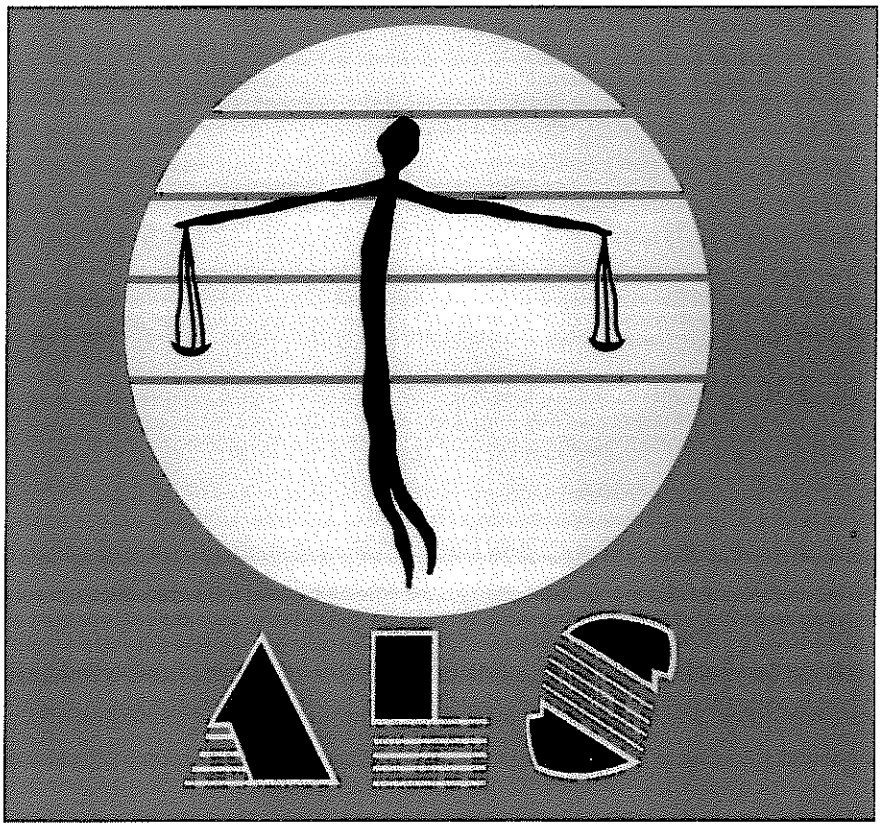
ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC)



SUBMISSION IN RESPONSE TO THE FEDERAL SENATE FINANCE AND PUBLIC ADMINISTRATION REFERENCES COMMITTEE INQUIRY INTO ABORIGINAL AND TORRES STRAIT ISLANDER EXPERIENCE OF LAW ENFORCEMENT AND JUSTICE SERVICES

29 April 2015

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, and human rights law. Our services are available throughout Western Australia via 14 regional and remote offices and one head office in Perth.

THE INQUIRY'S TERMS OF REFERENCE

On 4 March 2015, the following matter was referred to the Finance and Public Administration References Committee ('the Committee') for inquiry and report by the **10 August 2015:**

Aboriginal and Torres Strait Islander experience of law enforcement and justice services, with particular reference to:

a. the extent to which Aboriginal and Torres Strait Islander Australians have access to legal assistance services;
b. the adequacy of resources provided to Aboriginal legal assistance services by state, territory and Commonwealth governments;

c. the benefits provided to Aboriginal and Torres Strait Islander communities by Family Violence Prevention Legal Services;
d. the consequences of mandatory sentencing regimes on Aboriginal and Torres Strait Islander incarceration rates;
e. the reasons for the high incarceration rates for Aboriginal and Torres Strait Islander men, women and juveniles;
f. the adequacy of statistical and other information currently collected and made available by state, territory and Commonwealth governments regarding issues in Aboriginal and Torres Strait Islander justice;
g. the cost, availability and effectiveness of alternatives to imprisonment for Aboriginal and Torres Strait Islander Australians, including prevention, early intervention, diversionary and rehabilitation measures;
h. the benefits of, and challenges to, implementing a system of 'justice targets'; and
i. any other relevant matters.

The submission closing date is 30 April 2015 and the reporting date is 10 August 2015.

ALSWA considers that the issues under consideration by this inquiry are vitally important. The experience of Aboriginal and Torres Strait Islander peoples[1] with law enforcement and justice services is a longstanding critical issue deserving of immediate action. However, ALSWA is also of the view that the allocated submission period of less than two months, and a reporting period of approximately five months, will be generally insufficient to enable relevant organisations to provide full and comprehensive submissions or for the Committee to fully and effectively address all of the terms of reference. Bearing this in mind, ALSWA strongly urges the Committee to be guided by the plethora of previous inquires and reports that have made repeated recommendations for improvements to the way in which the justice system interacts with Aboriginal people and for better outcomes in this area for both Aboriginal people and the community at large. Now is not the time for recommendations for further inquiries or investigations.

ALSWA SUBMISSION

BACKGROUND

Aboriginal people are overrepresented at all stages of the criminal justice system in Australia. ALSWA has no doubt that the Committee will be privy to the various statistics in this regard for all Australian jurisdictions. However, ALSWA believes that it is important to highlight the position of Western Australia given that Western Australia has the dubious honour of having the highest

1 Throughout this submission ALSWA uses the term 'Aboriginal people' when referring to Aboriginal and Torres Strait Islander people (other than when directing quoting other works).

overrepresentation of Aboriginal adults and juveniles in custody as well as the highest overrepresentation of Aboriginal children under the formal care of the state.

In 1991 the *Royal Commission into Aboriginal Deaths in Custody* (RCIADIC) observed that Western Australia 'a State with 16.6% of the national Aboriginal population, has the dubious distinction of having not only the highest number of deaths in custody...but truly shocking levels of over-representation of Aboriginal people in police custody' and that:

> In a State where Aboriginal people form only 2.7% of the total population, there were in August 1988 actually more Aboriginal (54.2%) than non-Aboriginal people in custody, and they were over-represented in police custody at an appalling rate of 43 times that of non-Aboriginal people.[2]

Almost 25 years later and after numerous inquiries and repeated recommendations designed to address the unacceptable level of overrepresentation of Aboriginal people in the justice system, little has changed. As recently stated:

> Each year, at least one new study confirms what we already know: Indigenous Australians are imprisoned at higher rates than any other racial or ethnic community in the developed world.[3]

The aptly named 2011 report of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system* ('the *Doing Time – Time for Doing* report') stated that it is concerning that the same factors as identified by the RCIADIC have been identified some 20 years later and the overrepresentation of Aboriginal young people has increased. The Committee made numerous recommendations for reform stating at the outset that the extent of overrepresentation is a 'national disgrace' and strongly urged 'all governments and jurisdictions to be rigorous in implementing [its] recommendations'.[4]

The most recent available statistics of the Western Australian Department of Corrective Services indicates that as at 26 June 2014 Aboriginal prisoners comprised 39.6% of the adult prisoner population and Aboriginal detainees made up 77.2% of the juvenile detention population.[5] It is also alarming that the proportion of Aboriginal female prisoners is higher than the proportion of males – Aboriginal women comprised 53% of the adult female prisoner population. As stated above, Western Australia has the highest level of overrepresentation of Aboriginal people in custody than any in other Australian jurisdiction.

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2 Royal Commission into Aboriginal Deaths in Custody, National Report Volume 1 [9.2].

3 McConnel D, 'Indigenous Imprisonment: A New Approach' (April 2015) *Law Institute Journal*, 87.

4 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) 2.

5 Western Australia, Department of Corrective Services, Weekly Offender Statistics (WOS) Report as at 26 June 2014.

It has also been observed, that relative to population size, Western Australia is 'processing a higher proportion of children through the Children's Court than any other State or Territory in Australia'.[6] In fact, the total number of children processed through the Children's Court in Western Australia (in 2009–2010) is only second to New South Wales, a staggering statistic given that Western Australia had just over 10 percent of the national population of persons under the age of 18 years.

ALSWA is also deeply concerned about the level of Aboriginal representation in the remand populations. Overall, 22% of adults in custody in Western Australia at 26 June 2014 were remand prisoners; however, Aboriginal adults comprise 40% of this population. For juveniles the situation is disastrous, 47% of juveniles in custody were unsentenced detainees and 73% of these were Aboriginal children.

Aboriginal people are also more likely to be victims of crime than non-Aboriginal people and Aboriginal women are more likely to be victims than Aboriginal men. It has been stated that from 2006–2007 Aboriginal women were '35 times more likely to be hospitalised as a result of spouse or partner violence' than non-Aboriginal women.[7] The *Doing Time – Time for Doing* report observed that:

> Indigenous victimisation rates must be addressed in conjuncture with offending rates, and that both are symptoms of the disadvantage and social dysfunction that pervades many Indigenous communities. [8]

ALSWA agrees that measures designed to reduce the unacceptable level of overrepresentation of Aboriginal people in custody must equally address the overrepresentation of Aboriginal people as victims.

ALSWA's submission in response to each term of reference appears below. Bearing in mind ALSWA's day-to-day interaction with the experiences of Western Australian Aboriginal people with law enforcement and justice services, the submission is focused on Western Australian issues. However, ALSWA would expect that many of the issues raised are relevant to other Australian jurisdictions. Nonetheless, it is anticipated that in some areas other states and territories will be performing better given that Western Australia has the highest disproportionate rate of incarceration of Aboriginal adults and juveniles in the nation.

For Western Australia, its geographical size and number of Aboriginal people living in remote areas presents specific challenges in terms of the experience of Aboriginal people with law enforcement and justice services. As will be apparent throughout this submission, Aboriginal people living in regional and remote areas are frequently disadvantaged in terms of service provision and access to legal and

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6 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) 4.

7 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) [2.18].

8 Ibid [2.19].

justice services. The current Western Australian government proposal to close a number of remote communities will only serve to increase the problems experienced by Aboriginal people from these communities. Further dislocation from country and community and the resulting influx into regional towns will increase family and community dysfunction, homelessness and other forms of social disadvantage. An increase in offending behaviours and the consequential burden on already under-resourced justice services is inevitable.

(a) The extent to which Aboriginal and Torres Strait Islander Australians have access to legal assistance services

Civil and family law needs

The civil and family law needs of Aboriginal people have been considered by the recent Productivity Commission inquiry[9] as well as the Indigenous Legal Needs Project (ILNP).[10] These projects identified major deficiencies in terms of Aboriginal peoples' access to legal assistance in the areas of civil and family law. In addition, it was highlighted that there is a clear connection between unaddressed civil and family law needs and future legal problems including interaction with the criminal justice system.

Generally, for all Australians, the Productivity Commission identified gaps in access to justice for family law matters such as domestic violence and the care and protection of children as well as civil law matters such as employment and tenancy law.[11] It estimated that approximately $200 million per year in additional funding is required from the federal and state and territory governments to maintain existing frontline services as well as to enable legal assistance providers to offer a greater number of services.[12] It was also acknowledged that the provision of additional funding in times of 'fiscal tightening is challenging'; however, 'not providing legal assistance in these instances can be false economy as the costs of unresolved problems are often shifted to other areas of government spending such as health care, housing and child protection'.[13]

Specifically, in regard to Aboriginal people, the Productivity Commission identified additional barriers that hinder effective access to legal services such as a lack of awareness of legal rights and obligations and the availability of potential legal remedies; language barriers; socioeconomic disadvantage; and a lack of trust of the legal system coupled with the conceptual differences between traditional law and the Australian legal system.[14] In addition to the need for substantial extra funding of legal services across the board (as noted above), the Commission found that funding to specialised legal assistance services to Aboriginal and Torres Strait Islander people remains justified.[15] A similar sentiment was referred to by the Law Reform Commission of Western Australia in its report on Aboriginal customary laws. It stated that an earlier inquiry into access to justice had found that 'Indigenous-specific legal services are particularly beneficial because they are community-owned;

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9 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report Overview (September 2014).

10 Allison F, Schwartz M & Cunneen C, *The Civil and Family Law Needs of Indigenous People in WA* (A report of the Australian Indigenous Legal Needs Project (2014).

11 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report Overview (September 2014) 30.

12 Ibid.

13 Ibid 30-31.

14 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report Volume 2 (2014) 762–765.

15 Ibid 767.

have a strong awareness of cultural issues; and are more accessible to Aboriginal people'.[16] In this regard, ALSWA highlights that in 2013–2014, 32% of its workforce was Aboriginal and this included 21 Aboriginal court officers who provide a unique role in liaising between clients and lawyers and enhancing the overall cultural competency of service provision.[17]

The ILNP project in Western Australia identified, mainly based on focus group questionnaires, five priority areas of need: housing, disputes with neighbours, discrimination, credit/debt issues and stolen wages.[18] Further areas of need were also highlighted including stolen generations, consumer law issues, child protection, education, social security/Centrelink and wills. In regard to child protection, it was emphasised that although this area was not the most common problem as identified by Aboriginal participants in the study, qualitative data indicates that 'child removal into the care and protection system generates serious levels of grief, distress and anxiety for Aboriginal people' and that there are 'significant levels of distrust towards [the Department for Child Protection and Family Support] and a strong sense of disempowerment amongst Aboriginal people around their interactions with this agency, leading for instances to acquiescence to orders for removal'.[19] ALSWA agrees that child protection is an area where Aboriginal people do not receive adequate access to justice and in many cases a sense of inevitability may discourage Aboriginal families to seek legal assistance especially at an early stage of child protection intervention.

The ILNP report concluded that:

> Services are presently vastly under-resourced in terms of capacity to address legal need in Aboriginal communities. Additional funding is urgently required for civil/family law work, with priority to be given to Indigenous legal services as primary providers of legal assistance to Indigenous people. Any increase in the funding of civil/family law work should not lead to a reduction in current resourcing of legal service delivery with respect to criminal law matters. It makes no sense, economically or otherwise, to take from one area to bolster another, given the clear interconnection between different types of legal issues.[20]

It was also observed that additional resources for community legal education is required to address the lack of knowledge or understanding of civil and family law because many Aboriginal people do not recognise the legal dimension of the issues they are facing or how to effectively seek legal assistance.[21]

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16 Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) 87–88.

17 Aboriginal Legal Service of Western Australia, *Annual Report 2013-2014* (2014) 9.

18 Allison F, Schwartz M & Cunneen C, *The Civil and Family Law Needs of Indigenous People in WA* (A report of the Australian Indigenous Legal Needs Project (2014) 11.

19 Ibid 14–15.

20 Ibid 17.

21 Ibid.

In regard to the link between unaddressed civil and family law needs and future legal problems, the Productivity Commission stated that:

> If left unresolved, civil problems can have a big impact on the lives of the most disadvantaged. The Commission was given many examples of simple problems spirally into complex problems when legal assistance was not provided. Unmet civil problems can also escalate into criminal matters.[22]

Likewise, the ILNP in Western Australia reported that when 'civil law needs are left unaddressed or unresolved, the situation can sometimes deteriorate to involve criminal law issues too. This is evident in areas such as social security and discrimination'.[23] The February 2015 ILNP Progress Report states that:

> Our research *also* indicates, however, that unmet Indigenous civil/family law need is directly linked with the continuing marginalisation of Indigenous Australians, evident (for example) in their poorer educational outcomes, unemployment and poverty. Whilst being able to better resolve civil and family law issues is an essential goal in and of itself, the clear connection between not doing so and broader Indigenous social disadvantage provides an impetus for ensuring that Aboriginal and Torres Strait Islander access to justice in these areas is enhanced.[24]

The ILNP also observed that there are instances of 'lateral escalation', for example, where unresolved civil law problems lead to further civil law problems. As one example, eviction from a tenancy may lead to overcrowding in an alternative residence which, in turn, may lead to neighbourhood disputes. Specifically, it was highlighted that the Western Australian Department of Housing's Disruptive Behaviour Management Policy 'emerged as an issue of some prominence' and this 'policy appears to have a disproportionate or discriminatory impact on Aboriginal tenants, leading to eviction'.[25]

ALSWA also highlights that the Commonwealth Government provided one-off funding in May 2013 for family law services in regional Western Australia. This funding enabled the provision of two FTE family lawyers – one in Broome (servicing the Kimberley) and one in Kalgoorlie (servicing the Goldfields). Sadly, this funding has ceased and these two lawyers will no longer be employed after June 2015. These roles enhanced Aboriginal peoples' access to family law services in these areas, in particular, in relation to child protection matters. The lack of funding to continue these services will result in a significantly increased workload for family lawyers operating from Perth and will clearly impact on the overall family law service provision capabilities of ALSWA.

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22 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report Overview (September 2014) 24.

23 Allison F, Schwartz M & Cunneen C, *The Civil and Family Law Needs of Indigenous People in WA* (A report of the Australian Indigenous Legal Needs Project (2014) 16.

24 http://www.jcu.edu.au/ilnp/.

25 Allison F, Schwartz M & Cunneen C, *The Civil and Family Law Needs of Indigenous People in WA* (A report of the Australian Indigenous Legal Needs Project (2014) 12.

Criminal law needs

ALSWA lawyers and court officers provide representation for Aboriginal people charged with criminal offences in all court jurisdictions across the state. Its 14 regional offices are staffed by lawyers and court officers along with administrative staff, although some offices are only staffed by a single court officer. ALSWA provides legal advice and representation to Aboriginal people in some of the most remote locations in Western Australia.

As observed by the *Doing Time – Time for Doing* report funding of Aboriginal and Torres Strait Islander Legal Services ('ATSILS') has remained static for a number of years whilst 'funding for mainstream legal services has more than doubled during the same period. Between 2005 and 2010, funding for legal aid programs increased by around 50 percent, whereas funding for legal aid for Indigenous Australians programs increased by less than 10 percent. At the same time, the number of court cases involving Indigenous people has grown'.[26] It was also commented that ATSILS' lawyers have 'higher workloads than their mainstream counterparts' and that the provision of legal services by ATSILS is more expensive, especially in Queensland, Northern Territory and Western Australia where there are significant Aboriginal populations in remote or regional locations.[27] The Standing Committee stated that:

> This chronic underfunding has serious ramifications for the effectiveness of ATSILS. The capacity of ATSILS to provide quality services is hindered by the lack of resources to recruit and retain staff. A joint submission from several ATSILS noted that 'we cannot match the salaries and conditions of government agencies. Our ability to respond adequately to the high level of demand is constantly stretched'. The Law Council of Australia identified the gap between ATSILS salaries and Legal Aid Commission salaries as 'perhaps the single most important issue' for attracting and retaining legal practitioners.[28]

It was recommended that the Commonwealth Government 'increase funding for Aboriginal and Torres Strait Islander Legal Services to achieve parity per case load with Legal Aid Commission funding in the 2012–2013 Federal Budget, with appropriate loading to cover additional costs in service delivery to regional and remote areas.[29]

This situation in regard to funding for ATSILS has impacted significantly, among other things, on ALSWA's capacity to provide representation in criminal matters. Since 2011, ALSWA has been unable to provide any representation for Aboriginal people in the Magistrates and Children's Courts at Midland, Fremantle and Rockingham and, also, in some regional locations. Since 2014, services have

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26 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) [7.70].

27 Ibid [7.73]–[7.74].

28 Ibid [7.75].

29 Ibid Recommendation 26.

also been discontinued at Joondalup. Apart from being unable to provide a duty lawyer service in these locations, the changes also mean that Aboriginal people who plead not guilty and are refused a grant of aid from Legal Aid WA will be unrepresented at trial. ALSWA highlights that the courts at Midland, Fremantle and Rockingham have significant numbers of Aboriginal accused.

Legal Aid WA's Annual Report for 2012-2013 indicates that its total expenditure was $66.225 million (both state and federal grants) and it employed a total of 307 FTE. In contrast, ALSWA received approximately $12 million and employed a total of 105 staff across the state. While it is difficult to compare the services provided by and the budgets of the two organisations, ALSWA notes that in 2012-2013 the total number of applications received for legal aid by Legal Aid WA was in excess of 13,000 (not all applications are approved). Further, there were a total of 50,562 duty lawyer services provided by Legal Aid WA. In the same time period, ALSWA provided casework assistance in 16,154 matters and duty lawyer assistance in 8,691 matters.

As noted above, ALSWA's funding from Commonwealth grants has remained relatively static over the past five years. For the five financial years from 2008/09 to 2012/13 ALSWA funding grants fluctuated from $11,626,608 in 2011/12 to a high of $16,489,660 in 2009/10; however, the grant level in 2012/13 was some $2.2 million less than it was in 2008/09.

ALSWA appreciates that its lack of capacity to provide a duty lawyer service in some locations has impacted on Legal Aid WA. In its 2013-2014 Annual Report, Legal Aid WA explains that:

> The position of ALSWA is a significant issue for Legal Aid WA because a reduction in ALSWA's service delivery capacity creates additional demand (and expense) for equivalent services provided by Legal Aid WA. Notably, while overall demand for Legal Aid WA duty lawyer services between 2010-11 and 2013-2014 increased by close to 17 per cent, the number of duty lawyer services provided by Legal Aid WA to people identifying themselves as Aboriginal increased by over 70 per cent during this period. This increase in demand coincides with the period over which ALSWA has been compelled to withdraw duty lawyers from a number of metropolitan and regional courts.
>
> Legal Aid WA acknowledges the response of the State Government in providing additional duty lawyer resources in 2011-2012 and 2014-2015 to respond to this increase in demand for State-funded services. It remains a policy concern, however, that the Commonwealth's insufficient funding of ALSWA is creating a growing shift from the Commonwealth to the State.[30]

As discussed immediately below, ALSWA is of the view that the provision of resources for funding ATSILS should be both a federal and state responsibility. Previous inquiries, such as those referred to above, clearly support the continued and better funding of specialised Aboriginal legal services such as ALSWA.

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30 Legal Aid WA, *Annual Report 2013-2014* (2014) 41.

(b) The adequacy of resources provided to Aboriginal legal assistance services by state, territory and Commonwealth governments

Although ALSWA welcomes the Commonwealth Government's announcement that the previously proposed funding cuts to ATSILS will be reversed and current funding levels will be guaranteed until June 2017, ALSWA does not consider that the current funding levels of ATSILS is adequate. There is insufficient funding to adequately provide effective legal assistance to all Aboriginal people in Western Australia to address their civil, family and criminal law needs. The Chief Justice of Western Australia, Wayne Martin, recently commented that there is an 'obvious and direct connection between the provision of adequate legal assistance and the rate of over-incarceration of Aboriginal people'.[31] ALSWA strongly urges the Commonwealth Government to increase its funding to ATSILS to ensure that all legal needs are addressed in an effective and culturally appropriate manner because this will assist in reducing disadvantage and further entrenchment in the justice system. ALSWA also emphasises that it is crucial that the Commonwealth Government continues to fund the National Aboriginal and Torres Strait Islander Legal Service (NATSILS). NATSILS plays a vital role in enabling individual ATSILS to share important information, to implement best practice in regard to the effective provision of specialised legal services to Aboriginal people and to work collaboratively with governments to address Aboriginal disadvantage in the justice system.

Having said that, ALSWA is equally concerned that the Western Australian government does not provide any funding to ALSWA. As noted above, the state government provided additional funding to Legal Aid WA to address the additional workload caused by ALSWA's inability to provide duty lawyer services in some areas. This funding could have been provided directly to ALSWA to enable it to continue to provide culturally appropriate services to Aboriginal people in this state.

Furthermore, the lack of state funding means that the Western Australia government can introduce new laws or justice policies that are likely to impact on Aboriginal people with impunity. In this regard, the Productivity Commission stated in its inquiry that 'State and territory governments should also contribute to the funding of services provided by ATSILS and FVPLS'[32] and that state and territory contributions would 'prompt state and territory governments to consider the implications of policy changes on the demand for legal assistance services'.[33] In particular, it was noted that state government policies in relation to criminal matters have a significant impact on demand for ATSILS and FVPLS.[34] ALSWA highlights, for example, that the Western Australian government does not need to consider the increased demand on ALSWA services as a result of the current proposals to expand

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31 The Honourable Wayne Martin AC, Chief Justice of Western Australia, *Indigenous Incarceration Rates: Strategies for much needed reform* (Law Summer School 2015) 13.

32 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report Overview (September 2014) 29.

33 Ibid 38.

34 Ibid 66.

mandatory sentencing. ALSWA is strongly of the view that the Western Australian government should contribute to the funding of ALSWA.

(c) The benefits provided to Aboriginal and Torres Strait Islander communities by Family Violence Prevention Legal Services

ALSWA considers that Aboriginal and Torres Strait Islander Family Violence Prevention Legal Services provide an extremely important specialist and culturally appropriate legal service for victims (and their children) for family violence and sexual assault. It is well known that Aboriginal people are overrepresented as victims of family violence and it is vital that they can access culturally competent legal services to assist in a variety of matters arising from family violence and sexual assault including restraining orders, family law and child protection issues. The provision of separate Indigenous-specific legal services (ie, separate from ATSILs) is necessary because of the nature of the provision of legal representation by ATSILs. ALSWA represents victims of family violence (eg, in relation to applications for violence restraining orders and in family law and child protection matters). However, ALSWA is required to provide legal assistance, if sought, to an alleged perpetrator of family violence in accordance with its funding guidelines. ALSWA cannot refuse to provide legal advice or representation to an alleged perpetrator on the basis of an ideological preference for representing alleged victims. If an accused person who has been charged with a family-violence related offence appears in court or is in police custody and seeks assistance from ALSWA this assistance must be provided subject to general guidelines for criminal matters. In practice, it is common for the alleged perpetrator to make contact with the ALSWA early and before the alleged victim seeks legal assistance. Therefore, in these situations ALSWA has a legal conflict of interest and is not able to represent the alleged victim in accordance with its professional obligations. The existence of AFVPLS fills an important gap in these circumstances.

(d) The consequences of mandatory sentencing regimes on Aboriginal and Torres Strait Islander incarceration rates

Western Australia has three mandatory sentencing regimes each requiring a sentencing court to impose a minimum term of imprisonment.

Home burglary

Section 401(4) of the *Criminal Code* (WA) currently provides for a mandatory sentencing regime for repeat offenders who are convicted 'third strike' home burglary offence (a minimum of 12 months'

imprisonment or 12 months' detention[35]). The so-called 'three strikes' home burglary laws were introduced in 1996 and apply to both adults and children. An early review of these laws by the former Department of Justice found that over 81% of the children sentenced under the laws were Aboriginal[36] and the Law Reform Commission of Western Australia observed that 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.[37]

The Western Australia government has introduced the *Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014* (WA) and this Bill was passed by the Legislative Assembly in March 2015 and is currently before the Legislative Council. The Bill seeks to extend the mandatory sentencing provisions by introducing mandatory minimum terms of imprisonment/detention for offenders (aged 16 years and over) who commit serious violent and sexual offences during the course of an aggravated home burglary; by increasing the mandatory minimum term of imprisonment for 'third-strike' adult home burglary offenders from 12 months' imprisonment to two years' imprisonment; and by amending the counting rules for determining repeat offender status for adult offenders and juvenile offenders aged over 16 years, with the intention that multiple offences dealt with in court on one day are no longer counted as a single 'strike'. It has been stated in Parliament that the government's conservative estimate is that as a consequence of these amendments an extra 60 juveniles and 208 adults over three years will be imprisoned or detained.[38]

In 2014, the President of the Children's Court noted that possibly an extra 130 beds may be required for juveniles over a two-year period as a consequence of the proposed laws. However, he also commented that irrespective of the precise number of additional juvenile detainees, 'if a large number of more hardened, angry and disconnected young offenders are returned to the community....then they will have a wide sphere of influence on other disconnected children, including children even younger than them. That will create an ongoing multiplier effect, which over time, will sustain and increase serious offending and its human and financial cost to the community'.[39] Judge Reynolds also observed that:

> Regrettably most Aboriginal children who appear before the Court have profiles characterised by extreme disadvantage and vulnerability. They with other children with similar profiles [will be] impacted most by the proposed extended mandatory regime...With respect, it seems to me that the many complexities and layers of crises which render children and young vulnerable to offend are simply not

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35 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.

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

37 Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australia law with Aboriginal law and culture,* Final Report (2006) 86.

38 Western Australia, Parliamentary Debates, Legislative Assembly, 19 March 2015, 1890-1904 (Mr Paul Papalia).

39 Judge Dennis Reynolds, *Youth Justice in Western Australia – Contemporary Issues and its future direction,* (University of Notre Dame, 13 May 2014) 5–6.

> known or properly appreciated by many policy advisers and decision makers....It is often as superficial as, lock them up, that will teach them and their mates a lesson, and they will not do it again.
>
> With respect, that line of thinking will not solve the problem and so it will not result in the community being a safer place. It is never as simple as that. The solution requires addressing the underlying causes of anti-social and criminal behaviour.[40]

In his speech, Judge Reynolds also 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.[41] Clearly, the current mandatory sentencing laws have a significant impact on the total number of juveniles in detention in Western Australia. Bearing in mind, as stated above, the high numbers of Aboriginal children caught by the three strike burglary laws, the 'three-strikes' laws clearly have considerable impact on the total number of Aboriginal juveniles in detention in Western Australia. ALSWA is gravely concerned that the vast majority of juveniles detained under the proposed extended mandatory sentencing laws for home burglary will be Aboriginal children.

Assault public officer

Sections 318(2) and 318(4) of the *Criminal Code* provide for a mandatory minimum sentence for juveniles and adults, for assaulting specified public officers and causing bodily harm. The minimum term is 3 months' imprisonment or detention for juveniles aged 16 years and over and either 6 months or 9 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.

These provisions were subject to a statutory review and a report was tabled in Parliament in June 2014.[42] The review explained that during the three-year period since the provisions commenced, no charges had been lodged under the mandatory sentencing provisions in s 297 (grievous bodily harm). However, 106 charges were lodged in the lower courts under section 318 which specified a mandatory component. The vast majority of these were lodged in the Magistrates Court, though 17 charges were levelled against juveniles and were, therefore, heard in the Children's Court.[43] Whilst this review did not provide any data in relation to the proportion of Aboriginal juveniles and adults sentenced under the provisions, it provides evidence to support a number of the key arguments against mandatory sentencing.

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40 Judge Dennis Reynolds, *Youth Justice in Western Australia – Contemporary Issues and its future direction*, (University of Notre Dame, 13 May 2014) 11–12.

41 Ibid 19.

42 Statutory review: Operation and Effectiveness of the 2009 Amendments to Sections 297 and 318 *Criminal Code* (June 2014).

43 Ibid 3.

One such argument (see below) is that mandatory sentencing laws shift discretion from courts to police and/or prosecutors. The report states that the Police Commissioner advised that the applicable prosecutorial guidelines were intended to promote a consistent approach to the management and assessment of alleged assaults on public officers. The Police Commissioner noted that the guidelines are also considered to provide a measure of protection because it is not intended that persons should be imprisoned for what are determined to be relatively minor assaults, and the process of applying them 'is also used as an authority to remove prescribed circumstances regarding bodily harm if that officer decided the charge was not to proceed'.[44] The DPP also noted that the existence of the guidelines reflects the fact that 'where judicial discretion is removed it does not remove discretion so much as redistribute it to other parts of the criminal process'.[45]

The review observes that of the 106 charges lodged by police in the lower courts, 86 charges were finalised and resulted in a conviction. Of these 86 charges, 39 resulted in a mandatory period of imprisonment of detention (46%) and 45 (50%) were 'downgraded' to remove the applicable mandatory component of the charge (two charges were still yet to be finalised).[46]

Another strong argument against mandatory sentencing is that it leads to higher rates of not guilty pleas because there is no incentive for the offender to plead guilty. The review report states that the Chief Magistrate advised that persons charged under section 318 in prescribed circumstances pleaded not guilty at much higher rates than the general rate of not guilty pleas in the Magistrates Court. The Chief Magistrate suggested that the 'consequence of a mandatory term of imprisonment would appear to have clearly influenced the decision to plead not guilty to the matters' and noted that a high rate of not guilty pleas 'would indicate an increase in the workload of the Magistrates Court'.[47]

Whilst it is suggested in the report that the decrease in charges lodged in the first three years following the 2009 amendments under s 318 (and also for charges of obstructing public officers under s 172)[48] might be attributable to the new laws, it is also explained that this decrease may reflect a change in the reporting or prosecution of these forms of assault and, further, that the crime rates overall in Western Australia fell by 14% for all charges during the same period and therefore 'one must be cautious about attributing these statistics to the impact of the 2009 amendments'.[49]

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44 Ibid 4.

45 Ibid 6.

46 Ibid 3.

47 Ibid 8.

48 It is stated that in the first three years there has been a 27% decrease in s 318 charges and a 30% decrease in s 172 charges, ibid 4.

49 Ibid 4.

Reckless driving and other driving offences during a police pursuit

Section 60(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 member of the Police Force. 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 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 3538 offenders charged with 'pursuit offences'. However, he did not provide details in relation to the number of offenders sentenced under the mandatory provisions.[50]

As one example demonstrating the inappropriateness of mandatory sentencing, ALSWA represented 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. The client 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. He 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 the young male 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 imprisonment. The magistrate indicated that if it wasn't for the mandatory sentencing regime, the sentence would be have less or possibly not one of imprisonment at all. 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.

Breach Violence Restraining Orders

Although not strictly a form of mandatory sentencing, s 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 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 Law Reform Commission of Western Australia in its 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

50 Western Australia, Parliamentary Debates, Legislative Assembly, 22 October 2014, 7753 (Mr J Day).

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.[51] This is just one example that demonstrates the potential unfairness of mandatory sentencing because such laws fail to recognise exceptional and individual circumstances.

Another pertinent example is where the person protected by a violence restraining order initiates the contact with the person bound by the order. ALSWA has represented numerous clients in this position, especially in the Kimberley region. In a number of instances, persons protected by violence restraining 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 penalty regime does enable these circumstances to be appropriately taken into account.[52] ALSWA is also 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 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).[53]

Proponents of mandatory sentencing argue that such laws reflect community standards in relation to the appropriate punishment for particular offences; deter future crime; and prevent further crime by removing certain known offenders from the community for a period of time.[54] However, there are **numerous and far stronger arguments against mandatory sentencing**, namely, that these laws:

- **Result in injustice** because they remove or restrict judicial discretion and, accordingly, do not allow the individual circumstances of the offence and/or the offender to be taken into account.[55] Such regimes fail to recognise that all offences in a similar category (ie, all home burglaries) are not identical or of equal seriousness and that all offenders are not the same. In

51 Law Reform Commission of Western Australia, *Enhancing Laws Concerning Family and Domestic Violence*, Final Report, Project No 104 (2014) 116.

52 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.

53 See also Law Reform Commission of Western Australia, *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'.

54 Roth L, *Mandatory Sentencing Laws* (NSW Parliamentary Research Services, e-brief 1/2014, January 2014) 2.

55 Ibid 3.

a report on the Children's Court of Western Australia, it was 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'.[56] Further, as highlighted by the Western Australian Association for Mental Health (WAAMH), mandatory sentencing removes the important protection afforded by judicial discretion to appropriately take into account differences in moral culpability, for example, for offenders who are suffering from mental impairment. WAAMH highlighted that there are 'instances of people receiving mandatory sentences for assault to police officers when resisting arrest during psychotic episodes'.[57] ALSWA is also particularly concerned about the impact of mandatory sentencing on Aboriginal people with cognitive impairments such as FASD. The presence of FASD may significantly impair judgement and decision-making such as the inability to recognise the consequences of one's actions.[58] Mandatory sentencing does not enable the judicial officer to take into account reduced culpability and the special circumstances in these instances.

- **Do not deter** would-be offenders, especially disadvantaged and vulnerable people because mandatory penalties are highly unlikely to influence people suffering from mental impairment, alcohol and/or drug dependency or those who are socially and economically disadvantaged. The New South Wales Law Reform Commission has commented on research from the Bureau of Crime Statistics and 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]

> 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]

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56 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.

57 Western Australian Association for Mental Health, Contributions for submissions to Senate Finance and Public Administration Committee inquiry (17 April 2015).

58 See further Closing the Gap Clearinghouse, *Fetal Alcohol Spectrum Disorders: A review of interventions for prevention and management in Indigenous communities* (2015) Resource Sheet No 36, 10; Parliament of Australia, House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: The Hidden Harm* (November 2012); Submission of Catherine Crawford to the House of Representatives Standing Committee on Indigenous Affairs inquiry into the harmful use of alcohol in Aboriginal communities (June 2014).

59 New South Wales Law Reform Commission, *Sentencing*, Report No. 139 (2013) 31 (emphasis added).

60 Ibid 32.

- **Contribute to higher recidivism rates** because imprisonment is the least successful option for rehabilitating offenders.[61] In this regard, the Office of the Inspector of Custodial Services has observed that the recidivism rate for Western Australia has been 'typically between 40 and 45 per cent' over the past decade.[62] This means that approximately 40 to 45% of prisoners who are released from prison return to prison within two years. The figure for Aboriginal prisoners is far worse – the 'Aboriginal recidivism rate is 25 percentage points higher than the non-Aboriginal recidivism rate'.[63] Similarly, it has been stated that the recidivism rate of Aboriginal adult males is 70% and for Aboriginal adult females it is 55%.[64] WAAMH has emphasised the high incidence of mental health issues among Aboriginal people[65] and that mental illness can be aggravated by prison because of the prison experience itself and the lack of appropriate and sufficient custodial mental health care facilities. Sending mentally impaired offenders to prison under mandatory sentencing regimes is highly likely to increase recidivism upon release in contrast to diversion into mental health treatment in the community.[66]

- **Shift discretion** from the open and accountable decision-making of judicial officers (ie, sentencing decisions are heard in open court and are subject to an appeal process) to the far less transparent decision-making processes of police and prosecutions.

- **May cause additional trauma and stress for victims and lead to increased costs to the justice system**[67] 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; and

- **Do nothing to address the underlying causes of crime and reduce the overall incidence of crime in the community.** As just one example, the Western Australia Police data in relation to

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

62 Ibid 4. The OICS observed that Western Australia experienced a significant decline in the recidivism rate in 2009/10; however, it was also observed that this decline may be partly attributable to a change in the practices of the Prisoner's Review Board during that period. In 2008/09, 66% of prisoners released from prison were released on an early release order (eg, parole). In contrast, in 2009/10 only 39% of prisoners released from prison were released on an early release order. Overall, it was stated that it 'remains to be seen whether the drop in the recidivism rate for 2009/10 can be sustained and its causes are not clear' (8).

63 Ibid 12.

64 Western Australia Parliament, Community Development and Justice Standing Committee, *Making our Prisons Work: An inquiry into the efficiency and effectiveness of prisoner education, training and employment strategies*, Report No 6 (2010) 72.

65 WAAMH noted that the '2004–05 National Aboriginal and Torres Strait Islander Health Survey (NATSIHS) (2006) found Indigenous Australians were twice as likely to report high or very high levels of psychological distress as non-Indigenous Australians'.

66 Western Australian Association for Mental Health, Contributions for submissions to Senate Finance and Public Administration Committee inquiry (17 April 2015).

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

> home burglaries demonstrates that only a small proportion of home burglaries are 'solved'. In 2013–2014 there were 25,971 home burglaries reported to the police but less than 3,000 home burglaries were 'cleared up' in the same time period (11%). A similar rate applied in the period 2012–2013.[68] So, conservatively for at least 85% of home burglaries the perpetrator or perpetrators are never found nor held to account. One can easily surmise that those home burglars who are less sophisticated (eg, mentally impaired offenders, intoxicated offenders) are more likely to be caught than more professional burglaries who better equipped to reduce their chance of detection. Measures that are designed to address the underlying causes of offending behaviour are more likely to reduce the true incidence of home burglary.

Furthermore, 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).

ALSWA is of the view that the extension of mandatory sentencing laws in Western Australia will only serve to increase the already unacceptable level of overrepresentation of Aboriginal persons in custody in this state and strongly urges the repeal of all existing and future mandatory sentencing provisions.

(e) The reasons for the high incarceration rates for Aboriginal and Torres Strait Islander men, women and juveniles

The reasons for the high incarceration rates for Aboriginal and Torres Strait Islander men, women and children are well documented and have been repeatedly examined by numerous federal and state inquiries.[69] In summary, ALSWA is of the view that the reasons 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

68 http://www.police.wa.gov.au/Aboutus/Statistics/Crimestatistics/tabid/1219/Default.aspx.

69 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, 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). See also 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) 16–19.

itself (ie, the failure to recognise cultural differences and the existence of laws, processes and practices within the justice system that discriminate, either directly or indirectly, against Aboriginal people such as over-policing practices by Western Australia Police, punitive bail conditions imposed by police and inflexible and unreasonable exercises of prosecutorial decisions by police). In this regard it has recently been observed that:

> Several factors have been identified in the literature as potentially influencing Indigenous overrepresentation in criminal justice systems, including: discrimination and prejudice by police, increased police presence and monitoring in Indigenous communities, poor awareness of Indigenous culture, language barriers, lower rates of access to diversionary processes, lack of appropriate support programs, and inadequate access to legal representation.[70]

In a recent speech, the Chief Justice of Western Australia, Wayne Martin argued that the overrepresentation of Aboriginal people in the criminal justice system is a result of the reality that Aboriginal people are 'overrepresented amongst those who commit crime' and that Aboriginal people are 'overrepresented amongst the most marginalised and disadvantaged people within our society, and it is the most marginalised and disadvantaged people within our society who are much more likely to commit crime'.[71] However, the Chief Justice also highlighted 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. [72]

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 crimes 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. If higher rates of offending among Aboriginal people were the sole cause of higher incarceration rates then there should be no difference in the rate of overrepresentation between different states and territories. Incidentally, it has been stated that:

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70 Higgins D & Davis K, 'Law and Justice: Prevention and early intervention programs for Indigenous youth' (Closing the Gap Clearinghouse, Resource Sheet No 34, July 2014) 4.

71 The Honourable Wayne Martin AC, Chief Justice of Western Australia, *Indigenous Incarceration Rates: Strategies for much needed reform* (Law Summer School 2015) 7–8.

72 Ibid 8–9.

> 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.[73]

Furthermore, the fact that the level of overrepresentation of Aboriginal people increases the deeper within the justice system one examines (eg, from the time of arrest to imprisonment) supports the contention that there is structural bias or discrimination within the system itself.[74] In other words, various practices and processes within the justice system serve to further alienate and discriminate against Aboriginal people resulting in harsher outcomes. As noted at the outset, Aboriginal juveniles comprise close to 80% of the juvenile detention population in Western Australia; yet Aboriginal children make up 67% of juveniles subject to community supervision[75] and approximately 43% of diversionary options (oral cautions, written cautions and referrals to juvenile justice teams).[76] It has been observed that Aboriginal children are less likely to receive a police caution and more likely to be referred to formal court proceedings than non-Aboriginal children.[77] The Auditor General in Western Australia found in 2008 that '27% of indigenous young people aged 15 or less who have high levels of repeat offending have never been referred to a juvenile justice team by police'.[78] The cumulative effect of these outcomes cannot be ignored.

In ALSWA view, current examples of structural bias or discrimination within the justice system include:

- **Lack of Aboriginal-specific or Aboriginal-owned programs and services within the justice system, in particular in regional and remote areas**[79]

  It has been observed that:

  > The absence of service options is particularly marked in rural Western Australia, impacting most severely on Aboriginal children, who constitute the vast majority of clients. Across both protective and criminal jurisdictions children are denied access to experienced, professionally qualified staff and crucial facilities such as bail hostels, mental health, specialised therapeutic,

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73 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.

74 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) 9.

75 Western Australia, Department of Corrective Services, Weekly Offender Statistics (WOS) Report as at 26 June 2014.

76 Commissioner for Children and Young People, Western Australia, *Youth Justice – Supporting vulnerable children and young people in WA*, Policy Brief (March 2015) 2.

77 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) [7.1].

78 Auditor General of Western Australia, *The Juvenile Justice System: Dealing with young people under the Young Offenders Act 1994* (WA) 21.

79 See LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture,* Final Report (2006) 84; Office of the Inspector of Custodial Services, *Recidivism Rates and the Impact of Treatment Programs* (September 2014) [6.2] where it was observed that in Western Australia there are insufficient programs for women prisoners and for prisoners held in the 'Aboriginal-dominated prisons of Broome, Roebourne, Greenough and Eastern Goldfields'.

> health and educational facilities, and places of safety when remaining at home is unacceptable.[80]

Given that 40% of adults imprisoned in Western Australia are Aboriginal and 77% of juvenile detainees are Aboriginal, there should be a large proportion of programs and services within the justice system that are specifically designed for Aboriginal offenders; however, this is not the case. The Office of Inspector of Custodial Services has observed that 'improvements in program availability [within prisons] have not been equitably distributed. In 2013 the gap between treatment needs and program delivery was markedly different between metropolitan and regional 'Aboriginal' prisons (those where the proportion of Aboriginal prisoners is 75 per cent or more). Prisoners released from 'Aboriginal' prisons were far more likely to have treatment needs unaddressed due to programs being unavailable'.[81] In 2014 the President of the Children's Court observed that there 'has been an almost complete absence of rehabilitation programs for Aboriginal children for many years despite the ongoing urgent need for them'.[82] Also, WAAMS highlighted to ALSWA that the 'lack of effective, culturally appropriate mental health treatment prior to, during and after imprisonment is one significant factor associated with the ongoing high rates of Aboriginal imprisonment' in Western Australia.[83]

Nonetheless, ALSWA acknowledges that the Department of Corrective Services apparently intends to increase the provision of Aboriginal-owned programs and services within the corrections system. The Department of Corrective Services Draft Reconciliation Action Plan 2015 states that initiatives include 'increasing the number of programs run by Aboriginal people for Aboriginal people, and funding more programs like the Fairbridge Bindjareb project that works with Aboriginal young men and involves re-engagement with and respect for culture to build self-esteem through mentioning and workplace training'.[84] Further, on 13 March 2015 the Minister for Corrective Services announced the first grant under to the Youth Justice Innovation Fund to the Wirrpanda Foundation's Moorditj Ngoorndiak program which is described as an 'Aboriginal-designed and run mentoring program' for Aboriginal males aged

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80 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) 22–23.

81 Office of the Inspector of Custodial Services, Recidivism Rates and the Impact of Treatment Programs (September 2014) 27.

82 Judge Dennis Reynolds, *Youth Justice in Western Australia – Contemporary Issues and its future direction*, (University of Notre Dame, 13 May 2014) 17.

83 Western Australian Association for Mental Health, Contributions for submissions to Senate Finance and Public Administration Committee inquiry (17 April 2015). It was further contended that the provision of health care in correctional settings should be the responsibility of the relevant health department rather than corrective services and that 'such a division might incorporate prison health, forensic health, community and court based health issues allowing a focus on early intervention, prevention and diversion of at risk groups'.

84 https://www.correctiveservices.wa.gov.au/_files/about-us/draft-reconciliation-action-plan-2015.pdf.

12 to 19 at Banksia Hill Detention Centre. The mentors will work with detainees and their families for up to four months in custody and then for at least a further six months in the community.[85] ALSWA strongly supports more initiatives of this nature and emphasises that the commitment to increasing Aboriginal-owned justice programs must be long term with the provision of recurrent and adequate funding.

- **Lack of availability and lack of use of Aboriginal interpreters within the justice system**

ALSWA submits that the continued lack of availability of Aboriginal interpreters and failure to use Aboriginal interpreters when they are available is an ongoing serious problem in the justice system, in particular in Western Australia. It has been observed that Aboriginal people from the Northern Territory and Western Australia are less likely to speak English as a first language than Aboriginal people from the rest of Australia.[86] ABS census data from 2011 reveals that 17% of Aboriginal people who spoke an Aboriginal language at home reported that they did not speak English well or at all.[87]

For those Aboriginal people who are unable to speak English fluently, the use of interpreters within the justice system is vital from the initial time of arrest and interactions with police, throughout the court proceedings and also within the corrections and prison systems.

> Although many Indigenous people with limited English language skills can get by in everyday social situations, the misunderstandings and confusion that can occur in communicating with police or justice officials has the potential for serious consequences.[88]

The *Doing Time – Time for Doing* report recommended that criminal justice guidelines should 'include the formal recognition of the requirement to ascertain the need for an interpreter service or hearing assistance when dealing with Indigenous Australians'.[89] Further, it was recommended that the Commonwealth government in conjunction with state and territory governments should establish and fund a national interpreter service with sufficient resources to service remote areas.[90] The Productivity Commission also recommended that the federal and state and territory governments 'should continue to work together to explore the use of the Northern Territory Aboriginal Interpreter Service as a platform for a National Indigenous Interpreter Service funded by ongoing contributions from Australian, State and Territory

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85 http://www.mediastatements.wa.gov.au/Pages/StatementDetails.aspx?StatId=9195&listName=StatementsBarnett.

86 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) [7.45].

87 2076.0 - Census of Population and Housing: Characteristics of Aboriginal and Torres Strait Islander Australians, 2011.

88 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) [7.46].

89 Ibid Recommendation 24.

90 Ibid, Recommendation 25.

Governments. While this service is being developed governments should focus their initial efforts on improving the availability of Aboriginal and Torres Strait Islander interpreter services in high need areas, such as in courts and disputes in rural and remote communities'.[91]

Against this backdrop, the Western Australian government has discontinued its funding of the only Aboriginal interpreter service in Western Australia (Kimberley Interpreter Service). In response to this, Chief Justice Wayne Martin has highlighted 'if we do not have properly resourced and effective interpreter services for Aboriginal people, then they will continue to fare badly in the criminal justice system'. A recent Western Australian case illustrates the ongoing failures of the justice system in regard to the use of interpreters - an Aboriginal accused charged with murder was not afforded an interpreter when interviewed by police. The Hall J observed, when ruling that the police interviews were inadmissible, that:

> Because the accused had only a very limited understanding of English the absence of an interpreter means that I cannot be confident that he understood what the police said to him about his rights. Nor can I be confident that he sufficiently understood police questions or that his answers can be accepted at face value.[92]

ALSWA submits that it is unacceptable that Aboriginal people for whom English is a second or third language continue to be questioned by police without the presence of an interpreter. It is equally objectionable that Aboriginal people who cannot adequately understand English are required to participate in rehabilitation and training programs within the justice system without the benefit of an interpreter. Furthermore, it is manifestly unjust that Aboriginal people appear in court on a daily basis with limited or no understanding of the proceedings because there are no interpreters available in their Aboriginal language. In contrast, for example, if an accused person is an alleged Indonesian people trafficker and does not speak English, the system operates to ensure that their matter is adjourned and at every appearance thereafter an Indonesian interpreter will be present. ALSWA is strongly of the view that a statewide interpreter service should be established in Western Australia as a matter of priority and that such a service should provide interpreters on a daily basis at every court where the need for their arises.

- **Mandatory sentencing**

ALSWA has provided detailed comments above in relation to mandatory sentencing and its disproportionate impact on Aboriginal people. In regards to indirect discrimination ALSWA highlights that the offences selected for mandatory sentencing regimes are invariably the types of offences that are predominantly committed by vulnerable and disadvantaged persons

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91 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report Overview (September 2014) 66.

92 *The State of Western Australia v Gibson* [2014] WASC 240 [84].

(ie, Aboriginal people, people with mental illness and/or cognitive impairment, people who are economically and socially disadvantaged). Despite the serious consequences of white collar crime and fraud on the community at large, these offences are not targeted by tough law and order strategies.

- **Impact of the regulation of road traffic and driving offences**

Road traffic and driving laws in Western Australia do not accommodate the circumstances of Aboriginal people living in remote communities. For many Aboriginal people driving without a licence is the only realistic option due to the lack of any other available forms of transport. As Chief Justice Wayne Martin stated, there 'are far too many Aboriginal people in prison whose only crimes has been to drive without a driver's licence. Traffic laws fashioned for the metropolitan area can operate unjustly in remote communities'.[93] ALSWA recognises that the Department of the Attorney General targets this issue through the Aboriginal Justice Program by providing open days in regional areas which include the provision of assistance with driving licence tests and to obtain drivers licences.[94] Nonetheless, the accumulation of repeated drivers licence suspensions coupled with suspensions for unpaid fines means that many Aboriginal people face years before they will be lawfully permitted to drive.

- **Over-policing of Aboriginal people**

The over-policing of Aboriginal people must be acknowledged and addressed. The *Doing Time – Time for Doing* report stated that:

> 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.[95]

For that inquiry, ALSWA referred to a number of case examples in its submission.[96] 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. As a consequence of formal police intervention this boy spent several hours in police custody and

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93 The Honourable Wayne Martin AC, Chief Justice of Western Australia, *Indigenous Incarceration Rates: Strategies for much needed reform* (Law Summer School 2015) 11.

94 Department of the Attorney General, *Annual Report 2013–2014* (2014) 33.

95 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].

96 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).

was placed on a curfew by justices of the peace. Other examples included a 15-year-old boy from a regional area being charged with attempting to steal an ice-cream and 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.[97]

In Western Australia, the police have the option of issuing an 'informal warning' to children; however, data in relation to the number of informal warnings issued is not available. In the 2008 review by the Auditor General of Western Australia it was observed that, anecdotally, police issue about half a million informal warnings per year, mainly for anti social behaviour and minor misdemeanours.[98] Based on its experiences, ALSWA does not believe that Aboriginal children receive the benefit of this option anywhere near as frequently as non-Aboriginal children and it is concerning that there is no publicly available data to examine the police practices in this regard.

- **Funding of ATSILS**

ALSWA has referred to the underfunding of ATSILS above including the lower funding of ATSILS in comparison to Legal Aid and the gap between salaries of Legal Aid lawyers and ATSILS lawyers. If governments are serious about addressing disadvantage within the justice system, it is imperative that increased resources are provided to ATSILS to enable improved access to culturally appropriate legal services.

- **Lack of Aboriginal people working in the criminal justice system**

Given the high levels of involvement of Aboriginal people in the justice system, it is vital that there are significantly more Aboriginal people working within the justice agencies such as police, corrective services and prisons. A recent South Australian review observed that considering the 'significant over-representation of Aboriginal young people in detention and/or under community supervision, having so few Aboriginal employed within the Youth Justice Directorate restricts the cultural competency of the department'.[99]

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97 Ibid 8.

98 Auditor General of Western Australia, *The Juvenile Justice System: Dealing with young people under the Young Offenders Act 1994* (WA) 19.

99 South Australian Council of Social Service, *Justice or an Unjust System? Aboriginal over-representation in South Australia's juvenile justice system* (April 2015) 14.

The Western Australian Department of Corrective Services Annual Report 2013–2014 states that 'on average 4.7% of the Department's permanent staff identified as being Aboriginal'.[100] Further, the Department has set a target ratio of 7.25% and is focusing on front-line roles such as prison officers, youth custodial officers, community corrections and youth justice officers, and prevention and diversion officers. It is noted that the Office of the Inspector of Custodial Services is currently reviewing the level of Aboriginal employment within the Department and this review will consider 'whether the Department is meeting its commitment to increase Aboriginal employment' as well as the 'effectiveness of its strategies in attracting, employing and retaining Aboriginal people'.[101] A report is due in mid-2015.

ALSWA supports measures to increase the proportion of Aboriginal staff within the Department; however, even if the targets are reached many Aboriginal offenders under the supervision of the Department will be unlikely to be supervised, mentored, or assisted by Aboriginal staff. As just one example of the potential issues that arise as a result of underemployment of Aboriginal staff within the justice system, in a survey conducted by the Office of the Inspector of Custodial Services it was found that 'Aboriginal prisoners were far less likely to believe that staff were fair and respectful to prisoners than non-Aboriginal respondents. Most Aboriginal people felt that they neither respected nor understood their culture'.[102] ALSWA acknowledges that many Aboriginal people are discouraged from working in the justice system because of the historical poor relations between Aboriginal communities and justice agencies. The reality that the number of Aboriginal staff within the justice system is unlikely to ever reflect the numbers of Aboriginal people being dealt with in the system is another strong justification for increasing the provision of Aboriginal-owned justice services and programs.

- **Imprisonment for unpaid fines**

Following the tragic death of Julieka Dhu in August 2014—a young Aboriginal woman who was being held in police custody for failing to pay fines of approximately $1,000—the Western Australian scheme for enforcing unpaid fines has come under considerable scrutiny. The system of fines enforcement in Western Australia discriminates against vulnerable and disadvantaged persons, in particular Aboriginal people. The number of Aboriginal people imprisoned for fine default in Western Australia has increased by 480% between 2008 and 2013 and, specifically, for Aboriginal women there has been an increase of 576%.[103] In this regard, it has been observed that due to issues such as low incomes, unemployment, poor

100 Department of Corrective Services, *Annual Report 2013–2014* (2014) 37.

101 http://www.oics.wa.gov.au/work-in-progress/current-reviews/.

102 Office of the Inspector of Custodial Services, *Prisoner and Staff Perceptions of WA Custodial Facilities from 2010–2012* (2014) 22.

103 WA Labor Party, *Locking in Poverty: How Western Australia drives the poor, women and Aboriginal people to prison* (November 2014) 2.

literacy and numeracy skills, language barriers and transience, Aboriginal people are 'less likely to be able to pay their fines and less likely to be able to negotiate the fines enforcement system'.[104] As discussed above, ALSWA highlights that the lack of Aboriginal interpreters in Western Australia further compounds the lack of understanding of the court process and its outcomes.

An alternative regime in New South Wales recognises the particular vulnerability of persons with mental health issues, serious alcohol/drug issues, homelessness or acute economic hardship. A special work and development order can be issued to disadvantaged and vulnerable fine defaults enabling them to complete community work or, alternatively, participate in therapeutic programs in lieu of paying the fine. Applications for a work and development orders are supported by an approved organisation or a qualified health professional.[105] The Aboriginal Legal Service (NSW/ACT) and Legal Aid NSW in conjunction with the State Debt Recovery Office operate the Work and Development Order Service to assist fine defaulters and potential sponsors under the WDO scheme.[106] An evaluation of the pilot scheme in 2011 found that it resulted in many positive benefits including that it was an effective tool for engagement with service and treatment providers and preliminary results indicated that there was a degree of success in terms of reoffending – as at February 2011, 82.5% of WDO clients had not received a further fine or penalty enforcement notice.[107] As at April 2011, there were 141 organisations and 77 health professionals participating in the scheme. The evaluation recommended that the scheme be made permanent. ALSWA urges the Western Australian government to address the issue of imprisonment for unpaid fines as a matter of urgency.

- **Punitive bail laws and resulting increases in remand population**

As stated at the outset, Aboriginal people feature in prison and juvenile detention remand numbers at an unacceptable level. In Western Australia a young person under the age of 17 years cannot be released on bail unless a responsible adult signs an undertaking. This provision does not serve Aboriginal children well. For many reasons Aboriginal children are unable to meet this condition (for example, they are more likely to be homeless or living in dysfunctional circumstances). One particular cohort that suffers unjustly from the requirement to obtain a responsible adult undertaking is Aboriginal children under the care of the Department for Child Protection and Family Support. As noted earlier, Aboriginal children are

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104 Williams M & Gilbert R, 'Reducing the Unintended Impacts of Fines' (2011) Indigenous Justice Clearinghouse, *Current Initiatives Paper 2*, 1.

105 See New South Wales, Office of State Revenue, *Work and Development Order Fact Sheet.*

106 http://www.legalaid.nsw.gov.au/what-we-do/civil-law/work-and-development-order-service.

107 New South Wales Government, Attorney General and Justice, *A Fairer Fine System for Disadvantaged People: An evaluation of time to pay, cautions, internal review and the work and development order scheme* (May 2011) 40.

grossly overrepresented in the numbers of children under the formal care of the state – in Western Australia Aboriginal children are 16 times more likely to be in out-of-home care than non-Aboriginal children and approximately 50% of children under the formal care of the state are Aboriginal.[108] For children who are under the formal care of the state, only the Department for Child Protection and Family Support can sign the responsible adult undertaking. Repeatedly, ALSWA is seeing cases where children under the care of the Department remain in custody as a consequence of a decision by the Department not to sign the responsible adult bail undertaking or a decision to postpone the signing of bail because a suitable accommodation placement is not available. ALSWA highlights that these children are the responsibility of the Department and the existence of criminal charges does not lessen that responsibility or shift it to another government agency. In one case, a 15-year-old boy who had been under the care of the Department from the time he was six years old was charged with an offence of wilfully lighting a fire (although the fire spread to an area of few metres it was extinguished by emergency services). The boy was under the influence of cannabis at the time and threw lit matches out of boredom without any real appreciation of the potential damage. He had no prior criminal history. The Department refused to sign a responsible adult undertaking because there was no available accommodation for him and the boy spent 55 days in custody awaiting sentence. On the day of sentencing there was still no accommodation placement put forward by the Department. The sentencing judge indicated that he was considering a community-based option and queried where the boy would go if he were to be released from custody. Comments from the judge to Departmental staff who were present, best illustrate the seriousness of the problem:

> He has been in custody for 55 days. I'm struggling, to be frank, that we've got the resources of the State and no disrespect to you good people, the resources of the State after someone in the care of the State cannot tell, after over seven weeks, nearly eight weeks in custody where someone will go if they the courtroom. I'm struggling.

It was only after this pressure from the judge, his indication that the boy would be placed on a community-based order that day, and after the matter was stood down for a two hours that a residential placement was found.[109] ALSWA also refers to a disturbing case in 2014 when an 11-year-old Aboriginal girl from a regional location in the north of Western Australia was held in a police cell for two days because there was nowhere else for her to stay. She was under the care of the Department and had allegedly threatened staff at the hostel where she was staying. Despite not being released on bail because of the apparent lack of options available, when she appeared in court after her weekend in custody she was released into the care of

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108 Australian Institute of Health and Welfare, *Child Protection Australia 2012–2013* (2014) Child Welfare Series No 58, 14.

109 See further ALSWA, *Submission to the Commonwealth Senate Community Affairs References Committee Inquiry into Out of Home Care* (30 October 2014).

the Department. ALSWA highlights that this issue was referred to back in 2008 when the Auditor General of Western Australia recommended that the Department review their practices to ensure that no children under the protection of the Director General are refused bail on 'no responsible adult' grounds.[110]

ALSWA is also of the view that the imposition of punitive and unnecessary bail conditions on juveniles (eg, curfews) and the strict monitoring and enforcement of these conditions by police is resulting in more charges and higher levels of involvement in the justice system. Curfew conditions appear to be vigorously enforced by police and there have been instances where ALSWA has been informed that police have visited a child's home three to four times in one night to check if the child is present. This can be extremely disrupting to other members of the family, especially younger children. In some cases, ALSWA has informed the court of this practice and has successfully argued for the removal of curfew conditions. From the information available to the ALSWA it appears that children are invariably charged with breaching bail conditions if they are found outside the home without adult supervision. This is even the case where the child may have been five minutes late to return home or has become separated briefly from his or her responsible adult in a public area such as a shopping centre.

- **The Western Australian Department of Housing ('three strikes') Disruptive Behaviour Management Strategy (DBMS)**

The DBMS was introduced in 2011 and it results in proceedings for eviction for public housing tenants who accumulate 'three strikes' for disruptive behaviour within a 12-month period. Disruptive behaviour is defined as 'activities that cause a nuisance, or unreasonably interfere with the peace, privacy or comfort, of persons in the immediate vicinity'.[111] Examples provided include 'domestic and family disputes which impact on neighbours' and 'substantial and unreasonable disturbance from children associated with loud noise'. The Equal Opportunity Commissioner has observed that the DBMS 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

110 Auditor General of Western Australia, *The Juvenile Justice System: Dealing with young people under the Young Offenders Act 1994* (WA) 9.

111 See http://www.dhw.wa.gov.au/HousingDocuments/DBM_brochure.pdf. More serious behaviour will result in eviction proceedings at an earlier stage (ie before three strikes are accumulated).

antisocial behaviour. In turn, this adds to the likelihood of additional complaints under the DBMS.[112]

It has recently been observed that Aboriginal children are between six and 13 times more likely 'to be clients of homelessness services than non-Aboriginal children and young people'.[113] It is ALSWA's view that this strategy is impacting disproportionately on Aboriginal families and causing homelessness and overcrowding which, in turn, may lead to Department of Child Protection and Family Support intervention and/or further eviction proceedings. Furthermore, resulting homelessness and/or overcrowding may lead to offending behaviour or cause practical difficulties in terms of accessing non-custodial release options because of a lack of suitable accommodation (eg, release on bail, release on parole).

(f) The adequacy of statistical and other information currently collected and made available by state, territory and Commonwealth governments regarding issues in Aboriginal and Torres Strait Islander justice

ALSWA's experience is that available data regarding issues concerning the involvement of Aboriginal and Torres Strait Islander people in the justice system are inadequate. Some examples include:

- The Western Australian Department of Corrective Services weekly offender statistics[114] which shows, among other things, the proportion of adult prisoners and juvenile detainees who are Aboriginal have not been publicly available since 26 June 2014.

- As far as ALSWA is aware there is no publicly available data in Western Australia to demonstrate the proportion of Aboriginal children under the care of the state who are simultaneously involved in the juvenile justice system. As stated above, approximately 50% of children under the care of the state in Western Australia are Aboriginal and approximately 77% of children in detention are Aboriginal - anecdotally there is a high crossover of cases where children are involved in both the justice and child protection systems. It has been observed that 'knowledge about the extent of multiple-sector involvement and the types of children and young people who are

112 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.

113 Commissioner for Children and Young People, Western Australia, *Housing and Homelessness: The impact on the wellbeing of WA children and young people*, Policy Brief (March 2015) 1.

114 https://www.correctiveservices.wa.gov.au/about-us/statistics-publications/statistics/2014.aspx.

involved would allow government and non-government agencies to provide more targeted services'.[115]

- The true prevalence of mental health problems and the incidence of intellectual disability (such as FASD) among children involved in the criminal justice system are unknown.[116] It has also recently been observed by First Peoples Disability Network (Australia) that 'data of people with disability in the justice system is largely absent'. Given that the Australian Bureau of Statistics (ABS) estimates that 50% of Aboriginal and Torres Strait Islander people[117] have some form of disability or long-term health condition it is highly likely that a considerable number of Aboriginal people in custody and generally in the criminal justice system also have a disability.

- In its reference on family and domestic violence in 2013, the Law Reform Commission of Western Australia sought data in relation to the Aboriginal status of persons protected by violence restraining orders and, in response, the Commission was informed that available data in relation to Aboriginality is unreliable.[118]

- There is a scarcity of published information by the Department of Corrective Services about the effectiveness of programs and services for Aboriginal people in Western Australia. The Office of the Inspector of Custodial Services has observed that despite some progress by the Department of Corrective Services in relation to the delivery of programs, problems remain. One of these problems is that the 'Department of Corrective Services does not have any robust evaluations which can explain what works for whom, and why, by way of programs in the Western Australian context'.[119]

- Similarly, a joint submission from WACOSS, WAAMH and WANADA to the Western Australian Economic Regulation Authority's current prisons inquiry highlighted the lack of available data from the Department of Corrective Services. This submission notes that a 2014 Department of Corrective Services report on recidivism in Western Australia was prefaced by the Commissioner with the observation that the reasons for

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115 Australian Institute of Health and Welfare, *Children and Young People at risk of social exclusion: links between homelessness, child protection and juvenile justice* (2012) 1.

116 Commissioner for Children and Young People, Western Australia, *Youth Justice – Supporting vulnerable children and young people in WA*, Policy Brief (March 2015) 5.

117 First Peoples Disability Network Australia, *Justice System and Policy Reform to Address the Unwarranted Detention of People with Mental Impairment: A submission to the review of the Western Australian Criminal Law (Mentally Impaired Accused) Act* 1996 (2014) 2 & 8.

118 Law Reform Commission of Western Australia, *Enhancing Laws Concerning Family and Domestic Violence*, Discussion Paper, Project No 104 (2013) 57.

119 Office of the Inspector of Custodial Services, *Recidivism Rates and the Impact of Treatment Programs* (2014) [6.2].

the recent decline in recidivism are 'unclear'. It was further stated in the introduction by Commissioner McMahon that:

> There is no doubt that some of what we are doing is highly effective, but without reliable evidence to the contrary, I must assume that some of the measures we currently undertake in an effort to reduce recidivism do not work. To find out for certain will require a robust framework of reliable data collection and monitoring, along with independent evaluation.[120]

ALSWA agrees with the comments in the joint submission that:

> [T]he lack of any explanation as to why recidivism rates have fallen means that the Department has no evidence upon which to base future decisions in order to replicate/continue/expand/address those programs/services/factors which have contributed to these improved results. The Commissioner's comments are a shocking indictment on the Department and its ability to measure and evaluate its own performance at present. Without robust measurement and evaluation, how can the Department determine whether the Department's programs and services it offers to prisoners are effective? Understanding such things is critical to improving the performance of the prison system in WA, and should be the priority of the Department and its stakeholders.[121]

It is acknowledged that the Department of Corrective Services has established a 'Knowledge and Information (KIT) Directorate' in order to improve data collection; however, ALSWA agrees with the view expressed in the joint submission that 'it is imperative that [the Department] be open and transparent about both the data they are collecting, and how this data is being used across policy, planning and procurement'.[122]

- In the abovementioned submission it was highlighted that the 'assessment of the [alcohol or drug] support needs of prisoners is not routinely conducted at prison entry. This gap in relevant data was evident in the inability of WA to provide statistics to the AIHW *Health of Australia's Prisoners Report (2012)*, as well as the need for modelling to be undertaken specifically to inform the development of the [Mental Health Alcohol and Drug] Plan'.[123]

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120 Department of Corrective Services, *Recidivism Trends in Western Australia with Comparisons to National Trends* (2014) 2.

121 Western Australian Council of Social Services, Western Australian Association for Mental Health & Western Australian Network of Alcohol and Other Drug Agencies, *Joint Submission to the Economic Regulation Authority's Prisons Inquiry* (9 January 2015) 52-53.

122 Ibid 7.

123 Ibid 37.

- The Australian Institute of Health and Welfare publishes various report and papers as part of the Juvenile Justice National Minimum Data Set (JJNMDS). Western Australia has not contributed data to the JJNMDS from 2008/09 to 2012/13. This gap means that valuable information concerning the juvenile justice system in Western Australia is excluded.[124] For example, the publication, *Youth Justice in Australia 2012–2013*, states at the outset that it provides information on young people under supervision in the community and in detention; however, the data is reported for all jurisdictions other than Western Australia and the Northern Territory. Estimates for Western Australia and Northern Territory are included where possible.[125]

- Australian Bureau of Statistics data in relation to recorded offenders only presents data about Aboriginal and Torres Strait Islander offenders for New South Wales, Queensland, South Australia and the Northern Territory for the periods 2008/09 to 2012/13. The data for other jurisdictions is not considered to be of sufficient quality for inclusion and/or does 'not meet ABS standards for self-identification for national reporting'.[126] In 2008 it was observed that in Western Australia, for 'half of the young people in contact with police, their ethnicity and indigenous status was not recorded. This makes it difficult to conduct a thorough analysis of indigenous young people and the juvenile justice system'.[127]

It is noted that in the 2008 report of the Auditor General of Western Australia, it was recommended that the Western Australia Police, Department of Corrective Services and the Department of the Attorney General 'improve the extent to which they record data on ethnicity and indigenous status to enable better monitoring and evaluation of the impact of initiatives on young people from diverse backgrounds'.[128] The *Doing Time – Time for Doing* report recommended various improvements to data collection by the Australian Bureau of Statistics and the Australian Institute of Health and Welfare.[129]

ALSWA by no means suggests that the above examples are the only examples of inadequacies in relation to available data. However, these examples serve to illustrate the extent of the problem, at least, in Western Australia. If governments are genuine about addressing the appalling extent of overrepresentation of Aboriginal people in the justice system, it is essential that proper and reliable

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124 http://www.aihw.gov.au/youth-justice/data-quality/.

125 Australian Institute of Health and Welfare, *Youth Justice in Australia 2012–2013* , Bulletin 120 (April 2014) 1.

126 Australian Bureau of Statistics, Recorded Crime Offender 2012-2013, 4519.0 – explanatory notes.

127 Auditor General of Western Australia, *The Juvenile Justice System: Dealing with young people under the Young Offenders Act 1994* (WA) 16.

128 Ibid 8.

129 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) Recommendation 34.

data is maintained during all stages of the justice process and by all justice agencies. This data must easily comparable between agencies and must be accessible publicly. ALSWA strongly supports 'justice targets' (as explained further below) and believes that the requirement for state governments to report against justice targets will encourage better data recording and analysis.

(g) The cost, availability and effectiveness of alternatives to imprisonment for Aboriginal and Torres Strait Islander Australians, including prevention, early intervention, diversionary and rehabilitation measures

It is well understood that imprisonment is very expensive. The Economic Regulation Authority of Western Australia has recently stated that in 2013-14 the 'total net cost to the State of providing prisons was $608 million'.[130] It is also known that imprisonment and detention are more expensive that supervision and support provided in a community setting. In Western Australia in 2013–2014 it cost $334 per day to imprison an adult and $814 per day to detain a child. In comparison it cost $46 per day to supervise an adult offender in the community and $90 per day to supervise a child in the community.[131] ALSWA acknowledges that there are some offenders who commit such serious offences that imprisonment is the only viable option and that there will remain a continuing need for prisons and detention centres. However, bearing in mind the enormous financial cost to the community coupled with the reality that imprisonment and detention does not perform well in terms of addressing the underlying causes of offending behaviour and preventing future crime, it is crucial that more effective alternatives are developed and adopted, especially for lower level offending.

There have been numerous calls for adopting a 'justice reinvestment' approach in Australia along with the obvious need to resource and support culturally appropriate programs for early intervention, diversion and rehabilitation. The President of the Children's Court in Western Australia has stated that offending by Aboriginal children will not be solved without resourcing culturally appropriate programs and the inclusion of Aboriginal people.[132] The *Doing Time – Time for Doing* report indicated its support of justice reinvestment principles and recommended that governments 'focus their efforts on early intervention and diversionary programs and that further research be conducted to investigate a justice reinvestment approach in Australia.[133] A recent South Australian review of the juvenile justice system supports justice reinvestment and stated that this approach 'aims to divert a portion of funds spent on incarceration to local community initiatives where it is invested in early intervention and prevention

130 Economic Regulation Authority, *Inquiry into the Efficiency and Performance of Western Australian Prisons*, Discussion Paper (March 2015) 4.

131 Department of Corrective Services, Annual Report 2013–2014 (2014) 13.

132 Judge Dennis Reynolds, *Youth Justice in Western Australia – Contemporary Issues and its future direction*, (University of Notre Dame, 13 May 2014) 18.

133 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) Recommendation 40.

services'.[134] It was further explained that justice reinvestment involves four stages: demographic/justice mapping and data analysis; development of options; implementation; and evaluation.

In its contribution for this submission, WAAMH emphasised that the 'criminalisation of social and health issues' is a 'key feature' of the existing criminal justice system in Western Australia. It further stated that there are strong links between substance abuse, mental health and cognitive impairment and other issues relating to health and disability.

> The lack of support provided to those experiencing significant social and health disadvantage together with the lack of appropriate and effective treatment for mental health, alcohol and other drug problems (and their comorbidity) contributes to circumstances where those affected and untreated and significantly more likely to end up in our justice system. [135]

ALSWA agrees that prevention is always better than cure and appropriate programs and services must be provided to address these underlying factors which are, unfortunately, too frequently a characteristic of the vast majorly of Aboriginal people who are involved in the justice system.

ALSWA strongly supports a justice reinvestment approach so long as any initiatives recognise the importance of Aboriginal ownership and participation. In this regard, it is highlighted that the *Doing Time – Time for Doing* report emphasised five key principles to be applied in addressing Aboriginal disadvantage and disproportionate incarceration:

- Aboriginal communities must be involved in the development and implementation of policy and programs.
- There must be a holistic approach to addressing the needs of Aboriginal families and communities.
- Responses must be integrated and coordinated by government agencies, non-government agencies and local individuals and groups.
- There must be a focus on early intervention rather than punitive response.
- Aboriginal leaders and elders must be engaged in positions of authority.[136]

Similarly, in its comprehensive 2006 report on Aboriginal customary laws,[137] the Law Reform Commission of Western Australia made a number of recommendations designed to reduce or

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134 South Australian Council of Social Service, *Justice or an Unjust System? Aboriginal over-representation in South Australia's juvenile justice system* (April 2015) 24.

135 Western Australian Association for Mental Health, Contributions for submissions to Senate Finance and Public Administration Committee inquiry (17 April 2015).

136 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) [x].

eliminate discrimination and disadvantage experienced by Aboriginal people in the justice system, including:

- The provision of resources for adequate and accessible programs and services for Aboriginal people in the justice system, especially Aboriginal-owned programs and services (Recommendation 7).
- The establishment of Aboriginal community justice groups with functions to include the development of local justice strategies and crime prevention programs; the provision of diversionary options; the supervision of offenders on community-based orders; and undertaking the role of responsible persons for bail in lieu of a surety (Recommendations 17 & 29).
- The establishment of Aboriginal courts for adults and children in regional and metropolitan (Recommendation 24).

A very recent review of the South Australian juvenile justice system recommended that 'youth justice policies and practices should be informed by principles of self-determination – of involving and empowering Aboriginal people at all levels of the system'.[138]

Bearing these sentiments in mind, ALSWA submits that alternatives to imprisonment for Aboriginal and Torres Strait Islander Australians such as prevention, early intervention, diversionary and rehabilitation measures must be designed by and for Aboriginal people and appropriately resourced to enable long-term sustainability. It is also crucial that programs are evaluated and proper data collection and recording measures are established at the outset to support effective evaluations. It has been observed that even 'when programs are evaluated, there are often challenges in obtaining adequate data to sufficiently inform the evaluation, particularly where evaluation is not built into the initial program design and implementation'.[139]

(h) The benefits of, and challenges to, implementing a system of 'justice targets'; and

The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs expressed concern that none of the Closing the Gap targets actually addressed the 'Safe Communities Building Block'.[140] It further argued that 'investment in education, health, housing and

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

138 South Australian Council of Social Service, *Justice or an Unjust System? Aboriginal over-representation in South Australia's juvenile justice system* (April 2015) 5.

139 Higgins D & Davis K, 'Law and Justice: Prevention and early intervention programs for Indigenous youth' (Closing the Gap Clearinghouse, Resource Sheet No 34, July 2014) 10.

140 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) [2.62].

employment initiatives are sufficient to close the gap in Indigenous justice outcomes'.[141] While acknowledging the obvious benefits of investment in these areas it is also important to 'recognise intergenerational patterns in which a significant number of Indigenous people are entangled already within the criminal justice system. These people return to their communities upon release, often without improved prospects and with the capacity to negatively influence others in their communities'.[142] Therefore, it was recommended that there should be a National Partnership Agreement dedicated to the Safe Communities Building Block and that justice targets be included in the Closing the Gap strategy.[143] ALSWA is a strong proponent of justice targets and believes that the current omission of justice targets from the Closing the Gap strategy discourages state and territory governments from ensuring accurate data recording and from developing an 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.

(i) Any other relevant matters

CONCLUSION

ALSWA concludes its submission by emphasising what it stated at the outset. There have been numerous inquiries examining the disgraceful position that exists in respect of Aboriginal peoples' experience with law enforcement and justice services and the resulting overrepresentation of Aboriginal people in custody. Many of these inquires (such as those referred to in this submission) have made appropriate and useful recommendations for reform. Few of these reforms have ever been implemented. ALSWA considers that the major obstacle to implementing necessary reform is a lack of political will (from both sides of Parliament). Tough law and order policies (such as mandatory sentencing and hardening approaches to fine defaulters) continue to be favoured because they are perceived to be 'vote winning' strategies. If this position doesn't change, measures adopted by individual government and non-government agencies to improve the position of Aboriginal people in the justice system will continue to be undermined. The wider community deserves to know the enormous financial and social cost of continued ineffective justice policies and, most importantly, that the enduring failure of national and state and territory governments to address the issue of Aboriginal overrepresentation in the justice system significantly undermines community safety.

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141 Ibid [2.133].

142 Ibid.

143 Ibid Recommendations 1 & 2.

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