the ALRC to view the case examples included in this submission as a 'sample' of cases rather than as the only evidence of the various problems discussed.

Introduction

Contributing factors

The ALRC explains that the findings from various 'other inquiries provide a fuller picture of both the drivers of incarceration and opportunities that exist to address offending behaviours before the point of imprisonment'.⁴ The ALRC states it will consider these issues in more detail in its Final Report. ALSWA agrees that many past inquiries and reports have thoroughly documented the factors contributing to the disproportionate imprisonment rates for Aboriginal and Torres Strait Islander people.⁵

¹ Australian Law Reform Commission (ALRC), *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [1.30].

² Western Australian Department of Corrective Services, *Adult Prisoners in Custody Quarterly Statistics March Quarter 2017*; *Young People in Detention Quarterly Statistics March Quarter 2017*.

³ Australian Institute of Health and Welfare, *Child Protection Australia 2015-2016* (2017) 52.

⁴ ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [1.13].

⁵ See for example, the Royal Commission into Aboriginal Deaths in Custody (1991); Law Reform Commission of Western Australia (LRCWA), *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) & LRCWA, *Aboriginal Customary Laws*, Discussion Paper (2005) (in particular,

In summary, ALSWA is of the view that the factors fall into two main categories. The first category are underlying factors that contribute to higher rates of offending (eg, socio-economic disadvantage, impact of colonisation and dispossession, stolen generations, intergenerational trauma, substance abuse, homelessness and overcrowding, lack of education, and physical and mental health issues). The second category is structural bias or discriminatory practices within the justice system itself. There are many examples of this bias such as over-policing; lack of culturally appropriate programs in the community and in prison; mandatory sentencing; punitive bail laws; insufficient resourcing of Aboriginal-specific legal services; and lack of language interpreters.

The Chief Justice of Western Australia, Wayne Martin has argued that:

Over-representation amongst those who commit crime is, however, plainly not the entire cause of over-representation of Aboriginal people. The system itself must take part of the blame. Aboriginal people are much more likely to be questioned by the police than non-Aboriginal people. When questioned they are more likely to be arrested rather than proceeded against by summons. If they are arrested, Aboriginal people are more likely to be remanded in custody than given bail. Aboriginal people are much more likely to plead guilty than go to trial, and if they go to trial, they are much more likely to be convicted. If Aboriginal people are convicted, they are much more likely to be imprisoned than non-Aboriginal people, and at the end of their term of imprisonment they are much less likely to get parole than non-Aboriginal people.⁶

In this regard, it is important to highlight two issues. First, crime statistics (eg, rates of arrest, rates of imprisonment) do not measure the true prevalence of crime in the community nor do they tell us who is responsible for committing those crimes. Instead, crime statistics measure the demographics of those people who are caught and punished for criminal behaviour. As one example, it is an offence in Western Australia to consume alcohol in a public place (street drinking).⁷ The infringement penalty is \$200 and the maximum penalty is a fine of up to \$2000. Many people consume alcohol in contravention of this law (eg, drinking at a family picnic on the river). However, not everyone is charged with street drinking; ALSWA suggests that Aboriginal and Torres Strait Islander people are charged for street drinking far more frequently than non-Aboriginal people.

Second, if higher rates of offending among Aboriginal people were the sole cause of disproportionate incarceration rates then there should be no difference in the rate of overrepresentation between different states and territories. As observed by Morgan and Motteram,

Unless one espouses the absurd notion that Aboriginal Western Australians are many times more evil than their inter-state colleagues, this cannot explain why Western Australia's imprisonment rate is so much higher than the rest of the country.⁸

Western Australia has the worst overrepresentation followed by the Northern Territory. ALSWA suggests that the ALRC should look closely at why Western Australia's justice system is failing Aboriginal and Torres Strait Islander peoples.

see pp 97-99); House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time—Time for Doing: Indigenous youth in the criminal justice system* (2011); Senate Legal and Constitutional Affairs References Committee, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) (in particular see pp 33-41).

6 The Honourable Wayne Martin AC, Chief Justice of Western Australia, *Indigenous Incarceration Rates: Strategies for much needed reform* (Law Summer School 2015) 8-9.

7 *Liquor Control Act 1988* (WA) s 119.

8 Morgan and Motteram as quoted in LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) 83.

Child protection and adult incarceration

The ALRC observes that out-of-home care and juvenile detention are key contributing factors to adult incarceration rates for Aboriginal and Torres Strait Islander people.⁹ As highlighted at the outset, Western Australia has the highest disproportionate rate of Aboriginal and Torres Strait Islander juvenile detention and of Aboriginal and Torres Strait Islander children in out-of-home care, (approximately 53% of all children in care¹⁰).

The ALRC notes that while reviews and strategies are occurring at the state/territory level, there has not been a 'national review of the laws and processes operating within the care and protection systems of the various states and territories. The ALRC considers that such a review would be timely'.¹¹ The State Government is conducting a review of child protection laws in Western Australia and ALSWA provided a comprehensive submission to that review early in 2017.¹² It is not yet known what reforms will be implemented but ALSWA emphasised in its submission that while reforms to current legislation may improve the position, the entire child protection system as it applies to Aboriginal children, must be redesigned 'from the ground up'. Aboriginal and Torres Strait Islander communities are tired of inquiries and reviews that rehash the same issues and seldom result in meaningful reform. Having said that, ALSWA would support a national child protection inquiry if its mandate is sweeping with a view to wholesale system reform.

Rural and remote

ALSWA agrees with the ALRC's observation that the lack of legal services and community programs in remote areas is a contributing factor to incarceration.¹³ The pressures on ALSWA lawyers in regional and remote Western Australia are enormous with some lawyers representing up to 30-40 clients in Magistrates Courts on one day. In extreme cases, ALSWA lawyers have acted for well over 100 clients in one Magistrates Court sitting day. It is vital that sufficient resources are provided to Aboriginal and Torres Strait Islander Legal Services (ATSILS) to ensure that all Aboriginal and Torres Strait Islander people across Western Australia have access to culturally competent and effective legal representation. In terms of community programs, governments must invest in Aboriginal and Torres Strait Islander community controlled programs and services utilising local community members.

Bail and the Remand Population

In recent years, there has been a substantial increase in the remand prisoner population at the national level. The position is no different in Western Australia: at the end of 2009, 15% of adult prisoners were on remand and by July 2014, this figure had risen to almost 25%.¹⁴ As at 31 March 2017, approximately 30% of adult

9 ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [1.16]-[1.17].

10 Department for Child Protection and Family Support, *Annual Report 2015-2016* (2017) 34.

11 ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [1.24].

12 ALSWA, *Submission to the Review of the Children and Community Services Act 2004* (13 April 2017) available at <http://www.als.org.au/wp-content/uploads/2015/08/ALSWA-Submission-to-Review-of-CCSA-13-April-2017.pdf>.

13 ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [1.27].

14 OICS, *Western Australia's Rapidly Increasing Remand Population* (2015) 4.

prisoners in Western Australia were on remand.¹⁵ As the ALRC observes 'one-third of Aboriginal and Torres Strait Islander peoples in prison are held on remand'¹⁶ and, therefore, measures to reduce the remand population will assist in reducing the level of over incarceration.

The ALRC refers to a number of factors that influence a court's decision to grant bail (or set bail on reasonable and appropriate conditions) for Aboriginal and Torres Strait Islander people. These factors include unstable accommodation and employment; previous breaches of bail conditions due to cultural and/or family obligations; and prior convictions. As stated in the Discussion Paper, Aboriginal and Torres Strait Islander people are 'less likely to be granted bail than non-Indigenous persons'.¹⁷

The Western Australian Office of the Inspector of Custodial Services (OICS) has observed that approximately 90% of remand prisoners in Western Australia have had bail refused by the court and the remaining 10% are unable to meet their bail conditions.¹⁸ OICS has also stated that the proportion of women on remand is increasing faster than the proportion of men and that this is 'primarily due to an extraordinary increase in the number of Aboriginal women on remand'.¹⁹

Under the *Bail Act 1982 (WA)* (*Bail Act*), there are two categories of bail decision-making: cases where there is a broad discretion to consider bail and cases where there is a presumption against bail (ie, accused will not be granted bail unless there are exceptional reasons).

For the first category, the court is required to consider, among other things, whether the accused, if released, may fail to appear in court; commit an offence; endanger the safety, welfare or property of any person; and interfere with witnesses or otherwise obstruct the course of justice.²⁰ If there is such a risk, the court is required to consider whether there are any conditions that would sufficiently address that risk. Such conditions include personal bonds, sureties, residential conditions, curfew conditions, reporting conditions and conditions to attend a prescribed person for counselling or attend a prescribed course or programme.²¹ The court has discretion to impose any condition that it considers necessary.

The second category is often referred to as 'Schedule Two Cases'; in these cases there is a presumption against bail. If an accused is charged with a 'serious offence' that was allegedly committed while the accused was on bail or subject to parole for another 'serious offence' the court is not to grant bail unless there are exceptional reasons why the accused should not be kept in custody. Schedule 2 of the *Bail Act* defines 'serious offence' and the list covers a wide range of offences. While some of these offences are very serious (eg, murder, aggravated sexual penetration without consent), others may be less serious depending on the circumstances (assaulting a public officer, indecent assault, assault occasioning bodily harm, burglary, stealing a motor vehicle and breaching a police order).

15 ALSWA notes that the proportion of children in custody on remand is even higher; as at 31 March 2017 45% of juvenile detainees were on remand: DOCS, *Young People in Detention Quarterly Statistics March Quarter 2017*.

16 ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [2.1].

17 Ibid [2.3] & 2.20.

18 OICS, *Western Australia's Rapidly Increasing Remand Population* (2015) 1.

19 Ibid 5.

20 *Bail Act 1982 (WA)* Clause 1, Part C, Schedule 1.

21 *Bail Act 1982 (WA)* Clause 2, Part D, Schedule 1. Under Reg 11 of the *Bail Regulations 1988 (WA)*, a prescribed person is a registered psychologist who is employed in or providing services under contract to the Department of Corrective Services. Prescribed programs are Anger Management Programme; Domestic Violence Programme and Warminda Programme.

Bearing in mind the presumption of innocence and the need to ensure that accused persons are not unnecessarily remanded in custody prior to conviction, **ALSWA is of the view that the provisions of the *Bail Act* should be amended to:**

1. Create a general presumption in favour of bail so that a court may only refuse bail where there is a substantial risk that the accused will fail to appear in court; commit an offence; endanger the safety, welfare or property of any person; or interfere with witnesses or otherwise obstruct the course of justice.
2. Restrict Schedule Two Cases to the most serious offences only.
3. Ensure that a court only imposes conditions to address any risk (that the accused will fail to appear in court; commit an offence; endanger the safety, welfare or property of any person; or interfere with witnesses or otherwise obstruct the course of justice) if the court is satisfied that the condition is reasonably necessary in all of the circumstances.

Proposal 2-1 The *Bail Act* 1977 (Vic) has a standalone provision that requires bail authorities to consider any 'issues that arise due to the person's Aboriginality', including cultural background, ties to family and place, and cultural obligations. This consideration is in addition to other requirements of the *Bail Act*.

Other state and territory bail legislation should adopt a similar provision.

As with all other bail considerations, the requirement to consider issues that arise due to the person's Aboriginality would not supersede considerations of community safety.

In Western Australia, the *Bail Act* provides that when considering bail the court is to take into account, among other things, the 'character, previous convictions, antecedents, associations, home environment, background, place of residence, and financial position of the accused'.²² The Law Reform Commission of Western Australia (LRCWA) observed in 2006 that 'these criteria (many of which focus on western concepts) have the potential to disadvantage Aboriginal people applying for bail'.²³

ALSWA has represented numerous clients who spend weeks or months in custody on remand because they are unable to raise a surety. Magistrates may set a surety in the amount of \$1,000 or \$2,000; however, for Aboriginal and Torres Strait Islander people who are socially and economically disadvantaged, these amounts of money present insurmountable obstacles to obtaining surety bail. Instead, as the LRCWA proposed, an 'assessment of their family, kin and community ties would be more appropriate' for Aboriginal and Torres Strait Islander people.²⁴

The LRCWA also observed that customary law and cultural factors 'may explain more fully an Aboriginal person's ties to his or her community. It may also provide a reason why an accused previously failed to attend court. Aboriginal customary law processes may impact upon the choice of appropriate bail conditions'.²⁵ The LRCWA

²² *Bail Act* 1982 (WA) Clause 3, Part C, Schedule 1.

²³ Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) 165.

²⁴ *Ibid.*

²⁵ *Ibid* 166.

recommended that Clause 3 of Part C in Schedule 1 of the *Bail Act* should provide that 'the judicial officer or authorised officer shall have regard, where the accused is an Aboriginal person, to any known Aboriginal customary law or other cultural issues that are relevant to bail'.²⁶ This is similar to the approach adopted by the ALRC.

ALSWA supports the ALRC's Proposal 2-1 and agrees that the Victorian provision is an appropriate model. Such an amendment will provide consistency and ensure that courts are required to take into account issues that arise due to a person's Aboriginality. In order to ensure that issues relating to the accused person's cultural background and cultural obligations are properly presented to the court, it is also essential that ATSILS and Aboriginal language interpreter services are adequately funded.²⁷

Proposal 2-2 State and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to identify service gaps and develop the infrastructure required to provide culturally appropriate bail support and diversion options where needed.

There is a lack of culturally appropriate bail support and diversion options for Aboriginal and Torres Strait Islander people in Western Australia. For this reason, **ALSWA supports Proposal 2-2.**

There are two key ways of supporting Aboriginal and Torres Strait Islander people in relation to bail. The first is to ensure Aboriginal and Torres Strait Islander people are not remanded in custody because they are unable to meet the bail conditions set by the police or the court. The Auditor General of Western Australia found that, in 2014, of the 43,249 accused persons granted bail, 1,663 remained in prison until they could meet their bail release conditions. Of these 1,663 remand prisoners, 740 were released within a week. The Auditor General observed that providing more support to accused persons 'at the time bail is granted would help reduce the number of people granted bail but held in prison'.²⁸ The bail conditions that were the most difficult to meet were obtaining a surety and providing a suitable residential address.²⁹

The second way is to provide assistance for Aboriginal and Torres Strait Islander people on bail to ensure that they comply with their bail conditions and to ensure that they receive appropriate and relevant support to divert them from further involvement in the criminal justice system.

ALSWA considers that the best way to provide culturally appropriate bail support and diversion options is to develop and establish Aboriginal-run programs that provide holistic, flexible and individualised support and assistance. ALSWA's Youth Engagement Program is one such program. The Youth Engagement Program employs three Aboriginal diversion officers who currently work with 48 young people who are appearing in the Perth Children's Court. Although this program is only available for young people and applies at any stage of the justice process, it could easily be

26 Ibid Recommendation 34.

27 Resources to ATSILS and for statewide interpreter services are addressed later in this submission.

28 Auditor General of Western Australia, *Management of Adults on Bail* (2015) 7.

29 Ibid 13.

adapted for adults who are on bail. Support provided by Aboriginal diversion officers includes accommodation assistance; referrals to programs (eg, drug and alcohol rehabilitation programs, educational and training programs, recreational programs); transport assistance; reminders for court and other appointments; mentoring and encouragement; and liaison and advocacy with various government and non-government agencies. The diversion officers work onsite at the Perth Children's Court as well as conducting extensive outreach services.

Aboriginal diversion/support workers could assist in ensuring that an accused person meets the conditions of bail and support accused persons who are released on bail to comply with their conditions. The Western Australian government should work with ALSWA, as the only Indigenous-specific legal service provider for Aboriginal and Torres Strait Islander people charged with criminal offences, to develop bail and diversion programs for adults. As discussed later in this submission, an ALS-run Custody Notification Service is another mechanism to assist in more positive bail outcomes at the time of arrest by police and such a service in conjunction with a bail support program would provide continuity of support.

The recent findings of the Australian Institute of Criminology, in its literature review of bail support programs, endorse ALSWA's view and its approach under the Youth Engagement Program. The review observes that 'best practice principles' include that bail support programs should be voluntary; be timely and individualised (eg, available immediately and even before the accused has left court); be holistic (addressing full range of needs); be collaborative; consistently apply a strong program philosophy; prioritise support over supervision; be localised; have a court-based staffing presence; and be founded on sound guidelines and processes.³⁰

Nevertheless, the review also highlighted that the lack of accommodation options and limited treatment places poses challenges to the effectiveness of bail support programs.³¹ ALSWA agrees and urges state and territory governments to invest in alternative accommodation options such as bail hostels and to increase the number of culturally appropriate residential rehabilitation placement options.

From its perspective, ALSWA considers that the idea of 'support over supervision' is a critical component of success. Mainstream bail support programs for young people in Western Australia tend to focus on monitoring rather than enabling compliance (eg, regular check-in phone calls, checking on compliance with curfew conditions and residential conditions). The ALSWA Youth Engagement Program is able to offer young people support to comply with bail conditions; young people and their families will often contact the diversion officers if difficulties arise. This enables a proactive and problem-solving response instead of disengagement out of fear of reprisals. ALSWA also considers that restrictions on eligibility to be released to a bail support program, (eg that those charged with violence type offences are not eligible), adversely impact on Aboriginal people as well as contributing to the rates of Aboriginal people on remand, and should be reviewed.

Sentencing and Aboriginality

Question 3-1 Noting the decision in *Bugmy v The Queen* [2013] HCA 38, should state and territory governments legislate to expressly require courts to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples when sentencing Aboriginal and Torres Strait Islander offenders?

If so, should this be done as a sentencing principle, a sentencing factor, or in some other way?

ALSWA is of the view that states and territories should legislate to expressly require sentencing courts to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.

The LRCWA considered this issue in its inquiry into Aboriginal customary laws in 2006. An examination of cases in Western Australia revealed that sentencing courts have taken into account various factors such as social and economic disadvantage; substance abuse; hardship of imprisonment for Aboriginal and Torres Strait Islander peoples due to loss of connection to culture, land, family and community; and the impact of past policies of child removal. However, it found that there was only a 'limited number of cases that have acknowledged the disadvantages experienced by Aboriginal people within the criminal justice system'.³² The LRCWA observed that:

[I]t is now widely acknowledged that part of the reason for the high levels of Aboriginal people in custody is the cumulative effect of what has been described as 'structural racism' and bias within the justice system.³³

After examining the Canadian approach, the LRCWA considered that reform was required to encourage sentencing courts to adopt an approach consistent with the approach of the Western Australian Court of Appeal in *WO (A Child) v The State of Western Australia*.³⁴ In that case, the court observed that:

[T]he dramatic overrepresentation of Aboriginal youth in the criminal justice system, and particularly detention, may be a consequence of a sequence of decisions, each of which appears relatively inconsequential at the time, but which compound and become serious retrospectively. Young Aborigines then quickly develop a 'profile' of characteristics which identify them as habitual offenders and quickly exhaust whatever diversionary alternatives exist.³⁵

And, as the LRCWA observed:

The Court stated that as a consequence of these past decisions, children appearing before a court may incorrectly be assumed to be the more serious offenders and therefore the court held that it is 'critical that, at each stage of that process, the Court should examine, by reference to the detailed circumstances of the prior offences, whether those assumptions are justified'.³⁶

The LRCWA stated that:

The Commission wishes to make it clear that its recommendation does not mean that Aboriginal offenders will not go to prison. Nor does it mean that Aboriginal people will be treated more

32 LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture* (2006) 171-172.

33 Ibid 174.

34 [2005] WASCA 94.

35 Ibid [60].

36 LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture* (2006) 176.

leniently than non-Aboriginal people just on the basis of race... What the Commission is recommending is that when judicial officers are required to sentence Aboriginal people they turn their minds not just to the matters that are directly relevant to the individual circumstances of the offender but to the circumstances of Aboriginal people generally. These circumstances include over-representation of Aboriginal people in the criminal justice system. A judicial officer would need to be satisfied that the particular offender has experienced in some way the negative effects of systemic discrimination and disadvantage within the criminal justice system and the community.³⁷

The LRCWA recommended that the *Sentencing Act 1995* (WA) and the *Young Offenders Act 1994* (WA) include a provision that 'when considering whether a term of imprisonment (or detention) is appropriate the court is to have regard to the particular circumstances of Aboriginal people'.³⁸ This is similar, although not identical, to s 718.2(e) of the *Canadian Criminal Code*, which provides that:

All available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

In *R v Gladue*,³⁹ the Court explained that 'the fundamental purpose of s 718.2(e) is to treat [A]boriginal offenders fairly by taking into account their difference'⁴⁰ and that the provision does not result in an 'automatic reduction of a sentence... simply because the offender is [A]boriginal'.⁴¹ A recent case reiterates this view. In *R v Lavergne*⁴² the judge stated that although the offender is Indigenous, the 'record does not disclose anything else beyond his statement of his Indigenous heritage. There is no evidence of any systemic or background factors which may have played a part in bringing this accused before the court. A bare assertion of Indigenous heritage, without more, would not have any impact on the sentence imposed'.⁴³

In *R v Ipeelee*⁴⁴ the court discussed criticisms of the provision.⁴⁵ One criticism is that sentencing is not an appropriate means of addressing overrepresentation. In response, it was stated that 'sentencing judges can endeavour to reduce crime rates in Aboriginal communities by imposing sentences that effectively deter criminality and rehabilitate offenders'.⁴⁶ In addition, 'judges can ensure that systemic factors do not lead inadvertently to discrimination in sentencing' as 'sentencing judges, as front-line workers in the criminal justice system, are in the best position to re-evaluate these criteria to ensure that they are not contributing to ongoing systemic racial discrimination'.⁴⁷

In response to the view that the 'Gladue principles' provide a race-based discount, it was stated that 'sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case'.⁴⁸ It was further stated that 'Gladue is entirely consistent with the requirement that sentencing judges engage in an individual assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them'.⁴⁹

37 Ibid 177.

38 Ibid Recommendation 37.

39 [1999] 1 SCR 688.

40 Ibid [87].

41 Ibid [88].

42 [2017] ONCA 642.

43 Ibid [33].

44 [2012] 1 SCR 433.

45 Ibid [64] LeBel J (LeBel J wrote the majority judgement).

46 Ibid [66].

47 Ibid [67].

48 Ibid [75].

49 Ibid [75].

R v Ipeelee also confirmed that in order to rely on the provisions of s 718.2(e) it is not necessary for the offender to establish a causal link between the background factors and the commission of the current offence and, further, that the provision is applicable for all offences.⁵⁰

In the recent case, *R v Wesley*⁵¹, McLeod J stated that the '[a]pplication of the Gladue factors is at least in part aimed at understanding the individual offender's moral blameworthiness'.⁵² ALSWA considers this analysis of the provision particularly useful because moral blameworthiness is always relevant to sentencing. An assessment of moral blameworthiness explains why it is considered less serious to steal 'for need' than 'for greed'. It also explains why a person who has been treated extremely badly by police in the past and then responds aggressively to police intervention by assaulting an officer is less morally blameworthy than someone else who assaults a police officer for absolutely no reason at all. ALSWA considers that the experience of systemic discrimination within the justice system coupled with extreme disadvantage and vulnerability will often reduce an Aboriginal or Torres Strait Islander person's moral blameworthiness.

In *Bropho v Harrison*⁵³ a magistrate sentenced an Aboriginal female offender to seven months' imprisonment for two offences of failing to comply with a move on order and one offence of carrying an article with intent to cause fear. The offender was homeless and had a chronic substance abuse problem. The more serious charge involved her holding up a pair of scissors in the air while adopting a fighting stance as she was arguing with her partner in the street. She had a long history of offending and had received multiple fines. She was paying \$100 per fortnight from her Centrelink payments to pay off her fine debt. The sentencing magistrate stated:

When I have someone who is nearly 50 years of age with a 30-year offending history, then in my view if you remain unwilling or unable to take advantage of support and services that are available to you, and rehabilitation available to you, then you remain at risk of reoffending.⁵⁴

On appeal, Hall J observed that the magistrate erred by failing to take into account that her offending was a 'consequence of her long term issues of substance abuse, which, in turn, are particular problems in the Aboriginal community of which she is a part'.⁵⁵ The sentence of imprisonment was set aside with an order that the offender be resentenced in the Magistrates Court. The offender spent approximately two months in custody awaiting the appeal.

While the appeal was successful, ALSWA considers that this case demonstrates the need for legislative reform to require courts to take into account the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples and the need for specialist sentencing reports (referred to below). The appeal court correctly followed past decisions about the need to take into account the offender's 'impoverished circumstances and environment associated with her Aboriginality'.⁵⁶ However, a broader inquiry as envisaged by the LRCWA's 2006 recommendation may have resulted in a deeper analysis of her treatment by the police and the justice system. Why did the police issue her with move-on orders? As a homeless person, where was she supposed to go? Even the appeal court noted that there was nothing before the Magistrate to indicate what first brought her to the attention of police for

50 [81] & [84].

51 [2017] ABPC 206.

52 Ibid [83].

53 [2013] WASC 250.

54 Ibid [24].

55 Ibid [48].

56 Ibid [44].

the move on orders. During the appeal, it was suggested that it might have been street drinking.⁵⁷ The Magistrate referred to this woman as being unwilling to take advantage of the rehabilitation available to her. What, if any, rehabilitation had been made available to her?

ALSWA submits that the *Sentencing Act* and the *Young Offenders Act* should include a provision that when sentencing an Aboriginal and Torres Strait Islander person the court must take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.

Question 3-2 Where not currently legislated, should state and territory governments provide for reparation or restoration as a sentencing principle? In what ways, if any, would this make the criminal justice system more responsive to Aboriginal and Torres Strait Islander offenders?

Unlike other jurisdictions, Western Australia's sentencing legislation does not expressly refer to the purposes of sentencing (ie, punishment, deterrence, protection of the community, denouncement and rehabilitation). It also does not include a comprehensive list of relevant sentencing factors. Section 6 of the *Sentencing Act 1995 (WA)* (*Sentencing Act*) sets out the principles of sentencing:

- (1) A sentence imposed on an offender must be commensurate with the seriousness of the offence.
- (2) The seriousness of an offence must be determined by taking into account —
 - (a) the statutory penalty for the offence; and
 - (b) the circumstances of the commission of the offence, including the vulnerability of any victim of the offence; and
 - (c) any aggravating factors; and
 - (d) any mitigating factors.
- (3) Subsection (1) does not prevent the reduction of a sentence because of —
 - (a) any mitigating factors; or
 - (b) any rule of law as to the totality of sentences.
- (4) A court must not impose a sentence of imprisonment on an offender unless it decides that
 - (a) the seriousness of the offence is such that only imprisonment can be justified; or
 - (b) the protection of the community requires it.

In 2009, the LRCWA recommended that the *Sentencing Act* should be amended to include the purposes of sentencing.⁵⁸ ALSWA highlights that any recommendation that reparation or restoration should be included in sentencing legislation as a sentencing principle or as an objective of sentencing will be problematic in Western Australia in the absence of broader reform of the Act. The LRCWA's recommendation was:

1. That the *Sentencing Act 1995 (WA)* be amended to provide that the purposes for which a court may impose a sentence on an offender are as follows:
 - (a) to ensure that the offender is adequately punished for the offence;
 - (b) to prevent crime by deterring the offender and other persons from committing similar offences;
 - (c) to protect the community from the offender;
 - (d) to promote the rehabilitation of the offender;

57 Ibid [7] & [11].

58 LRCWA, *Court Intervention Programs*, Final Report (2009) Recommendation 11.

- (e) to make the offender accountable for his or her actions;
- (f) to denounce the conduct of the offender; and
- (g) to recognise the harm done to the victim of the crime and the community.

2. That the *Sentencing Act 1995* (WA) provide that the order in which these purposes are listed does not indicate that one purpose is more or less important than another and that a court may impose a sentence for one or more of the abovementioned purposes.

ALSWA would have no objection to a similar reform in Western Australia noting that the purposes of making the offender accountable for his or her actions and recognising the harm done to the victim and the community adequately accommodate concepts of restoration and reparation.

Specialist sentencing reports

Question 3-3 Do courts sentencing Aboriginal and Torres Strait Islander offenders have sufficient information available about the offender's background, including cultural and historical factors that relate to the offender and their community?

Question 3-4 In what ways might specialist sentencing reports assist in providing relevant information to the court that would otherwise be unlikely to be submitted?

Question 3-5 How could the preparation of these reports be facilitated? For example, who should prepare them and how should they be funded?

The ALRC alludes to two issues in relation to the adequacy of information available to sentencing courts. First, the ALRC notes that the pressures on lawyers coupled with the time constraints of busy courts means that sufficient information about an offender's background and circumstances may not be presented to the court. Second, it suggests that pre-sentence reports (PSRs) may not provide adequate information. ALSWA agrees that workload pressures and time constraints will sometimes affect the ability of ALSWA lawyers to obtain and present a comprehensive account of the offender's background and circumstances. This can only be rectified by additional resources for ATSILS and for courts.

ALSWA has longstanding concerns about the current approach to pre-sentence reports. In Western Australia, community corrections officers prepare PSRs and sentencing courts place significant weight on the content of these reports. In the absence of instructions from the court, a PSR is required under s 21 of the *Sentencing Act* to set out matters about an offender that are relevant to sentencing. While some PSRs are prepared well, and may provide information that is otherwise difficult to obtain (eg, information about the offender's prior involvement with child protection authorities or prior experience of family violence), ALSWA is of the view that, overall, the approach to PSRs is another example of systemic bias within the system. Some of the key problems are:

- Interviews for PSRs can involve a one off interview and sometimes the author conducts the interview over the phone. If the report writer is non-Indigenous and the offender is an Aboriginal and Torres Strait Islander person, rapport

can sometimes be difficult to establish. In the absence of rapport, Aboriginal and Torres Strait Islander people will often consider the author to be another 'white authority figure' who is there to be critical and they are unlikely to engage in the process. This lack of engagement results in PSRs that frequently state the offender is not remorseful.

- Where an Aboriginal and Torres Strait Islander person does not speak English sufficiently, authors conduct interviews in English, without interpreters and miscommunication and misunderstanding is likely.
- ALSWA has seen many PSRs that have 'cut and pasted' significant information from previous reports and do not contain up to date information about an offender's personal and family circumstances, which may contradict information included from previous reports.
- PSRs often contain negative statements such as the offender 'lacks victim empathy'; 'minimises offending behaviour' and 'doesn't accept responsibility'. However, invariably the basis for these opinions is not expressed in the PSR and therefore it is difficult to obtain instructions from clients about these statements.
- The tone used in PSRs is detrimental, for example, if an offender says something to the author of the report that is mitigatory, the report uses words such as 'the offender claims'. However, if there is negative information it is usually expressed as a fact (eg, the offender lacks victim empathy).
- There may be cultural considerations which preclude an Aboriginal and Torres Strait Islander person from discussing aspects of their offending with the author of a PSR. For example, an older Aboriginal man from a traditional background may be precluded by cultural considerations from discussing aspects of sexual offending with a younger female non-Indigenous PSR author. This cultural 'disconnect' may also result in conclusions reflecting poorly on the offender (eg, that the offender lacks remorse, victim empathy etc).

In Western Australia, PSRs are rarely culturally appropriate; they do not canvass issues of Aboriginality and systemic issues such as deprivation, intergenerational trauma and discrimination.

Case Example A

In 2017, the District Court sentenced A to 9 months' imprisonment for Aggravated Burglary. For the sentencing hearing, the court had a PSR prepared by a community corrections officer (CCO) and a Psychological Report. A was in custody in a regional prison; however, the CCO who prepared the PSR was from a metropolitan office. The CCO interviewed A over the phone. The report stated that A had poor insight, was reluctant to discuss the offence and his personal history and contended that this suggested 'potential difficulties with him engaging meaningfully with interventions that meet his cognitive and treatment needs'. The PSR was a typical deficit-focused report with constant references to his failings, 'cognitive deficits' and poor past compliance with community based dispositions. The Psychological Report made similar references to his 'lack of insight' and reluctance to discuss the offences and his background. The PSR mentioned that because his assessment was conducted by telephone it was 'difficult to gauge physical cues which may have been utilised to encourage an open discussion'. It is concerning the author of the PSR acknowledges that it is only 'difficult' to gauge physical cues over the telephone – one would have thought it was impossible! What is even more alarming is that neither the CCO nor the psychologist was aware that A had significant hearing loss in both ears. Fortunately, this was known by the

ALSWA lawyer, who was able to elicit significant information about A's life and background from family members.

ALSWA considers that there is a strong case for the provision of specialist sentencing reports for Aboriginal and Torres Strait Islander people. ALSWA is rarely able to commission private reports for its clients due to the high cost and limited availability of experts to provide reports.

ALSWA considers that Gladue style reports, prepared by an independent Aboriginal person or agency, would greatly assist the sentencing process and outcomes for Aboriginal and Torres Strait Islander people in Western Australia. PSRs could continue to provide information about the offender's experiences with corrections and other relevant government and non-government agencies and focus on providing factual material to the court. Gladue style reports could provide a deep understanding of the background of the person, their family and their community. ALSWA agrees with the observations of the ALRC that sufficient resourcing is required to ensure that such reports are prepared across the board for Aboriginal and Torres Strait Islander people. Nonetheless, ALSWA recognises that it would be cost prohibitive to require a specialist sentencing report for every criminal matter. Arguably, such reports should be prepared for superior court matters or where they are specifically requested by the offender (eg, if the offender is facing imprisonment in a lower court).

Sentencing Options

Mandatory sentencing

Question 4-1 Noting the incarceration rates of Aboriginal and Torres Strait Islander people:

- (a) should Commonwealth, state and territory governments review provisions that impose mandatory or presumptive sentences; and
- (b) which provisions should be prioritised for review?

ALSWA strongly opposes mandatory and presumptive sentencing regimes primarily because such regimes remove or restrict judicial discretion and result in injustice. Mandatory sentencing prevents a sentencing court from taking into account the individual circumstances of an offence and the offender, and fails to recognise that all offences in a similar category (eg, all assault public officers or all home burglaries) are not identical or of equal seriousness and that all offenders are equally culpable.

Mandatory sentencing regimes are an ineffective tool for deterrence for Aboriginal and Torres Strait Islander offenders who are vulnerable or disadvantaged. The existence of mandatory minimum penalties is not likely to influence people who are suffering from mental impairment and alcohol and/or drug dependency or who are socially or economically disadvantaged. In this regard, ALSWA also notes that the New South Wales Law Reform Commission has commented on research, which found that 'increasing the risk of arrest or the risk of imprisonment reduces crime while increasing the duration of prison sentences "exerts no measurable effect at all"'.⁵⁹ Moreover, it stated that:

The risk of detection and of imprisonment may well have a stronger impact for white collar criminals, environmental offenders and corporate offenders than it will for a drug addict who feeds an addiction through robbery, or to the homeless, or to those who are economically disadvantaged.⁶⁰

There are many other arguments against mandatory sentencing including that it contributes to higher recidivism rates because imprisonment is the least successful option for rehabilitating offenders.⁶¹ In addition, mandatory sentencing is likely to add to the trauma and stress for victims and lead to increased costs to the justice system⁶² because of a higher number of pleas of not guilty arising from the reality that there is no or little incentive to plead guilty to an offence that is subject to a mandatory penalty. Finally, mandatory sentencing shifts discretion from transparent and accountable judicial decision-making to the less visible discretionary decision-making of police and prosecuting authorities.

ALSWA also highlights that mandatory sentencing regimes are inconsistent with Australia's international human rights obligations. Of major significance is the requirement under the *Convention on the Rights of the Child* to ensure that children are detained only as a last resort and for a short a time as possible. These principles are reflected in the *Young Offenders Act 1994 (WA)* yet completely ignored under the mandatory sentencing provisions that apply to children in Western Australia (in some instances, to children as young as 10 years). While ALSWA appreciates that the ALRC's terms of reference do not directly include Aboriginal and Torres Strait Islander children, it should not ignore the reality that mandatory sentencing of children increases the likelihood of recidivism and future adult incarceration. A report in Western Australia observed that there is a 'worrying trend' in regard to the 'criminalisation of welfare issues' such as instances where 'young children, particularly Aboriginal children in remote regions, were frequently arrested for breaking and entering houses to obtain food or to seek a safe refuge from the domestic violence occurring within the home'.⁶³ Mandatory sentencing also prevents sentencing courts from taking into account mental health issues and cognitive impairment (eg FASD) that may reduce the moral culpability of offenders.

The President of the Children's Court, Judge Reynolds has highlighted that on 15 May 2012 there were 93 juvenile sentenced detainees in Western Australia. Of these, almost 40% (37) were 'third strikers' for home burglaries.⁶⁴ Clearly, the current mandatory sentencing laws have a significant impact on the total number of juveniles in detention in Western Australia.

The ALRC seeks submissions about whether governments should review provisions that impose mandatory or presumptive sentences and which provisions should be prioritised for review. The Discussion Paper identifies Western Australia as one jurisdiction with mandatory sentencing regimes that have a disproportionate impact on Aboriginal and Torres Strait Islander peoples. Specifically, the ALRC refers to the

60 Ibid 32.

61 Office of the Inspector of Custodial Services, *Recidivism Rates and the Impact of Treatment Programs* (September 2014) 1.

62 Roth L, *Mandatory Sentencing Laws* (NSW Parliamentary Research Services, e-brief 1/2014, January 2014) 3.

63 Clare M et al, *An Assessment of the Children's Court of Western Australia: Part of a national assessment of Australia's Children's Courts* (University of Western Australia, 2011) 31.

64 Judge Dennis Reynolds, *Youth Justice in Western Australia – Contemporary Issues and its future direction*, (University of Notre Dame, 13 May 2014) 19.

mandatory sentencing regimes for repeat home burglary, grievous bodily harm committed during a burglary and assault public officer.

ALSWA considers that given Western Australia has the highest disproportionate rate of incarceration of Aboriginal and Torres Strait Islander people in the nation, all mandatory and presumptive sentencing laws in this state should be immediately reviewed, including those that apply to children. Each regime is discussed below.

Repeat home burglary

Section 401(4) of the *Criminal Code* (WA) provides for a mandatory sentencing regime for repeat offenders who are convicted of a 'third strike' home burglary offence (a minimum of two years' imprisonment for adults or 12 months' detention for children⁶⁵). The so-called 'three strikes' home burglary laws were introduced in 1996 and apply to both adults and children (and have been recently amended to increase the mandatory minimum terms). An early review of these laws by the Department of Justice found that over 81% of the children sentenced under the laws were Aboriginal.⁶⁶ According to the Department of Corrective Services, from 2000–2005 approximately 87% of all children sentenced under the mandatory sentencing home burglary laws were Aboriginal.⁶⁷ When these laws were amended in 2015, the definition of a 'repeat offender' was tightened so that now a person is generally liable to the mandatory sentence if they have at least three convictions irrespective of the time the offence was committed. As the ALRC observes, the mandatory sentence may apply to a first offender who has committed three home burglaries searching for food in one night.⁶⁸

Case Example B

ALSWA acted for B who was a 20-year-old Aboriginal female from a regional location who came to live in Perth. She commenced a relationship and starting using drugs for the first time. B acted as a lookout while her boyfriend committed various burglaries. She was a repeat offender under the legislation despite having no prior convictions other than an offence of providing false details as a juvenile. The client was sentenced to the minimum mandatory term of 2 years' imprisonment; the prosecutor stated at sentencing that this case was not the type of case that the amendments to the 'three strikes home burglary laws' were aimed at and that the conduct did not warrant imprisonment.

Case Example C

C, who was a 24-year-old Aboriginal male with an intellectual disability and no family support, was released from prison after serving an 18-month term of imprisonment. Within weeks of his release, C was charged with four burglaries on a dwelling and trespass. Three of the burglaries were committed by him alone because he was hungry and homeless. The fourth was committed with others. This client has a history of sniffing and previous psychological reports have all noted his memory and reasoning are impaired; he is also illiterate. When he was released from prison, he was homeless,

65 For juveniles, the courts have interpreted the legislative provisions as permitting the imposition of a Conditional Release Order (which is a suspended sentence of detention) for 12 months.

66 Morgan N, Blagg H and Williams V, *Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth* 2001).

67 LRCWA, *Aboriginal Customary Laws: The interaction of Western Australia law with Aboriginal law and culture*, Final Report (2006) 86.

68 ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [4.14].

was not receiving any Centrelink benefits and had no support in the community. It is unsurprising that he would eventually offend in these circumstances. C was sentenced to the minimum mandatory sentence of 2 years' imprisonment.

Case Example D

ALSWA represented D, an Aboriginal male adult who was charged with Aggravated Burglary on a Dwelling. While in a psychotic state, he entered a house believing it was his mate's house. He ate a bowl of cereal and turned on the stereo. If convicted, he would have been a 'third striker' and liable to the mandatory minimum sentence of 12 months' imprisonment (under the previous regime). Fortunately, ALSWA was able to negotiate with police and D pleaded guilty instead to an offence of trespass. However, successful negotiations with police/prosecuting authorities are dependent on many factors not least of which is access to legal representation. If this man had pleaded guilty without legal advice, he would have been sent to prison for 12 months.

Case Example E

E, an 18-year-old Aboriginal male with FASD, was dealt with in a regional Children's Court for a home burglary, which had been committed when he was a juvenile. He was also due to be sentenced for a number of other charges including a breach of an intensive youth supervision order (IYSO). Some of these charges pre-dated the IYSO.

The IYSO was imposed after E had spent 5 months and 15 days in a juvenile facility in Perth some 1800km away from his home. He was transported to appear in the Newman Children's Court for sentence. Immediately after E was sentenced to this order, police took him back into custody and charged him with further offences that had occurred some seven months prior to the order and the time spent in custody. When questioned about this procedure, the OIC of the police station advised that there had not been an opportunity to speak with him any earlier.

In regard to the breach of the IYSO, the sentencing Magistrate noted that the report from Youth Justice commented that his supervision had been 'inconsistent' and that although he maintained regular contact with his youth justice officer it was rarely on the days he was supposed to report. The Magistrate observed that this approach was disappointing because Youth Justice did not seem to understand what a diagnosis of FASD means or how they should support E. The Magistrate also commented that every government department, which had been charged with E's care since birth, had failed this young man.

The home burglary offence involved the young man entering a house and eating two slices of cake. This offence was committed while he was under the influence of cannabis and alcohol and because he was hungry. Because of the mandatory sentencing provisions, the minimum mandatory sentence of 12 months' imprisonment had to be imposed. All other offences were dealt with by very small fines or small concurrent sentences of imprisonment.

Assault public officer

Sections 318(2) and 318(4) of the Criminal Code (WA) provide for a mandatory minimum sentence for juveniles and adults, for assaulting specified public officers and causing bodily harm. The minimum term is three months' imprisonment or detention for juveniles aged 16 years and over and either six months or nine months' imprisonment for adults (depending on the circumstances). Section 297 has the same minimum mandatory term for grievous bodily harm where the offender is aged at least 16 years but under the age of 18 years and the minimum mandatory term for adults is 12 months' imprisonment.

Case Example F

F is an 18-year-old Aboriginal female who has been charged with assaulting a public officer in the prescribed circumstances. She has no prior convictions. This young girl has experienced multiple deaths in her family, her house has burnt down, she has been hospitalised for a suicide attempt and has early onset psychosis. The police allege that they approached F in the street with concerns about her welfare and she lashed out causing the police officer to suffer cuts and abrasions. After many months advocating for the charges to be discontinued given her circumstances, the Western Australia Police finally agreed to have her assessed for the START (Specialist Treatment and Referral Team) Court, which is a specialist Magistrates Court for offenders with mental health problems. Depending on the outcome and her engagement with the START Court, the police may reconsider the 'prescribed circumstances' (ie mandatory component of the charge).

Reckless driving and other driving offences during a police pursuit

Section 60B(5) of the Road Traffic Act 1978 (WA) provides for a mandatory minimum term of at least six months' imprisonment for the offence of reckless driving if the person was driving the vehicle concerned to escape pursuit by a police officer. The same mandatory minimum term applies under s 59A for dangerous driving causing bodily harm committed in the same circumstances and where the offence is dangerous driving causing death or grievous bodily harm the mandatory minimum term is 12 months' imprisonment. The former Acting Minister for Police (Mr J Day) stated in Parliament that from the time that the laws commenced in December 2014 until 31 May 2014 there had been 3,538 offenders charged with 'pursuit offences'. However, he did not provide details in relation to the number of offenders sentenced under the mandatory provisions.⁶⁹

Case Example G

ALSWA represented G, a 22-year-old male, for one charge of reckless driving, one charge of driving without a licence and one charge of failing to stop. G made a rash and unfortunate decision to drive a motor cycle to work because his employer (who normally picked him up for work was unable to do so). When he saw the police, he panicked, sped off, drove through a red light and veered onto the wrong side of the road. G had a relatively minor record – his only prior offences were failing to stop, excess 0.02% and driving without a licence. These offences were dealt with in 2010 by the imposition of fines and the client had not offended since that time. When sentencing G the magistrate observed that he 'had the potential to actually live a productive life', worked hard and that his prospects for staying out of trouble were very good. However, the magistrate had no choice but to impose the mandatory minimum sentence of six months and one day's imprisonment. The magistrate indicated that if it were not for the mandatory sentencing regime, the sentence would have been different. ALSWA submits that it is very unfortunate and counterproductive for a young Aboriginal man in full time employment with a limited criminal record to be sent to prison for six months.

Serious offences committed during an aggravated home burglary

In 2015, various sections of the Criminal Code (WA) were amended to provide for mandatory minimum penalties for serious violent and sexual offences committed during the course of an aggravated home burglary. For example, if an adult offender

is convicted of causing grievous bodily harm in these circumstances, the court must impose at least 75% of the maximum statutory penalty (ie, either 75% of 10 years' or 14 years' imprisonment depending on the circumstances). Therefore, if the applicable maximum penalty is 14 years' imprisonment, the offender must be sentenced to at least 10 ½ years. If the offender is a child, the mandatory minimum penalty is three years imprisonment or detention.

ALSWA emphasises that the likely penalty for these types of offences are usually significant periods of custody. For example, in *Royer v The State of Western Australia*,⁷⁰ the Court of Appeal dismissed an appeal against a sentence of 16 years' imprisonment imposed for various offences including burglary, deprivation of liberty, threats to kill and sexual assaults. Likewise, appeals were dismissed for serious violent and sexual offences committed in the course of a home burglary in *Pollock v the State of Western Australia*⁷¹ (a term of 14 years' imprisonment was imposed) and *Ugle v The State of Western Australia*⁷² (a term of 11 years' imprisonment was imposed and the offender was 18 years of age).

Thus, while it accepted that offenders convicted of serious sexual and violent offences during the course of an aggravated home burglary are highly likely to receive substantial terms of imprisonment (and possibly more than the minimum mandatory terms), the mandatory provisions are likely to result in injustice in exceptional cases.

Breach Violence Restraining Orders

Section 61A of the *Restraining Orders Act 1997* (WA), provides for a presumptive penalty of imprisonment/detention if the offender has been convicted of two or more prior offences of breaching a violence restraining order or a police order within two years. The sentencing court can deviate from the presumptive penalty if imprisonment or detention would be 'clearly unjust' given the circumstances of the offence and the person, and the person is unlikely to be a threat to the safety of a person protected by the order or the community generally.

This provision was examined by the LRCWA in its 2014 reference on family and domestic violence. Interestingly, despite earlier concerns expressed in the media that some offenders were receiving lenient sentences for breaching violence restraining orders (because the provisions were not strict enough), the Commission found that the vast majority of respondents to its Discussion Paper did not support the tightening of the provisions. In particular, the Women's Council for Domestic and Family Violence Services did not support full mandatory sentencing because some victims of family and domestic violence are inappropriately bound by a violence restraining order (eg, as a result of retaliation or defensive conduct) and therefore any subsequent breach of the order should be viewed with all of the relevant circumstances and background in mind.⁷³

ALSWA has serious concerns about this presumptive sentencing regime given that 'consent' is not a defence to breaching a violence restraining order or a police order. Furthermore, even if the person protected facilitates or encourages the person bound to breach the order, there is no mitigation in the sentence. ALSWA has represented numerous clients where the person protected by a violence restraining order or police

70 [2009] WASCA 139.

71 [2009] WASCA 121.

72 [2012] WASCA 104.

73 LRCWA, *Enhancing Laws Concerning Family and Domestic Violence*, Final Report, Project No 104 (2014) 116.

order initiates the contact with the person bound by the order. In a number of instances, persons protected by orders have informed ALSWA lawyers that they have contacted the person bound to seek assistance with children or financial support, because they are jealous of a new relationship or because they always intended to maintain the relationship despite the order being in place. In these situations, the statutory regime does not enable the court to consider these circumstances.⁷⁴ ALSWA is also gravely concerned that the presumptive mandatory sentencing regime applies to police-issued orders (which do not require the provision of sworn evidence, are not subject to judicial oversight, do not necessarily take into account the views of the victim and are often made by police as a matter of convenience, for example, sometimes police orders are issued against the female victim because the residence belongs to the male and the female is able to access alternative accommodation).⁷⁵

Case example H

ALSWA represented H, an Aboriginal male who was subject to a violence restraining order (VRO). The protected person was his female partner. H was at his home and the person protected came to his house and knocked on the door. He told her to go away because of the VRO. However, she did not listen and was relentless. She eventually threw a brick through his window and climbed through the broken window without permission. H was understandably startled and spontaneously threw a punch as she entered through the window. H was charged with breaching the VRO and the female was only charged with damage (despite entering the house without permission).

Case Example I

ALSWA represented I, an Aboriginal male, in a regional court who was subject to a VRO. The female person protected by the order approached the ALSWA lawyer at court and indicated that she wished to speak to I. The lawyer informed her that she shouldn't speak to him because of the VRO and that if she did, he would likely be charged with breaching the order by police who were outside the courtroom. The lawyer took I away from court as soon as possible to drive him to his residence, which was about one kilometre away. As they drove out of the car park, the protected person chased the car down the street.

Case Example J

J is an Aboriginal female who was charged with breaching a VRO. The person protected by the order had numerous restraining orders taken out against him and was well known in the community as difficult and a troublemaker. He had managed to obtain a restraining order against J when the resident magistrate was on leave. Soon after obtaining the restraining order against J, he sent her a text message indicating that he had something nice for her and she should come over to see him. As soon as she arrived at his location, he immediately contacted police and she was arrested for breaching the order.

Case Example K

A 28-year-old male K, was living in a regional town with his mother. He had an argument with her; police arrived and saw him behaving aggressively towards her. Police issued K with a police order. He advised police that he had nowhere to go and was not given an opportunity to take any clothes or bedding (blankets) from the house.

⁷⁴ Section 61B of the Restraining Orders Act 1997 (WA) stipulates that any aiding of a breach of the order by the protected person is not a mitigating factor. The combination of this provision with the presumptive sentence of imprisonment does not allow these circumstances to be taken into account.

⁷⁵ See also LRCWA, *Enhancing Laws Concerning Family and Domestic Violence*, Discussion Paper, Project No 104 (2013) 71–72 where it was stated that the 'most significant complaint received by the Commission (from lawyers and victim advocates) in relation to police orders concerns the making of police orders against victims of family and domestic violence'.

The police dropped him off in the middle of the town square at approximately 11:30pm at night and left him there. Unsurprisingly K went home. He was not long after arrested by police in the rear yard of the property. The police then transported him to the nearest major town to appear the next day before the Magistrate (K spent one night in custody). He received a conditional release order (similar to a good behaviour bond) and K was then released from court to find his own way back to his hometown.

Case Example L

ALSWA represented L, a 47-year-old male who had recently obtained his own house in a regional town. L invited his sister to stay with him for a short period because she had been living on the streets in Perth. There was an argument and police attended. Police observed L being verbally abusive to his sister and issued him with a police order for 24 hours. Because he had only recently relocated to the town, he had nowhere else to go. The next day L returned to his home and walked inside. The Police Statement of Material Facts state that the victim 'allowed the accused to stay at the address'. There was another verbal argument and the victim called the police. L was arrested and transported in custody to the nearest major town. He spent two nights in custody before appearing in court. He was released and required to find his own way back home.

Short sentences of imprisonment

Question 4-2 Should short sentences of imprisonment be abolished as a sentencing option? Are there any unintended consequences that could result?

Question 4-3 If short sentences were to be abolished, what should be the threshold (eg, three months; six months)?

Question 4-4 Should there be any pre-conditions for such amendments, for example: that non-custodial alternatives to prison be uniformly available throughout states and territories, including in regional and remote areas?

As observed by the ALRC, Western Australia is the only jurisdiction to have already abolished short sentences of imprisonment (ie sentences of six months or less). Section 86 of the *Sentencing Act* provides that:

A court must not sentence an offender to a term of 6 months or less unless —

- (a) the aggregate of the term imposed and any other term or terms imposed by the court is more than 6 months; or
- (b) the offender is already serving or is yet to serve another term; or
- (c) the term is imposed under section 79 of the *Prisons Act 1981*.

The *Sentence Legislation Amendment Act 2016* (WA) was passed in 2016 and s 73 of this Act amends the above provision to reduce the limit from six months to three months. Once this section commences operation, Western Australia will have a prohibition on sentences of three months or less. The primary rationale for this reform is the view that the amendment in 2003 (which increased the threshold from three months to six months) has resulted in 'sentence creep'; that is, offenders who would have previously received a sentence of less than six months are now receiving longer sentences of imprisonment rather than a community-based option.

A review of the *Sentencing Act* in 2013 observed that stakeholders were unanimous in their view that the current prohibition on sentences of six months or less should be removed because the prohibition has resulted in 'sentence creep'. It was further stated that:

In 2007, an internal report by the DCS revealed that offences that had previously attracted sentences of less than six months were now receiving longer sentences (known as 'sentence creep'). Several magistrates also expressed the view that mandating a minimum custodial sentence at six month plus one day results in a lack of flexibility for magistrates in their sentencing deliberations.⁷⁶

Clearly, the abolition of short sentences carries with it a real risk that offenders will receive longer terms of imprisonment. However, ALSWA acknowledges there is also a risk that full sentencing discretion will result in some offenders receiving 'short sharp' sentences of imprisonment in circumstances where the court would otherwise have imposed a community-based disposition. It is impossible to know in advance whether reform in this area will result in more people being sent to prison and/or longer imprisonment terms.

Overall, **ALSWA favours sentencing discretion but emphasises there must be alternative non-custodial options available for Aboriginal and Torres Strait Islander people to ensure that sentences below the current threshold in Western Australia are not imposed simply because there is no viable option available** (eg, a remote location). Furthermore, prison support programs must be available for all prisoners irrespective of their sentence length. Aboriginal and Torres Strait Islander prisoners who are removed from their communities for short periods will face issues such as loss of accommodation, employment, training opportunities and child removal. Prison support programs must be accessible at the earliest possible stage of incarceration to enable these issues to be addressed and negative outcomes minimised.

Availability of community-based sentencing options

Proposal 4-1 State and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to ensure that community-based sentences are more readily available, particularly in regional and remote areas.

The ALRC observes that 'the availability of alternatives to incarceration is limited or non-existent in many locations and, in particular, in areas outside of metropolitan areas. This can lead to the imposition of sentences of imprisonment where community-based sentences would otherwise be appropriate'.⁷⁷ ALSWA agrees and notes that in Western Australian remote and regional areas, the imposition of imprisonment may also be an indirect side effect of the lack of appropriate community-based options. For example, an Aboriginal or Torres Strait Islander person in a remote area may be sentenced to a community-based order with supervision requirements and program conditions as directed by his or her community corrections officer (CCO). If the CCO is physically located hundreds of kilometres from the offender, supervision will often be sporadic and often by telephone. If no programs are available, this irregular contact between the CCO and

⁷⁶ Department of the Attorney General, *Statutory Review of the Sentencing Act 1995 (WA)* (2013) 57.

⁷⁷ ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [4.65].

the offender is all that will take place. It is not surprising that in the absence of actual support to address the offender's underlying needs, he or she will soon offend again and/or breach the order.

ALSWA supports Proposal 4-1 to ensure that community-based sentences are more readily available, particularly in regional and remote areas and agrees with the suggested approach that, in some instances, Aboriginal community members rather than distant community corrections officers should supervise and support offenders. In this regard, ALSWA notes that in 2006, in its reference on Aboriginal customary laws, the LRCWA recommended the establishment of Aboriginal community justice groups. While the LRCWA suggested various potential roles for community justice groups (eg, provision of information to courts and delivery of diversionary programs), one proposed role was the supervision of offenders subject to court-imposed orders.⁷⁸

Flexibility to tailor sentences

Question 4-5 Beyond increasing the availability of existing community-based sentencing options, is legislative reform required to allow judicial officers greater flexibility to tailor sentences?

While an increase in alternative community-based options is necessary (as outlined above), **ALSWA also recommends that state and territory governments should ensure that sentencing laws are flexible enough to accommodate alternative options**. ALSWA considers that the current statutory framework for community-based orders is too rigid to facilitate Aboriginal community controlled programs. What is needed is a less regulatory approach to community supervision. For example, a requirement to report to a CCO once a week at a designated time and day may not be workable. Instead, regular but flexible contact with an Aboriginal support worker who can provide mentoring and referrals to culturally appropriate programs and services would be more meaningful. In other words, the focus needs to shift to outcomes rather than outputs. The current legislative and policy requirements for community-based orders do not support such an approach.

Under ss 47 and 48 of the *Sentencing Act* a court may impose a 'conditional release order' (CRO) upon an offender if the court considers that there are reasonable grounds for expecting that the offender will not re-offend during the term of the order and that the offender does not need supervising by a CCO. A CRO is an order that if the offender commits an offence during the period of the order, the offender may be sentenced again for the original offence and the offender must comply with any requirement imposed by the court to secure the good behaviour of the offender. Section 49(2) provides that 'a requirement imposed by a court must not be such as requires or would require the offender to be supervised, directed or instructed by a CCO'. Under s 50, the court may direct the offender to re-appear at a particular time and place to ascertain whether the offender has complied with the conditions of the order. The court may impose a requirement for the offender to enter into a monetary bond or provide a surety if it is considered necessary to ensure compliance.

⁷⁸ LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture* (2006) 109 and Recommendation 17.

The *Sentencing Legislation Amendment Act 2016* amends Part 7 of the *Sentencing Act* to provide that the court may impose a requirement that the offender participate in an activity approved by the CEO (DOTAG). The CEO may approve any educational, vocational or personal development program, unpaid work, or any other activity that the CEO considers appropriate. The number of hours for such a requirement must be at least 10 hours and not more than 60 hours. These amendments are designed to reduce the imprisonment of fine defaulters by providing an alternative option to a monetary fine. During the Second Reading Speech, the former Attorney General stated that it is hoped that some of the over 5,000 volunteer organisations, not-for-profit community organisations and local governments will be involved in the scheme. It appears that this new option is loosely based on the New South Wales Work and Development Order Scheme, although it does not apply to *fine defaulters*. As discussed, further below, ALSWA is strongly in favour of the introduction of a work and development order scheme for fine defaulters based on the model in New South Wales.

While ALSWA does not oppose this new option in principle, further flexibility is required to ensure that alternative and effective community-based sentencing options are available for Aboriginal and Torres Strait Islander people. As noted above, s 47 of the *Sentencing Act* provides that a court may only impose a CRO if, among other things, there are reasonable grounds for expecting that the offender will not reoffend during the term of the CRO. This condition means that the option of a CRO tends to be reserved for first time offenders or offenders with a short and minor criminal history. It is not likely to apply to offenders with repeated less serious offending. These offenders will probably continue to receive and accumulate multiple fines or be placed on community-based orders supervised by CCOs.

ALSWA recommends that a more flexible order should be available for adults (and young people) and key components of the order should be:

1. That the court determines the appropriate conditions of the order.
2. That the offender is required to reappear at a later date or dates for the court to assess whether the offender is complying or has complied with the order (this would enable a degree of judicial monitoring and would be particularly useful if specialist Aboriginal courts are in existence).
3. That if the offender does not comply with the conditions of the order the offender is liable to be re-sentenced for the original offence.
4. That the conditions of the order cannot include a condition that the offender is to be supervised, directed or instructed by a community corrections officer or a youth justice officer.
5. That the court may impose the order if it is satisfied that the order is appropriate for the person's rehabilitation, treatment and support.
6. That the court may request a representative from a non-government organisation to provide a report to the court (written or verbal) outlining any proposed conditions for the order and to provide a report to the court (written or verbal) about the person's performance on the order.
7. That the person must consent to the order.

ALSWA is of the view that this recommended new order, coupled with its recommended extension of the power to adjourn sentencing under s 16 of the *Sentencing Act* for up to 12 months (see further below), will provide a sufficiently flexible suite of options to enhance justice outcomes for Aboriginal and Torres Strait Islander peoples and facilitate the involvement of Aboriginal community-owned initiatives.

Prison Programs, Parole and Unsupervised Release

Recidivism rates for Aboriginal and Torres Strait Islander prisoners are far higher than the rates for non-Indigenous prisoners⁷⁹ and, therefore, ALSWA supports the ALRC's approach that aims to improve and extend the support and programs available to Aboriginal and Torres Strait Islander prisoners during their incarceration and following release.

Remand and short sentences

Proposal 5-1 Prison programs should be developed and made available to accused people held on remand and people serving short sentences.

Question 5-1 What are the best practice elements of programs that could respond to Aboriginal and Torres Strait Islander prisoners held on remand or serving short sentences of imprisonment?

ALSWA agrees that the lack of support programs available for remand prisoners and prisoners serving short sentences is a serious flaw in the current system and therefore supports Proposal 5-1. Currently, prisoners on remand may spend several months in custody prior to the disposition of their charges (and even up to 18 months awaiting a trial in a superior court). Depending on the circumstances, the court may impose a sentence of imprisonment and backdate the sentence to the time when the offender first went into custody. Therefore, some offenders will be released from custody at the time or very soon after the sentencing date. For others, even a short period as a sentenced prisoner precludes participation in programs. Such offenders are released into the community with no support and the risk of reoffending is therefore high.

ALSWA considers that it is shortsighted to justify a lack of programs for remand prisoners on the basis that these accused are not convicted. ALSWA believes that programs for remand prisoners can be effective if they respond to the underlying needs of the prisoner rather than focusing on the specific offence or offences for which the prisoner is in custody. Such programs could address practical needs such as housing; literacy; employment and training; substance abuse; access to Centrelink payments and related matters such as bank accounts and lack of identification; drivers licences and unpaid fines; and work towards assisting the prisoner with transition back into the community upon release. Many of these prisoners will have prior convictions in any event (otherwise, it is highly likely that they would have been released on bail). Hence, there will probably be 'standing' to

address criminogenic needs in any event (eg, substance abuse or anger management counselling).

Programs for women

Proposal 5-2 There are few prison programs for female prisoners and these may not address the needs of Aboriginal and Torres Strait Islander female prisoners. State and territory corrective services should develop culturally appropriate programs that are readily available to Aboriginal and Torres Strait Islander female prisoners.

Question 5-2 What are the best practice elements of programs for Aboriginal and Torres Strait Islander female prisoners to address offending behaviour?

The Western Australian Department of Corrective Services is currently evaluating submissions for a tender to provide 'reintegration and rehabilitation services' for adult prisoners throughout the state. During the tender process, ALSWA received advice that submitting a response for a program for Aboriginal and Torres Strait Islander female prisoners in the metropolitan area would not be acceptable – any response must cover *all* female prisoners in the designated geographical area. This type of approach is not conducive to developing and implementing programs specifically designed to address the needs of Aboriginal and Torres Strait Islander female prisoners.

As identified by the ALRC, Aboriginal and Torres Strait Islander female prisoners have specific needs because of historical trauma and abuse; family violence and sexual assault; and family/carer responsibilities, in particular due to the high number of female prisoners who are mothers.⁸⁰ In a recently published report by the Human Rights Law Centre and Change the Record, it was observed that:

While the vast majority of Aboriginal and Torres Strait Islander women will never enter the justice system as offenders, the lives of those who do are marked by acute disadvantage. The overwhelming majority of Aboriginal and Torres Strait Islander women in prison are survivors of physical and sexual violence. Many also struggle with housing insecurity, poverty, mental illness, disability and the effects of trauma. These factors intersect with, and compound the impact of, oppressive and discriminatory laws, policies and practices, both past and present. Too often, the impact of the justice system is to punish and entrench disadvantage, rather than promoting healing, support and rehabilitation.⁸¹

ALSWA supports the ALRC's Proposal 5-1 but emphasises that the development of culturally appropriate programs that are readily available to Aboriginal and Torres Strait Islander female prisoners should be undertaken in collaboration with peak Aboriginal and Torres Strait Islander organisations. This should include ATSILS and Aboriginal Family Violence Prevention Legal Services because these agencies are at the coalface; they represent and assist women who are facing multiple layers of disadvantage and experiencing complex legal problems including criminal proceedings, applications for family violence protection orders, family court

⁸⁰ ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [5.13].

⁸¹ Human Rights Law Centre & Change the Record, *Over-represented and Overlooked: The crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (2017) 5.

proceedings, child protection proceedings and tenancy issues. The Human Rights Law Centre and Change the Record report stated that:

Aboriginal and Torres Strait Islander community controlled legal services must be properly and sustainably funded. With Aboriginal and Torres Strait Islander women's over-imprisonment having increased so dramatically, and at a faster rate than men's, funding should also allow for these services to develop holistic models that are tailored to women's circumstances, both as offenders and victim/ survivors, including culturally safe and individualised support and case management.⁸²

ALSWA supports a 'one-stop shop' model, whereby Aboriginal and Torres Strait Islander women can access culturally appropriate legal assistance and representation along with holistic support and case management.

Discretionary and court ordered parole

Proposal 5-3 A statutory regime of automatic court ordered parole should apply in all states and territories.

Question 5-3 A statutory regime of automatic court ordered parole applies in NSW, Queensland and SA. What are the best practice elements of such schemes?

In Western Australia, parole eligibility is set by the sentencing court but the Prisoners Review Board (PRB) determines if an eligible prisoner will be released on parole and on what conditions. However, s 23(3) of the *Sentence Administration Act 2003* (WA) provides that the PRB *may* make a parole order in relation to a prescribed prisoner but *must* make a parole order in respect of any other prisoner. A prescribed prisoner is defined under s 23(1) as:

- a prisoner who is serving a term for a serious offence;
- a prisoner who was released from serving a term for a serious offence on a date in the five years preceding the commencement of the term that the prisoner is serving; or
- was subject to an early release order (includes parole) that was cancelled on a date in the two years preceding the commencement of the term that the prisoner is serving.

A serious offence is defined under Schedule 2 of the *Sentence Administration Act* and includes all offences under Chapter XXVIII of the *Criminal Code* (Homicide: Suicide: Concealment of birth; Chapter XXIX (Offences endangering life or health); Chapter XXX (Assaults); Chapter XXXI (Sexual offences); Chapter XXXIII (Offences against liberty); Chapter XXXIIIA (Threats); Chapter XXXIIIB (Stalking); Chapter XXXVIII (Robbery: Extortion by threats); Section 187 (Facilitating sexual offences against children outside Western Australia); an offender under section 60 of the *Censorship Act 1996*; an offence under section 61(1) or (2a) of the *Restraining Orders Act 1997*. In summary, serious offences are offences of a violent, threatening or sexual nature against a person, as distinct to offences against property. Hence, Western Australia has a mix of automatic parole and discretionary parole.

In ALSWA's experience, for discretionary cases, the PRB will regularly decline to make a parole order because the prisoner has not completed the necessary or expected rehabilitation programs in prison. Often, this occurs through no fault of the prisoner but rather because there is a significant lack of programs available across the state, especially in regional prisons. ALSWA acted for a prisoner in a regional area who served his entire six-year sentence of imprisonment despite being eligible for parole. Throughout time in custody, he was repeatedly moved from one prison to another and, as a result, was always placed on the bottom of the waiting lists for any relevant programs.

It has been observed that 80% of Aboriginal and Torres Strait Islander prisoners in Western Australia in 2014-2015 were not released on parole.⁸³ Apart from a lack of programs, other factors affect whether Aboriginal and Torres Strait Islander prisoners will access programs in prison. For some, the only relevant programs require the prisoner to be transferred 'off country' and away from family. For others, participating in programs with non-Aboriginal prisoners may cause shame.⁸⁴ For some, language and cultural barriers will mean that participation is pointless.

The PRB website states that:

The unavailability of programmes for any reason, does not remove the requirement of the Board to consider the risk of re-offending and the risk to the safety of the community posed by a person's release if treatment needs have not been met.⁸⁵

The PRB is required to take into account a number of factors when determining whether to make a parole order; however, pursuant to s 5B of the *Sentence Administration Act*, the board must regard the 'safety of the community as the paramount consideration'. None of the other legislative considerations expressly requires the board to take into account the need to provide support and supervision to the prisoner upon release in order to ensure the protection of the community in the long-term. The New South Wales Law Reform Commission (NSWLRC) recommended that the applicable legislation should include a statement that the primary purpose of parole is 'to promote community safety by supervising and supporting the conditional release and re-entry of prisoners into the community, thereby reducing their risk of reoffending'.⁸⁶ The NSWLRC observed that:

At the heart of our review is the goal of improving the parole system to protect community safety, and to reduce reoffending by providing a means for supervised reintegration following imprisonment. Parole is not leniency shown at the end of a sentence, it is an integral part of a sentence of imprisonment that imposes significant restriction on liberty.⁸⁷

ALSWA recommends that the *Sentence Administration Act 2003* (WA) should be amended to include a provision that the primary purpose of parole is 'to promote community safety by supervising and supporting the conditional release and re-entry of prisoners into the community, thereby reducing their risk of reoffending'.

Further, ALSWA supports the concept of automatic court ordered parole and considers that the current automatic parole system should be expanded in Western Australia to a broader range of offenders. This would place a far greater

83 Commonwealth Government, *Prison to Work Report* (2016) 97.

84 Ibid.

85 http://www.prisonersreviewboard.wa.gov.au/F/frequently_asked_questions.aspx.

86 New South Wales Law Reform Commission, *Parole* (2015) Recommendation 2.

87 Ibid [1.35].

onus on the newly formed Department of Justice to ensure that there are sufficient programs and services available for Aboriginal and Torres Strait Islander prisoners while in prison and especially in regional areas because the department will know that each prisoner subject to automatic parole will be released on a specified date.

Counting time spent on parole when parole revoked

Proposal 5-4 Parole revocation schemes should be amended to abolish requirements for the time spent on parole to be served again in prison if parole is revoked.

As observed by the ALRC, in Western Australia, time spent on parole from the date of release on parole up until the date of the breach of parole counts towards the head sentence.⁸⁸ ALSWA agrees that this approach is preferable because it encourages prisoners to apply for parole and reduces the time spent in custody in the event of a breach. **ALSWA supports the ALRC's Proposal 5-4.**

Throughcare

The ALRC describes throughcare as measures to 'support the successful reintegration of offenders returning to the community at the end of their head sentence – ie, prisoners released without parole'.⁸⁹ **ALSWA strongly supports the provision of resources for culturally competent throughcare services for Aboriginal and Torres Strait Islander prisoners.** A critical component of effective throughcare is the provision of individualised case management and support at the earliest possible stage in custody and continuity of care for a considerable period following release.

Fines and Drivers Licences

Imprisonment terms that 'cut out' fine debt

Proposal 6-1 Fine default should not result in the imprisonment of the defaulter. State and territory governments should abolish provisions in fine enforcement statutes that provide for imprisonment in lieu of unpaid fines.

The ALRC highlights, 'imprisonment for fine default is most prevalent' in Western Australia.⁹⁰ ALSWA has advocated strongly for the removal of imprisonment as an option for fine default since the tragic death of Ms Dhu in 2014. A comprehensive briefing paper, *Addressing Fine Default by Vulnerable and Disadvantaged Persons: Briefing Paper*, is available on the ALSWA website.⁹¹ ALSWA understands that the ALRC has already considered this paper and reiterates the submissions contained in that briefing paper for the purposes of this submission. **ALSWA fully supports the ALRC's Proposal 6-1.**

88 ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [5.39].

89 Ibid [5.43].

90 Ibid [6.18].

91 <http://www.alsw.org.au/wp-content/uploads/2015/08/Briefing-Paper-August-2016-signed-1.pdf>

The impact of infringement notices

Question 6-1 Should lower level penalties be introduced, such as suspended infringement notices or written cautions?

Question 6-2 Should monetary penalties received under infringement notices be reduced or limited to a certain amount? If so, how?

Question 6-3 Should the number of infringement notices able to be issued in one transaction be limited?

ALSWA understands that some jurisdictions (eg, NSW) use infringement notices more frequently or more broadly than in Western Australia. Western Australia has only recently moved towards expanding infringement notices (see discussion below in relation to the Criminal Code Infringement Notices scheme).

In relation to infringement notices generally, ALSWA highlights that standard minimum monetary penalties for offences such as speeding, parking and other regulatory offences will have a greater detrimental impact upon vulnerable and disadvantaged people. ALSWA supports measures designed to decrease the use of infringement notices and/or to reduce the financial penalty imposed. For many Aboriginal and Torres Strait Islander people, infringements for amounts such as \$100-\$500 cannot be paid and result in fines enforcement strategies such as drivers licence suspensions.

Prosecuting agencies should have the discretion to issue written cautions, especially for very low-level offending by vulnerable and disadvantaged persons. For example, it might be appropriate to issue a written caution for a failure to pay for a train ticket by a homeless person. Similarly, a council worker might caution a person who did not have enough money to pay for a parking ticket outside the local medical centre where she rushed to take her very sick child for treatment. While governments may view infringements as a method of revenue raising, it is important to bear in mind that vulnerable and disadvantaged people are not likely to pay the infringement amount in any event. Hence, different approaches to regulatory type offending is sensible for this cohort. The issuance of infringements to people who are unable to pay will, in the end, actually incur greater administrative and enforcement costs to the state. **ALSWA supports a scheme whereby prosecuting agencies can issue written cautions in lieu of an infringement.**

However, ALSWA warns against the introduction of *conditional* cautioning schemes in the absence of evidence of their impact on Aboriginal and Torres Strait Islander peoples. *Operation Turning Point* has been operating in Western Australia as a pilot program since 2015 for low-level first offenders. ALSWA understands that the program is being evaluated and a final report will be produced. *Operation Turning Point* is similar to a conditional cautioning scheme because the offender enters into an agreement with police to participate in specified activities and if those conditions are complied with, the offender will not be prosecuted for the offence. ALSWA does not consider that it is appropriate to introduce a conditional cautioning scheme across the board prior to the final evaluation results of *Operation Turning* program being made publicly available (in particular, its impact on or utility for Aboriginal and Torres Strait Islander people).

Question 6-4 Should offensive language remain a criminal offence? If so, in what circumstances?

Question 6-5 Should offensive language provisions be removed from the criminal infringement notices schemes, meaning that they must instead be dealt with by the court?

Section 74A(1) of the *Criminal Code* (WA) creates the offence of disorderly behaviour in public. If a person behaves in a disorderly manner in a public place or in the sight or hearing of any person who is in a public place; or in a police station or lock up, the person is guilty of an offence and liable to a fine of up to \$6,000. The provision defines the phrase 'behave in a disorderly manner' to include using 'insulting, offensive or threatening language' or behaving in an 'insulting, offensive or threatening manner'.

In March 2015, the *Criminal Code Amendment (Infringement Notices) Act 2011* (WA) commenced and this Act enables police to issue a Criminal Code Infringement Notice (CCIN) for disorderly conduct and stealing (where the value of the property stolen does not exceed \$500). A CCIN can only be issued to a person who is 17 years or older and the set penalty is \$500 (this penalty is enforced in the usual manner through the Fines Enforcement Registry process). The Western Australian Ombudsman is required under s 723(1) of the *Criminal Code* to review the operation of the scheme, including its impact on Aboriginal and Torres Strait Islander communities. At the date of this submission, the Ombudsman's review has yet to be published.

ALSWA has advised the Ombudsman of its views and concerns about the CCIN scheme. ALSWA appreciates the potential benefits of the Western Australian CCIN scheme for Aboriginal and Torres Strait Islander people (eg, fewer arrests and fewer court appearances; diversion from formal court proceedings and no criminal conviction recorded). It is also acknowledged that there are potential benefits for the justice system overall (eg, reduced costs for the police and the courts). However, ALSWA is extremely concerned about the potential detrimental impact of this new scheme on Aboriginal and Torres Strait Islander people in Western Australia. The key concerns raised by ALSWA with the Ombudsman were:

1. Net widening

ALSWA considers that there is a significant risk that Aboriginal and Torres Strait Islander people will be issued with CCINs in circumstances where they would have previously been cautioned or where police may have decided to take no action. This is especially likely for alleged offences of disorderly conduct. The New South Wales Ombudsman observed in relation to a similar scheme in that jurisdiction that:

The initial state-wide data indicates that CINs are contributing to a significant net increase in legal action taken on offensive language and offensive conduct incidents. That is, some offenders are being diverted from court, but the early data indicates that the decreases in court appearances are being eclipsed by the very high numbers of minor offenders now being fined for those offences.⁹²

ALSWA is also concerned that there may be an increase in police activity or the targeting of Aboriginal people in public spaces. The relative ease in which a CCIN can be issued in comparison to arrest and charge may encourage police to take action in response to particular types of public nuisance behaviour. For example, a CCIN may be issued instead of endeavouring to disperse a group or may be issued in preference to encouraging people to desist with anti-social behaviour.

2. Difficulties in paying the infringement amount

Many Aboriginal people will find a fixed penalty of \$500 difficult or impossible to pay. The New South Wales review found that 'only 8.5% of CINs received by Aboriginal people were paid at penalty notice stage compared with 48.3% paid overall'. It also found that the vast majority of CINs (89%) issued to Aboriginal people lead to enforcement action, with additional costs and sanctions.⁹³ ALSWA also emphasises that, unlike the New South Wales scheme, the Western Australian scheme applies to children aged 17 and over. While ALSWA strongly supports diversion of young people from the court system, a \$500 penalty will be prohibitive for most young Aboriginal people. Failure to pay this penalty will draw young people into the fines enforcement system and resulting drivers licence suspensions.

3. Lack of understanding of the requirements of a CCIN

The New South Wales Ombudsman report observed that it 'is essential that people are given clear, comprehensive and accurate information about their options on receiving a CIN'.⁹⁴ It also stated that:

Aboriginal CIN recipients are, for example, much more likely to live in regional or remote areas far from government services and court facilities. Also, many Aboriginal people do not have easy access to internet facilities, may not have high levels of English literacy (or computer literacy) and, because of socio-economic stressors, may have more immediate concerns to deal with than their fines.⁹⁵

ALSWA considers that some Aboriginal and Torres Strait Islander people, especially those who do not speak English as their first language and/or who have literacy problems may have considerable difficulty in understanding the content and consequences of a CCIN. In addition, some Aboriginal people who are issued with a CCIN may be intoxicated by alcohol or drugs (or both), be homeless, have mental health issues and/or suffer from a cognitive impairment (such as FASD). This cohort is now regularly subject to move-on orders and applications for prohibitive behaviour orders. From ALSWA's experience with clients subject to those orders, it expects that many Aboriginal CCIN recipients will have very little capacity to understand the content of a CCIN and will be highly unlikely to understand their legal rights (such as the right to elect to have the matter dealt with in court). Furthermore, this cohort is likely to already have accumulated a large debt because of unpaid fines and, therefore, ALSWA questions the utility of issuing further financial penalties to already highly disadvantaged and vulnerable Aboriginal people.

93 Ibid 101.

94 Ibid 101.

95 Ibid 102.

4. Inappropriate acceptance of CCIN penalty

The New South Wales review found that only seven of the 895 Aboriginal CIN recipients elected to have their matter determined by a court.⁹⁶ It was further stated that the reasons that Aboriginal people do not elect the court option include homelessness, disability, lack of literacy, lack of access to legal advice or 'lack of awareness that they even have this option'.⁹⁷ ALSWA considers that many Aboriginal people will simply accept the CCIN in circumstances where they are not guilty of the alleged offence. This is particularly relevant for the offence of disorderly conduct where alleged behaviour such as swearing or shouting in particular circumstances may not necessarily amount to disorderly conduct at law. As stated above, many CCIN recipients are likely to be intoxicated and/or suffering from mental impairment at the time of the alleged offence and, therefore, they will not have a subsequent recollection of the incident. When a person is charged with an offence and attends court in such circumstances, they may receive legal advice that they have a defence at law and/or the evidence is incapable of establishing an element of the offence beyond reasonable doubt. In the case of a CCIN, there is no practical and effective way for the evidence against the person to be objectively assessed.

5. Lack of access to therapeutic interventions for offending behaviour

The offence of disorderly conduct under s 74A(2) of the *Criminal Code* has a maximum penalty of a fine of \$6000. Pursuant to s 44 of the *Sentencing Act 1996* (WA) and Reg 6AA of the *Sentencing Regulations 1996* (WA) a court convicting an offender of an offence of disorderly can impose no sentence, a conditional release order, a fine or a community based order. For some offenders, alternative penalties such as a requirement to comply with a substance abuse treatment program (as a condition of a community based order) is more likely to address offending behaviour than the imposition of a fine that cannot be paid. Depending on the outcomes of the review of the new scheme in Western Australia, it may be worth considering the feasibility of an alternative diversionary option that enables participation in programs in lieu of payment of the infringement.

ALSWA has had limited direct involvement with the CCIN scheme; this is expected given that most people are not likely (for the various reasons explained above) to seek legal advice in relation to an infringement notice.

Nevertheless, ALSWA represented a client who was charged with one offence of stealing two loaves of bread and another offence of stealing three loaves of bread. The police offered to issue an infringement notice; however, the client told police that he wanted the charges to be dealt with in court. The client received two Conditional Release Orders (similar to a good behaviour bond) for \$100 each for a total period of 12 months. This case demonstrates that, for some people, the penalty imposed by a court may well be significantly less than the infringement penalty of \$500.

It was reported in the media in October 2015 that an Aboriginal woman was issued with a CCIN for stealing a \$6.75 box of tampons. The excuse provided by the woman to the police was reportedly that she stole the tampons for another person because that person was too ashamed to buy them. ALSWA considers that this case is a pertinent example of the risk of net-widening from the CCIN scheme. Given the type of offence, the circumstance underpinning its commission and the value of the

96 Ibid 102

97 Ibid 114.

property stolen, there is a compelling argument that this matter should have been dealt with by diversionary means not involving the issuing of a CCIN (eg, by way of a police caution).

More recently, ALSWA represented a client who elected to have a CCIN dealt with in court. While this is rare, the circumstances of this matter demonstrate the risks identified above are real.

Case Example M

ALSWA represented M, a 57-year-old Aboriginal man who was issued with an infringement for disorderly conduct under s 74A(2)(a) of the Criminal Code (WA).

M was the front passenger in a vehicle driven by his partner. The police stopped the vehicle at 9 pm, allegedly because the vehicle was swerving. However, the police did not issue a traffic infringement. The police searched M and his son under the Misuse of Drugs Act but no drugs were found. It was alleged that M leaned out of the window and shouted 'You fucking dick head'. The police officer told M he would receive a fine for disorderly conduct in the post.

M elected to have the matter dealt with in court and he pleaded not guilty. M was acquitted after trial on the basis that his words 'You fucking dickhead', in all of the circumstances and judged by contemporary standards was not such as to warrant the intervention of the criminal law and therefore did not amount to disorderly conduct.

Without knowing the outcome of the Ombudsman's Review, ALSWA has not yet formed a view about whether disorderly conduct should be removed from the CCIN scheme. However, it remains concerned that the risks of such schemes are very real.

More generally, however, **ALSWA recommends that offensive language should no longer be sufficient to provide the basis for the offence of disorderly conduct in Western Australia.** Swearing is now commonplace on social media, TV and other public forms of communication. While it may be viewed as, 'bad manners' offensive language is not sufficient to justify the intervention of the criminal law. Furthermore, because of the historical negative relations between Aboriginal and Torres Strait Islander peoples and police, intervention for offensive language is often the trigger for more serious criminal conduct.

Case Example N

N, a 36-year old Aboriginal woman from a remote area was charged with disorderly conduct. N was seen by police outside a Deli at about 8:45 pm to be yelling and screaming. The sample of language referred to in the Statement of Material Facts was simply, 'Fuck off'. N was warned numerous times to stop but she continued to act in a disorderly manner by saying 'Fuck you' repeatedly. N was arrested and subsequently bailed from the police station to appear in court.

Case Example O

ALSWA represented O, a 28-year-old Aboriginal female from a regional location who was charged with disorderly conduct after police approached her and other females who were allegedly shouting at each other in an aggressive manner in the street. The Statement of Material Facts alleged that despite repeated warnings, O continued to shout in an aggressive and abusive manner. The Statement of Material Facts included as example of the language: 'Fucking cunts, leave us alone'. O was arrested but she struggled and broke free from police. After running 50 metres away, police detained her. O refused to enter the police van and had to be physically lifted inside, while this was

occurring O punched one police officer to the head causing soreness. She was charged with escape lawful custody, obstruct police and assault public officer and was sentenced to a suspended term of imprisonment.

ALSWA suggests that the initial police intervention was neither justified nor appropriate. ALSWA represents a number of clients from this regional area who are charged with relatively minor (fine-only) offences such as disorderly conduct but who end up being also charged with more serious charges because of the police officer's inability to respond to Aboriginal people in a culturally sensitive manner. For behaviour such as shouting aggressively in the street, a more conciliatory approach would be preferable.

Alternatives to court imposed fines

Question 6-6 Should state and territory governments provide alternative penalties to court ordered fines? This could include, for example, suspended fines, day fines, and/or work and development orders.

The ALRC comments that fines are the lowest penalty a court can impose. However, in Western Australia this is not strictly the case. Section 39 of the *Sentencing Act 1995 (WA)* creates a hierarchy⁹⁸ of sentencing options for natural persons. These are, in order:

- no sentence
- conditional release order
- fine
- community based order
- intensive supervision order
- suspended imprisonment
- conditional suspended imprisonment
- immediate imprisonment

Question 6-6 is seeking submissions about whether there are alternative sanctions that would prevent people receiving fines in the first place and hence avoiding the fines enforcement system. The ALRC notes that Western Australia has already introduced suspended fines; however, the provisions are yet to commence. ALSWA supported the introduction of suspended fines in its response to the *Sentencing Legislation Amendment Bill 2016*.

Nevertheless, as the ALRC notes, a suspended fine without the provision of support services is unlikely to address the underlying issues. For this reason, ALSWA generally supports the proposed amendments to the provisions of the *Sentencing Act* in relation to conditional release orders (CROs) (these amendments are discussed earlier in this submission and are yet to commence). Currently, s 49 of the *Sentencing Act* provides that a court making a CRO may impose any requirements on the offender that it decides are necessary to secure the good behaviour of the offender. The amendments provide that without limiting this option, the court may impose a requirement that the offender participate in an activity approved by the CEO

98 Section 39(3) provides that a court must not use a sentencing option in the list of options unless satisfied that it is not appropriate to use any of the options listed before that option.

(DOTAG).⁹⁹ The CEO (DOTAG) may approve any educational, vocational or personal development programme; unpaid work; or any other activity the CEO (DOTAG) considers appropriate. The aim of these amendments is to reduce the imprisonment of fine defaulters by providing an alternative option to a monetary fine.

However, ALSWA is concerned about the likely effectiveness of these amendments in reducing fine default. Section 47 of the *Sentencing Act* provides that a court may only impose a CRO if there are reasonable grounds for expecting that the offender will not reoffend during the term of the CRO. As explained earlier, the option of a CRO not likely to apply to offenders with repeated offending. These offenders will probably continue to receive and accumulate multiple fines. Many of ALSWA's clients who accumulate multiple fines (and who are unable to pay those fines and are ultimately imprisoned for non-payment) suffer from mental health issues and/or cognitive impairment; have substance abuse problems; and/or are homeless. These are the most vulnerable and disadvantaged members of the community and precisely the cohort who would benefit from the imposition of a CRO with appropriate programs. ALSWA recommends that the provisions dealing with CROs should be flexible enough to enable such orders to be imposed on a wider range of offenders (ie, not just those who are unlikely to reoffend).

NSW Work and Development Orders

Proposal 6-2 Work and Development Orders were introduced in NSW in 2009. They enable a person who cannot pay fines due to hardship, illness, addiction, or homelessness to discharge their debt through:

- community work;
- program attendance;
- medical treatment;
- counselling; or
- education, including driving lessons.

State and territory governments should introduce work and development orders based on this model.

As evident from ALSWA's briefing paper (referred to above), **ALSWA is strongly in favour of the establishment of a work and development scheme based on the New South Wales model.** ALSWA submits that such a scheme must be available for fine defaulters.

The ALRC questions if such a scheme should also be available as a sentencing option (ie, before a fine is imposed). As discussed immediately above, amendments have been made to the provisions under the *Sentencing Act* in relation to CROs and it appears that these amendments are intended to establish a similar scheme as a

⁹⁹ CEO (DOTAG) is the CEO of the Department of the Attorney General. Since this provision was passed the Department of the Attorney General has been amalgamated with the Department of Corrective Services and is now the Department of Justice.

sentencing option. ALSWA supports this approach if the option is not restricted to only those offenders who can satisfy the court that they are unlikely to reoffend.

The ALRC suggests that it may be difficult to establish a WDO scheme in regional and remote areas because these areas may lack the infrastructure required to implement the programs.¹⁰⁰ The New South Wales scheme is a joint project between relevant government agencies, ALS (NSW/ACT) and Legal Aid NSW. The role of ALS (NSW/ACT) and Legal Aid NSW is to provide support and assistance to proposed agencies to enable them to be approved as sponsors and to link clients with sponsor agencies to participate in the scheme. So long as the criteria for approval is flexible and encompasses a wide range of organisations and health practitioners, ALSWA does not consider that the scheme will be ineffective in remote and regional areas. For example, government agencies can (and should be required to participate) as sponsors. This may include local councils as well as state government agencies. Aboriginal health services, Aboriginal land councils and Aboriginal agencies should be provided with the necessary support to apply for and to be approved as sponsors.

The advantages of the NSW scheme is its flexibility. There is no set number of hours that must be performed in any given week. This is an essential component to ensure that the scheme works for Aboriginal and Torres Strait Islander people, especially in regional and remote areas. As the ALRC mentions, one example of a potential activity under the scheme is a life skills course such as driver licence training. If the Department of Transport and/or Department of Justice runs a driver licence training program in a remote area, a participant with unpaid fines should be able to 'cut out' a proportion of the unpaid fines by participating in and completing the course. This might be a one-off event. Then the same person may be able to 'cut out' further unpaid fines, by attending an appointment each time the visiting mental health practitioner visits the community.

ALSWA also highlights that in New South Wales, Corrective Services is an approved sponsor and prisoners who complete voluntary programs in prisons can count this towards 'cutting out' their fine debt. This approach should be encouraged because it enables prisoners to address multiple issues at the one time and set themselves up for a more positive re-entry outcome.

Loss of licence through fine default

Question 6-7 Should fine default statutory regimes be amended to remove the enforcement measure of driver licence suspension?

Question 6-8 What mechanisms could be introduced to enable people reliant upon driver licences to be protected from suspension caused by fine default? For example, should:

- (c) recovery agencies be given discretion to skip the driver licence suspension step where the person in default is vulnerable, as in NSW; or
- (d) court be given discretion regarding the disqualification, and disqualification period, of driver licences where a person was initially suspended due to fine default?

ALSWA strongly supports the amendment of the *Fines, Penalties and Infringement Notices Enforcement Act 1994 (WA)* (FPINE Act) to allow discretion in relation to the enforcement measure of licence suspension. The Fines Enforcement Registrar may impose a driver's licence suspension order for unpaid infringement notices (under s 19 of the FPINE Act) and for unpaid court fines (under s 43 of the FPINE Act). The FPINE Act provides the registrar with discretion not to make a licence suspension order or to cancel a licence suspension order in certain cases of hardship.¹⁰¹ The relevant grounds are that the licence suspension order would deprive the alleged offender of the means of obtaining urgent medical treatment or the principal means of obtaining income or that the suspension would hinder the alleged offender in performing family or personal responsibilities. In addition, ss 20 and 44 of the FPINE allow the Registrar to cancel a licence suspension order for infringements and fines for 'good reason'.

ALSWA acknowledges that there are some fine defaulters who refuse to pay their fines and simply ignore their obligations. The major debtors list on the Department of the Attorney General's website on 18 August 2017 shows that of the 17 fine defaulters with a fines debt in excess of \$100,000, 12 were corporations. However, for many vulnerable and disadvantaged people, failure to pay fines is not a deliberate strategy but rather a consequence of impoverished and complex circumstances. In this regard, it has been observed that for homeless and other vulnerable people, the accumulation of 'massive fine debt adds to the problems of finding food and shelter, dealing with a mental illness or navigating the world with a cognitive impairment. It is all but impossible for those surviving on a Centrelink benefit (and sometimes on no benefit at all), to pay off their [fine] debts'.¹⁰²

ALSWA submits that the current discretion not to make a licence suspension order or to cancel a licence suspension order should be expanded to also cover the categories of persons eligible to participate in the New South Wales Work and Development Order scheme referred to above. This discretion should not be conditional upon proving a specific hardship relating to medical needs, income or family reasons. Instead, if a person has accumulated infringement notices and/or fines, and the person:

- has a mental illness;
- has an intellectual disability or cognitive impairment;
- is homeless;
- is experiencing acute economic hardship;
- is experiencing or has experienced family violence;¹⁰³ or
- has a serious addiction to drugs, alcohol or volatile substance

and the person can demonstrate a genuine need to drive (eg, medical reasons, family and community responsibilities, employment, training, obligations under justice orders, cultural obligations, lack of public transport) then the recovery agency should be able to exercise discretion to skip or cancel the licence suspension order.

101 *Fines, Penalties and Infringement Notices Enforcement Act 1994 (WA)* s 27A & s 55A.

102 Santow E, *The NSW Work and Development Scheme: A therapeutic response to an infringement system that oppresses people experiencing homelessness* (2014) 51 available at <http://www.piac.aen.au/publication/2014/11/nsw-work-and-development-order-scheme>.

103 In its consultations with Legal Aid NSW, it was argued that the scheme should apply to persons experiencing family and domestic violence: see ALSWA, *Addressing Fine Default by Vulnerable and Disadvantaged Persons: Briefing Paper*, 2016) 11.

Further, where a person is charged with an offence of driving without a licence after having their licence suspended due to fine default, ALSWA recommends that the sentencing court should have discretion as to whether or not to order disqualification of the person's driver's licence and in relation to the disqualification period. This will allow the court to take into account the individual circumstances of the case including the reason for driving and the reason why the person has been unable to pay their fines.

Access to driver licences

Question 6-9 Is there a need for regional driver permit schemes? If so, how should they operate?

Question 6-10 How could the delivery of driver licence programs to regional and remote Aboriginal and Torres Strait Islander communities be improved?

ALSWA submits that there is a strong need for a regional driver permit scheme. Several studies have highlighted the low rates of driver licensing in the Aboriginal and Torres Strait Islander community and the expected prevalence of licence holding is very low in regional and remote areas.¹⁰⁴ KJ Rangers have advised ALSWA that they estimate the percentage of Martu people (from the East Pilbara region) who currently hold a driver's licence is less than 5%.¹⁰⁵ There are major barriers to Aboriginal and Torres Strait Islander people who live in regional and remote areas obtaining their driver's licence, as set out below. Coupled with the low rate of driver licensing is a very real need to drive. The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs¹⁰⁶ recommended a licence for people living in remote communities in 2011. The rationale was that people living in remote communities do not have the same traffic regime as people in cities and should not be subject to the same rules.¹⁰⁷ The Standing Committee recommended that the licence would cost less, not require the same number of logged hours in qualified driving instruction and have a reduced Learners and Probationary periods.¹⁰⁸ ALSWA considers that a licensing system that is less arduous, requires fewer identity documents, costs less to access, and has fewer requirements in relation to driving competency than is required in an urban setting is urgently needed. Although some people may need to drive further than the region in which they live, a regional driver permit limited to the region in which a person lives would be a useful initial step to assist with the most pressing needs to drive.

¹⁰⁴ See Elliott & Shanahan Research, 'Research Report: An Investigation of Aboriginal Driver Licensing Issues' (prepared for Roads & Traffic Authority of NSW, 2008); Helps, Y & Moller J, 'Aboriginal People Travelling Well Literature Review: Driver Licensing Issues, Seat Restraint Non-compliance, Aboriginal Health, Aboriginal Disability' (Research and Analysis Report, Australian Transport Safety Bureau, Commonwealth of Australia, November 2007).

¹⁰⁵ Information provided to ALSWA from the Kanyirninpa Jukurrpa (KJ) organisation. For further information see www.kj.org.au.

¹⁰⁶ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (SCATSIA), *Doing Time - Time for Doing: Indigenous Youth in the Criminal Justice System* (2011) Recommendation 21 [146].

¹⁰⁷ Ibid [133].

¹⁰⁸ Ibid [137].

Barriers to obtaining a driver's licence for Aboriginal and Torres Strait Islander people who live in regional and remote areas

There are major structural barriers to obtaining a driver's licence for Aboriginal people who live in regional and remote areas. One of these is the lack of sufficient identification. Many Aboriginal and Torres Strait Islander people do not have a birth certificate to prove their identity for licensing purposes. Another barrier is many Aboriginal and Torres Strait Islander people's lack of literacy and the fact that English is often not their first language. This makes it extremely difficult to fill in forms and other paperwork necessary to apply for a driver's licence. The Department of Transport offers translation services to people who have come from overseas countries; however, this option is not available for Aboriginal and Torres Strait Islander People.¹⁰⁹ In addition, there is a lack of education and understanding of technology and the protracted, bureaucratic licensing process. Access to technology, such as computers, that many people take for granted, is just not available to many Aboriginal and Torres Strait people living in regional and remote areas.

There are also many families with limited financial capacity and the costs associated with applying for a licence can be a significant barrier. This also means there is a lack of suitable, licensed vehicles for people to learn to drive in and use for their practical driving assessment.¹¹⁰ The Wyatt report¹¹¹ recognised low levels of employment and limited financial capacity as a significant barrier to Aboriginal and Torres Strait Islander Western Australians obtaining a driver's licence.¹¹² In January 2011, Rio Tinto Iron Ore highlighted that many young Aboriginal and Torres Strait people in the Pilbara cannot get a job because they do not have a driver's licence, and they cannot afford to get their licence because they do not have a job and noted this as a 'chicken and egg' situation.¹¹³

Currently in Western Australia, it costs \$18.80 to sit the learner's permit theory test and another \$18.80 for every retest. There is a \$77.20 application fee for a driver's licence and that cost includes one practical driving assessment; every subsequent assessment is \$77.20. Once a driver has passed that test, they must purchase a logbook for \$18.70 and record 50 hours of supervised driving before they sit a computer based hazard perception test that costs \$21.20 (and the same amount for every retest).¹¹⁴ As of 9 October 2017, a person must complete the theory test, 50

109 Department of Transport <www.transport.wa.gov.au/licensing/other-languages.asp> .

110 Barter A. 'Indigenous driving issues in the Pilbara region' in Melissa Castan & Paula Gerber (eds) *Proof of Birth*, Sydney, NSW: Future Leaders, 2015, 64 – 66.

111 Wyatt, B. (2007) 'Indigenous Licensing and Fine Default: A Clean Slate' Western Australian Parliamentary Committee To Explore The Effect Of Motor Driver's Licence And Driving Laws On Remote Communities, Report presented on behalf of the Minister for Corrective Services, Margaret Quirk MLA, 12

112 See also Helps, Y. & Moller, J. (2007) 'Aboriginal People Travelling Well Literature Review: Driver Licensing Issues, Seat Restraint Non-Compliance, Aboriginal Health, Aboriginal Disability' Research Centre for Injury Studies, Australian Transport Safety Bureau Research and Analysis Report, Road Safety Research Grant, <http://aboriginalhealth.binders.edu.au/Newsletters/2010/Downloads/AboriginalPeople%20Travelling%20Well%20Literature%20Review.pdf>; Elliott & Shanahan Research (2008) 'Research Report: An Investigation of Aboriginal Driver Licensing Issues', Prepared for Roads & Traffic Authority of NSW http://www.rta.nsw.gov.au/publicationsstatisticsforms/downloads/aboriginal_licensing_report171208.pdf.

Edmonston CJ et al (2003) 'Working with Indigenous Communities to Improve Driver Licensing Protocols and Offender Management' in Proceedings Road Safety Research, Policing and Education Conference, Sydney, 2003, 231-238, <http://eprints.qut.edu.au/9393/1/9393a.pdf>; Anthony T & Blagg H, 'Addressing the "crime problem" of the Northern Territory Intervention: alternate paths to regulating minor driving offences in remote Indigenous communities' (2012) Report to the Criminology Research Council Grant: CRC 38/09-10.

113 Burrow, A. (2011) Submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into the high levels of involvement of indigenous juveniles and young adults in the criminal justice system' Superintendent, Work Readiness and Education, Rio Tinto Iron Ore, 3 <www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees/%3FurF%3D%2Fatsia%2Fsentencing%2Fsubs%2Fsub%2520110.pdf&#>

114 Department of Transport 'Get your first driver's licence', Driver and Vehicle Services, <<http://www.transport.wa.gov.au/licensing/20663.asp#2161>>

hours (including five hours of nighttime driving) and the hazard perception test before attempting the practical driving assessment.

Further, many Aboriginal people have a historical distrust of the police and the government. This means they are reluctant to access government agencies to obtain the required identification and paperwork and to sit licensing tests. Some Aboriginal people feel 'shame' and intimidation, because they do not like walking into a licensing centre or police station where they are the only Aboriginal person. There is a lack of services in regional Western Australia and regional areas suffer from centralised government. All government offices such as the Registry of Birth, Deaths and Marriages and the Department of Transport are based in Perth. These problems are compounded by licence suspension orders for non-payment of fines. Apart from the difficulties in paying fines with limited incomes, there is a lack of understanding of the process so people do not know when they are allowed to drive again.¹¹⁵

There are also ideological barriers to obtaining a driver's licence. The relevance of a driver's licence is different for regional and remote Aboriginal and Torres Strait Islander peoples compared with the mainstream community. There is a sense that 'you do not need a licence to drive in the bush'; not having a driver's licence is the norm and is intergenerational. There is also a lack of understanding as to the purpose of a licence and a lack of understanding of and respect for 'whitefella' law.¹¹⁶

The need to drive

The nature of living in a remote area means that people have a very real need to drive. It is impossible to compare driving in the city or a large town to driving in the regional and remote parts of Western Australia; the vast distances, harsh environment and lack of public transport means people must drive whether or not they hold a valid licence. Many of the communities in Western Australia are extremely remote with people needing to get into town to conduct business, access medical services, do shopping and attend court with many people living hours away from the nearest town. The cost of taxis is often prohibitive, for example, taxis in Newman cost \$10 per person to travel three kilometres. Due to the long distances and harsh conditions, other options like walking or riding bicycles are not feasible. Further people need to drive in connection with employment. According to the 2011 Census of Population and Housing, almost three-quarters of people who travelled to work used a car (74%) and the proportion was even higher in regional and remote areas (87%).¹¹⁷

There are also cultural reasons for driving without a valid licence. The notion of 'culture' has two different aspects: firstly, people need to travel for law business, funerals, hunting and to visit family; secondly, in some areas in Western Australia, an Aboriginal person is obliged under customary law to follow directions from an elder so they may be compelled to drive.¹¹⁸ Many Aboriginal people see their cultural obligation and traditional law as more important than the mainstream law. In the local Aboriginal cultures, bereavement or 'sorry time' is very important and people are expected to leave employment or other obligations to travel vast distances to pay

115 Barter, Alice, 'Indigenous driving issues in the Pilbara region' in Melissa Castan & Paula Gerber (eds) *Proof of Birth*, Sydney, NSW : Future Leaders, 2015, 64 – 66; Wyatt, B. (2007) 'Indigenous Licensing and Fine Default: A Clean Slate' Western Australian Parliamentary Committee To Explore The Effect Of Motor Driver's Licence And Driving Laws On Remote Communities, Report presented on behalf of the Minister for Corrective Services, Margaret Quirk MLA, 12.

116 Barter A *ibid* 64 – 66.

117 Ivers R et al 'Driver Licensing: Descriptive Epidemiology of a Social Determinant of Aboriginal and Torres Strait Islander Health' (2016) 40 *Australian and New Zealand Journal of Public Health* 377.

118 Barter, Alice, 'Indigenous driving issues in the Pilbara region' in Melissa Castan & Paula Gerber (eds) *Proof of Birth*, Sydney, NSW : Future Leaders, 2015, 67.

their respects to the deceased person and their family. Many of the places they need to travel are only accessible by driving a car.¹¹⁹

How a regional driver permit scheme should operate

ALSWA submits a regional driver permit should provide an alternative licence to Aboriginal and Torres Strait Islander people living in regional areas that addresses some of the barriers described above.

The regional driver permit should require a reduced number of logged hours in qualified driving instruction and have reduced Learners and Probationary periods. It should also require fewer identity documents. The principal reason for a driver's licence scheme is to ensure people driving vehicles know how to drive safely. This could be achieved by a modified test that is more relevant to country driving rather than city driving. A regional permit could be granted to low income earners on a reduced fee basis.

ALSWA submits a regional driver permit could relate to the person's community, relevant native title determination areas or regional boundaries for example in Western Australia: East Kimberley, West Kimberley, Pilbara, Gascoyne, Goldfields, South West. There should be an option to expand the geographical constraints of the permit after a certain period without any traffic convictions.

Registration of vehicles

The cost of registering a vehicle is insurmountable to many Aboriginal and Torres Strait Islander people. The registration of vehicles is important for insurance reasons and so ALSWA suggests a reduced fee for low-income earners who also reside in regional or remote areas.

Current programs in place in Western Australia

There are some positive programs currently being run in Western Australia. These include the Remote Areas Licensing Program, the Aboriginal Justice Program Open Days, and the Department of Transport partnering with schools to implement programs to assist students to obtain their learner's permit and progress to a provisional driver's licence.¹²⁰ Despite these programs, there is still a dire need for assistance with obtaining and maintaining driver's licences in remote and regional areas.

ALSWA makes the following recommendations to improve the delivery of driver's licence programs to regional and remote Aboriginal and Torres Strait Islander communities:

- Increase the frequency and geographic scope of visits from the Remote Areas Licensing Program and of the Aboriginal Justice Program 'Open Days', thereby increasing the accessibility of the services they provide to regional and remote Aboriginal communities.
- School programs to assist students obtain their learner's permit and progress to a provisional driver's licence be run in all regional and remote schools.

¹¹⁹ Barter, Alice, 'Indigenous driving issues in the Pilbara region' in Melissa Castan & Paula Gerber (eds) Proof of Birth, Sydney, NSW : Future Leaders, 2015, 67; Wyatt, B. (2007) 'Indigenous Licensing and Fine Default: A Clean Slate' Western Australian Parliamentary Committee To Explore The Effect Of Motor Driver's Licence And Driving Laws On Remote Communities, Report presented on behalf of the Minister for Corrective Services, Margaret Quirk MLA, 12.

¹²⁰ Department of Transport,
<http://www.transport.wa.gov.au/mediaFiles/about-us/DOT_P_RAP_2017_19.pdf>

- Adapt Department of Transport service provision to better meet the needs of Aboriginal communities by undertaking the following measures:
 - reduce requisite fees for driving assessments, learner guides, and logbooks, or alternatively, provide subsidies or fee waivers for Aboriginal and Torres Strait Islander people;
 - provide publicly funded driver education in remote Aboriginal communities;
 - revise current licensing education materials to develop more culturally appropriate and context-sensitive resources, with particular consideration for users with low literacy levels;
 - review testing procedures to ensure that oral, pictorial, and outdoor testing options are available to all applicants, and that assessments in traditional languages are provided, with interpreters supplied when needed;
 - in collaboration with Aboriginal community representatives, conduct a review of existing cultural competency training procedures for all Department of Transport employees, and identify and implement areas for improvement;
 - relocate Department of Transport offices currently situated within regional law enforcement facilities; and
 - employ more local Aboriginal and Torres Strait Islander People in the Department of Transport to work in regional areas.

Extraordinary Driver's Licences

The current criteria for an Extraordinary Licence under the *Road Traffic (Authorisation to Drive) Act 2008* (WA) allows a person to apply for an extraordinary licence on the following grounds:

- that it is necessary for the applicant to obtain urgent medical treatment for him or herself or a member of his or her family;
- that the absence of the extraordinary licence would place an undue financial burden on the applicant or his or her family by depriving the applicant of his or her principal means of obtaining income; or
- that it is the only practicable means for the applicant or a member of the applicant's family to travel to their employment.

Many Aboriginal people (especially those living in remote areas where there are no other feasible transport options) may need to drive to attend a funeral or other cultural ceremonies, as described above. **Therefore ALSWA submits that the terms of extraordinary driver's licences under the *Road Traffic (Authorisation to Drive) Act* be revised to allow an applicant's family and cultural obligations to be considered.** In 2006, the LRCWA recommended that the relevant criteria for an application for an extraordinary driver's licence be amended to include:

1. Where there are no other feasible transport options, Aboriginal customary law obligations should be taken into account when determining the degree of hardship and inconvenience which would otherwise result to the applicant, the applicant's family or a member of the applicant's community.
2. When making its decision whether to grant an extraordinary driver's licence the court should be required to consider the cultural obligations under Aboriginal customary law to attend funerals and the need to assist others to travel to and from a court as required by a bail undertaking or other order of the court.¹²¹

121 LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) Recommendation 13.

ALSWA echoes the Law Reform Commission of Western Australia's recommendation and also submits that the *Road Traffic (Authorisation to Drive) Act* should be revised to allow people who have had their licences suspended for fine default to apply for extraordinary licences.

Mandatory accumulation of suspensions

Under s 49(8) of the *Road Traffic Act* (WA) when sentencing a person for driving without a valid licence, if the person is already serving a period of disqualification or suspension, then the Court must disqualify them for nine months cumulative on any other suspension. This means that people can be convicted for driving without a valid licence very early on in their life and if they continue to drive for the reasons set out above, it could be tens of years before they are eligible to even attempt to obtain a valid licence. If people have no hope of ever being able to apply for a driver's licence, they will continue to drive unlicensed.

Therefore, ALSWA supports repealing the mandatory accumulation of suspension periods in section 49(8) of the *Road Traffic Act* (WA) and providing a discretionary range of suspension periods.

Removal of licence disqualification

The need for people to have a chance to change their life around is very important. Many Aboriginal and Torres Strait Islander people in regional and remote areas of Western Australia have had very limited opportunities and have been exposed to severe trauma and disadvantage throughout their lives. Many people have accumulated an extensive poor driving record in the early part of their life. When an employment or community opportunity then becomes available, these people should have a realistic mechanism to clear their suspensions/disqualifications, obtain their licence and change their offending and life trajectory.

Under the *Road Traffic (Authorisation to Drive) Act 2008* (WA) if a person has been disqualified by a court from holding or obtaining a drivers licence for a period of more than three years then, after a specified waiting period, they can apply to the District Court or Supreme Court for an order removing the disqualification.¹²²

The court must consider the following matters:

- safety of the public generally – that the public will not be endangered by the disqualified driver driving a vehicle;
- character of the disqualified driver – that they are of good character;
- circumstances of the case – that their case is one where they should be given their licence back, for example, they have a need for a driver's licence for employment or transporting children;
- nature of the offence(s) which gave rise to the disqualification – that the offences for which they were disqualified can be explained; and
- conduct of the disqualified driver since the disqualification – that they have taken steps to rehabilitate themselves since they were disqualified (eg alcohol consumption is under control), and they have done nothing wrong since the disqualification.¹²³

¹²² *Road Traffic (Authorisation to Drive) Act 2008* (WA) s 24. If the Supreme Court imposed the disqualification, the application must be made to the Supreme Court (s 24(2)). This would include someone who has been permanently disqualified or disqualified for life by a court from holding a drivers licence.

¹²³ *Road Traffic (Authorisation to Drive) Act 2008* (WA) s 24(5) and see *Davis v Commissioner of Police* (1990) 12 MVR 297.

This is a very lengthy and complex process and for the reasons people need to drive in regional and remotes areas as set out above, ALSWA suggests that this process should be reviewed and made more accessible to Aboriginal and Torres Strait Islander people.

Community education and legal representation for traffic matters

Legal Aid WA provides limited advice and representation for Aboriginal people who are applying for an extraordinary driver's licence or the removal of a licence disqualification. **There is a dire need for more resources for legal representation in this area. ALSWA submits that the Western Australian government should provide resources to ALSWA for the purpose of providing:**

- **educative strategies for Aboriginal people across the state (in particular in remote locations) about driving and licensing; and**
- **legal representation for Aboriginal people who are applying for an extraordinary driver's licence, the cancellation of a licence suspension order (if applicable) or the removal of a licence disqualification.**

Justice Procedure Offences – Breach of Community-based Sentences

Breach of community-based sentences

Proposal 7-1 To reduce breaches of community-based sentences by Aboriginal and Torres Strait Islander peoples, state and territory governments should engage with peak Aboriginal and Torres Strait Islander organisations to identify gaps and build the infrastructure for culturally appropriate community-based sentencing options and support services.

The ALRC reports that 'justice procedure offending is the third most common type of offending resulting in sentences of imprisonment for Aboriginal and Torres Strait Islander people' and that a considerable proportion of these Aboriginal and Torres Strait Islander prisoners have breached their community-based sentence.¹²⁴ Despite being the worst in nation in terms of overrepresentation, Western Australia appears, on the face of it, to fare well in relation to imprisonment for justice procedure offending. There were 142 Aboriginal and Torres Strait Islander people imprisoned for a justice procedure offence in December 2016 (representing 6% of all Aboriginal and Torres Strait Islander prisoners in custody in Western Australia at that time). The national average was 11% and Western Australia had the lowest proportion.¹²⁵

The ALRC outlines some of the potential issues concerning community-based sentences including that Aboriginal and Torres Strait Islander people may be subject to inappropriate conditions and programs, and that they do not receive the appropriate level of support.

The ALRC's discussion of *AH v Western Australia*¹²⁶ is particularly instructive; not only does it demonstrate the failures of and gaps in the system, it also shows the disastrous consequences that result from ineffective community based options. This

¹²⁴ ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [7.2].

¹²⁵ Ibid [7.12].

¹²⁶ [2014] WASCA 228.

young Aboriginal woman with extremely complex needs was not provided with any services or support yet she was expected to report to her community corrections officer at regular times. She failed to report and reoffended by stealing a car. She was sentenced to 'another community-based order, under which services were again not provided, and AH again reoffended'.¹²⁷ ALSWA highlights that after AH was placed on her second community-based order by the District Court, for the subsequent six weeks she 'was spoken to only once' by her community corrections officer and this was immediately after the order was imposed. The Court of Appeal observed that while 'the various agencies involved communicated with each other during that period, none of them actually did anything to provide any form of support or assistance to AH, who then reoffended'.¹²⁸ ALSWA has experienced this in other cases; where government and non-government agencies communicate and 'collaborate' about a particular 'client' but little is done with them or for them. On the third occasion that AH breached the community-based order by reoffending (two aggravated burglaries and other offences), she was sentenced to two years' imprisonment. This woman's data would not be included in the data for imprisonment for justice procedure offending because her most serious offence would be recorded as aggravated burglary.

Hence, the comparatively low proportion of Aboriginal and Torres Strait Islander prisoners who are in custody in Western Australia due to breaching a community-based order should be viewed with extreme caution. This data takes no account of the reality that many Aboriginal and Torres Strait Islander people will reoffend because the community-based order has not achieved the purpose for which it was imposed.

Case Example P

In a recent case in Western Australia, a District Court judge referred to the lack of effective programs within the Department of Corrective Services (DCS). He commented that during his most recent regional circuit he dealt with an offender who had been sentenced to a community-based disposition with a requirement to attend psychological counselling. Some nine months after the order was imposed, he still had not seen a psychologist. The man stopped reporting to his community corrections officer for supervision. As the judge eloquently stated 'Who could blame him when [DCS] weren't providing him the psychological input they have mandated for him?' DCS instituted breach proceedings and the man then reoffended, he is now serving a substantial term of imprisonment.

Case Example Q

ALSWA recently represented Q, an Aboriginal female who was sentenced to a Pre-Sentence Order (PSO) by the District Court. Q had been a victim of extreme domestic violence. A male community corrections officer managed her PSO. Q instructed ALSWA that she felt uncomfortable with this male officer. In his report to the court, he indicated that she had been rude to pathology staff and inappropriately attended her urinalysis test accompanied by other people. The pathology agency had informed the community corrections officer that Q had failed to attend for testing. Q disputed this and attended the pathology centre to inquire about what had occurred. They claimed that they had no record of her attendance and she argued with them that they were 'playing with her freedom'. After making further inquiries, they eventually informed her that they had misfiled her results and that Q had in fact attended as required under her order. The

¹²⁷ ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [7.17].

¹²⁸ *AH v The State of Western Australia* [2014] WASCA 228, [4].

people Q had attended with were her children. As soon as Q became aware that she was not supposed to attend with any other people she ceased bringing her children.

ALSWA supports Proposal 7-1 not only because a reduction in imprisonment for justice procedure offences will reduce the number of Aboriginal and Torres Strait Islander people in prison but also because more culturally appropriate and effective community-based orders is vital to ensure that Aboriginal and Torres Strait Islander people are provided with the right support to prevent reoffending.

The ALRC refers to a number of programs across Australia that appear to be working well in relation to supporting Aboriginal and Torres Strait Islander people to successfully complete community-based orders. It also mentioned that consideration should be given to enabling local Aboriginal community members to supervise and support offenders on community-based orders in remote communities.¹²⁹ ALSWA emphasises that appropriate solutions will vary from one location to another. In a state as large as Western Australia, flexibility is essential. ALSWA also agrees that working with peak Aboriginal and Torres Strait Islander organisations to identify gaps and build infrastructure would be facilitated by the re-establishment of an independent Aboriginal Justice Council in Western Australia.

Finally, ALSWA again refers to its Youth Engagement Program. While this program is designed for young people, many of the activities undertaken would be equally applicable to adults on community-based orders (eg, assistance with attending appointments, reminders, liaison and advocacy with the Department of Corrective Services and other program providers; mentoring and encouragement and practical assistance (eg, Centrelink payments, opening bank accounts, obtaining drivers licences, obtaining Medicare cards)).

Alcohol

The ALRC refers to the harmful effects of alcohol misuse in Aboriginal communities and its link to the incarceration of Aboriginal and Torres Strait Islander peoples. ALSWA agrees with the observation in the Discussion Paper that alcohol misuse is a health issue rather than a criminal issue.¹³⁰ While public drunkenness is no longer an offence in Western Australia, police officers often use offences such as street drinking and offensive language as a backdoor method to criminalise Aboriginal and Torres Strait Islander people who are under the influence of alcohol in public spaces. In this submission, ALSWA has recommended that offensive language should be decriminalised. ALSWA also refers later in this submission to civil protection schemes such as move on orders and prohibitive behaviour orders that similarly disproportionately impact on Aboriginal and Torres Strait Islander people (and often because those people are affected by alcohol).

The ALRC refers to FASD noting that although there is some research linking FASD to Aboriginal incarceration rates, the evidence is 'scarce'.¹³¹ ALSWA notes that the Telethon Kids Institute of Western Australia is undertaking various research projects

129 ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [7.17].

130 ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [8.12].

131 ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [8.4]–[8.19].

in relation to FASD including a study of young people at Banksia Hill Detention Centre. While ALSWA acknowledges that assessment and diagnosis of FASD has improved, there is a massive gap in the provision of appropriate supports and services following a diagnosis. Investment in Aboriginal community controlled solutions is essential. As evident from Case Example E, there remains a lack of understanding within government justice agencies about FASD and the needs of people with FASD.

Assessing solutions

Question 8-1 Noting the link between alcohol abuse and offending, how might state and territory governments facilitate Aboriginal and Torres Strait Islander communities, that wish to do so, to:

- (e) develop and implement local liquor accords with liquor retailers and other stakeholders that specifically seek to minimise harm to Aboriginal and Torres Strait Islander communities, for example through such things as minimum pricing, trading hours and range restriction;
- (f) develop plans to prevent the sale of full strength alcohol within their communities, such as the plan implemented within the Fitzroy Crossing community?

Question 8-1 In what ways do banned drinkers registers or alcohol mandatory treatment programs affect alcohol-related offending within Aboriginal and Torres Strait Islander communities? What negative impacts, if any, flow from such programs?

As the ALRC explains, there have been various recommendations made in response to alcohol misuse in Aboriginal and Torres Strait Islander communities including 'dry communities; pricing controls; supply reduction strategies and reduction in trading hours; community controls and patrols; and other laws that restrict the sale of alcohol to intoxicated persons'.¹³²

ALSWA does not have direct experience providing legal advice, representation or support in relation to these types of strategies. For that reason, ALSWA only wishes to emphasise (as acknowledged by the ALRC) that strategies must be community-led and community-owned. Different communities may wish to adopt different solutions and the desired solutions may alter over time, depending on the dynamics and circumstances in a particular community. State and territory governments must provide support to Aboriginal and Torres Strait Islander communities to develop and implement their own responses.

Finally, alcohol-harm reduction strategies such as those mentioned above, carry risks such as sly grogging, displacement of persons to different locations, and replacement of alcohol with illicit drugs or other substances. It is vital that communities have access to culturally competent alcohol rehabilitation programs and services because it is unrealistic to expect a person with alcohol addiction to simply stop or reduce drinking without any support.

¹³² ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [8.23].

Female Offenders

ALSWA emphasises that all of its responses and recommendations in this submission are relevant for Aboriginal and Torres Strait Islander females. ALSWA is deeply concerned about the ever-increasing rate of imprisonment of Aboriginal and Torres Strait Islander women in Western Australia and across the nation. As at 31 March 2017, 46% of women in prison were Aboriginal or Torres Strait Islander women.¹³³ It has been observed that Western Australia has 'by far the highest Aboriginal and Torres Strait Islander women's imprisonment rate in Australia relative to population size at nearly twice the national average'.¹³⁴

The ALRC discusses the multiple and complex factors that underpin this shocking situation. Many of these factors are sadly also common to Aboriginal men; however, Aboriginal and Torres Strait Islander female prisoners have extremely high rates of family violence¹³⁵ and sexual abuse and are often sole carers of children (as well as carers of elderly family members). As the ALRC observes, it has been estimated that up to 80% of Aboriginal and Torres Strait Islander female prisoners are mothers.¹³⁶ As the Human Rights Law Centre and Change the Record report observed 'imprisoning women is damaging for Aboriginal and Torres Strait Islander children, who are already overrepresented in child protection and youth justice systems'.¹³⁷

Aboriginal and Torres Strait Islander women are frequently imprisoned for low-level offending and fine default and are not provided with adequate supports and interventions in the justice system. The tragic case of Ms Dhu is one stark example. Other examples are contained in the recent report from the Human Rights Law Centre and Change the Record. Set out below are further examples:

Case Example R

R was imprisoned for seven months for driving under suspension. While she was in prison, her ex-partner caused \$26,000 worth of damage to her Homeswest property, where she had resided for 20 years. R was evicted by the public housing authority and is unable to access a further Homeswest house because of the unpaid debt. Following her release from prison, R was homeless. She developed a serious drug addiction and her offending has escalated.

Case Example S

Police arrested S, who was heavily pregnant, on the weekend and she gave birth to her baby on the Sunday. The Department for Child Protection removed her baby from her care. Had this woman already been in Bandyup Prison before she went into labour she would have been able to keep her baby with her in prison.

Case Example T

ALSWA represented T, who was a victim of ongoing family violence; however, she had a tendency not to turn up to court to give evidence against the perpetrator. T was seriously assaulted by him (ribs broken) and she responded by throwing a knife at him that stuck in his back. Police charged T with aggravated unlawful wounding. The court released her on bail even though she was already on bail for another serious offence.

¹³³ Department of Corrective Services, *Adult Prisoners in Custody Quarterly Statistics March Quarter 2017*.

¹³⁴ Human Rights Law Centre and Change the Record, *Over-represented and Overlooked: The crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (2017) 10.

¹³⁵ A recent study in Western Australia found that up to 90% of Aboriginal women in prison had been subjected to violence: Human Rights Law Centre and Change the Record *ibid* 17.

¹³⁶ ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [9.14].

¹³⁷ Human Rights Law Centre and Change the Record, *Over-represented and Overlooked: The crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (2017) 5.

However, shortly after her release T breached the protective bail condition by having contact with the perpetrator. Consequently, she was remanded in custody. The police did not charge T's partner with anything even though the police took T to the hospital for her injuries while she was in their custody.

Case Example U

U is an Aboriginal woman with five children who was imprisoned for approximately \$15,000 of unpaid fines. She was required to spend about 10 days in prison and as a result she was forced to organise her violent partner to look after her children while she went into custody.

Diversion

Question 9-1 What reforms to laws and legal frameworks are required to strengthen diversionary options and improve criminal justice processes for Aboriginal and Torres Strait Islander female defendants and offenders?

As mentioned above, many of the ALRC's proposals and ALSWA's recommendations in this submission will address the needs and circumstances of Aboriginal and Torres Strait Islander women (eg, removing imprisonment as an option for fine default; establishing a CNS in each jurisdiction; increasing resources to ATSILS). ALSWA submits that the recommendation that courts are required to take into account the unique systemic and background factors affecting Aboriginal and Torres Strait Islander people will particularly benefit Aboriginal and Torres Strait Islander women.

Finally, ALSWA suggests that diversionary and rehabilitation programs for Aboriginal and Torres Strait Islander women must be designed, developed and delivered by Aboriginal women.¹³⁸ Such programs must be culturally competent and trauma informed and should recognise the specific needs of Aboriginal women and provide holistic and flexible wrap around services to enable women to address their complex needs. For many Aboriginal and Torres Strait Islander female offenders this support would include:

- practical assistance (eg, Centrelink, housing, obtaining a birth certificate, food hampers, addressing unpaid fines, obtaining a driver's licence);
- legal assistance (eg, assistance with family law and/or child protection matters, applications for family violence protection orders; and tenancy issues);
- referrals to rehabilitation and therapeutic programs (eg, substance abuse, counselling, education and training, mental health);
- support to comply with any court orders or requirements of a community based-order (eg, reminders, transport assistance and moral support); and
- assistance for other family members (eg, helping mothers re-enrol their children into school).

138 See also Human Rights Law Centre and Change the Record, *Over-represented and Overlooked: The crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (2017) 5.

Aboriginal Justice Agreements

Proposal 10-1 Where not currently operating, state and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to renew or develop Aboriginal Justice Agreements.

The ALRC observes that Aboriginal Justice Agreements (AJAs) have been introduced in some states and territories 'as a coalition between peak Aboriginal and Torres Strait Islander organisations and state or territory governments to improve justice outcomes for Aboriginal and Torres Strait Islander People'.¹³⁹

The original intention for AJAs was that they would include 'targets to reduce the rate of over-representation of Aboriginal and Torres Strait Islander persons in the criminal justice system and to decrease incarceration rates' and they would address the delivery and funding of Aboriginal and Torres Strait Islander programs and services.¹⁴⁰

In Western Australia, the former Aboriginal Justice Council developed an Aboriginal Justice Plan (2000), which was the precursor to the Western Australia Aboriginal Justice Agreement 2004-2009 (WA AJA). However, the state government disbanded the Aboriginal Justice Council in 2002 following a recommendation from the former Aboriginal and Torres Strait Islander Commission.¹⁴¹ The Department of Justice, Department of Communities, Department of Indigenous Affairs, Western Australia Police, Aboriginal and Torres Strait Islander Commission, Aboriginal and Torres Strait Islander Services and ALSWA entered into and signed the WA AJA. The WA AJA had three main outcomes: achieving safe and sustainable communities; reducing the number of victims of crime; and reducing the overrepresentation of Aboriginal people in the criminal justice system. The intended AJA process was to develop an Aboriginal Justice Implementation Plan; Regional Aboriginal Justice Plans and Agreements; and Local Justice Plans.¹⁴² The LRCWA observed that after 18 months of operation it was 'difficult to find any evidence of direct action which empowers Aboriginal people to determine their own justice issues and solutions'.¹⁴³ The LRCWA made a comprehensive recommendation for the establishment of Aboriginal community justice groups coupled with a recommendation for the establishment of an Aboriginal Justice Advisory Council (comprised of members of the Aboriginal community and government departments). The proposed role of the Aboriginal Justice Advisory Council was to consult with Aboriginal communities and provide advice and assistance to enable communities to establish local community justice groups.¹⁴⁴ The Aboriginal and Torres Strait Islander Social Justice Commissioner submitted to the LRCWA that this proposed Aboriginal Justice Advisory Council was 'critical to the success of any Indigenous justice initiatives'.¹⁴⁵

139 ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [10.2].

140 ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [10.6].

141 Western Australia Government, *Aboriginal Justice Council in WA to be disbanded*, Media Statements (1 May 2002).

142 LRCWA, *Aboriginal Customary Laws*, Discussion Paper, Project No 94 (2005) 110.

143 *Ibid* 111.

144 Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australia law with Aboriginal law and culture*, Discussion Paper, Project No 94 (2005) 98.

145 *Ibid*.

The WA AJA was superseded by the State Aboriginal Justice Congress, *State Justice Plan: Aboriginal Community Solutions for Statewide Issues* (2009–2014), which has now expired.¹⁴⁶ In June 2011, the former Attorney General, Christian Porter stated in Parliament that the original budget allocation for the WA AJA was \$10.8 million over four years and that the government had reviewed the program. The review found there were some difficulties in convening regional meetings with Aboriginal and Torres Strait Islander leaders and far less meetings were held than initially hoped for. Mr Porter further stated that the results of the review would be released after he had consulted with the Aboriginal Justice Congress. The government decided to use the AJA resources to expand the parts of the program that had been successful, namely, measures to assist with licensing such as Open Days in remote communities and further work was to be done in relation to repeat low level offending and domestic violence.¹⁴⁷

In making its proposal above, the ALRC identifies four main components for effective AJAs: collaboration, governance, joint objectives and strategic direction, and accountability. The ALRC suggests that AJAs may represent a useful mechanism to facilitate the implementation of its proposals that require state and territory governments to work with peak Aboriginal and Torres Strait Islander organisations.¹⁴⁸

ALSWA supports Proposal 10-1 and emphasises that the successful development of a new AJA for Western Australia will require close collaboration with Aboriginal and Torres Strait Islander peoples, communities and organisations at the outset to ensure appropriate governance, joint objectives and accountability. In addition, ALSWA considers that the focus for a new AJA in Western Australia must be on achieving tangible outcomes. The ALRC observes that the ACT AJA has an action plan that includes 'key initiatives, measures and delegates for each program' and for the criminal justice system, this includes developing culturally appropriate corrective services programs; increasing participation in throughcare; creating outreach support to aid compliance with community-based orders; and maximising existing diversion options.¹⁴⁹

ALSWA would welcome the opportunity to be closely involved in the development of a new Aboriginal Justice Agreement for Western Australia. It also considers that the establishment of an independent Aboriginal Justice Council/Congress with representatives from across the state would complement any such agreement by ensuring that Aboriginal and Torres Strait Islander peoples have an independent voice in the development of solutions to the alarmingly high levels of over incarceration in this state.

¹⁴⁶ ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [10.7].

¹⁴⁷ Western Australia Parliamentary Debates, Legislative Assembly, 337–338, 1 June 2011 (Mr CC Porter, Attorney General).

¹⁴⁸ ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [10.33].

¹⁴⁹ ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [10.11].

Question 10-1 Should the Commonwealth Government develop justice targets as part of the review of the Closing the Gap policy? If so, what should these targets encompass?

ALSWA is a strong proponent of justice targets as part of the Closing the Gap strategy. ALSWA believes that the current omission of justice targets discourages state and territory governments from ensuring accurate data recording and from developing and utilising effective alternative strategies to imprisonment. The inclusion of justice targets will also ensure that the Commonwealth and state and territory governments work together to address Aboriginal overrepresentation.

ALSWA agrees with the views expressed in the 2017 report by the Human Rights Law Centre and Change the Record that justice targets should be developed in partnership with peak Aboriginal and Torres Strait Islander organisations to close the gap in the disproportionate rates of imprisonment of and violence against Aboriginal and Torres Strait Islander peoples.¹⁵⁰ Sub-targets for overrepresentation might include targets to reduce arrest rates; reduce the number of people remanded in custody; increase diversion by police; increase resourcing to Aboriginal community controlled programs and services for people involved in the justice system; increase compliance rates for community based orders; and increase the number of prisoners released on parole. Specific targets may vary from one jurisdiction to another depending on the most pressing issues faced by each state or territory. Sub-targets for reducing violence might include an increase in alternative accommodation facilities for victims and perpetrators of violence; increase in resourcing to Indigenous-specific legal services to assist victims of violence; and an increase in culturally competent perpetrator programs.

Access to Justice Issues

Proposal 11-1 Where needed, state and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to establish interpreter services within the criminal justice system.

Interpreter services

In order to ensure just outcomes, access to Aboriginal and Torres Strait Islander language interpreter services at all stages of the criminal justice system is essential. For Aboriginal and Torres Strait Islander people who do not speak English sufficiently, wrongful convictions or harsher sentences are likely to result from the inability to properly understand proceedings and communicate effectively. The consequences of a lack of language interpreters in Western Australia in the context of police interrogations are well known. The case of Gene Gibson is a clear example

¹⁵⁰ ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [10.43].

of the serious dangers of interviewing Aboriginal and Torres Strait Islander people who do not speak English sufficiently without an interpreter.

ALSWA highlights that the negative impacts extend far deeper. In Western Australia, community corrections officers interview offenders for a pre-sentence report without the use of interpreters. As explained earlier in this submission, negative reports referring to an offender's lack of cooperation, remorse and insight into their offending behaviour are common for Aboriginal and Torres Strait Islander people in Western Australia. While other factors also contribute to this situation (eg, cultural barriers, manner of conducting the interview), it is unquestionable that the lack of interpreters is negatively affecting the quality of pre-sentence reports. How can an offender express his or her views about the offending behaviour if they are unable to understand the questions posed and/or communicate their views? Access to interpreters is also essential to achieve rehabilitation and reintegration. How can an offender who does not speak English sufficiently participate and meaningfully engage in rehabilitation, education, training or treatment programs without access to an interpreter?

The ALRC refers to the Northern Territory Aboriginal Interpreter Service (AIS) as a useful model for developing a statewide Aboriginal and Torres Strait Islander language interpreter service. ALSWA understands that AIS provides interpreters at all courts on a regular basis. The Kimberley Interpreting Service is the only Aboriginal language interpreting service in Western Australia; it is under-resourced and struggles to accommodate the interpreting needs of all Western Australian Aboriginal and Torres Strait Islander peoples. **ALSWA supports the ALRC's Proposal 11-1 and emphasises that a well-resourced statewide Aboriginal and Torres Strait Islander language interpreter service is a necessary component of any reform designed to reduce the unacceptable level of overrepresentation in Western Australia.**

Specialist courts and diversion programs

<p>Question 11-1 What reforms to laws and legal frameworks are required to strengthen diversionary options and specialist sentencing courts for Aboriginal and Torres Strait Islander peoples?</p>
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As discussed earlier in this submission, ALSWA supports the development of more effective diversionary options for Aboriginal people. Ideally, diversionary options should be available at the earliest possible stage, reducing the need for police to charge Aboriginal and Torres Strait Islander people for less serious or low-level offending.

Equally, diversionary options should be available prior to sentencing and hence the pre-sentencing process needs to be sufficiently flexible to accommodate participation in culturally competent diversionary programs. ALSWA highlights from its experience in operating the Youth Engagement Program for young people, that it often takes time to develop rapport and trust with participants and if programs are too short it is difficult to make significant progress. ALSWA's Youth Engagement Program has no set duration and it has found that for some young people, positive outcomes are not evident until many months have passed (and in some cases in excess of 12

months) after the young person commenced participation. If Aboriginal and Torres Strait Islander people can access diversionary options before sentencing takes place, less severe sentencing options will be imposed and this will, in turn, have a positive effect on imprisonment rates.

Specialist sentencing courts such as Drug Courts, Mental Health Courts and Aboriginal Courts are a form of diversion because successful compliance usually results in less severe sentencing outcomes. There are currently two main specialist courts in Western Australia for adults: the Perth Drug Court and the START Court for offenders with mental health issues. Both of these specialist courts are only available in Perth. The Kalgoorlie Aboriginal Community Court and the metropolitan Family Violence Courts have ceased operation. The Bardimalgu List has now replaced the Bardimalgu Court in Geraldton and operates in a similar way.¹⁵¹

Currently, in Western Australia there are two mechanisms under the *Sentencing Act 1995* (WA) that can facilitate diversionary options and access to specialist sentencing courts. First, s 16(1)(e) of the *Sentencing Act* enables sentencing to be adjourned for any reason that the court considers proper and s 16(2) provides that sentencing cannot be adjourned for longer than six months after the offender has been convicted. A sentencing court might adjourn a matter to enable an offender to participate in a diversionary program in the community. In a number of different reports, the LRCWA has recommended that **s 16(2) of the *Sentencing Act* should be amended to enable sentencing to be deferred for up to 12 months**.¹⁵² ALSWA considers that reform would facilitate greater participation in a wider range of diversionary and alternative pre-sentencing options.

Second, Part 3A of the *Sentencing Act* provides for pre-sentence orders (PSOs). A court can only make a PSO if the seriousness of the offence warrants a term of imprisonment; the PSO would allow the offender to address his or her criminal behaviour; and the court might not impose imprisonment if the offender complies with the conditions of the order. A PSO may be made for up to two years. A community corrections officer or a speciality court¹⁵³ determines the precise conditions in relation to treatment, rehabilitation and curfews. The LRCWA observed in 2008 that compliance rates for PSOs were higher than for community-based sentencing orders.¹⁵⁴

ALSWA is of the view that diversionary programs including specialist court programs could operate more effectively for Aboriginal and Torres Strait Islander people if there was greater flexibility with PSOs. For example, there is no reason why a PSO should not be available for offending that does not warrant imprisonment. Successful compliance might result in a less punitive sentencing option. For example, if an offender has successfully complied with a 12-month PSO, the court might sentence the offender to a Conditional Release Order. ALSWA also notes that there is power under s 46 of the *Sentencing Act* to release an offender without sentence; however, the option is only available if the offence is trivial or technical. **ALSWA suggests that the criteria for release without sentence under s 46 should be expanded to cover a wider range of circumstances** (eg, to

151 For further information about the Bardimalgu Court in Geraldton, see LRCWA, *Enhancing Laws Concerning Family and Domestic Violence*, Discussion Paper (2014) 133–135.

152 LRCWA, *The Interaction of Western Australian Law with Aboriginal Law and Culture*, Final Report (2006) Recommendation 40; LRCWA, *Court Intervention Programs*, Final Report (2009) Recommendation 13; LRCWA, *Enhancing Laws Concerning Family and Domestic Violence*, Final Report (2014) Recommendation 60.

153 Currently the only speciality court is the Perth Drug Court, see *Sentencing Regulations 1996*, Reg 4A.

154 LRCWA, *Court Intervention Programs*, Discussion Paper (2008) 200.

encourage offenders to participate in rehabilitative programs because successful compliance will result in no further supervision or conditions).

In addition, ALSWA has recommended, earlier in this submission, a new flexible sentencing order based on the current provisions under the *Sentencing Act* for conditional release orders to enhance justice outcomes for Aboriginal and Torres Strait Islander peoples and facilitate the involvement of Aboriginal community-owned initiatives.

Specialist sentencing courts

ALSWA is supportive of Aboriginal sentencing courts such as the Koori Courts in Victoria. Currently, there are no formally established Aboriginal courts in Western Australia. The former Attorney General, Michael Misichin, disbanded the Kalgoorlie Aboriginal Community Court due its perceived ineffectiveness in reducing reoffending. In 2015, the media reported that the most recent evaluation of the court demonstrated that 55% of participants had reoffended within six months compared to 48% in the mainstream courts. In addition, after 24 months the reoffending rates were 78% and 72% respectively.¹⁵⁵ As far as ALSWA is aware, this evaluation is not publicly available.

An earlier evaluation of the Kalgoorlie Community Court made similar findings; however, it also explained that:

- more serious offences (hence more serious offenders) were being referred to the Kalgoorlie Community Court than the mainstream;
- that although the 'time to fail' for the Kalgoorlie Community Court participants was shorter than for mainstream participants, "a greater proportion of the 'failure' cases for Community Court participants were less serious than their 'original' offence compared to offenders choosing the mainstream court";
- Kalgoorlie Community Court participants were 'much less likely to have no prior convictions';
- The 'groups were so different in characteristics that the difference in time to fail cannot confidently be attributed to' whether the offender attended the Community Court or the mainstream court.¹⁵⁶

The evaluation also found that a lack of mainstream and Aboriginal-specific treatment, intervention and rehabilitation programs and support services coupled with a lack of knowledge and information sharing concerning those programs compromised the effectiveness of the program. Furthermore, planned extra resources for the Kalgoorlie Community Court were not forthcoming.¹⁵⁷

ALSWA has remained deeply concerned about the lack of appropriate investment and support for the Kalgoorlie Community Court and is of the view that its perceived failure in those circumstances should not be used to justify a lack of investment in Aboriginal Courts in Western Australia.

Bearing in mind the significant overrepresentation of Aboriginal and Torres Strait Islander people in the Western Australian justice system, ALSWA supports the establishment of Aboriginal Courts (such the Koori Courts in Victoria). The establishment of an Aboriginal Court would enhance options for Aboriginal and Torres Strait Islander people and facilitate the greater use of Aboriginal community-

155 See <https://thewest.com.au/news/australia/aboriginal-court-gets-the-chop-ng-va-127355>.

156 Shelby Consulting, *Evaluation of the Kalgoorlie Aboriginal Sentencing Court* (2009) v-vi.

157 Ibid vii.

owned initiatives. ALSWA believes that the establishment of an Aboriginal Court must be underpinned by legislation and highlights that such legislation exists in Victoria.¹⁵⁸ ALSWA acknowledges that work would need to be undertaken prior to establishing such a court and ALSWA recommends that the Western Australian Government immediately facilitate the development of this option by setting up a working group comprised of representatives of the Aboriginal community, Aboriginal organisations, and relevant justice agencies. Furthermore, if an Aboriginal Justice Agreement is renewed in Western Australia, this would provide a suitable forum for developing a model for an Aboriginal sentencing court in this state.

ALSWA is also supportive of the Neighbourhood Justice Centre (NJC) model in Victoria. The NJC combines a problem-solving approach with the provision of various onsite programs and services and it has been subject to positive evaluations. The LRCWA was supportive of this model in its report on Court Intervention Programs in 2009. It suggested that the Western Australian government should examine, following the results of the evaluation of the NJC, the feasibility of establishing a community court in Western Australia.¹⁵⁹ The University of Western Australia's Centre for Indigenous Peoples and Community Justice is currently undertaking an 18-month study exploring the feasibility of a NJC 'demonstration project' in Western Australia. In May 2017, ALSWA representatives attended the Neighbourhood Justice Centre Feasibility Study Roundtable. ALSWA lends it support to this study and trusts that the development of any demonstration project will place the needs of Aboriginal and Torres Strait Islander people at the forefront. A pilot project with strong Aboriginal involvement and support would be a useful step in addressing the over-representation of Aboriginal and Torres Strait Islander people in the Western Australian justice system.

Indefinite detention when unfit to stand trial

<p>Proposal 11-2 Where not already in place, state and territory governments should provide for limiting terms through special hearing processes in place of indefinite detention when a person is found unfit to stand trial.</p>

ALSWA has been calling for urgent reforms to the *Criminal Law (Mentally Impaired) Accused Act 1996* (WA) for many years. As part of this advocacy work, ALSWA, the Western Australian Association of Mental Health, Developmental Disability WA and a number of other agencies prepared an *Advocacy Brief: Priorities for Urgent Reform* in October 2015 outlining the five most critical and urgent reforms required in Western Australia.¹⁶⁰ A significant number of people with extensive experience and expertise in relation to individuals with cognitive or psychiatric impairment in the justice system contributed to the development of these five key reforms. The five key reforms are that the legislative scheme dealing with mentally impaired accused must include:

¹⁵⁸ See *Children, Youth and Families Act 2005* (Vic) s 504; *Magistrates' Court Act 1989* (Vic) s 4D; *County Court Act 1958* (Vic) s 4A.

¹⁵⁹ LRCWA, *Court Intervention Programs*, Final Report (2009) 117.

¹⁶⁰ <https://weamh.org.au/assets/documents/systemic-advocacy/clmia-priorities-for-reform-advocacy-brief-final.pdf>

- Judicial discretion to impose the appropriate order/disposition based on the individual circumstances of the case (ie, no mandatory custody/detention orders and a full range of appropriate community-based dispositions).
- Special hearings to test the evidence against an accused in cases where unfitness to stand trial is raised so that a mentally impaired accused who is unfit to stand trial is not treated more severely than other accused (ie, if there is insufficient evidence to prove that the accused committed the relevant act or omission, the charge is dismissed).
- Finite terms for custody/detention orders so that mentally impaired accused cannot be detained for any longer than they would have been imprisoned if convicted of the offence (ie, no indefinite detention of mentally impaired accused).
- Procedural fairness (eg, right to appear, right to appeal/review, right to reasons for decision and right to legal representation).
- Accountability and transparency so that determinations about the release of mentally impaired accused and any conditions attached that their release is made by a relevant qualified board or tribunal and subject to judicial oversight (eg, right of annual review by the Supreme Court).

ALSWA made a comprehensive submission to the Statutory Review of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) in December 2014 and prepared two submissions to the Senate Community Affairs References Committee inquiry into indefinite detention in 2016 and these submissions are available on its website.¹⁶¹

In summary, ALSWA supports Proposal 11-2 to ensure that mentally impaired accused are not held in custody or under supervision for any longer than they would have been if they had been convicted of the offence and that they are afforded fairness via the introduction of a special hearing process and other procedural safeguards.

While the need to reform the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) is urgent and compelling, it is not a panacea for responding to the high levels of cognitive impairment, intellectual disability and mental illness amongst Aboriginal and Torres Strait Islander people who are involved in the criminal justice system. Governments must provide resources to enable sufficient screening and diagnosis coupled with necessary programs and services to support Aboriginal and Torres Strait Islander people throughout the entire justice process. For many people with cognitive impairment and intellectual disability, it is unrealistic to expect compliance with onerous court orders and other legislative regulatory schemes.

The following case study demonstrates how the system criminalises Aboriginal and Torres Strait Islander people with cognitive impairments or intellectual disability because of their lack of capacity to comply with 'orders'.

Case Example V

V was a homeless, alcoholic, Aboriginal man with a cognitive impairment caused by sniffing solvents. V's criminal history largely comprised low-level public order type offending. He had 16 convictions for breaching a move-on order, 23 convictions for breaching bail, as well as 48 convictions concerning regulatory transport offences. An

application for a prohibitive behaviour order (PBO) sought to exclude V from entering Northbridge and the Perth CBD for 18 months. The offences relied on in support of the PBO were two offences of failing to obey a move-on order. The first involved V being found sitting on bench a few hours after being asked to leave the area. For the other offence, V was asked to move 1 km from Northbridge and he was found a few hours later sniffing glue and drinking alcohol almost but not quite 1 km away. A PBO was granted in the terms sought. V has breached the PBO on at least two occasions and further breaches may result in a period of imprisonment. His circumstances strongly suggest that he is unable to understand the terms of the PBO and has little capacity to comply with the order

Provision of legal services and supports

Question 11-2 In what ways can availability and access to Aboriginal and Torres Strait Islander legal services be increased?

The ALRC comments there are 'four discrete but complementary categories of legal services that provided targeted and culturally appropriate legal assistance to Aboriginal and Torres Strait Islander communities'. These are Legal Aid Commissions, Community Legal Centres, Aboriginal Legal Services and Aboriginal Family Violence Prevention Legal Services.¹⁶²

Whilst ALSWA acknowledges the benefits of the services provided by Legal Aid Commissions and community legal centres, it emphasises that Aboriginal controlled legal services have the greatest capacity to provide culturally competent legal assistance and support services. ALSWA has over 40 years' experience representing and providing culturally appropriate services to Aboriginal and Torres Strait Islander peoples across Western Australia. Furthermore, approximately 40% of ALSWA's staff are Aboriginal and ALSWA's board is wholly comprised of Aboriginal community members.

The most obvious way of increasing the availability and access to Aboriginal and Torres Strait Islander legal services (ATSILS) is for the **Commonwealth to increase its funding for legal service provision to each ATSILS. Likewise, state and territory governments should contribute more resources to ATSILS.** In Western Australia, the only state funding is for ALSWA's Youth Engagement Program (a two-year grant from the Department of Corrective Services). ALSWA does not receive any state funding for legal service provision despite the fact that the overwhelming majority of ALSWA's legal assistance work concerns state laws.

While direct funding for legal services is the preferred method, **state and territory governments could contribute indirectly by waiving state fees and charges imposed on ATSILS.** For example, ALSWA is required to pay the State for filing fees for civil litigation and for transcripts of proceedings, (such transcripts are often required for further bail applications after an initial bail refusal by a court and are a necessity to assess prospects of an appeal).

ALSWA also emphasises that ATSILS are increasingly providing non-legal support services to its clients (eg, ALSWA Youth Engagement Program; NAAJA Throughcare Program; CAALAS Kungkas Stopping Violence Program). This type of holistic joined-

up service provision increases the effectiveness of legal assistance by enhancing the information available to lawyers representing clients. It also improves outcomes for clients. This in turn reduces pressure on ATSILS lawyers. For example, in the ALSWA Youth Engagement Program, Aboriginal diversion officers will provide a wealth of information about the young person, their family and circumstances to the lawyer who is representing the young person in the Children's Court. Lawyers are able to focus on the legal issues and devote less time attempting to assist clients with non-legal problems. Furthermore, if positive outcomes are achieved (eg, greater compliance with court orders) there will be a reduction in legal needs (less court appearances) thus opening up resources for other or new clients.

ALSWA recommends that the Commonwealth and state and territory governments should provide additional resources to ATSILS to operate and expand these types of non-legal support programs.

Custody notification service

Proposal 11-3 State and territory governments should introduce a statutory custody notification service that places a duty on police to contact the Aboriginal Legal Service, or equivalent service, immediately on detaining an Aboriginal and Torres Strait Islander person.

ALSWA fully supports Proposal 11-3.

ALSWA has been advocating for the introduction of a Custody Notification Service (CNS) in Western Australia (based on the New South Wales model) for a number of years. The key components of ALSWA's recommended model are:

- That there must be a legislated mandatory obligation on police to notify the CNS whenever police take an Aboriginal or Torres Strait Islander person into custody (irrespective of whether the detained person requests to speak to a lawyer and irrespective of the reason the person is detained).¹⁶³ This will ensure the Aboriginal and Torres Strait Islander people who are detained in police custody for outstanding warrants¹⁶⁴ or for other protective reasons are also covered by the CNS.
- That specially trained ALSWA lawyers must operate the CNS because ALSWA lawyers have the capacity to provide relevant and culturally competent legal advice; negotiate with police in relation to bail and any available diversionary options; provide culturally competent welfare checks; and utilise community networks to contact family members for bail and other purposes.

ALSWA is also of the view that the current so-called notification service run by the Department of Corrective Services in Western Australia falls far short of the ideal

¹⁶³ This differs from the New South Wales scheme, which only requires police to notify ALS (NSW/ACT) if the police detain a person in relation to an offence. However, ALSWA understands from its consultations with ALS (NSW/ACT) that police usually contact the CNS whenever they detain an Aboriginal person. Once exception to this was a tragic death of an Aboriginal woman in a police cell in July 2016. Police detained her because she was intoxicated but they did not charge her with an offence. The New South Wales legislation did not mandate notification to CNS in this instance.

¹⁶⁴ ALSWA notes that under the New South Wales legislation, police would not have been required to contact the CNS for Ms Dhu because she was arrested on a warrant of commitment for unpaid fines.

model. As observed by the Western Australian State Coroner in the Record of the Investigation into the Death of Ms Dhu:

The Western Australia Police Service and Department of Custodial Services have developed the Aboriginal Referral Scheme, whereby detainees in police metropolitan and regional lock-ups, and the Perth Watch House, who self-identify as being Aboriginal (the Aboriginal detainees) can have access to staff from the Aboriginal Visitors Scheme (AVS). In February 2016, in line with the IAU recommendations, it was expanded to a 24 hours a day, seven days a week telephone support service for Aboriginal detainees and their families. It is managed by the Department of Corrective Services.¹⁶⁵

Notification to the AVS is not mandatory and, as such, notification is dependent on wishes of the detained person and/or the approach of the individual police officer. Whether an Aboriginal or Torres Strait Islander person in police custody elects to access AVS will depend on a multitude of factors including the physical and mental state of the person; his or her level of intoxication; and whether the detainee sufficiently understands English to appreciate the nature of the service. It will also be largely dependent on how the police officer explains the nature of the service and at what point in time the police offer access to the service.

Moreover, AVS cannot provide legal advice and assistance and are not equipped to liaise with police about possible bail conditions; nor would they be able to inform the person detained of the next steps in the legal process. As the State Coroner observed:

A primary difference between the AVS and the CNS is that the latter is staffed by lawyers and operated by the ALS in that jurisdiction, an agency that is independent of the police and/or corrective services. On the information before me I am not presently persuaded that the AVS is modelled on key aspects of the CNS.¹⁶⁶

The State Coroner recommended that the 'State Government gives consideration as to whether a state-wide 24 hours per day, seven days per week Custody Notification Service based upon the New South Wales model ought to be established in Western Australia, to operate alongside and complement the Aboriginal Visitors Scheme'.¹⁶⁷

ALSWA supports an ALS-operated CNS because it:

- enables an independent agency to check on the welfare of Aboriginal and Torres Strait Islander people in police custody;
- provides a mechanism for protecting legal rights of Aboriginal and Torres Strait Islander people in custody;
- enables appropriately qualified persons to provide advice to individuals in custody about the future legal process and likely outcomes thus relieving stress and pressure and this, in turn, will reduce difficult behaviour in police lock ups;
- enables lawyers to immediately liaise with police and advocate for the most appropriate bail options for Aboriginal people in custody with a view to minimising unnecessary remands in custody;
- enables ALSWA lawyers to be informed of the charges at the earliest possible opportunity thus increasing the effectiveness and timeliness of legal advice when the person first attends court; and

165 Record of the Investigation into the Death of Ms Dhu [834].

166 Ibid [846].

167 Ibid Recommendation 10.

- provides independent oversight of police conduct because there is mandated communication between police and professional lawyers and this is likely to result in improvements to police practices and processes over time.

Police Accountability

The ALRC discusses the historical tensions between police and Aboriginal and Torres Strait Islander peoples and highlights that police, as the gatekeepers of the system, have a considerable impact on whether an Aboriginal and Torres Strait Islander person is imprisoned.¹⁶⁸ The questions posed by the ALRC focus on improving relationships between Aboriginal and Torres Strait Islander people and police (including improving responses to Aboriginal and Torres Strait Islander offenders and victims). ALSWA responds to those questions below.

However, in ALSWA's view, what is missing from the analysis is **the need for independent accountability**. While the measures suggested by the ALRC will improve outcomes for police officers who are well intentioned, they will not address negligence, misconduct and corruption. ALSWA does not consider that the current mechanisms to ensure police accountability in Western Australia are sufficient.

Case Example W

ALSWA represented W who was charged with disorderly conduct. The Statement of Material Facts alleged that the client was disorderly by fighting and swearing in public. W instructed that he had been in town with his partner and was approached by a group of non-Aboriginal people who started yelling and challenging them to a fight. Police intervened and separated W from the other group (in the client's words, 'I was the only black man'). While the police were talking to W, one of the females from the other group pushed his partner. W defended his partner by pushing the female away from his partner. The client was then assaulted by a couple of the men from the other group. The police involved were wearing a body worn video camera and the video was played during the trial. The video showed that the W's version of events was exactly what had occurred and W was found not guilty. The others involved in the incident were issued with infringement notices for disorderly conduct instead of being charged.

Case Example X

ALSWA acted for X, an Aboriginal female (with no prior record) who had been charged with assault police officer. Again, the police involved were wearing a body worn video camera. The video showed a scuffle, however, it was difficult to see what happened. The police officer forgot to turn off the video when they returned to their police vehicle. A female police officer asked the male officer words to the effect 'did you arrest her for you or was that for me?' The male officer replied, 'that was for you, she's not allowed to do that to you'. The female officer said 'she didn't actually touch me'. The male officer replied, 'that is ok she is still not allowed to do that to you'. The female said, 'she may have touched me with her jumper'. The male officer subsequently prepared a written statement stating that he 'saw' the client hit the female officer with a closed fist. The prosecution discontinued the charge of assault police officer on the trial date.

ALSWA receives numerous complaints from the Western Australian Aboriginal community about police officers using excessive force. These complaints include allegations of hitting or punching; and the use of batons, tasers, firearms and police

dogs. They also include allegations of police officers verbally abusing ALSWA clients, often using racially derogatory language.

Case Example Y

ALSWA represented Y, a 14-year-old Aboriginal boy from a remote town in relation to a complaint about how the police treated him. Y and a number of his cousins went for a ride in their aunt's car. Y was a passenger and the driver did not hold a licence. A police car started following them. The driver kept driving. The driver then panicked and veered off the road to try to go onto a back, dirt road but the car became stuck in a ditch. The boys all got out of the car and started running.

The police officers caught Y and two others. Y instructed ALSWA that the officers told them to 'Get down'. He got down and he could feel the officer aiming a gun on the back of his neck. The male officer then said 'Stop crawling away or I'll shoot you with the gun'. Another boy heard the officers say 'Shut up mother fuckers. Get on the ground mother fuckers. Hey don't move or we'll shoot you with the gun. Shut up - you want to die?'

This boy said the police officers tackled him to the ground and hit him in the face and ribs. They then kicked him in the ribs. They also hit him on the leg with a baton.

ALSWA submitted a complaint about this conduct to the Western Australia Police Internal Affairs Unit who subsequently performed an investigation. The Western Australia Police interviewed Y and one other boy on one occasion; however, other boys were not interviewed due to difficulties in attending the remote locations. ALSWA is of the view that this client's complaint was adversely affected by his and his cousins' remoteness and the difficulty he had with engaging with police officers.

The Western Australian Police investigation "established insufficient evidence to sustain any criminal conduct on the part of any police officer or any breaches of Western Australia Police policy."

This response is the standard response that ALSWA receives to the majority of its serious complaints. **It highlights the need for an independent investigative body to conduct investigations into complaints about Western Australian police.** It is clear that police investigating police is neither effective nor procedurally fair.¹⁶⁹

Invariably, if ALSWA makes a complaint to the Western Australian Corruption and Crime Commission (CCC) about police conduct, the CCC refers the complaint back to Western Australia Police internal investigations.¹⁷⁰ ALSWA has requested in some cases for the CCC to conduct its own independent investigation; however, the typical response is that the CCC has 'refocussed its efforts' and now oversees fewer investigations. The outcome is that the CCC discontinues its involvement in the matter. Bearing in mind the reality that Aboriginal and Torres Strait Islander people in Western Australia have a deep and historical mistrust of police, the internal investigation of alleged misconduct is not appropriate. ALSWA believes that if the relationship between police and Aboriginal and Torres Strait Islander peoples is to improve, this situation needs to be rectified. Aboriginal and Torres Strait Islander people need to have confidence that complaints will be fully and independently investigated. Moreover, until police are held to higher standards of accountability, injustices and mistreatment will continue to occur and contribute to the over incarceration of Aboriginal and Torres Strait Islander peoples.

ALSWA also emphasises that over-policing of Aboriginal and Torres Strait Islander peoples is a key contributing factor to incarceration rates. Decisions to charge people

¹⁶⁹ See Eggington, Dennis; Allingham, Kate --- "Police Investigating Police Complaints: An Urgent Need for Change in Western Australia" [2007] IndigLawB 33; [2007] 6(28) Indigenous Law Bulletin 6.

¹⁷⁰ See s 37 of the Corruption, Crime and Misconduct Act 2003 (WA).

even with low level offending will have repercussions for future involvement in the justice system. The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs stated in 2011:

The Committee is concerned about evidence suggesting that over-policing of Indigenous communities continues to be an issue affecting not only relations between Indigenous people and the police, but also the rate at which Indigenous people come into contact with the criminal justice system.¹⁷¹

For that inquiry, ALSWA referred to a number of case examples in its submission.¹⁷² One such example was the notorious 'freddo frog' charge where a 12-year-old Aboriginal boy with no criminal convictions was charged with receiving a stolen freddo frog worth 70 cents. The boy was later arrested by police and detained in antiquated police cells because he failed to answer his bail after his mother forgot the court date. Other examples included a 15-year-old boy from a regional area being charged with attempting to steal an ice-cream who subsequently spent 10 days in custody in Perth before the charge was eventually dismissed; a 16-year-old boy who attempted to commit suicide by throwing himself in front of a car was charged with damaging the vehicle; and an 11-year-old with no prior contact with the justice system was charged with threats to harm following an incident at her primary school where she allegedly threatened teachers with plastic scissors.¹⁷³

While these examples concern children, they demonstrate that over-policing occurs to the detriment of Aboriginal and Torres Strait Islander people. Decisions made in relation to young people may have long-term consequences and cannot be detached from the issue of adult over incarceration. ALSWA has recently submitted that the most appropriate way of providing accountability for discretionary decisions by police in relation to the diversion of children is to require police to produce a written record in every instance when a young person is dealt under the *Young Offenders Act 1994* (WA) for an offence.¹⁷⁴ This written record must explain why police selected the option used and why they did not select a less punitive option. For example, if a young person is cautioned for an offence, the document must stipulate why it was considered inappropriate to take 'no action'. If a young person is referred to a juvenile justice team, the document must stipulate why it was considered inappropriate to take no action or to issue a caution to the young person. If police arrest and charge a young person, the document must explain why they did not decide to take 'no action'; caution the young person; refer the young person to a JJT; or issue a notice to attend court. Similarly, Amnesty International has recommended that the COPS Manual should be amended to require that a 'failure to caution notice' be prepared on all occasions where a young person is proceeded against by way of a JJT referral or charge and this notice should be provided to the legal representative and to the court.¹⁷⁵ **ALSWA considers that police should be mandated to provide written records justifying decisions not to caution or divert Aboriginal and Torres Strait Islander people for first and low-level offences.**

171 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system* (2011) [7.22].

172 ALSWA, Submission to the Parliament of Australia, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the High Level of Involvement of Indigenous Juveniles and Young Adults in the Criminal Justice System* (December 2009).

173 Ibid 8.

174 ALSWA, Submission to the Review of the Young Offenders Act (6 April 2017) available at <http://www.alsw.org.au/wp-content/uploads/2015/08/ALSWA-Submission-to-the-Review-of-the-Young-Offenders-Act-7-April-2017.pdf>.

175 Amnesty International, *There is Always a Brighter Future: Keeping Indigenous kids in the community and out of detention in Western Australia* (2015) Recommendation 5.

Question 12-1 How can police work better with Aboriginal and Torres Strait Islander communities to reduce family violence?

The appropriate police response to family violence in Aboriginal and Torres Strait Islander communities is extremely complex. The arrest and incarceration of perpetrators of family violence is clearly often necessary but it may not result in a reduction of future violence. Victims of family violence may or may not desire the intervention of the criminal justice system. Some will want support to leave a relationship, others will want to support for the perpetrator so the violence ceases.

Many commentators have observed that victims of family violence may not seek police intervention out of distrust of police and police may not respond effectively due to bias and discrimination. As noted by the ALRC, police may have preconceived ideas and view some Aboriginal female victims of family violence such as Ms Dhu as 'offenders' or 'fine defaulters' rather than victims.¹⁷⁶ The case of Ms Mullaley in Western Australia is another pertinent example. Ms Mullaley was seriously assaulted by her estranged partner and was found injured and naked by police officers. Her 'agitated behaviour' (including assaulting a police officer) distracted police from responding to her concerns about the welfare of her very young child (who shortly after the assault was abducted and later brutally murdered by the partner). The Corruption and Crime Commission commented in its investigation that the police failed to consider whether the cause of her behaviour 'might be the result of an attack that left her naked and injured'.¹⁷⁷ Ms Mullaley was later convicted by a Magistrate after trial of assaulting police and received a suspended sentence of imprisonment.

ALSWA considers that the best way to achieve an appropriate response from police to Aboriginal and Torres Strait Islander victims of family violence is to ensure that police treat Aboriginal and Torres Strait Islander victims with equality, respect and dignity. Some Aboriginal victims of family violence will elect to keep their experience of violence hidden; some will react aggressively to violence and fight back; others will calmly seek the intervention of the justice system. Moreover, some will be offenders and fine defaulters. It is for this latter category, that police must be constantly mindful of the dynamics of family violence and cultural considerations in Aboriginal and Torres Strait Islander communities. For this reason, ALSWA submits that Western Australia Police should undertake comprehensive training in relation to Aboriginal family violence. As suggested by the Human Rights Law Centre and Change the Record, '[i]mproving police responses will be assisted if Aboriginal and Torres Strait Islander women are employed to work as, and to train, police officers'.¹⁷⁸ **ALSWA agrees that it is vital that Aboriginal and Torres Strait Islander women as well as men design and deliver cultural awareness training and family violence training to police.**

ALSWA also considers that positive relationships between the police and Aboriginal and Torres Strait Islander peak organisations and communities is likely to improve the way in which police work to respond to and reduce family violence. In this regard, the Koori Family Violence Police Protocols may be a useful model. These protocols

¹⁷⁶ ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [12.26].

¹⁷⁷ Human Rights Law Centre and Change the Record, *Over-represented and Overlooked: The crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (2017) 31.

¹⁷⁸ *Ibid* 5.

are an agreement between local Aboriginal communities and Victoria Police that 'document the local Police response to Aboriginal family violence.'

The aim of the protocols is to strengthen the police response to incidents of family violence in Aboriginal communities with the longer term goal of reducing both the number of family violence incidents, and the rates of families experiencing repeated incidents of family violence. The protocols are aimed at a holistic, improved response to all parties including victims, children and perpetrators.¹⁷⁹

ALSWA does not believe that the mere existence of protocols is sufficient, but it may be a useful way to commence ongoing engagement between Aboriginal and Torres Strait Islander communities/organisations and the police.

Better police responses to communities

Question 12-2 How can police officers entering into a particular Aboriginal or Torres Strait Islander community gain a full understanding of, and be better equipped to respond to, the needs of that community?

As the ALRC observes, inadequate cultural awareness training for police and especially for those entering a remote community is a longstanding and ongoing issue.¹⁸⁰ This was recognised by the LRCWA in 2006 in its reference on Aboriginal customary laws. The LRCWA recommended that adequate resources should be provided to ensure that every police officer in Western Australia participates in Aboriginal cultural awareness training and that 'every police officer who is stationed at a police station that services an Aboriginal community participate in relevant and locally based Aboriginal cultural awareness training' provided by local Aboriginal people.¹⁸¹

Some ten years later, the State Coroner recommended in the 2016 Dhu inquest that the Western Australia Police develops its training for police officers who are transferred to a new police station to address the following:

1. That it be standard procedure for all police officers transferred to a location with significant Aboriginal population to receive comprehensive cultural competency training, tailored to reflect the specific issues, challenges and health concerns relevant to the location;
2. That members from the local Aboriginal community be involved in the delivery of such training, and that it be ongoing to reflect the changing circumstances of the location; and
3. That the initial training and at least a component of the ongoing training is to be delivered face-to-face.¹⁸²

This recommendation largely reflects the submissions made by ALSWA in the Dhu inquest. **ALSWA reiterates the critical need for all Western Australia police officers to undertake comprehensive and regular Aboriginal and Torres Strait Islander cultural competency training and locally-based training to be mandatory for all police officers working in specific Aboriginal communities.** Such training must be delivered by local Aboriginal and Torres Strait Islander people.

¹⁷⁹ Clear Horizon Consulting, *Evaluation of the Koori Family Violence Police Protocols: Ballarat, Darebin and Mildura* (2015) 1.

¹⁸⁰ ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [12.28].

¹⁸¹ LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (20016) Recommendation 56.

¹⁸² Record of the Investigation into the Death of Ms Dhu, Recommendation 3.

Question 12-3 Is there value in police publicly reporting annually on their engagement strategies, programs and outcomes with Aboriginal and Torres Strait Islander communities that are designed to prevent offending behaviours?

ALSWA agrees that there is merit in police publicly reporting annually on their engagement strategies and programs with and outcomes for Aboriginal and Torres Strait Islander communities. However, this reporting should not be limited to programs that aim to prevent offending behaviours. **All programs and engagement strategies involving Aboriginal and Torres Strait Islander peoples should be publicly reported.** ALSWA notes that the Western Australia Police publicly available information provides little reassurance that appropriate and effective strategies are actually being employed. The Western Australia Police website refers to the Aboriginal and Community Diversity Unit but provides no details about what programs and initiatives are actually undertaken; instead it is a mere statement of intention.¹⁸³ ALSWA also considers that the **Western Australia Police should be required to report on an annual basis the proportion of police officers who have undertaken cultural competency training; the nature, location and duration of that training; and how many officers have undertaken subsequent training.**

Police programs

Question 12-4 Should police that are undertaking programs aimed at reducing offending behaviours in Aboriginal and Torres Strait Islander communities be required to: document programs; undertake systems and outcome evaluations; and put succession planning in place to ensure continuity of the programs?

The ALRC comments that 'where there is a failure to undertake systems and outcomes evaluations of police programs, the success or otherwise of particular programs cannot be measured. During stakeholder consultations, the ALRC was made aware that there were challenges in supporting arguments for new funding or continuation of programs where evaluation of police programs did not exist'.¹⁸⁴

ALSWA simply responds that all government agencies including police that operate or deliver programs aimed at reducing offending behaviours in Aboriginal and Torres Strait Islander communities should be documented and evaluated and subject to succession planning.

¹⁸³ <https://www.police.wa.gov.au/Our-Community/Community-Diversity-and-Substantive-Equality/Aboriginal-Communities>.

¹⁸⁴ ALRC, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [12.50].

Question 12-5 Should police be encouraged to enter into Reconciliation Actions Plans with Reconciliation Australia, where they have not already done so?

Unlike many other agencies involved in the justice system (eg, Department of Corrective Services, Department of the Attorney General, DPP, and Legal Aid WA), the Western Australia Police do not have a Reconciliation Action Plan (RAP). ALSWA highlights that the existence of a RAP does not guarantee improved outcomes in relationships between Aboriginal and Torres Strait Islander peoples and police; however, it is an important step. The inclusion of key objectives in a RAP may facilitate improved outcomes such as increasing Aboriginal and Torres Strait Islander employment and improving cultural awareness across the agency. In addition, RAPs can include specific targets that may assist in the reduction of incarceration rates. For example, the Department of Corrective Services RAP 2015–2018 includes an action to 'develop strategies to reduce recidivism by Aboriginal people by reducing adult and youth offending by 6% year on year'.¹⁸⁵ For the Western Australia Police, a RAP could include specific aims such as increasing the rate at which Aboriginal and Torres Strait Islander people access police diversionary options and increasing the number of cautions issued for low level offending. **ALSWA is of the view that the Western Australia Police should enter into a Reconciliation Action Plan.**

Employment strategies

Question 12-6 Should police be required to resource and support Aboriginal and Torres Strait Islander employment strategies, where not already in place?

ALSWA considers that the employment of more Aboriginal and Torres Strait Islander peoples as police officers will assist in improving relations as well as encouraging victims of family violence to seek police assistance. In this regard, ALSWA notes the recommendation referred to above, that strategies should encourage the employment of more Aboriginal and Torres Strait Islander women as police officers.

The Western Australia Police have established an Aboriginal Cadet Program.¹⁸⁶ The program is 'open to Aboriginal and Torres Strait Islander people as a special measure to achieve equality'; the applicant must be 16-24 years of age and the initial two-year course has 10 places. The program was 'created to encourage more young Indigenous people to become police officers' and the former Minister for Police was reported as stating that only 1.7% of Western Australia's 6000 or more police officers were Aboriginal or Torres Strait Islander people. The goal was to increase this figure to 3.2%.¹⁸⁷ Bearing in mind the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system and as victims, even 3.2% Aboriginal employment is insufficient. **ALSWA supports this program and further resources for Aboriginal and Torres Strait Islander employment strategies.**

185 See <http://www.reconciliation.org.au/raphub/wp-content/uploads/2016/09/Govt-WA-RAP.pdf>

186 <https://www.stepforward.wa.gov.au/join-wa-police/aboriginal-cadet/>

187 <https://thewest.com.au/news/wa/wa-police-launch-aboriginal-cadet-plan-ng-ya-112597>

Question 13-1 What laws and legal frameworks, if any, are required to facilitate justice reinvestment initiatives for Aboriginal and Torres Strait Islander peoples?

ALSWA is a strong proponent of justice reinvestment strategies; investment in early intervention, prevention and rehabilitation is far more effective for long-term community safety and far cheaper than continuing to imprison the most marginalised and disadvantaged members of the community. ALSWA is a member of Social Reinvestment WA which is an Aboriginal-led coalition of approximately 15 community sector not-for-profit organisations working together to achieve a new vision of justice for Western Australia by advocating for the adoption of a social reinvestment approach in this state.¹⁸⁸

ALSWA considers that many of the recommendations in this submission will facilitate the adoption of a justice reinvestment approach. In particular, the inclusion of justice targets in Closing the Gap will provide the Commonwealth, state and territory governments with the impetus to fund and support justice reinvestment strategies in order to meet those targets. ALSWA considers that justice reinvestment approaches need to remain flexible and locally based and therefore does not consider that any specific laws are required at this stage.

Other

Other discriminatory laws

In its submission to the ALRC in response to its draft terms of reference to this inquiry, ALSWA highlighted that numerous different laws and legal frameworks contribute to the rate of offending and incarceration of Aboriginal and Torres Strait Islander peoples. From the Western Australian perspective, apart from those laws and legal frameworks already referred to in this submission, ALSWA wishes to emphasise a number of other laws and legal frameworks that it believes contribute to the over incarceration of Aboriginal and Torres Strait Islander people.

Disruptive behaviour management policy

For many years, ALSWA has been concerned about the impact of the Housing Authority's Disruptive Behaviour Management Policy (DBMP) on Aboriginal and Torres Strait Islander Peoples. The DBMP states that legal action to terminate a tenancy agreement can commence after the tenant has accumulated the required number of strikes during a 12-month period. For 'disruptive behaviour' (as distinct to 'serious disruptive behaviour'), if three strikes are accrued within 12 months, eviction proceedings will commence. The guidelines define 'disruptive behaviour' as activities that cause a nuisance, or unreasonably interfere with the peace, privacy or comfort, of persons in the immediate vicinity'.¹⁸⁹ One example listed for disruptive behaviour is 'domestic and family disputes which impacts on neighbours'.¹⁹⁰

188 <https://socialreinvestmentwa.causcvox.com/>.

189 Housing Authority WA, *Rental Policy: Disruptive Behaviour Management Policy*, 80.

190 http://www.housing.wa.gov.au/HousingDocuments/DBM_brochure.pdf.

The Equal Opportunity Commissioner has observed that the DBMP increases overcrowding because:

When families are evicted as a result of the strategy, their only option (other than being homeless) is to stay with relatives. These relatives are often also tenants of the Department. This frequently creates increased noise levels in these households and raises the potential for antisocial behaviour. In turn, this adds to the likelihood of additional complaints under the DBMS.¹⁹¹

It was observed in Parliament that in 2015-2016, there were 53 evictions under the DBMP and 51% of these tenants were Aboriginal people.¹⁹² This policy contributes to homelessness and overcrowding which in turn contribute to social disadvantage and further offending. **ALSWA recommends that the Western Australian government immediately review the Housing Authority's DBMP.**

Move on orders

In Western Australia, police have the power to issue 'move-on orders' to persons in public places in a number of circumstances. These orders require the person to move on from the specified area for 24 hours. The potential circumstances include if the police officer reasonably suspects that the person is committing a breach of the peace; is hindering, obstructing or preventing any lawful activity that is being, or is about to be, carried out by another person; or intends to commit an offence.¹⁹³ The penalty for a breach of a move-on order is \$12,000 or 12 months' imprisonment.¹⁹⁴ Data in relation to move-on orders was presented to Parliament in 2014. The data shows that for the six-year period from 2008-2013 there was a total of 137,050 move-on orders issued and 47,763 of these were against Aboriginal people (34%). In 2013, the proportion of move-on orders issued against Aboriginal people reached a high of 40%.

In 2014, ALSWA acted for a homeless Aboriginal man who was the subject of an application for a Prohibited Behaviour Order (PBO). The man lived on streets in and around the Perth CBD and Northbridge areas. The PBO sought to ban the man from entering those areas for a period of 18 months. The man had previously been issued with 463 move-on orders between 2005 and 2014. One move-on order required him to leave a CBD park where a charity was operating a soup kitchen which the man accessed every day for an evening meal.

The former Attorney General, Jim McGinty, who introduced the laws, reportedly stated that these laws were not intended to be used in this manner and were meant to give the police power to 'diffuse anti-social behaviour that was threatening to escalate into a danger to people or property'.¹⁹⁵ The orders are discriminatory and ineffective for vulnerable and disadvantaged people, especially those with cognitive or psychiatric impairment. ALSWA considers that the police issue many Aboriginal and Torres Strait Islander people with move-on orders because they are drinking in public, wandering around in groups, or shouting in the street. The reality is that many of these people are homeless and have nowhere else to go. **ALSWA recommends that the laws dealing with move-on orders should be repealed or, at the very least, reformed to ensure that a move-on order can only be issued**

191 Equal Opportunity Commission Western Australia, *A Better Way: A report into the Department of Housing's disruptive behaviour strategy and more effective methods for dealing with tenants* (June 2013) 11 & 52.

192 Western Australia, Parliamentary Debates, Legislative Council, 8 September 2016, 5673 (Hon Col Holt).

193 Criminal Investigation Act 2006 (WA) s 27.

194 Criminal Investigation Act 2006 (WA) s 153.

195 Emerson D, "Move-on Notices 'used wrongly'", *The West Australian*, 2 December 2013.

where there is a reasonable belief that the person poses a danger to a person or to property.

Prohibited Behaviour Orders

The *Prohibited Behaviour Orders Act 2010* (WA) provides for civil injunctive-style orders against persons (aged over 16 years) who have had at least two convictions for anti-social behaviour within a three-year period. Prohibitive Behaviour Orders (PBOs) may prevent persons from undertaking lawful activities such as attending specific locations. There is also a 'name and shame' website with the names and photographs of persons subject to PBOs publicly displayed.¹⁹⁶ Applications for PBOs are made by the Western Australia Police and heard in the Magistrates Court. The penalty for a breach of a PBO includes imprisonment: if the order was made in the Children's Court, the penalty is a fine of \$2,000 or two years' imprisonment (or both); if it was made in the Magistrates Court a fine of \$6,000 or two years' imprisonment (or both); and if it was made by a superior court, a fine of \$10,000 or five years' imprisonment (or both).¹⁹⁷

An internal review of PBO respondents represented by ALSWA in 2013 (a total of 59 respondents) showed that 56% were homeless, 65% had a mental health issue; 52% were cognitively impaired and 96% had substance abuse issues. Of the overall number of applications for PBOs lodged by the state by July 2013 (114 applications), 52% were against Aboriginal people. Thirty-two of those applications were successful and seven of the successful applications were against Aboriginal people (21%).¹⁹⁸

While ALSWA was able to successfully defend a number of the applications, the impact of PBOs on Aboriginal people, especially those with cognitive or mental impairment is extreme. Although a PBO is a civil order, non-compliance results in a criminal charge. A cognitively or psychiatrically impaired respondent to an application for a PBO may not understand why the application is being made; may not understand the evidence that is presented to support the application; and may not understand the consequences of the order if it is made. Moreover, the legislative requirement to provide an explanation to the person about the meaning and consequences of the order does not expressly accommodate cognitive or psychiatric impairment.¹⁹⁹ Case Example V above is a pertinent example of the impact of this law on Aboriginal people with cognitive impairment. **ALSWA calls for the repeal of the *Prohibited Behaviour Orders Act 2010* (WA).**

Police Orders

ALSWA has already expressed its concerns about the presumptive sentencing that applies to breaching violence restraining orders and police orders. More generally, ALSWA is concerned about the impact of police-issued violence restraining orders (police orders) upon Aboriginal and Torres Strait Islander people, especially those with cognitive impairment, intellectual disability and mental illness. Under Division 3A of the *Restraining Orders Act 1997* (WA) police have the power to issue a police order in circumstances where there is a reasonable belief that there are grounds for a

196 <http://www.pbo.wa.gov.au/PBOWebSite/Home/index>

197 *Prohibited Behaviour Orders Act 2010* (WA) s 35.

198 ALSWA, Submission to the Department of the Attorney General Statutory Review of the *Prohibited Behaviour Orders Act 2010* (May 2014).

199 Section 14 of the *Prohibited Behaviour Orders Act 2010* (WA) provides that the court must give an explanation of the terms and effect of the PBO to the person constrained. If the person does not readily understand English or the court is not satisfied that the person understood the explanation the court must, as far as is practicable, arrange for the explanation to be given in a way that the person can understand. However, a PBO is not invalid because the explanation was not given.

violence restraining order due to family and domestic violence. Once issued, the police order remains in force for between 24 to 72 hours and, if breached, constitutes a criminal offence with a penalty of \$6,000 or two years' imprisonment. Further, as noted above, repeat offenders are liable to a presumptive mandatory sentence of imprisonment.

ALSWA acknowledges the importance of providing immediate protection to victims of family and domestic violence; however, police orders are not subject to any judicial review and are issued in circumstances where a lack of understanding of the consequences of the order may have a profound impact. Further, police officers often impose police orders without properly considering the views of the victim and the circumstances of the family. The LRCWA has observed that police orders are issued against Aboriginal people without the assistance of an interpreter and often at a time when the person is intoxicated.²⁰⁰ It is unlikely that in the midst of an alleged incident of family and domestic violence (and, in particular, if the alleged perpetrator does not speak English as his or her first language and/or is intoxicated) the attending police officers would even appreciate the existence of a cognitive or psychiatric impairment. Such persons are likely to fail to appreciate the serious consequences of a failure to comply with the order (which will often include conditions preventing them from returning home or contacting the person protected in any manner). Moreover, the person bound by the order has no defence to an offence of breaching the order even where the person protected initiates the contact or communication. To expect that an individual with cognitive or psychiatric impairment will appreciate this subtlety in the law is absurd.

Community Protection (Offender Reporting) Act 2004

The *Community Protection (Offender Reporting) Act 2004* (WA) establishes a scheme whereby child sex offenders are required to register with and report to police. Similar, although not identical, schemes exist in other states and territories and the national child sex offender register is known as ANCOR. In general, there is a requirement to report an extensive list of personal details (eg, name, date of birth, address, employment details, phone numbers, email addresses, internet server providers, vehicle details, details of children ordinarily residing with the person etc) as well as an ongoing requirement to notify police of any changes to these details. In addition, reportable offenders will be required to report periodically irrespective of any changes to their circumstances and this is at least annually but often far more frequently. Depending on the seriousness of the relevant offence(s), adults are required to report for eight years, fifteen years or life and children are required to report for either four years or seven years.

In its reference on this scheme, the LRCWA found that there were particular difficulties in respect of compliance for Aboriginal reportable offenders from remote and regional areas and for reportable offenders who were cognitively or mentally impaired.²⁰¹ Furthermore, it is important to highlight that the mandatory nature of the scheme in Western Australia means that some reportable offenders include children who have been convicted of consensual underage sexual activity as well as cognitively impaired young adults who are convicted of consensual underage sexual activity (eg, a 19-year old cognitively impaired person with a mental age of 13 years convicted of sexual penetration of a child under the age of 16 years).

200 LRCWA, *Enhancing Laws Concerning Family and Domestic Violence*, Discussion Paper (December 2013) 74.
201 LRCWA, *Community Protection (Offender Reporting) Act 2004* (WA), Discussion Paper (2011) 115 & 150.

ALSWA echoes the concerns in relation to the capacity of cognitively or psychiatrically impaired reportable offenders to comply with the strict legislative requirements, especially those from remote areas where there is a clear lack of support services. ALSWA frequently represents persons who are repeatedly charged with failing to comply with their reporting obligations because they do not understand or remember what they required to do. Many of these people are imprisoned. ALSWA appreciates the seriousness of child sexual offences (although does not support the mandatory nature of the scheme) and therefore acknowledges that some serious child sex offenders need to be monitored by police. For that reason, appropriate reforms include the provision of resources to provide suitable supports to reportable offenders who are unable to comply with the strict conditions on their own and a more flexible approach to non-compliance that is clearly unintentional.

Cultural competency training

ALSWA has already discussed the need for cultural competency training for police; however, it wishes to highlight that it is equally important that all people working in the justice system have adequate, regular and locally based cultural competency training (ie, judicial officers, lawyers, prosecutors, community corrections officers, prison officers, counsellors, and other program providers). Given the high levels of intergenerational trauma among Aboriginal and Torres Strait Islander peoples, this training must be trauma informed, and designed and delivered by Aboriginal and Torres Strait Islander people and organisations. ALSWA considers that participation in cultural competency training must be compulsory and updated (eg, undertaken on an annual basis). It also considers that government agencies should be required to report annually on the proportion of staff who have undertaken cultural competency training each year; the nature, location and duration of that training; and whether staff have participated in initial or additional training.

Conclusion

ALSWA recognises that the ALRC's terms of reference are restricted to reforms to laws and legal frameworks. However, it is vital that the ALRC emphasises that adequate resources must accompany these reforms. The development of culturally competent programs and services within the justice system (including diversionary programs, prison programs, throughcare programs and programs for women) as well as increasing Aboriginal and Torres Strait Islander peoples' access to culturally competent legal services and language interpreters will cost money. But, continuing to imprison Aboriginal and Torres Strait Islander people in such alarming numbers will cost more.

It is now time to act! No further inquiries into Aboriginal and Torres Strait Islander over incarceration are necessary. ALSWA urges the ALRC to make concrete contemporary recommendations echoing the strong messages sent by all of the past inquiries held across the nation since the RCIADIC. Those messages repeatedly tell us that our justice system unnecessarily imprisons Aboriginal and Torres Strait Islander peoples far too often and treats Aboriginal and Torres Strait Islander peoples unfairly and unequally. And, if the ALRC's message is unquestionable, governments may listen.