

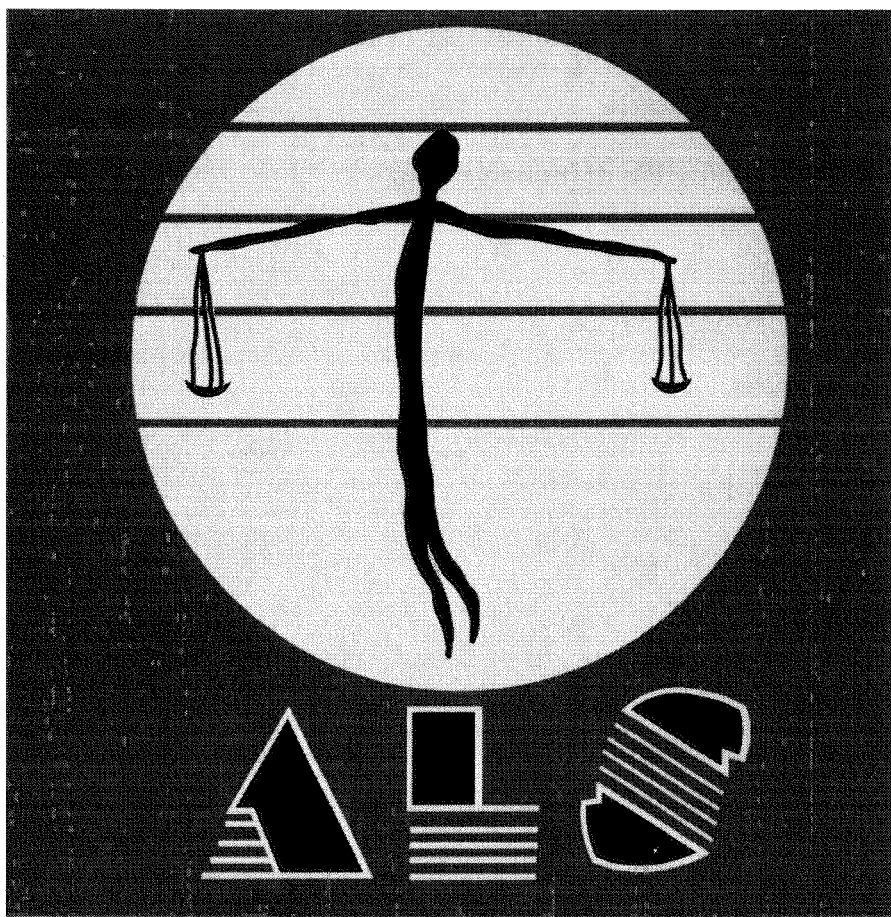
**ABORIGINAL LEGAL SERVICE OF WESTERN
AUSTRALIA (INC.)**

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**SUBMISSION TO THE
PARLIAMENT OF AUSTRALIA
HOUSE OF REPRESENTATIVES
HOUSE 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



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1. Introduction and scope of the submission

The Aboriginal Legal Service of Western Australia (Inc.) (ALSWA) prepared this submission in response to the invitation from the Parliament of Australia, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (the Committee) to make submissions for its inquiry into the high level of involvement of Aboriginal and Torres Strait Islander (Aboriginal)¹ juveniles and young adults in the criminal justice system. The inquiry was announced on 19 November 2009 after the Hon Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs requested the Committee to inquire and report on this issue.

ALSWA notes that the Inquiry was announced shortly after the charging of a 12 year old Aboriginal boy from Northam in relation to receiving a stolen Freddo Frog which received national media attention. This case provides the Inquiry with an opportunity to examine the ongoing and unacceptably high involvement of Aboriginal juveniles and young adults in the criminal justice system and will be the focus of this submission.

Case study: Freddo Frog Charge

A 12 year-old Aboriginal boy faced the Children's Court in Northam on 16 November 2009 charged with receiving a stolen Freddo Frog chocolate bar, allegedly stolen by his friend. The Freddo Frog cost 70 cents. The boy has no prior convictions and faced a further charge involving the receipt of a stolen novelty sign from another store, which read, 'Do not enter, genius at work.' The boy missed the first court appearance due to a misunderstanding about court dates and was then apprehended by police at 8.00am on a school day and taken into custody where he was imprisoned for several hours.² When the boy appeared before Justices of the Peace, after spending most of the day in the police lock-up, he was released to bail with conditions that he remain at his home between the hours of 7pm and 7am and that he not attend the central business district of Northam except in the company of his mother or older brother. The charges were eventually withdrawn and costs awarded to the boy, despite police defending their actions as "technically correct". ALSWA maintained the charges were scandalous and would not have occurred if the boy had come from a middle-class non-Aboriginal family in Perth.³

The failure of police to divert Aboriginal juveniles and young adults from the criminal justice system and other forms of over-policing practices are one of the main contributing factors to their high involvement in the criminal justice system in Western Australia (WA). The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) highlighted the overrepresentation of Aboriginal people in the criminal justice system as a contributing factor to the rate of Aboriginal deaths in custody in 1991.⁴ Almost 20 years later the system is still failing, with Aboriginal juveniles being 29 times more likely to be in detention than non-Aboriginal juveniles.⁵ WA has the highest rate of detention for Aboriginal children in Australia, with close to 75% of juveniles in custody being Aboriginal.

¹ ALSWA refers to Aboriginal peoples and Torres Strait Islander peoples as Aboriginal peoples in this submission.

² F. Farouque, 'Stolen Freddo: boy, 12, charged', *The Age*, November 16, 2009
<http://www.theage.com.au/national/stolen-freddo-boy-12-charged-20091115-igec.html>

³ *The Australian*, 'Freddo Frog Charges Withdrawn,' 23 November 2009,

<http://www.theaustralian.com.au/news/nation/freddo-frog-charges-withdrawn/story-e6frg6nf-1225802145515>

⁴ RCIADIC, Commonwealth of Australia, 1991, cited in L. Snowball, 'Juvenile Diversion and Indigenous Offenders: a study examining juvenile offenders in Western Australia, South Australia and New South Wales,' Criminology Research Council, January 2008, p 3.

⁵ Australian Institute of Health and Welfare (AIHW), 'Juvenile Justice in Australia 2007-2008,' *Juvenile Justice Series No 5*, November 2009, Canberra, at p 4.

ALSWA welcomes the opportunity to comment on this issue, however notes that it has been the subject of a previous submission by ALSWA.⁶ A copy of ALSWA's submission on 'The Overrepresentation of Young Aboriginal people in the Western Australian Juvenile Justice System' is **enclosed** as **Annexure 1**. ALSWA hopes the current inquiry will lead to concrete measures and timeframes to tackle the problems in the system and improve the situation of Aboriginal juveniles and young adults in Western Australia.

This submission will outline the role of ALSWA and then briefly mention the historical context surrounding the disparities and intergenerational poverty experienced by many Aboriginal people in contemporary society. It will then provide a snapshot of the current overrepresentation of Aboriginal young people and young adults in the criminal justice system in WA and highlight how;

- (a) over-policing and poor utilisation of diversionary schemes by police,
- (b) absence of crisis care accommodation, bail hostels and rehabilitation programs,
- (c) limited access to legal advice, and
- (d) mandatory sentencing and other punitive laws,

are major causes of the high involvement Aboriginal juveniles and young adults in the Western Australian criminal justice system.

ALSWA will finally refer to Australia's obligations and other relevant principles of international human rights law as a useful framework for the treatment of Aboriginal young people and young adults. This submission will then conclude that the empowerment of Aboriginal people through greater protection and promotion of human rights, support for programs that develop greater self-esteem and cultural identity, combined with increased funding for Aboriginal and Torres Strait Islander Legal Services (ATSILS) and other Aboriginal service providers to work collaboratively to divert young Aboriginal people from the system and into supportive, culturally appropriate programs will be the most effective way to improve the wellbeing of young Aboriginal people and reduce their high involvement in the criminal justice system.

2. About ALSWA

ALSWA is a community based organisation that was established in 1973. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law as well as human rights law and policy. Its services are available throughout WA via 17 regional and remote offices and one head office in Perth.

ALSWA is a representative body with 16 executive officers⁷ elected by Aboriginal peoples from their local regions to speak for them on law and justice issues.

ALSWA is a legal service provider solely for Aboriginal peoples living in WA and makes submissions on that basis.

Submissions are prepared by ALSWA in consultation with the Chief Executive Officer, Director of Legal Services, Executive Officer, Lawyers and Court Officers. All Court Officers are Aboriginal people and represent Aboriginal people in the Magistrates Courts and the Children's Court under section 48 of the *Aboriginal Affairs Planning Authority Act 1972 (WA)*.

⁶ ALSWA Submission: *The Overrepresentation of Young Aboriginal people in the Western Australian Juvenile Justice System*, January 2008.

⁷ There are two Executive Officers for each of the former 8 ATSIC regions (Metropolitan, Central Desert Region, Murchison/Gascoyne Region, Southern Region, Pilbara Region, Goldfields Region, West Kimberley Region and East Kimberley Region). They are elected by Aboriginal peoples every three years.

Each regional office also has a Court Officer who provides an understanding of local issues. In more remote areas, Court Officers are often the only local permanent legal service dealing with all aspects of the legal system.

3. Historical context

Aboriginal people in WA have been disproportionately and detrimentally affected by government policies since colonisation through many acts and omissions including dispossession of traditional lands, lack of citizenship, economic and social marginalisation, limited access to services, protection and assimilation policies.

ALSWA prepared a report in 1995 entitled 'Telling Our Story' as the first public research report that examined the effect of government policies that saw thousands of Aboriginal children removed from their families and reared in missions, orphanages, reserves and foster homes. ALSWA used 'Telling Our Story' as the basis for a submission in 1996 called 'After the Removal', to the National Inquiry into Separation of Aboriginal and Torres Strait Islander Children from their Families. It was made on behalf of the 710 Aboriginal clients who provided personal histories of their removal, or the removal of members of their families.

ALSWA's submission included, in addition to those histories, an historical framework, empirical analysis of the effects of removal, and a discussion on reparation and legal issues. 'After the Removal' also included chapters on housing, health, aged care, education, local government, over-representation of adult Aboriginal people within the criminal justice system, child welfare and juvenile justice.

The submission made 166 recommendations on how governments could address the wrongs of the past, provide justice, and improve the socio-economic and cultural conditions of Aboriginal people today. Many of these recommendations are yet to be implemented.

ALSWA urges the Committee and Minister to revisit these reports to better understand the historical framework and lasting impact of previous government policies on Aboriginal people.

The detailed report and submission are available for download at:
<http://www.als.org.au/Publications/index.html>

The impact of these previous policies is still felt by Aboriginal people in contemporary society. Young Aboriginal people and young adults often become victims of disadvantaged and dysfunctional family backgrounds. Young Aboriginal people and young adults are then more likely to be on the streets, interacting with police, and in turn become absorbed in a system that is ill-equipped to assist them.⁸

4. The main causes of high involvement with the criminal justice system

Snapshot of the high involvement of Aboriginal juveniles and young adults with the criminal justice system⁹

Aboriginal people comprise approximately 80% of young people in juvenile detention in WA.¹⁰ Significantly, the imprisonment rate of young Aboriginal females increased from 9% in 2000 to 17% in 2001.¹¹

⁸ Peter Collins, ALSWA, *Select Committee on Regional and Remote Indigenous Communities Hansard*, 26 August 2009, Commonwealth of Australia.

⁹ ALSWA Submission: *The Overrepresentation of Young Aboriginal people in the Western Australian Juvenile Justice System*, January 2008.

Aboriginal young people are disproportionately refused bail and remanded in custody prior to sentencing. In 2004/05, the total number of receptions into juvenile detention was 1406. Ninety five percent (1338) of these were formally detained in custody without conviction.¹² Recent statistics from the Rangeview juvenile remand centre shows that the number of remand admissions has increased exponentially to outnumber sentenced admissions.¹³ There is a marked difference in the trend for Aboriginal and non-Aboriginal young people. Aboriginal remand numbers show an upward trend whereas for non-Aboriginal youth there is a downward trend.

The Commonwealth Government Report on overcoming Indigenous disadvantage identified WA in 2003 as having by far the worst record in the country for the detention of Aboriginal young peoples in comparison to non-Aboriginal youth.¹⁴

As at 17 December 2009, 74.8% of the juvenile custodial population were Aboriginal, and 40.8% of adult prison population were Aboriginal.¹⁵ In addition, 44.5% of juveniles in custody were remand prisoners (as opposed to sentenced prisoners) compared to 14.0% of adults.

More detailed information can be found in numerous other State and Commonwealth Government reports.¹⁶

The *Young Offenders Act 1994* (WA) provides several options for police when dealing with a young person who is reasonably believed to have committed or to have been about to commit an offence. These options are:

1. Giving a caution
2. Referring the matter to the Juvenile Justice Team (which involves the young offender, their parents and the victim sitting down face to face talking things through and agreeing on a penalty¹⁷)
3. Charging the person without taking the person into custody, and
4. Apprehension and release to bail or detention in custody.

ALSWA's submission to the Auditor-General in 2008 on "the Overrepresentation of Young Aboriginal people in the Western Australian Juvenile Justice System" (the 2008 Submission) (see Annexure 1) examined the way in which police fail to effectively utilise the options contained in the *Young Offenders Act 1994* (WA) and other justice issues that ALSWA identified as central to the increasing numbers of young Aboriginal peoples being remanded in custody and included a total of 26 recommendations. ALSWA's submission was the catalyst for an inquiry by the Auditor-General into WA's juvenile justice system.

¹⁰ The Hon Dennis Mahony AO QC Special Inquirer, *Inquiry into the Management of Offenders in Custody and in the Community*, Perth: State Law Publisher (2005) p 341.

¹¹ Mahony, above n10, p 284

¹² Mahony, above n10, p 341

¹³ Western Australia, Department of Corrective Services, *Review of Remand admissions to Rangeview Remand Centre*, (November 2006), Ch.3

¹⁴ Australia. Productivity Commission, *Overcoming Indigenous Disadvantage 2003 Report* <<http://www.pc.gov.au/gsp/reports/indigenous/keyindicators2003/>> key indicator 3.12 (26 October 2007)

¹⁵ Government of WA, Department of Corrective Services, *Weekly Offender Statistics as at 17 December 2009*, <http://www.correctiveservices.wa.gov.au/files/Prison%20Count/cnt091217.pdf>

¹⁶ For example: Auditor General's Report, *'Performance Examination, The Juvenile Justice System: Dealing with Young People under the Young Offenders Act 1994'*, June 2008, WA Report No 4; *Senate Select Committee on Regional and Remote Indigenous Communities, Third Report 2009*, Commonwealth of Australia, Canberra, see chapter 4; J Fernandez et al, 'Police Arrests and Juvenile Cautions WA 2006,' *Statistical Report Series No. 2/2009*, Crime Research Centre, UWA; A. Ferrante et al, 'Pathways through Justice: A Statistical Analysis of Offender Contact with the WA Juvenile Justice System Final Report,' July 2004, Crime Research Centre, UWA; Australian Government Australian Institute of Health and Welfare, 'Juvenile Justice in Australia 2007-2008', *Juvenile Justice Series Number 5*, November 2009, Canberra: Cat. No. JUV 5.; K. Richards, 'Juveniles' contact with the criminal justice system in Australia,' *Monitoring Reports 07*, Australian Institute of Criminology.

¹⁷ Government of WA, Department of Corrective Services, *Juvenile Justice Teams*, <http://www.correctiveservices.wa.gov.au/juvjussystems.aspx?uid=4750-2726-1391-6826> accessed 30/11/09.

A key finding of the Auditor-General's inquiry was the noticeable decline in the issuing of cautions and referrals to the Juvenile Justice Team by police. The Auditor-General made various recommendations to improve the system. The responses from relevant agencies although generally supportive of the report, were primarily concerned with the "significant resource implications" of the recommendations. However disappointingly the police failed to acknowledge any responsibility and asserted the firm view "that [other] agencies need to take a leading and decisive role."¹⁸ There has been no follow-up to the Auditor-General's report,¹⁹ nor has there been significant implementation of its major recommendations.²⁰

ALSWA notes the current inquiry focuses only on Aboriginal juveniles and young adults, rather than Aboriginal people in general. ALSWA acknowledges the special place of children and young people in society and the importance of addressing the issues they face to secure their well being now and into the future. However the ongoing overrepresentation of all Aboriginal people in the criminal justice system cannot be ignored and requires urgent reform. Many of the causes and issues raised in this submission also apply to the high involvement of Aboriginal people in the criminal justice system in general, and ALSWA suggests this be a consideration of the current inquiry.

4.1 Over-policing and poor utilisation of diversionary schemes by police

The case involving the 12 year old aboriginal boy and the stolen freddo frog is a current example of the entrenched over-policing and the over use of arrest powers by police of young Aboriginal people in WA. A previous inquiry into the Management of Offenders in Custody and in the Community found that:

"Arrest rates have continually increased over the last 13 years for Indigenous persons, particularly females, yet they have remained relatively steady for non-Indigenous persons. In 2003, Indigenous persons were arrested at almost 12 times the rate of non-Indigenous persons. Indigenous youth in the 10-14 year age group were 29 times more likely to be arrested."²¹

The Auditor-General²² found a steady decline in the rate of police directing Aboriginal juveniles away from court in WA over the last five years. Aboriginal young people received only 28% of all cautions issued by police but represented 80% of the total population in juvenile detention. Also, 80% of non-Aboriginal young people were diverted whereas only 55% of young Aboriginal people were diverted.²³

The Auditor-General reported that police have been referring fewer young people to Juvenile Justice Teams, and granting fewer young people bail. Further, the Auditor-General found that police spent unnecessary time and cost transporting young people from regional areas who had been refused police bail.

ALSWA recently expressed its concerns at the hearings of the Senate Select Committee on Regional and Remote Indigenous Communities, stating, "Aboriginal people get charged with any number of minor offences, which brings them into contact with the system and, invariably leads to increased imprisonment rates."²⁴

¹⁸ Auditor General's Report, June 2008, above n18, at p 18.

¹⁹ Public Accounts Committee, Review of the Reports of the Auditor General 2007-2008, Report No 1 in the 38th Parliament of WA, Legislative Assembly, March 2009.

²⁰ ABC News, 'Juvenile justice hampered in WA's north,' 15 October 2009, <http://www.abc.net.au/news/stories/2009/10/15/2714767.htm> accessed 7 December 2009.

²¹ Mahoney Report, above n10, p282 at 9.10.

²² Auditor General's Report, 2008, above n18, at p 5.

²³ Mahony, above n410, p 341

²⁴ Peter Collins, ALSWA, *Select Committee on Regional and Remote Indigenous Communities Hansard*, 26 August 2009, Commonwealth of Australia.

The following case studies are presented as an illustration:

Case studies: Over-policing

1. A 15 year old boy from Onslow was charged with attempting to steal a \$2.05 ice cream (where the offence could have been the subject of diversion or a Juvenile Justice Team referral). The boy was arrested by police, refused police bail, remanded in custody by a court, transported to a juvenile detention centre in Perth and then spent 10 days in custody prior to his matter being dealt with in Perth Children's Court. The charge was dealt with by way of a dismissal pursuant to s67 of the Young Offenders Act on the basis that the boy had already been punished as a consequence of the time spent in pre sentence detention.
2. A 16 year old girl from Kalgoorlie was prosecuted using racial harassment laws under the Criminal Code where the allegation was she had sworn at her victim during an assault. The girl was later found not guilty by a Magistrate.
3. A 16 year old boy from Kalgoorlie attempted to commit suicide by throwing himself in front of a moving vehicle. The attempt was unsuccessful. The police were called and arrested the boy. The boy was charged with damaging the vehicle. At the time of the attempt the boy had a visible scar on his neck from a previous attempted suicide when he tried to slash his throat with a knife. The charge was later withdrawn, but only after numerous representations to police were made by ALSWA.
4. An 11 year old girl, 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 her teachers whilst holding plastic scissors. The girl was arrested by police at her school, sprayed with capsicum spray, hosed down with cold water in the yard of her school after the capsicum spray was administered and then transported in police custody, without notifying her family, to a Perth police station. The case was not dealt with by way of either a police caution or a referral by police to a Juvenile Justice team but instead proceeded by way of a formal prosecution. The girl was ultimately found not guilty by a Magistrate at a defended hearing.
5. A 13 year old boy from Wyndham in the East Kimberley was throwing water balloons at his friends. A water balloon was thrown through the open window of a passing car. The balloon burst on impact inside the car. A rear seat passenger was covered in water. It was not suggested that the passenger was injured or that the driver's capacity to control the car was effected. The boy was charged with common assault. Repeated representations to police to withdraw the charge, effectively endorsed by the local Magistrate, have failed. The charge will be the subject of a defended hearing.
6. A 16 year old girl from Geraldton with no prior convictions was taken by her family to the Geraldton Regional Hospital for assessment and treatment because her family were concerned with her mental health. The girl was experiencing hallucinations, including the seeing of people that were no longer alive. The girl was also expressing thoughts of self harm. The police were called and tried to take the girl into the hospital, however the hospital refused to admit the girl because of her behaviour. The girl swore at the police and behaved aggressively. The girl was informed she would be summonsed for the offence of disorderly conduct and driven home. Later that day the police were called to the girl's home. The girl yelled abuse at the police. She was arrested, taken into police custody and charged with disorderly conduct. She remained in police custody from Saturday night until she appeared before a Magistrate on Monday morning. She was referred by the Magistrate to the Bentley Adolescent Mental Health Unit in Perth where she was diagnosed with psychosis. The charges were later withdrawn by the police. In withdrawing the charges, the police advised the Court that the charges were laid merely as "holding charges".

These cases highlight the need for police to take a more measured and considered approach in deciding to institute criminal proceedings and to take all reasonable steps to divert young Aboriginal people away from the court process. The power of arrest should be

exercised as a last resort.²⁵ ALSWA submits that the time has come for the police to be transparent in the exercise of their discretion to prosecute and recommends that at the time of commencement of criminal proceedings the police file with the court written confirmation of why diversionary processes were inappropriate in the circumstances of the case.

Recommendation 1: Upon the commencement of criminal proceedings against a young person the police be required to lodge a written document with the court outlining why all diversionary processes were inappropriate in the circumstances.

4.2 Punitive police practices with respect to bail

Sections 41 and 42 of the Young Offenders Act give police several options after charging a young person with an offence:

- (a) Police can refuse bail and detain the young person in custody;
- (b) Police can release the young person to bail on such conditions as they see fit; or
- (c) Police can release the young person without bail and issue a notice to attend court.

The Young Offenders Act unambiguously expresses option (c) as the preferred option.

ALSWA has strong concerns that the police do not use notices to attend court as the preferred option. This failure results in many young Aboriginal people who are charged with an offence, unnecessarily being released on bail or being detained in custody.

The police have a broad discretion in setting the terms of bail for a young person. The Bail Act requires that bail conditions should only be as strict as is necessary to ensure that the young person attends court and does not commit a further criminal offence. Bail is not intended to be punitive.

In Western Australia the police routinely impose onerous bail conditions on young people. For example, the police commonly impose;

- (a) 24 hour curfews,
- (b) Residential conditions that prevent a young person from changing their address,
- (c) Restrictions inhibiting the young person from leaving their home unless in the company of a particular adult,
- (d) Prohibitions on the young person associating with other juveniles including alleged co-offenders regardless of whether those other people may be family members, and
- (e) Bans from attending a particular area, for example the CBD of a regional town, regardless of whether the young person's social, schooling, recreational, family, or religious activities may require their attendance in that area.

These conditions may be in place for several weeks until the first court date at which time the conditions can be reviewed by a Magistrate.

²⁵ Convention on the Rights of the Child, articles 37(b) and 40.

Such conditions exceed what would be necessary to ensure that the young person attends court and does not commit a further criminal offence. Further, such conditions impose undue obligations on the parents or other adults responsible for the young person.

In April 2008, the President of the Children's Court of WA, Judge Reynolds, issued a practice direction which required juveniles to be brought before a Magistrate in person or by video link to expedite bail decisions. A copy of Practice Direction No 2 of 2008 of the Children's Court of Western Australia in relation to video link appearances for juveniles is **enclosed as Annexure 2.**

Police repeatedly fail to ensure that arrested young people are brought before a Magistrate as soon as reasonably practicable (by either video link or in person) as is required by the Bail Act in compliance with Practice Direction No.2 of 2008.

Further, police then fail to notify the Court, ALSWA, the Department of Child Protection ("DCP") and Juvenile Justice when a young person is taken into police custody, so that those agencies can discharge their duties to the young person and thereby ensure that their rights are protected.

The following case studies provide examples of onerous police bail conditions, punitive enforcement of such conditions, and the unnecessary detention of young Aboriginal people in custody.

Case studies: punitive practices in relation to bail

1. An 11 year old boy from Broome who, at the relevant time, had no record of prior convictions and no Juvenile Justice Team or caution referral history was charged by police with burglary and released on bail. The police bail undertaking was in terms that the boy live with his grandmother, at a specified address, that he not associate with specified co-accused and that he comply with a night-time curfew.

Two days later, the boy was arrested by police at about 1pm for breaching the bail condition prohibiting contact with co-accused.

At about 3pm that day the police took the juvenile to his mother's house and advised the mother and father that he was in police custody and would not be brought before the Broome Children's Court until the following day.

The police seem to have decided against re-admitting the boy to police bail, did not advise the Court, ALSWA or any other entity of his arrest, and did not make arrangements that he be brought before the Broome Children's Court that afternoon.

The 11 year old boy spent the night in custody at the Broome police station lockup.

2. A 14 year old boy from the Kununurra area with no criminal record was charged with trespass. The charge involved an allegation that he had climbed on the roof of a supermarket in Kununurra. His bail conditions included a condition that he remain at his residence between the hours of 6pm and 6am. The boy was arrested for breaching his curfew by walking home after watching the Harry Potter movie at the drive in. An adult family member was prepared to act as a responsible adult for the purposes of the Young Offenders Act to enable the boy to be bailed from the police station that night, but police refused, insisting that the boy appear the next day before the Magistrate. The boy spent the night in the Kununurra Police Station lock up. When the boy appeared in court the next day, he pleaded guilty to the trespass charge and the matter was dismissed (i.e. no further punishment was imposed) pursuant to s67 of the Young Offenders Act on the basis that the boy had already been punished by being detained in the police cells overnight.
3. Another 14 year old boy from Kununurra with a limited criminal record was arrested by police for breaching a curfew bail condition by kicking his football at a park at 9.00 p.m. Police

advised that they attempted to contact a great grandmother who was the responsible adult for the boy's bail and when that was unsuccessful the boy was remanded in police custody. No attempts were made to contact the boy's mother or another adult female relative who was the boy's guardian for the purposes of them acting as the responsible adult for bail.

4. A 15 year old girl from Derby with a minor record of prior offending was arrested and charged in relation to driving a motor vehicle without a licence and stealing a motor vehicle.

The girl was released to police bail with a 24 hour curfew condition, unless in the company of her mother. There was no provision in the police bail conditions whereby the girl would be able to lawfully attend school, unless her mother went with her.

The next day the girl was waiting at 2.30pm outside the Derby IGA store for her mother who was shopping inside the store. The girl was arrested by police for an alleged breach of the curfew condition. The girl explained to the police that she was waiting for her mother. The girl was taken into police custody

There is no permanent Magistrate based in Derby. The police did not arrange for the girl to be video-linked to Broome Children's Court for a bail hearing that day. The girl was held in police custody and transported from Derby to Broome. The girl spent 2 ½ hours in a police transport van and the night in the Broome police lockup.

When the girl appeared in Broome Children's Court the next day, she pleaded guilty to the charges. The charges were referred to a Juvenile Justice Team ("JJT") and the matter was remanded for a JJT Review at Derby Children's Court at a later date. The girl was then "stuck" in Broome without any family to assist her. Juvenile Justice provided her with support and a bus ticket back to Derby. The girl would have arrived in Derby at about 10.00pm that night.

5. A 15 year old boy from the Geraldton area was refused bail by police after being charged with trespass. The trespass involved the boy entering the yard of a house to retrieve a tennis ball. Bail was refused by police because the boy was already on bail for charges of stealing a motor vehicle, driving without a licence and two other charges of trespass. The stealing a motor vehicle charge involved the boy riding a scooter that someone else had stolen but which the boy knew had been stolen. One of the trespass charges involved the boy riding the scooter into a yard and then driving off. The other trespass charge involved the boy running to another house to hide from police because he was scared. The boy was arrested on a Saturday afternoon in relation to the fresh trespass charge and remained in the police lock up at Geraldton police station for 2 days before appearing before a Magistrate.

Recommendation 2: That a judicial officer review all police decisions in relation to bail as soon as reasonably possible after charging to ensure that only appropriate bail conditions are set and to minimise the numbers of young people detained in custody.

4.3 Absence of crisis care accommodation, bail hostels and rehabilitation programs in regional and remote WA

The critical shortage of crisis care accommodation, bail hostels and culturally appropriate rehabilitation programs throughout WA and in particular in regional and remote WA has been well documented by several recent inquiries.²⁶

²⁶ See in particular, Senate Select Committee Report, Regional and Remote Indigenous Communities, *Third Report 2009*, Commonwealth of Australia, Canberra.

ALSWA recently noted in its evidence before the Inquiry into Regional and Remote Indigenous Communities:

“Fitzroy Crossing... is one of the 26 large Aboriginal communities that is being targeted by the federal government with its new funding policy. It has one drug and alcohol counsellor for the whole town. There is no psychiatric or psychological diversion or rehabilitation program. There is no sex offence program. There is no victim offender mediation. There is very limited capacity for the department of corrections or juvenile justice to put adults or juveniles on work orders, particularly females. So what it all means is that when a magistrate sitting in these jurisdictions is sentencing a person and trying to craft a fair and just community-based order, they have got no practical options which they can incorporate in those orders. The unfortunate consequence on many occasions is that magistrates become frustrated and turn to the next option in the line, which is a term of either suspended or immediate imprisonment, and that just increases incarceration rates.”²⁷

The Department of Corrective Services (“DCS”) stated to the Inquiry:

“We have to be completely honest ... and say that remote delivery of programs is not happening in the short term due to lots of logistical problems and the fact that it is an expensive option and also that, in real terms, we do not have the staff or the skills to be able to deliver these programs.”²⁸

One of many examples in this context can be found in the Ngaanyatjarra Lands, which are located in the Central Desert area of WA. Warburton is the main Aboriginal community in this area. Within this area there are no community based alcohol and drug programs, petrol sniffing programs, domestic violence programs or diversionary programs run by the DCS.

Aboriginal communities in the Ngaanyatjarra Lands are alcohol free. The nearest WA town to the Ngaanyatjarra Lands, where alcohol can be accessed, is Laverton. Laverton is 700 kilometres from Warburton and 380 kilometres from Kalgoorlie. Alcohol related offending by Aboriginal people coming to Laverton from the Ngaanyatjarra Lands to drink is notorious. Yet in Laverton there are no community based rehabilitation programs run by DCS nor is there a sobering up shelter in the town.

In August 2007, the Chief Justice of the Supreme Court of Western Australia created the Indigenous Justice Taskforce (“IJT”). The IJT was established to bring together the judiciary and relevant agencies involved in the delivery of justice services to deal with increased numbers of individuals (most of whom were Aboriginal) from the Kimberley region charged by police with sexual offences. ALSWA has acted for over 200 clients charged with sexual offences since mid 2007. A number of young Aboriginal males have been sentenced to community based orders in relation to willing sexual activity with their under age female partners. Some of these cases have involved young males who were unaware of the legal age of consent and who had engaged in unprotected sex. Unfortunately, despite judicial criticism, no community based sex offender education and treatment program for Aboriginal offenders has been put in place in the Kimberley. This has led to young Aboriginal males being placed on community based orders which have no capacity to address the core reasons for their offending behaviour.

²⁷ D Brunello, ALSWA, *Committee Hansard*, 9 October 2009, p 3 in Senate Select Committee Report, Regional and Remote Indigenous Communities, *Third Report 2009*, Commonwealth of Australia, Canberra, at para 4.38.

²⁸ J Tang, DCS, *Committee Hansard*, 26 August 2009, p. 9, in Senate Select Committee Report, Regional and Remote Indigenous Communities, *Third Report 2009*, Commonwealth of Australia, Canberra, at para 4.39.

Case studies: absence of crisis care accommodation, bail hostels and rehabilitation programs

1. A 15 year old boy from Warburton with a lengthy history of petrol sniffing was charged with a number of dishonesty offences. All of the offending occurred when he was under the influence of petrol. The boy suffered from Attention Deficit Hyperactivity Disorder and delayed emotional and cognitive development. He also came from a chaotic and unstable family background characterized by neglect and dysfunctional parenting. The boy had been placed on community based orders in the past in relation to offending while under the influence of petrol. Part of these orders involved the boy participating in brief intervention therapy to help address the boy's petrol sniffing problem.

This intervention involved a juvenile justice worker travelling from Kalgoorlie to Warburton every 6 weeks and speaking with the boy. Within the same field trip, the worker would speak to upwards of 20 other traditional Aboriginal young people. No formal program was delivered. At best the intervention involved a well intentioned discussion with the boy about the deleterious effects of petrol.

2. A 14 year old boy from the Kununurra area, whose only contact with the justice system was a previous dismissal under s67 of the Young Offenders Act, was charged with criminal damage. The allegation was that the boy had broken a shop window in company with other boys. The boy was released to bail with a curfew condition that he remain at his home between the hours of 6pm and 6 am. The boy was located by police on the streets of Kununurra at about 10.50pm and arrested for breaching the curfew condition. It was not alleged that the boy had committed further offences. The police summary of the alleged breach indicated that the boy did not want to go home.

When police attended at the boy's home, they found his mother, who was his responsible adult for the purposes of bail, comatose from the effects of alcohol. Other adult family members located by police were also found to be effected by alcohol and not in a fit state to undertake the role of responsible adult for the purposes of bail.

The instructions received by ALSWA were that the boy did not feel safe at home.

The police summary also noted that when police contacted Crisis Care in Kununurra they were informed that as the boy was not in State care and as he had breached his curfew, Crisis Care would not contact the on call Department of Child Protection (DCP) officer as they would not be able to take the boy into care. The boy was remanded in police custody prior to appearing before a Magistrate.

3. An 11 year old from Kununurra was arrested for breaching a condition of his bail. The boy was arrested at a house, in breach of a curfew condition, where there were 12 children sleeping in one room without an adult present. The police summary of the breach indicated that when police contacted Crisis Care they were informed that 'unless the accused was suffering from severe stress they would not call the on-call DCP Officer'. The boy remained in police custody for approximately 24 hours before appearing before a Magistrate.
4. In October 2009, police arrested several Aboriginal boys in Wiluna. Three of the boys were remanded in custody due to no responsible adults being located by the police. The charges involved stealing paint, stealing a motor vehicle and trespassing.

One of the boys was 11 years old and a chronic petrol sniffer who had previously been hospitalised in relation to burns caused by petrol and had suffered nose bleeds when arrested by police due to sniffing. The boy's mother had a serious alcohol problem and was unsuitable to act in the role of responsible adult. The Magistrate decided the boy needed medical treatment and that, in the absence of any community based treatment program in the region that appropriate treatment could only occur in Perth. The boy was remanded in custody to a Perth juvenile detention centre for 4 days for that purpose

5. An Aboriginal man from Fitzroy Crossing was sentenced to a term of imprisonment in relation to a serious assault committed on his female partner. The man had numerous prior convictions for previous assaults on the partner. At the time of sentencing, the man was

...serving a term of imprisonment for an assault committed upon another woman. Prison documents provided by the man to his ALSWA lawyer noted that the man had been assessed as needing to participate in Aboriginal specific alcohol rehabilitation, anger management, and cognitive behavioural therapy programs. None of these programs were made available to the man whilst serving the sentence. The man was not released to parole because he had not addressed the core reasons for his offending behaviour and remained a danger to the community. He was effectively trapped in the system.

Recommendation 3: That funding be provided to establish and operate culturally appropriate programs for young Aboriginal people, including the provision of adequate remuneration for staff, in the following areas:

- Drug and alcohol rehabilitation
- Psychiatric and psychological assistance
- Sex offence programs
- Victim offender mediation
- Gender specific programs
- Bail hostels and Crisis Care accommodation

4.4 Absence of an interpreter service in Aboriginal languages

There is no properly accredited and adequately funded state-wide interpreter service in Aboriginal languages in WA. Young people are routinely dealt with by police and appear in court without the assistance of an interpreter. Many do not fully comprehend what is being said to and asked of them.

Approximately 1 in 5 Aboriginal people living in remote areas have difficulty understanding or being understood by service providers.²⁹ 17% of Aboriginal peoples speak an Aboriginal language at home, with this figure rising to 51% in some remote areas. Only 75% of Aboriginal peoples claim to speak English well.³⁰

There is a pressing need for an interpreter service in Aboriginal languages in WA.

ALSWA made a submission to the WA Attorney-General in 2008 proposing a model for a state-wide interpreter service for Aboriginal peoples. A copy of the submission is **attached as Annexure 3**.

Case studies: lack of interpreters

1. A 15 year old boy from a Balgo community in the East Kimberley was charged with a sexual offence and refused bail. He spent 205 days in custody in a Perth detention centre prior to his matter being disposed of. The boy pleaded guilty and was sentenced to a community order. He had no prior convictions. He spoke the Aboriginal languages Kukatja and Gija as his first languages. English was his fourth or fifth language. One of the reasons for the delay in his matter being dealt with was caused by difficulty in locating an interpreter.
2. An 18 year old from a Balgo community was charged with the wilful murder of his 14 year old

²⁹ Australian Bureau of Statistics 2001 Census <http://www.abs.gov.au/>

³⁰ Australian Bureau of Statistics 1996 census <http://www.abs.gov.au/>

girlfriend. Wilful murder was punishable by life imprisonment. The boy spoke Kukatja and Gija as his first language. English was his third language. His spoken English was very poor. The boy pleaded not guilty and went to trial. Several of the issues at trial were complex, including the post mortem findings as to the cause of death. There was no accredited Kukatja interpreter available to interpret at the trial. The trial proceeded with a prisoner from Broome regional prison sitting next to the boy in the dock undertaking the role of a defacto interpreter. The so called interpreter spent the majority of the trial asleep. The trial had to proceed because the boy had spent approximately 12 months on remand and there was no reasonable prospect of obtaining a suitable interpreter had the trial been adjourned for that reason.

Recommendation 4: The Minister advocate to the WA Government the importance of providing adequate funding and resources for the immediate establishment and ongoing operation of a state-wide interpreter service in WA in Aboriginal languages.

4.5 Limited access to legal advice

Many police prosecutions involving young Aboriginal people are underpinned by admissions made by them in police interviews. In many instances, the only evidence of guilt comes from a confession made in a police interview.

Section 138(2)(c) of the *Criminal Investigation Act 2006* provides that an arrested suspect is entitled to a reasonable opportunity to communicate or attempt to communicate with a legal practitioner. In most instances when a young person contacts an ALSWA lawyer pursuant to s138(2)(c), advice is given that the young person should exercise their right to silence and not participate in an interview with police. In order for a young person to properly exercise their right to silence on advice from a lawyer, it is essential that the lawyer be in a position to communicate that advice to police.

However, it is a common practice for police to either:

- (a) insist on conducting a visually recorded interview with a young person as “a matter of fairness” so as to “put the allegations to the young person”, notwithstanding prior notice from ALSWA that the young person has provided instructions that they wish to exercise their right to silence. If police proceed to commence an interview to record a refusal to participate, it is then a short step for police to place subtle pressures on vulnerable young people to answer questions and make admissions against interest.
- (b) refuse to speak with the ALSWA lawyer so that the advice given to the young person can be communicated to police.

This is arguably a deliberate ploy by police to undermine the right to silence of young people in police custody. The following case studies are provided by way of illustration.

Case study: lack of access to legal advice

1. In October 2009, a lawyer with ALSWA’s office in Broome, received a telephone call from a Police Officer advising that 4 Aboriginal juvenile males, aged between 13 and 14, were in custody at Derby Police Station, having been arrested on suspicion of stealing a motor vehicle and that Police wished to formally interview all of them by electronic means.

The lawyer then spoke individually to the parents of the boys and advised them that their child did not have to participate in a visually recorded interview with police. As a consequence of this advice, each parent agreed that their child would not participate in a police interview.

Further, each parent indicated to the lawyer that they did not wish their child to do a police interview for the sole purpose of recording the child's refusal to participate. Each parent also indicated to the lawyer that they would inform officers from the Derby Police Station of their decision, namely, that they did not consent to their child being interviewed for any purpose.

After providing this advice to the parents, the lawyer then asked to speak to an officer at Derby Police Station to inform the officer of the advice given and to reiterate that no interviews were to take place. No officer would come to the telephone to speak with the ALSWA lawyer, and the ALSWA lawyer heard an officer in the background say "we don't talk to the ALS".

2. An 11 year old boy from Broome was arrested by police. Broome police advised an ALSWA lawyer that the boy was in police custody as a suspect and that police wished to interview him.

Ten minutes later, an ALSWA lawyer telephoned and spoke to a police officer at Broome Police Station. The ALSWA lawyer then spoke to both the boy and his grandmother. The boy supplied instructions that he wished to exercise his right to silence and decline to be interviewed. The ALSWA lawyer conveyed those instructions to the police officer. The police officer responded in terms that he intended to conduct a video record of interview with the boy nonetheless, so as to put the allegations to him and obtain a recorded refusal from the boy. The ALSWA lawyer made it clear to the police officer that this was unnecessary and improper, that the boy was a juvenile declining to be interviewed through legal Counsel, and that there was no need to conduct a video record of interview to properly record those matters. The police officer refused to alter his position, an interview was conducted, admissions were made by the boy and he was further charged.

Recommendation 5: That the Criminal Investigation Act 2006 be amended to make it mandatory for police to contact ALSWA in every circumstance where a young Aboriginal person is taken into police custody.

Recommendation 6: That funding be provided for the creation by ALSWA of a State wide telephone advice service to advise and assist young Aboriginal people in police custody.

4.6 Mandatory sentencing and other punitive laws

Mandatory sentencing laws are arbitrary, often disproportionate to the crime and do not allow regard to be had to the circumstances of offenders.³¹ Mandatory sentencing laws breach Australia's obligations under international law,³² in particular the Convention on the Rights of the Child³³.

WA now has two types of mandatory sentencing laws.

First, adults and young people convicted of a home burglary in WA must be sentenced to minimum of 12 months imprisonment or detention if they have been convicted of 2 or more previous home burglaries.³⁴

³¹ Australian Human Rights Commission, Mandatory Detention Laws in Australia, http://www.hreoc.gov.au/human_rights/children/mandatory_briefing.html accessed 14/12/09.

³² For example, International Covenant on Civil and Political Rights, articles 9, 10, 14, 24, 2 and 26 and 50.

³³ See articles 2, 3, 4, and 40.

³⁴ *Criminal Code (WA)* 1913, s401(4).

Second, adults and young people between the ages of 16 and 18 years who are convicted of assaults on police and other public officers, causing either bodily harm or grievous bodily harm, must be sentenced to a mandatory term of imprisonment or detention ranging between 3 to 12 months³⁵.

ALSWA maintains its opposition to all mandatory sentencing.

Mandatory sentencing does not apply to all assaults on police and other public officers. The critical requirement is that the assault causes injury that is more than transitory or insignificant. This is not a clear line. Therefore the liberty of an offender will now be determined by the police rather than a court. In other words, the police will now decide whether the offence will allege an injury against a public officer and therefore whether it will attract a mandatory term. This is a most disturbing development and contrary to time honoured legal principles which have served the community well for centuries.

ALSWA fears that these laws will impact disproportionately on young Aboriginal people given the current over policing practices.

The impact of mandatory sentencing for assaults on public officers is likely to be exacerbated by the introduction of proposed stop and search laws. The Criminal Investigation Amendment Bill 2009 was introduced in October 2009 to extend police powers enabling them to stop and search people and vehicles in certain areas without the consent of the person or the need for any reasonable suspicion that a crime has occurred.³⁶

ALSWA is deeply concerned that stop and search laws will be used by police to further target Aboriginal young people using public space. Young Aboriginal people may feel justifiably aggrieved if they are approached by police and searched for no reason. Some may react violently and lash out causing injury to a public officer bringing them within the scope of mandatory sentencing.

In 2004, legislation was introduced to enable police to issue individuals with a 'move on' notice ordering them to leave a specified area for a period of up to 24 hours. If a person returns to the prohibited area they can be arrested. The penalty for breaching a move on notice is a fine of up to \$12,000, or imprisonment for up to twelve months.³⁷

In ALSWA's experience the move on laws have also been used disproportionately against young Aboriginal people occupying public space. This further compounds the over policing of young Aboriginal people.

Case Studies

1. An 18 year old girl was issued with a move on notice by police at 10.40 pm for street drinking. The notice banned her from an area encompassing the Northbridge entertainment precinct in Perth until 7 am the following morning. Aside from consuming alcohol in a public space, it was not alleged that the girl was otherwise acting in a disorderly fashion. Twenty minutes after being issued with the move on notice, the girl was found within the prescribed area, arrested, charged with breaching the move on notice and taken into police custody. The girl had an intellectual disability, was homeless and was affected by alcohol and cannabis. The girl had been living from time to time in accommodation hostels located within the prescribed area and had nowhere else to go at that hour of the night.

³⁵ *Criminal Code (WA)* 1913, s297 & s318.

³⁶ Minister for Police, Criminal Investigation Amendment Bill 2009, Second Reading Speech, Legislative Assembly, Parliament of WA, 14 October 2009, Hansard p8024b-8025a.

³⁷ *Criminal Investigation Act (WA)* 2006, s27 & s153.

2. Two boys, aged 12 and 13 from Northam were issued with move on notices which prevented them from entering the central business district of Northam for a period of 24 hours. The boys had no prior convictions. The move on notices were issued by police following an allegation that the boys were firing shanghais. The move on order prevented the boys from riding their bikes to school as the route taken included them travelling through the prescribed area. One of the boys was charged with breaching the order when he was apprehended by police standing outside a shop, with a mother of a friend, in the central business district area. The boy was arrested, taken into police custody, transported to Northam police station and fingerprinted before being released.
3. An 11 year old boy from a remote community in the West Kimberley was dealt with in relation to the third strike mandatory sentencing home burglary laws in circumstances where the burglaries were committed because no one in his family was in a position to provide him with food or drink. He was breaking into homes in order to survive.
4. A 13 year old boy from a remote community in the Pilbara was dealt with in relation to the third strike mandatory sentencing home burglary laws. Some of his burglaries involved him entering motel rooms through unlocked doors and stealing confectionary and cool drinks from bar fridges. He was sentenced to 12 months detention to be served in a Perth juvenile detention centre.
5. Two Kununurra sisters aged 15 and 14 with no prior criminal record other than receiving police cautions for graffiti were issued with move on notices for being in a Kununurra supermarket carpark at 3 a.m. The move on notices were issued on the basis of their previous history and because they were not with a responsible adult. The move on notice was for a period of 24 hours. Both were arrested the following night for walking in town. The restricted boundary area restricted the girls from accessing community services, shops, juvenile justice and attending school. The girls were placed on police bail with a curfew from 6 pm-6am which was later removed by the Court. The charges were later withdrawn by police after the matters were listed for a defended hearing.
6. An Aboriginal boy was at the Kununurra sports oval when he was issued with a move on notice at dusk. The boy was walking to a disco organised by Kununurra Juvenile Justice as a safe place for children. The move on notice was issued on the basis that the boy might commit criminal damage. The boy did not attend the disco and returned home.

Recommendation 7: The Minister urge the WA government to repeal all mandatory sentencing laws.

Recommendation 8: The Minister urge the WA government to abandon the proposed stop and search amendments to the Criminal Investigation Amendment Bill 2009.

The Prohibitive Behaviour Orders Bill 2009 was introduced in December 2009, "to enable courts to make orders to constrain offenders who have a history of anti-social behaviour."³⁸ The orders will be imposed in addition to any penalty imposed for a criminal offence.

The terms of an order may restrict freedom of movement and association. For example, a young Aboriginal person who engages in graffiti and is dealt with by a court for criminal damage may also be subjected to a prohibited behaviour order preventing them from going to an area where the graffiti occurred.

³⁸ WA Legislative Council, Prohibitive Behaviour Orders Bill 2009, Draft Bill for public consultation

The likelihood of young people complying with such orders is very low. A breach of a prohibited behaviour order is punishable by a fine of up to \$6000 and two years imprisonment.

Most troubling, the proposed legislation will also allow for the publication of the order, name of the young person, their residential address and photograph.³⁹ This is a complete departure from current laws protecting the privacy and identity of young people, so as to best aid their rehabilitation. ALSWA is concerned that such laws may lead to government sanctioned vigilantism. Further, the laws are likely to have a demoralising effect on young Aboriginal people.

Recommendation 9: The Minister urge the WA abandon the proposed Prohibitive Behaviour Orders Bill 2009.

³⁹ Prohibitive Behaviour Orders Bill 2009, s 34

5. Terms of Reference

The terms of reference for the current inquiry are as follows:

- *How the development of social norms and behaviours for Indigenous juveniles and young adults can lead to positive social engagement;*
- *The impact that alcohol use and other substance abuse has on the level of Indigenous juvenile and young adult involvement in the criminal justice system and how health and justice authorities can work together to address this;*
- *Any initiatives which would improve the effectiveness of the education system in contributing to reducing the levels of involvement of Indigenous juveniles and young adults with the criminal justice system;*
- *The effectiveness of arrangements for transitioning from education to work and how the effectiveness of the 'learn or earn' concept can be maximised;*
- *Best practice examples of programs that support diversion of Indigenous people from juvenile detention centres and crime, and provide support for those returning from such centres;*
- *The scope for the clearer responsibilities within and between government jurisdictions to achieve better co-ordinated and targeted service provision for Indigenous juveniles and young adults in the justice system;*
- *The extent to which current preventative programs across government jurisdictions are aligned against common goals to improve the health and emotional well-being of Indigenous adolescents, any gaps or duplication in effort, and recommendations for their modification or enhancement.*

ALSWA will focus upon the following terms of reference to which it has relevant expertise.

5.1 *How the development of social norms and behaviours for Indigenous juveniles and young adults can lead to positive social engagement;*

ALSWA supports the development of culturally appropriate programs and diversionary processes within the justice system that engage young Aboriginal people in their communities and strengthen their ties to Aboriginal culture.

The enshrining of restorative justice principles in the *Young Offenders Act* was a positive step. Unfortunately, the potential benefits of restorative justice are undermined by the failure of police to utilise diversionary options. This is compounded by inadequate government funding for diversionary programs.

5.2 The impact that alcohol use and other substance abuse has on the level of Indigenous juvenile and young adult involvement in the criminal justice system and how health and justice authorities can work together to address this;

The numbers of young Aboriginal people dealt with for criminal offences who have serious substance abuse problems is alarming. The problems these young people face cannot be dealt with by the criminal justice system alone. ALSWA notes that mental illness is another significant cause of the involvement of young people in the criminal justice system.

In WA approximately 80% of the prison population suffers from a diagnosed mental illness. The prevalence of psychiatric disorder in children in Aboriginal communities ranges from 1.8% to 31.7% and in adolescents between 25 and 51%.⁴⁰

The Auditor-General found that there is no structure or process to ensure that mental health or substance abuse problems associated with repeated offending are identified and treated, and that a significant number of young people with high levels of offending have mental health or substance abuse problems.⁴¹

5.3 Any initiatives which would improve the effectiveness of the education system in contributing to reducing the levels of involvement of Indigenous juveniles and young adults with the criminal justice system;

ALSWA is experienced in providing community legal education to Aboriginal people, and currently provides such education through the following means:

- Publication and dissemination of community education material dealing with issues in relation to criminal, civil and family law;
- A 4 Volume CD, community education series, entitled "Law Matters"; and
- Community education seminars.

ALSWA runs community education programs at community events such as at NAIDOC, Wadarnji Aboriginal Cultural Festival, Survival Concert, International Women's Day, Be Active Aboriginal Elders Activity/Information Day, and Sorry Day.

There is a serious issue with respect to access to justice and culturally appropriate community education in regional and remote Aboriginal communities. ALSWA is best placed to deliver these services with 18 offices across regional WA but currently does not have the resources to provide this sort of assistance to those communities.

5.4 Best practice examples of programs that support diversion of Indigenous people from juvenile detention centres and crime, and provide support for those returning from such centres;

Kimberley Aboriginal Law and Culture

Recently, the independent organisation Kimberley Aboriginal Law & Culture (KALAC)

⁴⁰ Mahoney, 1.2

⁴¹ Auditor General's Report, 'Performance Examination, The Juvenile Justice System: Dealing with Young People under the Young Offenders Act 1994,' June 2008, WA Report No 4, at p 7.

received funding to run a one-off bail intervention program in respect of approximately 10 young Aboriginal males who were before the Fitzroy Crossing Children's Court in respect of a spate of group burglary offences committed around the Fitzroy Crossing townsite over Christmas 2008. The boys were released to bail with a condition that they comply with the directions of KALAC. KALAC then placed the boys in groups for a number of weeks on Aboriginal run cattle stations in the vicinity of Fitzroy Crossing to live, work and learn about station life and Aboriginal culture. The results were outstanding. Most of the boys enthusiastically participated in the program, showed real improvement in their behaviour and attitude and have subsequently either re-engaged in school or accepted transition into the workforce, without re-offending. The success of the KALAC program shows that investment in early intervention/rehabilitation programs has a greater potential to decrease offending than does adversarial law enforcement.

Kalumburu Restorative Justice Project

Restorative justice aims at restoring relationships between people with legal matters and is the principle underpinning Aboriginal Community Courts and community conferencing. ALSWA has met with local people and organisations that provide services to Kalumburu to discuss the establishment of a restorative justice project initiative in Kalumburu. Kalumburu is in the far north of the Kimberley region, approximately 650kms from Derby in the south west and 550kms from Kununurra in the south east. The project is still in the initial stages of development and requires ongoing support for its effective implementation.

Community Courts

Community Courts operate in Kalgoorlie-Boulder and Norseman in WA as a sentencing court service that is 'more culturally inclusive and relevant for Aboriginal people than traditional courts.'⁴² Community Courts were introduced in an attempt to reduce the high involvement of Aboriginal people in the criminal justice system. Community Courts operate during the sentencing process using the same laws as the Magistrates Court of WA.⁴³

Community Courts have an informal structure with a magistrate and other participants, including the offender and their family sitting at a table. The magistrate is assisted by Aboriginal elders and respected people to provide information and advice on social and cultural issues. Plain language is used during the process rather than technical legal jargon. Community Courts were developed through consultation with local Aboriginal communities over several months in 2006.⁴⁴

Community Courts have the same sentencing options as the Magistrates Court. However, a major goal is to make sentencing orders more appropriate to the social and cultural background and circumstances of the offender. Victims also play an important role in helping the offender understand the impact of the offence, accept responsibility and learn from the experience. Aboriginal members speak directly with the offender to further ensure the offender understands the effects of their behaviour and encourage them to change.⁴⁵

⁴² Government of WA, Department of Attorney General Court and Tribunal Service: Aboriginal Community Courts http://www.courts.dotag.wa.gov.au/A/aboriginal_community_court.aspx?uid=4279-5018-6799-1500 accessed 10/12/09.

⁴³ Government of WA, Department of Attorney General Court and Tribunal Service: Aboriginal Community Courts, above n 41

⁴⁴ Government of WA, Department of Attorney General Court and Tribunal Service: Aboriginal Community Courts, above n 41

⁴⁵ Government of WA, Department of Attorney General Court and Tribunal Service: Aboriginal Community Courts, above n 41

Most offences dealt with in the Magistrates Court can also be dealt with in the Community Court. Aboriginal people pleading guilty to an offence and who show an intention to take responsibility for their actions are eligible to participate in the Community Court.⁴⁶

ALSWA made a submission to the current review of the Community Courts in June 2009. The submission outlined the positive impact the Courts have had on offenders, panellists, Magistrates, court staff and the community, made recommendations to improve their current format and advocated for their extension into other communities. A copy of the submission is **attached as Annexure 4**.

Drug Court

A Drug Court currently operates in the Perth Magistrate's Court and Perth Children's Court. Young people who participate in Drug Court regimes are given the opportunity to participate in rehabilitation programs in the community before they are sentenced. The Court actively monitors their progress and endeavours to provide culturally appropriate intervention and support where available.

ALSWA has had several young clients successfully complete the Drug Court regimes and is most supportive of this initiative. However, Drug Court programs are resource intensive and ALSWA is not provided with any additional funding to resource specifically trained lawyers and court officers to appear in this jurisdiction.

Recommendation 10: That government commit to the further expansion of restorative justice diversionary programs and therapeutic jurisprudence initiatives in the criminal justice system.

Recommendation 11: That government commit sufficient funding to enable ALSWA to effectively participate in restorative justice diversionary programs and therapeutic jurisprudence initiatives in the criminal justice system.

⁴⁶ Government of WA, Department of Attorney General Court and Tribunal Service: Aboriginal Community Courts, above n 41

5.5 *The scope for the clearer responsibilities within and between government jurisdictions to achieve better co-ordinated and targeted service provision for Indigenous juveniles and young adults in the justice system;*

The Pilot Youth Justice Initiative was a collaborative inter agency project to improve case management of high risk young people appearing before the President of the Children's Court of Western Australia and the Chairman of the Supervised Release Review Board. The Pilot was instigated by the President of the Children's Court of Western Australia. The initiative addressed systemic barriers to effect intervention in the lives of young people, most of whom were Aboriginal, who commit serious offences including repeat offending. Parties to the initiative included most State Government departments and agencies which had an involvement with young people. All parties to the initiative recognised that existing ways of working were not meeting the needs of the Children's Court, the young people appearing in the court or the wider community. They also recognised that problems would not be overcome simply by applying additional resources.

The Pilot highlights how improved cooperation and inter agency collaboration can improve outcomes for young people involved in the justice system.

ALSWA submits that this sort of approach should be rolled out across WA to better coordinate and target service provision for young Aboriginal people. Various recommendations about this very issue were recently made by the Senate Select Committee on Regional and Remote Indigenous Communities in its Third Report.⁴⁷ ALSWA submits these recommendations need to be urgently implemented.

5.6 *The extent to which current preventative programs across government jurisdictions are aligned against common goals to improve the health and emotional well-being of Indigenous adolescents, any gaps or duplication in effort, and recommendations for their modification or enhancement.*

ALSWA does not have the requisite expertise to comment on this issue.

6. Protection and promotion of human rights

Human rights are the equal rights of all human beings based on the inherent dignity of humanity, and are enshrined under international law in conventions such as the Convention on the Rights of the Child (CROC). Australia ratified CROC in 1990, which means Australia has a duty to ensure that all children in Australia enjoy the rights set out in the convention. CROC was the first convention that recognised the right of Aboriginal children to learn about and practice their own culture and language. CROC also contains a number of protections including that children enjoy the right to fair treatment and freedom from discrimination, the best interests of the child must be the primary concern in making decisions affecting them, children have the right to express a view about decisions affecting them, the right to privacy, the right to education and health services, and also contains a specific provision on the use of diversionary methods in juvenile justice:

“States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleges as, accused or, or recognised as having infringed the penal law, and in particular:

b) whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.”⁴⁸

This submission has highlighted how the rights of Aboriginal young people and young adults are constantly being breached in their contact with the criminal justice system. The submission also noted that Aboriginal juveniles and young adults experience racial discrimination and lack of access to culturally appropriate services.

ALSWA submits that greater protection and promotion of human rights is needed to improve the contact of Aboriginal juveniles and young adults with the criminal justice system.

ALSWA notes the recent National Human Rights Consultation⁴⁹ found a lack of understanding in the Australian community about what human rights are and that support for greater awareness and education about human rights is needed to better protect and promote human rights. The Consultation Report recommended that Australia adopt a Human Rights Act which ALSWA submits is the best way to protect and promote the human rights of Aboriginal peoples. A Human Rights Act would create a culture of respect for human rights in Australia and improve law-making and government policy by requiring that human rights be considered in this process.

Recommendation 12: The Minister support the introduction of a Human Rights Act to better protect and promote the rights of young Aboriginal people and young adults.

7. Conclusion

The over representation of young Aboriginal people and young adults in the criminal justice system is unacceptable and requires immediate action. ALSWA welcomes the current inquiry in the hope that serious reform can be achieved to improve this situation.

This submission has focused on ALSWA's expertise in the criminal justice system to highlight how systemic failures in the system are one of the main causes of the overrepresentation of Aboriginal people and must be the focus of any proposed reform from this inquiry. Over-policing, poor utilisation of diversionary schemes by police, punitive police practices with respect to bail, the absence of crisis care accommodation, bail hostels and rehabilitation programs, the lack of an interpreter service in Aboriginal languages, limited access to legal advice, mandatory sentencing and other tough laws are some of the key contributing factors to the high involvement of young Aboriginal people and young adults in the criminal justice system.

8. List of Recommendations

Recommendation 1: Upon the commencement of criminal proceedings against a young person the police be required to lodge a written document with the court outlining why all diversionary processes were inappropriate in the circumstances.

⁴⁸ CROC, article 40.

⁴⁹ National Human Rights Consultation Report, Commonwealth of Australia, Attorney-General's Department, 2009.

Recommendation 2: That a judicial officer review all police decisions in relation to bail as soon as reasonably possible after charging to ensure that only appropriate bail conditions are set and to minimise the numbers of young people detained in custody.

Recommendation 3: That funding be provided to establish and operate culturally appropriate programs for young Aboriginal people, including the provision of adequate remuneration for staff, in the following areas:

- Drug and alcohol rehabilitation
- Psychiatric and psychological assistance
- Sex offence programs
- Victim offender mediation
- Gender specific programs
- Bail hostels and Crisis Care accommodation

Recommendation 4: The Minister advocate to the WA Government the importance of providing adequate funding and resources for the immediate establishment and ongoing operation of a state-wide interpreter service in WA in Aboriginal languages.

Recommendation 5: That the Criminal Investigation Act 2006 be amended to make it mandatory for police to contact ALSWA in every circumstance where a young Aboriginal person is taken into police custody.

Recommendation 6: That funding be provided for the creation by ALSWA of a State wide telephone advice service to advise and assist young Aboriginal people in police custody.

Recommendation 7: The Minister urge the WA government to repeal all mandatory sentencing laws.

Recommendation 8: The Minister urge the WA government to abandon the proposed stop and search amendments to the Criminal Investigation Amendment Bill 2009.

Recommendation 9: The Minister urge the WA abandon the proposed Prohibitive Behaviour Orders Bill 2009.

Recommendation 10: That government commit to the further expansion of restorative justice diversionary programs and therapeutic jurisprudence initiatives in the criminal justice system.

Recommendation 11: That government commit sufficient funding to enable ALSWA to effectively participate in restorative justice diversionary programs and therapeutic jurisprudence initiatives in the criminal justice system.

Recommendation 12: The Minister support the introduction of a Human Rights Act to better protect and promote the rights of young Aboriginal people and young adults.