ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC)

SUBMISSION TO THE REVIEW OF THE *YOUNG OFFENDERS ACT 1994* (WA)

6 April 2017

ABOUT THE ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA

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

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

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

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

SUBMISSION TO THE REVIEW OF THE YOUNG OFFENDERS ACT 1994

Introduction

In December 2016, the Department of Corrective Services ('DCS') published a Green Paper, *Young People in the Justice System: A Review of the Young Offenders Act 1994* ('the Green Paper'). DCS is seeking submissions in response to the Green Paper by 7 April 2017. ALSWA provides extensive legal advice and representation to Aboriginal[1] young people in the Children's Court of Western Australia throughout the entire state and, therefore, it has significant and relevant experience and expertise to respond to the questions and proposals outlined in the Green Paper. Furthermore, in May 2016 ALSWA commenced operating the Young Engagement Program in the Perth Children's Court. This program

1 In this submission, ALSWA uses the term 'Aboriginal' to refer to Aboriginal and Torres Strait Islander people.

employs Aboriginal diversion officers who work alongside ALSWA lawyers, providing individualised case management, support, referrals, mentoring and practical assistance to Aboriginal young people appearing in the Perth Children's Court. The knowledge and experience gained from representing Aboriginal people in the Children's Court for many years coupled with its involvement in the Youth Engagement Program provides ALSWA with a unique perspective on the proposed reforms to the YOA.

Background

Aboriginal young people are grossly overrepresented in the Western Australian justice system. While ALSWA acknowledges that the total number of juveniles in detention in Western Australia has declined over the last couple of years, the proportion of Aboriginal young people remains at an extraordinarily high rate: 75% of young people in detention as at 30 September 2016 were Aboriginal.[2] At the same time, Aboriginal young people constituted 54% of young people supervised by DCS in the community.[3] As observed by Amnesty International, 'Aboriginal young people are heavily over-represented at every stage of the youth justice system and most over-represented at the more punitive stags of the system'.[4] It is important to highlight that Western Australia has the highest level of overrepresentation of Aboriginal young people in custody in the nation and has done so for many years.

While ALSWA considers that appropriate legislative reform is one important mechanism to reduce this unacceptable level of overrepresentation, it is clearly not the only solution. Significant and ongoing investment in early intervention, prevention, diversionary and rehabilitation programs designed and operated by Aboriginal people, organisations and communities is the key to shifting the level of overrepresentation of Aboriginal young people in Western Australia. The review of the *Young Offenders Act* ('YOA') provides a timely opportunity for the Western Australian Government to commit to implementing both legislative and policy reforms that are designed to reduce the number of Aboriginal young peoples[5] in the justice system. In its response to questions and proposals below, ALSWA follows the general structure of the Green Paper; however, it is concerned that 'Aboriginality' has been categorised as one of six separate issues for consideration. For the reasons discussed above, Aboriginality should be at the front and centre of all potential reforms to the YOA.

Diversion

The Green Paper poses eight questions and lists six proposals under the topic of diversion. In order to avoid repetition, ALSWA has collated these issues into the general headings below (and it follows this approach for the remainder of the submission).

2 Department of Corrective Services, *Young People in Detention Quarterly Statistics: September Quarter 2016*, 3.
3 Department of Corrective Services, *Young People Managed in the Community Quarterly Statistics: September Quarter 2016*, 3.
4 Amnesty International, *There is Always a Brighter Future: Keeping Indigenous kids in the community and out of detention in Western Australia* (2015) 13.
5 In this submission, ALSWA uses both the terms 'young people' and 'children' to refer to persons who are under the age of 18 years.

Under Part 5 of the YOA, there are a number of diversionary options available to police. These are, commencing with the least intrusive option, to take no action; to issue a verbal caution; to issue a written caution; or to refer the matter to a Juvenile Justice Team (JJT). The stated purpose of Div 1 of Part 5 of the YOA (cautioning) is to divert a child away from the court's criminal justice system. Section 22A provides that before starting a proceeding against a young person, a police officer must first consider whether in all the circumstances it would be more appropriate to take no action or administer a caution. Div 2 of Part 5 deals with JJTs. The police and the court have the power to refer a matter to a JJT. Section 29 provides that the discretion to refer a matter to the JJT 'is to be exercised in favour of referring the matter to a juvenile justice team if the young person has not previously offended against the law'.

The Green Paper acknowledges that there has been a decline in the diversion of young offenders (ie, via cautioning and referrals to JJTs) in recent years.[6] ALSWA highlights that the rate of diversion for Aboriginal young people is much lower than for non-Aboriginal young people.

> On average between 2008-09 and 2012-13, Aboriginal young people were diverted by police 35 per cent of the time, whereas non Aboriginal young people were diverted 59 per cent of the time. The reasons for the discrepancy are not clear.[7]

ALSWA believes that stronger legislative provisions are required to ensure that diversion is properly utilised in practice for Aboriginal young people.

Legislative principles/rules to strengthen diversion

<u>General principles</u>

The Green Paper asks whether the general principles relating to diversion under the YOA should be strengthened and specifically proposes that the general principle in s 7(g) of the YOA should be amended to more closely reflect the legislative principles in New Zealand, Queensland and the Northern Territory.[8]

Section 7(g) of the YOA currently provides that:

> Consideration should be given, when dealing with a young person for an offence, to the possibility of taking measures other than judicial proceedings for the offence if the circumstances of the case and the background of the alleged offender make it appropriate to dispose of the matter in that way and it would not jeopardise the protection of the community to do so.

ALSWA agrees that a stronger principle favouring diversion over criminal proceedings should be included in the YOA. The Green Paper refers to legislative provisions in other jurisdictions and proposes

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6 Department of Corrective Services, *Young People in the Justice System: A Review of the Young Offenders Act 1994* (December 2016) 9.
7 Amnesty International, *There is Always a Brighter Future: Keeping Indigenous kids in the community and out of detention in Western Australia* (2015) 25.
8 Department of Corrective Services, *Young People in the Justice System: A Review of the Young Offenders Act 1994* (December 2016) 10 (Question 1) and Proposal 1.

an amendment to the effect that unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter. ALSWA supports such an amendment but emphasises that the inclusion of this principle alone will not ensure that the objective of greater diversion is achieved. As such, ALSWA supports legislative reform that places a clear onus on police to exhaust the least intrusive diversionary option prior to any consideration of the next option in the hierarchy of diversionary options. Moreover, police must be accountable for their discretionary decisions in relation to diversion (see further below).

ALSWA also raises the absence of diversion as an objective of the YOA and/or as an objective/purpose of Part 5 of the YOA. ALSWA submits that s 6 of the YOA should include the objective of diverting young people from the formal criminal justice system wherever appropriate and available. Furthermore, s 22A currently provides that:

> The purpose of this Division is to set up a way of diverting a child who commits an offence from the courts' criminal justice system by allowing a police officer to administer a caution to the young person instead of starting a proceeding for the offence.

This section provides for the purpose of Division 1, which deals with cautioning. Division 2 of Part 5 deals with JJTs. ALSWA submits that s 22A of the YOA should be reformulated and appear prior to Division 1 so it is a clear statement of the purpose of Part 5 in its entirety. This way, the purpose of diversion will also explicitly underpin the provisions dealing with JJTs.

RECOMMENDATIONS

1. Section 6 of the *Young Offenders Act 1994* (WA) should be amended to include that one of the objectives of the Act is to provide for diversionary options for young people in order to avoid the detrimental consequences of involvement with the formal criminal justice system.

2. Section 7(g) of the *Young Offenders Act 1994* (WA) should be amended to provide that unless the public interest requires otherwise, criminal proceedings should not be instituted against a young person if there is an alternative means of dealing with the matter.

3. Section 22A of the *Young Offenders Act 1994* (WA) should appear prior to the commencement of Division 1 and provide that:

> The purposes of this Part are:
> (a) to set up ways of diverting a child who commits an offence from the courts' criminal jurisdiction by allowing a police officer to administer a caution to the young person or refer the young person to a juvenile justice team instead of starting a proceeding for the offence; and
> (b) to set up a way for the court to divert a child away from any further involvement in the courts' criminal jurisdiction by allowing the court to refer the young person to a juvenile justice team.

Specific provisions

The Green Paper suggests that there are two specific options for increasing the use of diversionary measures: requiring police to undertake extra procedural steps if diversion is not used and removing discretion so it is mandatory to divert non-scheduled offences. The specific proposal states that:

> a provision be inserted at Part 5, Division 1 and 2 requiring police to lodge a document outlining why diversion was not pursued wherever court proceedings are commenced against a young person in respect of relevant offences - or; Part 5, Division 1 of the YOA be amended to provide that Police must issue a caution or Juvenile Justice Team referral for any non-scheduled offence.[9]

The material relied on in support of the first part of this proposal originates from a 2009 ALSWA submission which recommended that upon commencement of criminal proceedings police should be required to lodge a written document to the court outlining why all diversionary processes were inappropriate in the circumstances. More recently, Amnesty International recommended that the COPS Manual should be amended to require that a 'failure to caution notice' be prepared on all occasions where a young person is proceeded against by way of a JJT referral or charge and this notice should be provided to the legal representative and to the court.[10]

ALSWA supports the intention underlying these suggestions. ALSWA submits that the most appropriate way of providing accountability for discretionary decisions by police in relation to diversion and the utilisation of the least intrusive/punitive option available is to require police to produce a written record in every instance when a young person is dealt under the YOA for an offence. This written record must explain why police selected the option used and why they did not select a less punitive option. For example, if a young person is cautioned for an offence, the document must stipulate why it was considered inappropriate to take 'no action'. If a young person is referred to a JJT, the document must stipulate why it was considered inappropriate to take no action or to issue a caution to the young person. If police arrest and charge a young person, the document must explain why they did not decide to take 'no action'; caution the young person; refer the young person to a JJT; or issue a notice to attend court.

The police must provide this written document to the court and to the young person's legal representative for any matter where a young person is brought before the Children's Court. In other instances, the document must be produced if requested by the young person or their legal representative.

Furthermore, the production of these written records will also enable appropriate independent data analysis and research to be undertaken (for example, by University of Western Australia's Centre for Indigenous Peoples and Community Justice). It is vital that appropriate research bodies are able to access these records to enable a rigorous evaluation of police discretion, in particular, concerning Aboriginal young people. In this regard, ALSWA notes that Amnesty International recommended that the proposed 'failure to caution notice' be 'centrally recorded for data collection purposes so that the

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9 Ibid Proposal 2.

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

reason for the discrepancy in referral of Aboriginal and non-Aboriginal young people can be better understood'.[11]

The second part of the proposal suggests that the YOA should be amended to provide that police must caution or refer a young person to a JJT if the offence is a non-scheduled offence. Section 23 of the YOA currently provides that police are to use the power to caution in preference to laying a charge unless because of the number of previous offences with which the person has been charged or dealt with, it would be inappropriate only to give a caution. In relation to JJTs, s 29 provides that the discretion to refer a matter to a JJT is to be exercised in favour of referring the matter to a JJT if the young person has not previously offended against the law. The provisions do not create a mandatory requirement to caution or make a JJT referral for a first-time offender. The Green Paper's recommendation appears to be advocating for a mandatory requirement to caution or make a JJT referral for every non-scheduled offence. ALSWA does not agree that this is appropriate or workable. For example, it may not be appropriate to caution or make a JJT referral for a young person for their 200th burglary offence. Similarly, it may not be appropriate to caution or make a JJT referral for a 'first offender' who has committed numerous serious offences over many months.

In its Aboriginal Customary Laws report, the Law Reform Commission of Western Australia ('LRCWA') recommended that s 29 of the YOA should provide that a police officer must refer a young person to a JJT for a non-scheduled offence if the young person has not previously offended against the law, unless there are exceptional circumstances that justify not doing so.[12] ALSWA supports this recommendation in principle but highlights that any legislative direction in relation to the use of diversionary options must accommodate the hierarchy of options under the YOA. A requirement to refer a matter to a JJT should not operate to preclude or discourage the use of a less intrusive option.

In line with the recommendation above concerning the production of a written record by police, ALSWA is of the view that the YOA should expressly provide for the hierarchy of diversionary options in Part 5. Part 5 of the YOA should provide that the options for police for dealing with young people without taking court proceedings are to:

(a) take no action;

(b) administer a caution to the young person; or

(c) refer the young person to a JJT

The legislation should also provide that a police officer must not use one of these options, unless satisfied that it is not appropriate to use any of the options listed before that option. Furthermore, based upon the LRCWA recommendation, the legislation should state that a police officer must use one of the above three options for a non-scheduled offence if the young person has not previously offended

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11 Ibid, Recommendation 5.

12 LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) Recommendation 46.

against the law, unless there are exceptional circumstances that justify not doing so. ALSWA believes that this provision in conjunction with the legislative requirement to produce the written record explaining the choice of option used will increase the use of diversionary options and provide accountability for police decision-making.

Schedules

Cautioning and referrals to JJTs are not available under the YOA for offences in Schedule 1 and Schedule 2 of the Act. The Green Paper proposes reforms to the Schedules. The first proposal is to amend Schedule 1 of the YOA to include ss 321(7)(a) and (c) of the *Criminal Code* (WA).[13] Section 321(7)(a) and (c) are penalty provisions. The offences to which these penalty provisions relate are ss 321(2) and (3) and these are currently included in Schedule 1. ALSWA does not consider that there is any requirement to include s 321(7)(a) and (c) in Schedule 1.

The second proposal is to amend the Schedules to ensure that the offence description reflects the exact legislative provision creating the offence.[14] The Green Paper has not identified any problem in practice with the interpretation of the Schedules. The offence descriptions in the Schedules should continue to be a short description of the offence for ease of reference. It is not difficult to access the original section if required. ALSWA suggests that if there is any issue with interpretation, the Schedules could be amended to include the word 'short' before 'description of offence' so that the reader is immediately aware that it is a summary or short version of the offence.

A far more pressing issue is the range of offences included in the Schedules. ALSWA considers that a number of offences should be deleted from the Schedules, thus enlivening the discretion to caution or refer to a JJT. Such offences include assault occasioning bodily harm, serious assaults, criminal damage and a number of the offences listed under the *Road Traffic Act 1974* (WA). Both Amnesty International and the LRCWA have previously recommended that the Schedules should be reviewed to enhance the availability of diversion.[15] ALSWA reiterates these previous recommendations.

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13 Department of Corrective Services, *Young People in the Justice System: A Review of the Young Offenders Act 1994* (December 2016) Proposal 8, 60.

14 Ibid Proposal 9, 60.

15 Amnesty International, *There is Always a Brighter Future: Keeping Indigenous kids in the community and out of detention in Western Australia* (2015) Recommendation 7; LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) Recommendation 47.

RECOMMENDATIONS

4. The *Young Offenders Act 1994* (WA) should provide that police are required to produce a written record in every instance when a young person is dealt with for an offence under the Act. This written record must set out why police selected the option used for the young person and why the police did not select a less punitive option. The police must provide this written document to the court and to the young person's legal representative for any matter where a young person is brought before the Children's Court. In other instances, the document must be available for production if requested by the young person or their legal representative.

5. The Western Australia Police should ensure that these written records are made available to independent research bodies to enable appropriate independent data analysis and research.

6. Part 5 of the *Young Offenders Act 1994* (WA) should provide that the options for police for dealing with young people without taking court proceedings are to:

   (a) take no action;

   (b) administer a caution to the young person; or

   (c) refer the young person to a JJT

7. The *Young Offenders Act 1994* (WA) should also provide that a police officer must not use an option in the above provision, unless satisfied that it is not appropriate to use any of the options listed before that option.

8. The *Young Offenders Act 1994* (WA) should provide that a police officer must refer a young person to a Juvenile Justice Team for a non-scheduled offence if the young person has not previously offended against the law, unless there are exceptional circumstances that justify not doing so. Further, this only applies if the police officer has first decided that taking no action or issuing a caution is inappropriate in the circumstances.

9. That Schedule 1 and Schedule 2 of the *Young Offenders Act 1994* (WA) should be reviewed to enhance the availability of cautions and referrals to Juvenile Justice Teams.

Juvenile Justice Teams

The Green Paper discusses the effectiveness of JJTs, noting specific issues such as the delay between the referral and the meeting; that there is insufficient monitoring of action plans to ensure that the causes of offending are addressed; and that JJTs may not be appropriate for Aboriginal young people.[16] Overall, ALSWA supports the continued use of JJTs in Western Australia noting that for some of its clients they are an effective diversionary process. Nevertheless, improvements are required to ensure that JJTs are an effective option for all Aboriginal young people across the state.

In 2015, Amnesty International recommended that DCS provide funding and appropriate training to enable respected local Aboriginal community representatives to be recruited and renumerated to participate in the JJT process.[17] The LRCWA recommended in 2006 the establishment of Aboriginal community justice groups and that these groups should, among other things, be involved in the provision of diversionary options. [18]

ALSWA strongly supports the increased use of respected local Aboriginal community representatives in the JJT process. While this may occur now on an ad hoc basis, resources are required to ensure that this is standard practice for all JJT meetings for Aboriginal young people. As recommended by Amnesty International, respected local Aboriginal community representative need to be recruited in advance, trained and renumerated for their expertise. It is not sufficient for JJTs to attempt to locate an Aboriginal person to participate in the team meeting only on an as needs basis.

RECOMMENDATION

10. The Department of Corrective Services should provide resources to enable recruitment, training and remuneration for respected members of the local Aboriginal community to participate in JJT meetings for Aboriginal young people.

Conditional Cautioning

DCS proposes the introduction of an additional measure of cautioning under Part 5, Division 1, allowing the issuance of a conditional caution by a police prosecutor.[19] The basis for this proposal is the United Kingdom conditional cautioning scheme. The option of a conditional caution is a formal agreement

16 Department of Corrective Services, *Young People in the Justice System: A Review of the Young Offenders Act 1994* (December 2016) 23–24.
17 Amnesty International, *There is Always a Brighter Future: Keeping Indigenous kids in the community and out of detention in Western Australia* (2015) Recommendation 8.
18 LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) Recommendations 17 & 50.
19 Department of Corrective Services, *Young People in the Justice System: A Review of the Young Offenders Act 1994* (December 2016) Proposal 3.

between the police and the young person that if the young person complies with certain conditions, no charges will be laid.

The Green Paper suggests that police may be reluctant to issue a caution because there are no consequences attached, especially if the young person has previously received a caution. It also comments that the proposed scheme removes police discretion because the power to issue a conditional caution rests with a prosecutor. However, ALSWA highlights that the United Kingdom scheme for youth conditional cautions enables both police and prosecutors to issue a caution.[20] The types of conditions that may be imposed include rehabilitative conditions (eg, attendance at substance abuse counselling), reparative conditions (eg, apologising, repairing damage, financial compensation) or punitive conditions (eg, financial penalty, unpaid work). The conditions are required to be appropriate, proportionate and reasonable.[21] The scheme encompasses numerous administrative and procedural requirements.

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

ALSWA also understands that in some regional areas, DCS prevention and diversion officers contact a young person and their family following the issuance of a police caution. This contact is designed to provide an opportunity for the young person and their family to receive any necessary support to prevent further offending.[22] ALSWA strongly favours this approach as an alternative to a coercive conditional cautioning scheme.

In order to enhance the effectiveness of police cautioning for Aboriginal young people, ALSWA urges consideration of the provision for respected members of the young person's Aboriginal community to administer the caution instead of a police officer. The LRCWA made a similar recommendation in 2006[23] and this option exists under legislation in New South Wales, Tasmania and Queensland.[24] While one purpose of a caution is to divert a young person from the court system, another purpose is to 'warn' the young person of the detrimental consequences of further offending behaviour and/or encourage the young person to refrain from further offending. The delivery of a caution by a person with appropriate cultural authority is likely to be far more effective. ALSWA recognises that for this recommendation to

20 *Criminal Justice and Immigration Act 2008* (UK) s 66B.
21 UK Code of Practice for Youth Conditional Cautions, 8.1.
22 Amnesty International, *There is Always a Brighter Future: Keeping Indigenous kids in the community and out of detention in Western Australia* (2015) Recommendation 25.
23 LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) Recommendation 44.
24 *Young Offenders Act 1997* (NSW) s 27; *Youth Justice Act 1992* (Qld) s 14; *Youth Justice Act 1997* (Tas) s 11.

be effective in practice, it will be necessary to identify a panel of respected members of the Aboriginal community who are willing and available to administer a caution on an as needs basis. It is also essential that the government provide resources for the remuneration of the community members for proving this service.

RECOMMENDATIONS

11. Any consideration of introducing a conditional cautioning scheme for young offenders in Western Australia should be postponed until the results of the evaluation of Operation Turning Point are finalised and publicly available.

12. Part 5, Div 1 of the *Young Offenders Act 1994* (WA) should provide that a caution may be administered by a respected member of the young person's Aboriginal community.

13. The Western Australian Government provide resources to enable respected members of the Aboriginal community who are willing and available to administer cautions to be identified and for these community members to be remunerated for their service.

Court conferencing

Court conferencing commenced in Perth in 2001 and expanded to other areas of the state in 2003. Court conferencing operates in a similar way to referrals to JJTs; however, it is available for offences listed in the Schedules of the YOA. In order to access court conferencing, the court must refer the young person. The original guidelines stipulated that a young person could not be referred to court conferencing if he or she was subject to an existing order or a supervised release order, and there would also need to be an 'identifiable primary victim'.[25] The Green Paper observes that court conferencing represents only about 7% of referrals to JJTs in recent years.

It is proposed that court conferencing should be enshrined in legislation by inserting a provision at Part 7, Div 3 of the YOA. It is further proposed that the provisions should 'express that the Court is not obliged to dismiss a case where the offender is referred to court conferencing' and include a principle 'reinforcing the preference for court conferencing over upfront sentencing for first time scheduled offenders'.[26] The Green Paper suggests that when the young person returns to court after the 12-week adjournment, the outcome is 'often no further punishment under section 67 of the YOA' and 'that there

25 *The State of Western Australia v SR & SW-W* (2014), *Transcript of Proceedings*, 27 (retrieved from [illegible])
26 Department of Corrective Services, *Young People in the Justice System: A Review of the Young Offenders Act 1994* (December 2016) Recommendation 4, 31.

is a perception that all charges for scheduled offences that are referred to court conferencing end in dismissal'.[27]

The mechanism currently used to adjourn proceedings while the young person attends the JJT meeting and undertakes the action plan agreed at that meeting appear to be s 68 of the YOA. Section 68 is linked to s 67 of the Act. Section 67 provides that a court may refrain from imposing any punishment if satisfied that

- such undertakings as the court may approve have been or will be given by the offender or a responsible adult; or
- such punishment as the court may approve has been, or on the undertaking of a responsible adult will be inflicted on the offender.

Section 68 provides that instead 'of forthwith deciding whether it will refrain from itself imposing any punishment, the court may adjourn the proceedings until the punishment is carried out or the undertakings have been given or are fulfilled, as the case requires.

If there is a degree of confusion concerning the expected outcome of court conferencing, ALSWA suggests that any misconception that a dismissal under s 67 is the automatic outcome following participation in court conference would have been dispelled following the decision of Judge Reynolds in *The State of Western Australia v SR & SW-W*.[28] In this case, the State applied for a review of the decision to dismiss charges under s 67 following court conferencing. Judge Reynolds observed that the court conferencing process does not 'automatically require' the matters to be dismissed under s 67 of the YOA. Instead, participation in the process and the completion of the action plan are to be taken into account by way of mitigation. This may mean a lesser option is chosen or the same option that would have been imposed is selected with less onerous conditions.[29] In this case, the President of the Children's Court placed both offenders on an intensive supervision order with various conditions.

In ALSWA's view, the perceived difficulty lies with the wording of ss 67 and 68, in particular that these sections are linked by reference the words in s 68: 'Instead of forthwith deciding whether it will refrain from itself imposing any punishment' (which is the terminology used in s 67). While ALSWA has no particular objection to the inclusion of a specific division dealing with court conferencing, it highlights that court conferencing does not need to rely on s 68 of the YOA. Section 16 of the *Sentencing Act 1995* (WA) enables a court to adjourn the sentencing of an offender for a variety of reasons including 'for any other reason the court thinks is proper'. This section applies to and in respect of the sentencing of a young person by virtue of s 46A(1)(b) of the YOA.

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27 Ibid 28.

28 *The State of Western Australia v SR & SW-W* (2014), *Transcript of Proceedings*, 27 (retrieved from http://www.childrenscourt.wa.gov.au/_files/WAvSR_SW_W_05092014.pdf).

29 Ibid 28.

If court conferencing is to be specifically included under the YOA, ALSWA suggests that the provisions remain sufficiently flexible. Most importantly, there is absolutely no need to include a provision that a court is not obliged to dismiss a case where the offender has participated in court conferencing. Such a provision would arguably cement the view that a dismissal under s 67 is the ordinary, albeit not the required, outcome. Instead, ALSWA suggests that any legislative provision state that participation in court conferencing is to be taken into account in mitigation. Likewise, court conferencing should not be restricted to first time-offenders.

Overall, ALSWA favours the current flexible approach and considers that the existing power to defer sentencing under s 16 of the *Sentencing Act 1995* (WA) is an appropriate legislative basis for court conferencing. Having said that, ALSWA highlights that the LRCWA has repeatedly recommended that s 16 be amended to enable deferral of sentencing for up to 12 months (specifically to enable offenders to participate in appropriate diversionary and rehabilitation programs, including offender-victim mediation).[30] ALSWA supports this approach because it would enable young offenders to participate in longer programs such as the Drug Court program and any new programs that may be developed over time.

RECOMMENDATION

14. That s 16 of the *Sentencing Act 1995* (WA) be amended to enable sentencing to be adjourned for a period up to 12 months.

Requirement to bring a young person in custody before the court

The Green Paper observes that there is no provision under the YOA for proceedings to be expedited where the young person is in custody. It is proposed that consideration be given to inserting a provision which states that where criminal proceedings are commenced against a young person and the young person has not been released from custody, the young person shall be brought before the Children's Court as soon as practicable.[31]

ALSWA highlights that the requirement for a person to be brought to court as soon as is practicable is contained in the *Bail Act 1982* (WA). Section 5 of the *Bail Act* states that if an accused does not have his or her case for bail considered; or is refused bail or not released on bail, the accused must be brought before a court as soon as is practicable. In practice, young people in police custody are brought before the Children's Court on the day they are arrested, or depending on the time of arrest, the following day. However, there is no 'Sunday Court' for young people so if a young person is arrested

30 LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) Recommendation 40; LRCWA, *Court Intervention Programs*, Final Report, Project No. 96 (2009) Recommendation 13.
31 Department of Corrective Services, *Young People in the Justice System: A Review of the Young Offenders Act 1994* (December 2016) Proposal 5, 31.

on a Saturday afternoon, the young person will not appear in court until Monday morning. This should be immediately rectified by ensuring that there are sufficient resources available for the Children's Court sits on Sundays.

RECOMMENDATION

15. The Western Australian Government should provide sufficient resources to the Children's Court to enable the court to sit each Sunday and this court should also be available to hear matters where young people have not been released on bail throughout the state (ie via video link).

Remanding children under 14 years in detention before sentencing

The Green Paper comments that children aged between 10 and 13 years are almost never sentenced to detention. However, children in this age category are often remanded in custody, usually for short periods and '[e]xposing these children to detention before sentencing may be detrimental, considering that it is unlikely that these children will receive a custodial sentence.[32] In response, the Green Paper proposes that 'a new subsection be inserted under s 19 of the YOA stating that a child aged less than 14 years may not be placed in a detention centre prior to their sentencing for an alleged offence'.[33]

While ALSWA strongly supports the aim of this proposal, it is not a workable solution. The proposed provision prohibits the placement of child aged less than 14 years in a detention centre. A 'detention centre' is defined under s 3 of the YOA as 'a place declared to be a detention centre under section 13'. The practical implication of this proposal is that where a child under the age of 14 years is not released on bail, he or she will be kept in police custody.

Nevertheless, even if the proposed amendment is reworded to prohibit placing a child under the age of 14 years in any form of custody or detention, the proposal remains inappropriate and impracticable. There will always be exceptional cases where bail should not be granted and there will always be cases where a young person cannot be immediately released into the community (eg, because there is no carer or adult willing to look after the child; because there is nowhere for the child to stay). In the absence of a guaranteed placement for every child under the age of 14 years at a properly resourced and supervised bail hostel, ALSWA is unable to support this proposal.

32 Ibid 30.
33 Ibid Proposal 6, 31.

However, in order to facilitate the ultimate goal of reducing the numbers of young people remanded in custody, ALSWA recommends that the Western Australian Government should provide additional resources to enable sufficient placements at bail hostels across the state (ie, in regional and remote areas as well as in Perth). Furthermore, the *Bail Act* should be amended to provide a stronger presumption in favour of bail for children aged under 14 years. Clause 2 of Schedule 1 of the *Bail Act* currently provides for a qualified right to bail for a child. In summary, a child has a right to be granted bail (subject to the requirement for a responsible person) unless the decision-maker considers that:

- if the child is not kept in custody he or she may fail to appear in court; commit an offence; endanger the safety, welfare, or property of any person; interfere with witnesses or otherwise obstruct the course of justice;
- the child needs to be held in custody for his own protection;
- if the child is not kept in custody, the proper conduct of the trial may be prejudiced; or
- the alleged circumstances of the offence(s) amount to wrongdoing of such a serious nature as to make a grant of bail inappropriate; and

there is no condition which could be reasonably imposed to address the abovementioned concerns.

ALSWA recommends that the *Bail Act* should be amended to provide that a child under the age of 14 years must be granted bail unless releasing the child on bail would pose a serious risk to the safety of the child or to another person(s).

RECOMMENDATION

16. That the *Bail Act 1982* (WA) should be amended to provide that a child under the age of 14 years must be granted bail unless releasing the child on bail would pose a serious risk to the safety of the child or to another person(s).

Finally, ALSWA highlights that raising the age of criminal responsibility to at least 12 years of age will address the extremely detrimental impact of detention and involvement in the justice system on very young children. The age of criminal responsibility varies across the world; however, there are many countries with a higher minimum age of criminal responsibility than Australia. For example, the age of criminal responsibility is 12 years in Canada, Greece, Netherlands; 13 years in France, Israel and New Zealand;[34] 14 years in China, Austria, Germany, Italy; 15 years in Denmark, Finland, Norway and

34 Except for murder/manslaughter where it is 10 years of age.

Sweden; 16 years in Japan, Portugal, Spain, Argentina; and 18 years in Belgium, Luxembourg and Brazil.

The United Nations Committee on the Rights of the Child ('the Committee') has stated that 12 years of age is the *absolute* minimum and states should work towards achieving a higher age level. In its concluding observations on the implementation of the Convention on the Rights of the Child in Australia in 2005, the Committee stated that the age of criminal responsibility in Australia is 'too low' and recommended raising it to 12 years of age. The Committee reiterated this view in its 2012 concluding observations when it again recommended increasing the minimum age of criminal responsibility to at least 12 years.[35] In 2015, Amnesty International noted that the rate of overrepresentation is particularly high for 10- and 11-year old Aboriginal children who made up more than 60% of all 10- and 11-year olds in detention in Australia in 2012-2013 and 74% of all 10- and 11-year olds in detention in Australia in 2014-2015. Amnesty recommended that the Western Australian Government amend s 29 of the *Criminal Code* to provide that a person under the age of 12 years is not criminally responsible for any act or omission.[36]

RECOMMENDATION

17. Section 29 of the *Criminal Code* (WA) should be amended to provide that a person under the age of 12 years is not criminally responsible for any act or omission.

Other options to increase use of diversionary options

A police officer or the court cannot refer a young person to a JJT unless he or she accepts responsibility for the act or omission constituting the offence.[37] If the JJT does not deal with the matter, the prior acceptance of responsibility cannot be construed as an admission, a plea of guilty or otherwise used in evidence against the offender. ALSWA understands that in some instances, police require a young person to participate in a record of interview before referring the matter to a JJT. In addition, some young people may be reluctant to make admissions to police before they have had an opportunity to receive legal advice and these young people may miss the opportunity for diversion. ALSWA suggests that the YOA should be amended to remove the requirement for the young person to accept responsibility for the act or omission before being referred to a JJT. If the young person disputes involvement in the offence to the extent that the JJT is unable to deal with the matter, the team can always refer the matter back to court.

35 Committee on the Rights of the Child, Concluding Observations – Australia (28 August 2012) CRC/AUS/CO/4, [29]). More recently this was recommended during Australia's Universal Periodic Review before the Human Rights Council in 2016 (Human Rights Council, Report of the Working Group on the Universal Periodic Review: Australia, 31st sess, UN Doc A/HRC/31/14).

36 Amnesty International, *There is Always a Brighter Future: Keeping Indigenous kids in the community and out of detention in Western Australia* (2015) Recommendation 21.

37 *Young Offenders Act 1994* (WA) s 25(4).

RECOMMENDATION

18. The *Young Offenders Act 1994* (WA) should be amended to remove the requirement that a young person must first accept responsibility for an offence before being referred to Juvenile Justice Team.

Aboriginality

The Green Paper acknowledges the high rate of overrepresentation of Aboriginal young people in the justice system and in youth detention and considers potential legislative measures to reduce the rate of overrepresentation.[38] ALSWA welcomes the expressed intention; however, it is imperative that any legislative reform is accompanied by sufficient resources to support Aboriginal community controlled programs and initiatives for Aboriginal young people. As a recipient of funding through the Youth Justice Innovation Fund for its Youth Engagement Program, ALSWA supports the approach of funding innovative Aboriginal specific programs. However, this approach must extend beyond funding short-term 'pilot' initiatives to enable Aboriginal communities and organisations to build the necessary capacity and experience to build on new ideas and provide sustainable long-term outcomes for Aboriginal young people and their families.

A new flexible community-based order

The Green Paper acknowledges that the current statutory framework for community-based orders is not flexible enough to facilitate Aboriginal community controlled programs and to enable such initiatives to operate in 'their own space'.[39] The Paper also notes that there are potential difficulties when such initiatives 'are subject to mainstream governance structures and regulation, ending any real notion of community ownership'.[40] The proposed approach is to create a new order under the YOA to allow for non-government managed, culturally appropriate community justice and to 'create a layer of flexibility within the statutory framework to deal with Aboriginal young people, particularly those from rural and remote communities, in a more appropriate and individually tailored manner'.[41]

ALSWA agrees that it is important to ensure that Aboriginal community owned initiatives are not subject to overly prescriptive regulation. However, in formulating a new order under the YOA that is suitable for Aboriginal young people it is also essential to take into account the needs and circumstances of the

38 Department of Corrective Services, *Young People in the Justice System: A Review of the Young Offenders Act 1994* (December 2016) 32.
39 Ibid 33-34.
40 Ibid 34.
41 Ibid Proposal 7, 35-36.

young people themselves. In other words, it is not just that the initiatives themselves require a flexible approach but also that new approaches must 'fit' the particular circumstances of Aboriginal young people.

Currently, community-based orders under the YOA are prescriptive, both in terms of the statutory framework and in practice. For example, a young person subject to an intensive youth supervision order might be subject to the following conditions: supervision with a youth justice officer at least once per week (or twice per week); attendance at school or another educational/training program; attendance at alcohol/drug counselling (once per week) and community work up to 100 hours. For many of ALSWA's clients compliance with these types of conditions is extremely difficult to achieve. Complex social disadvantages and family dysfunction mean that some young people subject to onerous obligations will fail to meet all of the requirements and face potential breaches proceedings due to the practical difficulties facing the young person and their family.

As part of its Youth Engagement Program, ALSWA has assisted many Aboriginal young people to comply with the conditions of their orders by providing transport assistance, by reminding the young person and their family of the obligations, and by providing ongoing support and encouragement. For some of these young people, a more flexible option would be beneficial. As just one example, helping a young person to reengage with education might be the first priority. If the young person hasn't been attending school for some time, this might involve taking the young person on site visits to different educational options; assisting the young person with enrolment applications; assisting the young person to obtain books and clothing ready for attendance and taking the young person to the program for the first few days to provide mentoring and encouragement. If the young person was also required to report to a youth justice officer, attend counselling and complete community work it is likely that the impetus for reengaging with education would be lost. As another example, if an Aboriginal young person would benefit from attending an on-country program over a number of weeks, it would be counterproductive to require the young person to comply with other conditions at the same time.

In ALSWA's view, flexibility and an individualised approach is critical for Aboriginal young people. The variety of different programs and initiatives available coupled with the extent of social and economic disadvantage for many Aboriginal young people involved in the justice system, demands such an approach. ALSWA is concerned about the insertion of a new order unless it is sufficiently flexible to enable the court to devise individualised conditions/requirements for each young person. It is also of the opinion that in order to operate differently from the existing community-based orders under the YOA, a new order should not require the young person to be managed or supervised by youth justice officers. Such an option exists now in the adult jurisdiction.

Under ss 47 and 48 of the *Sentencing Act 1995* (WA) a court may impose a 'conditional release order' upon an offender if the court considers that there are reasonable grounds for expecting that the offender will not re-offend during the term of the order and that the offender does not need supervising by a community corrections officer. A conditional release order is an order that if the offender commits an offence during the period of the order, the offender may be sentenced again for the original offence and

the offender must comply with any requirement imposed by the court to secure the good behaviour of the offender. Section 49(2) provides that 'a requirement imposed by a court must not be such as requires or would require the offender to be supervised, directed or instructed by a CCO'. Under s 50 the court may direct the offender to re-appear at a particular time and place to ascertain whether the offender has complied with the conditions of the order. The court may impose a requirement for the offender to enter into a monetary bond or provide a surety if it is considered necessary to ensure compliance.

ALSWA recommends that a similar, although not identical, order should be included in the YOA. The key components of the order should be:

1. That the court determines the appropriate conditions of the order.

2. That the young person is required to reappear at a later date or dates for the court to assess whether the young person is complying or has complied with the order (this would enable a degree of judicial monitoring).

3. That if the young person does not comply with the conditions of the order the young person is liable to be re-sentenced for the original offence.

4. That the conditions of the order cannot include a condition that the young person is to be supervised, directed or instructed by a youth justice officer.

5. That the court may impose the order if it is satisfied that the order is appropriate for the young person's rehabilitation, treatment and support.

6. That the court may request a representative from a non-government organisation to provide a report to the court (written or verbal) outlining any proposed conditions for the order and to provide a report to the court (written or verbal) about the young person's compliance with the conditions of the order.

7. That the young person must consent to the order.

ALSWA is of the view that this recommended new order coupled with the existing power to adjourn a matter under s 68 of the YOA and the general power to adjourn sentencing under s 16 of the *Sentencing Act* will provide a sufficiently flexible suite of options that will enhance justice outcomes for Aboriginal young people and facilitate the involvement of Aboriginal community-owned initiatives.

RECOMMENDATION

19. The *Young Offenders Act 1994* (WA) should be amended to insert a new order based, in part, on the provisions of the *Sentencing Act 1995* (WA) dealing with Conditional Release Orders. This new order should ensure that the court has flexibility to impose a broad range of conditions that are relevant to the individual young offender's circumstances and that do not require the young offender to be supervised by a youth justice officer from the Department of Corrective Services. The provisions should include scope for the young person to be subject to judicial monitoring by requiring the young person to reappear in court on a particular day or days.

Increased focus on rehabilitation, support and treatment

The Green Paper proposes that the emphasis on restorative justice under general principles 7(b) and (e) of the YOA should be reduced with an increased focus on wraparound support and rehabilitation for young people. [42] Section 7(b) provides that 'a young person who commits an offence is to be dealt with, either formally or informally, in a way that encourages the young person to accept responsibility for his or her conduct'. Section 7(e) provides that victims of offences 'should be given the opportunity to participate in the process of dealing with offenders to the extent that the law provides for them to do so'. ALSWA does not consider that these principles should be removed or reformulated but supports the inclusion of a new principle, which emphasises the importance of ensuring that young offenders are provided with opportunities for support and treatment to address the underlying causes of their offending behaviour.

42 Department of Corrective Services, *Young People in the Justice System: A Review of the Young Offenders Act 1994* (December 2016) Proposals 8 & 9, 36.

RECOMMENDATION

20. The *Young Offenders Act 1994* (WA) should include a new general principle that young offenders should be provided with opportunities for support and treatment to address the underlying causes of their offending behaviour.

Other options to address high level of overrepresentation

Aboriginal courts

Bearing in mind the significant overrepresentation of Aboriginal young people in the Western Australian justice system, ALSWA supports the establishment of an Aboriginal Court (such the Koori Children's Courts in Victoria). The establishment of an Aboriginal Court would enhance options for Aboriginal young people and facilitate the greater use of Aboriginal community-owned initiatives. ALSWA believes that the establishment of an Aboriginal Court must be underpinned by legislation and highlights that such legislation exists in Victoria.[43] ALSWA acknowledges that work would need to be undertaken prior to establishing such a court and ALSWA recommends that the Western Australian Government immediately facilitate the development of this option by setting up a working group comprised of representatives of the Aboriginal community, Aboriginal organisations, and relevant justice agencies.

RECOMMENDATION

21. The Western Australian Government should establish a working group comprised of representatives of the Aboriginal community, Aboriginal organisations (including ALSWA) and justice agencies to progress the establishment of an appropriate Aboriginal Court in the Children's Court of Western Australia.

Specific legislative provisions in relation to Aboriginal young people

In 2006, after extensive research and consultations, the LRCWA recommended specific legislative reforms concerning the cultural background of offenders in bail and sentencing proceedings. It was recommended that the *Bail Act 1982* (WA) be amended to provide that the decision-maker shall have regard, where the accused is an Aboriginal person, to any known Aboriginal customary law or other cultural issues that are relevant to bail. Further, the *Sentencing Act 1995* (WA) should include that the cultural background of the offender is a relevant sentencing factor.

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

In recognition of the impact of systemic discrimination and long-term disadvantage on the level of overrepresentation of Aboriginal people in the justice system, the LRCWA also recommended that the *Sentencing Act 1995* and the *Young Offenders Act 1994* be amended to provide that when 'considering whether a term of imprisonment (or a term of detention) is appropriate the court is to have regard to the particular circumstances of Aboriginal people'.[44] In making this recommendation, the LRCWA stated that:

> The Commission wishes to make it clear that its recommendation does not mean that Aboriginal offenders will not go to prison. Nor does it mean Aboriginal people will be treated more leniently than non-Aboriginal people just on the basis of race...What the Commission is recommending is that when judicial officers are required to sentence Aboriginal people they turn their minds not just to the matters that are directly relevant to the individual circumstances of the offender but to the circumstances of Aboriginal people generally. These circumstances include overrepresentation of Aboriginal people in the criminal justice system. A judicial officer would need to be satisfied that the particular offender has experienced in some way the negative effects of systemic discrimination and disadvantage within the criminal justice system and the community.[45]

These types of provisions exist in other jurisdictions. For example s 3A of the *Bail Act 1977* (Vic) provides that:

> In making a determination under this Act in relation to an Aboriginal person, a court must take into account (in addition to any other requirements of this Act) any issues that arise due to the person's Aboriginality, including—
>
> (a) the person's cultural background, including the person's ties to extended family or place; and
> (b) any other relevant cultural issue or obligation.

This provision was discussed in the context of a bail application for a 22-year-old Aboriginal woman. The judge stated that he would have granted bail in the absence of s 3A. Nonetheless, the judge noted that 'over policing of Aboriginal communities and their overrepresentation amongst the prison population are matters of public notoriety'.[46] He also stated that the use of the offence of obtaining a financial advantage by deception in this case to charge an adult for travelling on a child's ticket as 'singularly inappropriate'.[47]

ALSWA highlights that s 46 of the YOA currently includes the cultural background of the offender as a relevant sentencing consideration. This should be replicated under the *Bail Act 1982* (WA). It is also recommended there should be a specific legislative provision that enables a court to take into account the particular circumstances of Aboriginal people including the general systemic discrimination and disadvantage suffered by Aboriginal people.

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44 LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) Recommendations 34, 36 & 37.
45 Ibid 177.
46 *In the Matter of an Application for Bail by Patricia Mitchell* [2013] VSC 59, [13].
47 Ibid.

RECOMMENDATION

22. The *Bail Act 1982* (WA) should include a provision that states that the judicial officer or authorised officer shall have regard, where the accused is an Aboriginal person, to any known Aboriginal customary law or other cultural issues that are relevant to bail.

23. The *Young Offenders Act 1994* (WA) should include a provision that when sentencing an Aboriginal young person, the court should have regard to the particular circumstances of Aboriginal people.

Interpreters

ALSWA emphasises that the continued lack of availability of Aboriginal language interpreters and the failure to use Aboriginal interpreters contributes to the overrepresentation of Aboriginal young people in the criminal justice system. For 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 as well as within the corrections and custodial systems. Although many Aboriginal 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.[48] The Federal House of Representatives report, *Doing Time – Time for Doing* 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'.[49] Further, it was recommended that the Federal government in conjunction with state and territory governments should establish and fund a national interpreter service with sufficient resources to service remote areas.[50]

In the present context, ALSWA submits that it is unacceptable for Aboriginal young people for whom English is a second or third language to be questioned by police without the presence of an interpreter. It is equally objectionable that Aboriginal young people who cannot adequately understand English are required to participate in interviews for pre-sentence reports and other expert reports as well as rehabilitation and training programs within the justice system or in detention without the benefit of an interpreter. Furthermore, it is manifestly unjust that Aboriginal young people appear in court with limited or no understanding of the proceedings because there are no interpreters available in their Aboriginal language. ALSWA is strongly of the view that a statewide interpreter service should be established in Western Australia as a matter of priority.

48 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].
49 Ibid Recommendation 24.
50 Ibid, Recommendation 25.

RECOMMENDATION

24. The Western Australian Government should immediately establish and resource a statewide Aboriginal languages interpreter service in order to ensure that Aboriginal young people have access to interpreters during questioning by police, during court proceedings and during their participation in rehabilitation, diversionary and other programs within the justice system (including in detention).

Pre-release

Day release

The Green Paper refers to the current provisions under the YOA in relation to the release of detainees on day release and suggests that the current maximum period of 72 hours for day release may be insufficient for detainees from remote and regional locations due to extended travel times. It is proposed that s 188(4) of the YOA should be amended to provide that the CEO may, in writing, authorise a detainee to be absent from a detention centre for a period not exceeding five days.[51] ALSWA agrees that the current limit of 72 hours is unduly restrictive; however, it sees no reason for imposing an arbitrary maximum limit, especially given that the CEO must approve the authorisation for leave of absence and specify the duration in any particular case.

RECOMMENDATION

25. Section 188(4) of the *Young Offenders Act 1994* (WA) should be amended to provide that the chief executive officer may, in writing, authorise a detainee to be absent from a detention centre for a reasonable period, and the written authorisation is to specify the time, the period, and the purpose, of the authorised absence.

Graduated release orders

The Green Paper considers a new mechanism for early release from detention – Graduated Release Orders ('GROs'). The intention is for these orders to operate as an option between full time detention

51 Department of Corrective Services, *Young People in the Justice System: A Review of the Young Offenders Act 1994* (December 2016) Proposal 10, 44.

and Supervised Release Orders ('SROs'). GROs would be available for those detainees serving sentences of 12 months or more and would only be available for the final three months before the detainee is eligible for a SRO.

The proposed amendments to facilitate the use of Graduated Release Orders are:

(a) the YOA be amended to give the SRRB power to make pre-release (graduated release) orders in the case of those detainees whom it is thought may be relied upon to comply;

(b) the power should be available during the last 3 months of service of their detention prior to the earliest release date for the making of an SRO;

(c) the SRRB's power should be in addition to that conferred upon the CEO by s188(4) of the YOA, but the Minister's approval of its exercise should not be required;

(d) the power should be exercisable for purposes described generally as being concerned with cultural matters; the pursuit of education or vocational training; the obtaining of employment or the pursuit of job readiness; undertaking psychiatric, psychological or other medical treatment, including for the use of illicit substances and the abuse of alcohol; to obtain suitable, stable accommodation; and for family and compassionate reasons; and

(e) the order should be made in such terms and upon such conditions as the SRRB thinks fit, including conditions concerned with supervision, reporting, a curfew and others, and there should be no assumption that successful service of a period of pre-release in the community will lead to the making of an SRO in any particular terms or at all.[52]

ALSWA supports the proposal for GROs; however, it is concerned about the proposal in (e) above. ALSWA acknowledges that there cannot be an automatic right to release on a SRO after successful completion of a GRO (eg, because the detainee's circumstances may have changed); however, successful completion of a GRO should be taken into account by the Supervised Release Review Board ('SRRB) in determining whether to make a SRO.

ALSWA also notes that the Green Paper suggests that GROs may be available during the three months leading up to eligibility for a SRO or during the last three months of detention. The proposal does not reflect this. ALSWA does not object to GROs being available for detainees during the final three months of their sentence so long as this only occurs when it is determined that a SRO is not appropriate. In other words, the legislative provisions must reflect that GROs are an alternative to full time detention prior to eligibility for release on a SRO and that they are only an alternative to a SRO where a SRO would otherwise be inappropriate.

52 Department of Corrective Services, *Young People in the Justice System: A Review of the Young Offenders Act 1994* (December 2016) Proposal 12, 45.

RECOMMENDATION	
26.	The *Young Offenders Act 1994* (WA) should provide for Graduated Release Orders for young offenders and these orders should be available where appropriate for detainees prior to their eligibility for release on a Supervised Release Order or where the Supervised Release Review Board determines that in all of the circumstances, release on a Supervised Release Order would not be appropriate.

Supervised release orders

Generally, a detainee is eligible for release on a SRO after serving 50 per cent of the term of detention. However, for sentences greater than 12 months the court has the power to set a lesser minimum period in accordance with a formula set under s 121 of the YOA. For example, the minimum term for a sentence of 18 months detention must be at least 8 months and for a sentence of 24 months, it must be at least 10 months. If the court does not set a minimum term, the standard 50 per cent rule applies.

The Green Paper observes that a SRO expires at the end of the sentence of detention and, therefore, the relationship between the youth justice officer and the young offender ceases at this time. Further, the Green Paper comments that given the typical short duration of sentences of detention, there is limited time to assemble appropriate evidence for the SRRB (eg, psychological, psychiatric, DCPFS reports, YJO reports and custodial case manager reports) and this places 'substantial pressure on youth justice officers'.[53] Extending the SRO beyond the duration of the term of detention is the suggested response to these issues.

It is proposed that the following amendments are made to provide for rehabilitative SROs:

(a) the Court having imposed a sentence of detention, the offender would have to serve 50% of the term, or the minimum fixed by the Court, before becoming eligible for release;

(b) the SRRB would then determine when, and upon what conditions, accepted by the offender, they were to be released, service of the term of detention being suspended upon release;

(c) the conditions might be amended in any way by the SRRB as the need arose, and with the consent of the offender;

(d) as is the case now, after 6 months the SRRB could cancel any or all of the conditions except the condition, applicable in every case, that the offender must not commit any offence;

(e) the SRO would have duration of 6-12 months, fixed by the SRRB, having regard to the evidence as to the time needed to complete applicable programs. If successfully completed, the offender would be discharged from the service of any unserved portion of the term of detention;

(f) a breach of the SRO, by re-offending or by otherwise failing to comply with a condition of the order, would result in the SRRB:

i. taking no action in the case of a minor breach;

53 Ibid 39.

ii. leaving the SRO in place, but amending its terms; or
iii. returning the offender to custody to serve any unserved period of the detention imposed, the service of which would be conditionally suspended upon the making of the SRO. The offender would be immediately eligible for an SRO to be made as before;

(g) if the SRO was breached and there was no further liability to serve any portion of the term of detention, the SRRB should have the power:

i. to take no action in the case of a minor breach;
ii. to leave the SRO in place, but amend its terms; or
iii. to order the young offender to be returned to detention for a short period by way of punishment, and to terminate the SRO. In this last case the young person would have the opportunity to be heard, which they would have upon the question of any proposed amendment to the terms of the SRO. [54]

ALSWA strongly opposes the suggested amendments to the YOA concerning SROs. As a matter of principle, an offender should not be liable to sanctions or conditions beyond the expiry of the sentence imposed by the court. What this proposal means is that the Executive effectively determines the appropriate length of the young person's sentence. This is wholly inconsistent with established principles of justice.

Moreover, the rationale for this proposal is, in ALSWA's opinion, misguided. Appropriate resources and policy changes are capable of rectifying any issue in assembling reports in a timely manner for the SRRB. Further, for young people subject to short periods of detention, comprehensive reports prepared for the sentencing court should be available and only need updating to reflect what has changed or occurred while the young person has been in custody. Youth Justice Services (and other relevant agencies) must begin preparing for the possible release of the young person at the earliest opportunity. ALSWA is gravely concerned that lack of resources and time pressures on Youth Justice Services' staff is the justification for lengthening the sentence imposed on a young person. In addition, if young offenders require support and assistance at the expiration of their sentence, referrals to appropriate agencies and programs should occur before the release of the young person.

If this proposal is implemented it will constitute a serious infringement of fundamental human rights. For example, Article 37(b) of the Convention on the Rights of the Child states that:

> No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

Further, Article 40(v) provides that:

> If considered to have infringed the penal law, to have this decision and *any measures imposed in consequence therefore* reviewed by a higher competent, independent and impartial authority or judicial body according to law.

The United Nations Working Group on Arbitrary Detention has stated that deprivation of liberty is arbitrary if it falls within one of three categories. The first of these categories is when 'it is clearly

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54 Department of Corrective Services, *Young People in the Justice System: A Review of the Young Offenders Act 1994* (December 2016) Proposal 11, 44-45.

impossible to invoke any legal basis justifying the deprivation of liberty' and one of two examples provided is when a person is kept in detention after the completion of his or her sentence.[55]

Family responsibility conditions

Responsible Parenting Agreements exist under the *Children and Community Services Act 2004* (WA); however, the Green Paper observes that these provisions have not been used in practice. It is stated that:

> A Court Order has not proven to be an appropriate or effective way of dealing with families who fail to assist their child in developing a non-offending way of life. However, it is clear that a basis level of family support and cooperation is often required to enable successful rehabilitation and reintegration in a young offender.[56]

The Green Paper suggests, as an alternative, there may be a role for the SRRB to prescribe conditions upon family members. It is proposed that the YOA provide for the SRRB to make a 'family responsibility' condition on a SRO and there 'would be no punitive sanctions for family members who breach conditions relating to them, but a breach may result in the terms of the SRO being reconsidered by the SRRB'.[57]

ALSWA is opposed to any such reform. While family support for young offenders is integral to future prospects, the approach to reform is misconceived. For many Aboriginal families with young offenders, lack of support results from entrenched disadvantage and vulnerability including homelessness, poverty, unemployment, physical and mental health issues, cognitive impairment, intergenerational trauma and family violence. These issues are compounded by a cycle of family imprisonment and disengagement from mainstream services. To expect that specific conditions will overcome these issues is unrealistic. These families must be provided with appropriate support and resources to address the relevant underlying issues and the young person must be provided with additional support mechanisms (eg, support worker, mentor) where necessary. The young person should not be liable to any type of consequence or change to the conditions of his or her SRO because of the actions or inactions of his or her family. It is difficult to conceive what type of changes the SRRB might make to a SRO following non-compliance by a family member that would not penalise the young person in some way.

Earliest release date

As noted above, a young person is generally eligible for a SRO after serving 50 per cent of the term of detention. For sentences of 12 months or more, some flexibility exists for the court to set a lesser minimum term. ALSWA is of the view that greater flexibility is required in order to enable the sentencing

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55 United Nations Working Group on Arbitrary Detention, Fact Sheet No. 26 retrieved from http://www.ohchr.org/Documents/Publications/FactSheet26en.pdf

56 Department of Corrective Services, *Young People in the Justice System: A Review of the Young Offenders Act 1994* (December 2016) Proposal 42.

57 Ibid Proposal 13, 45.

court to formulate an individualised sentence. For some young offenders, a lesser minimum term may be appropriate to reflect their strong prospects for rehabilitation but at the same time acknowledge the seriousness of the offence by requiring the young person to spend a short period of time in custody.

RECOMMENDATIONS

27. Supervised Release Orders under the *Young Offenders Act 1994* (WA) must continue to operate as a conditional early release option and must not be extended beyond the term of detention imposed by the court.

28. Family responsibility conditions must not be imposed as part of a Supervised Release Order.

29. The *Young Offenders Act 1994* (WA) should be amended to provide greater flexibility for the sentencing court to set an appropriate minimum term when a sentence of immediate detention is imposed.

Conditional release orders (CROs)

The YOA provides that a Youth Community Based Order is satisfied when every attendance condition or community work condition imposed has been fulfilled and the period for which it imposes supervision has elapsed. Section 76 further provides that the order remains in force until it is satisfied unless it is sooner discharged or cancelled by the court. By virtue of s 100 of the YOA, if the court makes an Intensive Youth Supervision Order without detention, the same rules apply.

However, if an Intensive Youth Supervision Order is made with detention (CRO), the maximum sentence of detention is 12 months and the order cannot exceed 12 months. Significantly, s 101(3) of the YOA provides that 'time during which the offender is released under the order does not count as time for which the offender is serving the term of detention'. Therefore, if an offender breaches a 12-month CRO after complying with the conditions of the order for 10 months, he or she is potentially liable to serve the full 12-month sentence of detention (although the court is to take into account the degree of compliance on the order when deciding how to deal with a breach).

Section 115 of the YOA provides that if the CRO runs for its full term without being cancelled the offender ceases to be liable to serve the sentence of detention unless:

1. proceedings for an offence are commenced within 6 months and the court finds that the young person committed the offence during the term of the CRO; or

2. a notice for breach of conditions is issued within 6 months and the court finds that the young person failed to comply with any condition under the CRO.

The Green Paper contends that given a CRO is more serious than a Youth Community Based Order or Intensive Youth Supervision Order, it may be necessary to amend the YOA to allow for the extension of a CRO past the term during which the offender would be liable to be detained in order to ensure that the conditions of the order are satisfied.[58]

ALSWA is of the view that it is not appropriate for a CRO to extend beyond a term of 12 months. Twelve months is a very long time for a young person to be subject to strict conditions coupled with the threat of detention for non-compliance. Any extension of the term of the CRO would also extend the liability for serving detention. If the young person fails to comply with the conditions of the order DCS can institute breach proceedings for up to six months after the expiration of the order.

RECOMMENDATION

30. The current maximum duration for a Conditional Release Order under the *Young Offenders Act 1994* (WA) should remain at 12 months.

Remaining in detention after release date

The Green Paper observes that some young people may be required to stay in custody for a day or two after they are eligible for release from detention for flights to return home or to locate a responsible person. The Department for Child Protection and Family Support (DCPFS) will accept responsibility for children in state care; however, there is concern about other young people. Detaining a young person past his or her release date may constitute unlawful detention. The Green Paper proposes that the YOA explicitly provide for situations where a young person cannot leave detention on the day they are due for release but acknowledges that caution must be exercised to ensure that any such provisions do not legislate for indefinite detention.[59]

ALSWA is opposed to any legislative amendment that authorises the detention of a young person beyond the expiration of their sentence. DCS should make every effort to facilitate the safe release of the young person at the correct time. If flight schedules do not permit this, there is no reason why the CEO could not authorise earlier release under s 188(4). In addition, the superintendent has the power under s 176 of the YOA to authorise the discharge of a detainee at any time during the period of three days immediately before the day when the detainee would be due to be released upon the expiry of the sentence.

Further, if the young person must wait a day or two before boarding a flight or returning home, suitable emergency accommodation should be sourced in advance. ALSWA is also perplexed by the inference

58 Department of Corrective Services, *Young People in the Justice System: A Review of the Young Offenders Act 1994* (December 2016) Proposal 14, 45.
59 Ibid Proposal 15, 43 & 45.

that if a responsible person cannot be located for a young person who is not under the formal care of the DCPFS, they should remain in custody. Surely as the department responsible for the safety and wellbeing of children, DCPFS should take responsibility for the young person until it is able to identify an appropriate placement.

RECOMMENDATION

31. The *Young Offenders Act 1994* (WA) should not enable a young person to be detained in a detention centre after the expiry of the sentence of detention.

Throughcare

ALSWA highlights that adequate resourcing for culturally competent throughcare services for Aboriginal detainees would alleviate many of the problems discussed above in relation to pre-release. As soon as a young person enters custody, an Aboriginal caseworker should commence working with the young person and his or her family (including extended family) to plan for the release of the young person as well as facilitating participating in appropriate rehabilitation programs during the time in custody. ALSWA recommends the allocation of further resources to Aboriginal community controlled programs for this purpose. As just one example, ALSWA is currently operating the Youth Engagement Program for clients appearing in the Perth Children's Court. ALSWA has worked with some young people in detention but resources are stretched given one purpose of the program is to have a daily onsite presence in the Perth Children's Court. Additional resources for this program to enable a dedicated diversion officer to operate from Banksia Hill Detention Centre would assist in providing better throughcare services for Aboriginal detainees.

RECOMMENDATION

32. That the Department for Corrective Services consider providing additional funding for Aboriginal community controlled programs to provide throughcare services to detainees.

Detention facilities

Youth Justice Board

The Green Paper observes that the Youth Justice Board in the United Kingdom is a non-departmental public body created under legislation to oversee the youth justice system. It is suggested that it may be beneficial for Banksia Hill Detention Centre to have an independent statutory board. The board would include the superintendent of the detention facility and it would provide decision-making support and oversight. The board would be comprised of appointed experts and respected community members. The Green Paper proposes that consideration be given to establishing a new division under the YOA to create an independent incorporated statutory board for a detention facility. This division should be set up so that any detention centre established in Western Australia has its own board.[60]

ALSWA does not consider that there is any merit in establishing a statutory board to oversee youth detention facilities in Western Australia. The preferable option is to strengthen existing independent oversight mechanisms. The Office of the Inspector of Custodial Services (OICS) currently has the power to inspect, and report to Parliament, on detention facilities. These reports contain recommendations for improvement and DCS provides its response to these recommendations, which are included in the final report. ALSWA recommends that DCS be required to report to Parliament after a specified period about whether and how it has implemented the recommendations of OICS and if a recommendation has not been implemented, DCS should be required to explain why.

ALSWA also highlights that the agreement by the Commonwealth Government to ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) by the end of 2017 will assist in ensuring greater oversight of juvenile detention centres in Western Australia.

RECOMMENDATION

33. The Department of Corrective Services should be mandated to respond to the recommendations of the Office of the Inspector of Custodial Services by reporting to Parliament within a specified period about whether and how the recommendations have been implemented.

60 Ibid Proposal 16, 51.

Transfer of young people aged 18 years to adult facilities

Section 21 of the YOA provides that if a young person attains the age of 18 years while on remand, the court may upon an application by the CEO direct that the person be transferred to a prison and treated as an adult prisoner on remand. Section 178 of the YOA enables the CEO to apply to the President of the Children's Court for a direction to transfer an offender, who is serving a custodial sentence in a detention centre, to a prison. Such a direction can only be made for an offender who is under the age of 18 years if the court is satisfied that the offender should be transferred because the offender's behaviour in a detention centre is or has been a significant risk to the safety or welfare of other detainees or staff; because of the offender's antecedents; or because of any other relevant reason.

For an offender who has reached 18 years and who is serving a sentence of detention, the court can make such a direction if the offender has a substantial period of detention to service or if the court is satisfied that the detainee should be transferred for the abovementioned factors. For an offender who has reached the age of 18 years and who is serving a sentence of imprisonment, the court can direct the transfer of the detainee if it thinks fit.

The Green Paper suggests that the sentencing magistrate should be able to determine whether a young person should be transferred to a prison at the time of sentencing because he or she will know whether the young person is likely to be unsuitable for Banksia Hill Detention Centre upon attaining the age of 18 years (eg, the offender will be a damaging influence on others or BHDC won't accommodate their needs).[61] The proposal states that a provision be inserted at s 50 of the YOA to grant the President of the Children's Court the discretionary power to order, when sentencing a young person aged 17 ½–18 years of age to a custodial sentence, that the young person be transferred to an adult facility upon reaching 18 years of age.[62]

ALSWA considers that the current provisions are appropriate and no reform is required. The determination of whether a young person should be transferred from a detention centre to a prison should not be made at the time of sentencing because the circumstances of the offender may change. The current process, whereby the CEO must apply to the President for a direction to transfer the young person is appropriate and transparent.

RECOMMENDATION

34. The existing provisions of the *Young Offenders Act 1994* (WA) dealing with the transfer of a young person from a detention centre to a prison should not be amended.

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61 Department of Corrective Services, *Young People in the Justice System: A Review of the Young Offenders Act 1994* (December 2016) 49.
62 Ibid Proposal 17, 51.

Privatisation of detention facilities

The Green Paper comments that there are no immediate plans for contracting custodial services for young people; however, it is proposed that the YOA include provisions modelled on s15A-15Z of the *Prisons Act 1981* (WA) allowing for contracts for custodial services. ALSWA opposes any amendments to the YOA to allow for the privatisation of juvenile detention facilities. Young people in detention are particularly vulnerable and the management of detention centres should rest directly with government. In the absence of clear evidence of the benefits of privatisation for young people, there is no justification for reform at this time.

RECOMMENDATION

35. The *Young Offenders Act 1994* (WA) should not be amended at this time to permit privatisation of detention centres.

Detention offences

Part 9 of the YOA deals with detention offences. Section 170 sets out what constitutes a detention offence and it includes non-criminal behaviour (such as disobeying a rule or an act of insubordination) and criminal behaviour (such as assault, escaping lawful custody and possession of drugs). If the conduct amounts to a criminal offence, there is always the option of referring the matter to police for prosecution in the Children's Court in the usual way.

The superintendent may hear and determine a detention offence charge or refer the charge to a visiting justice (Children's Court Magistrate or Justice of the Peace). The charge must be referred to a visiting justice if the detainee so elects. The superintendent or visiting justice can impose a range of sanctions if the charge is proved. These sanctions are a caution; a reprimand; an extension to the young person's earliest release date (up to three day by the superintendent and up to 14 days by a visiting justice); a cancellation of gratuities (up to three days by the superintendent and up to 7 days by a visiting justice); and confinement in a designated cell (up to 24 hours by the superintendent and up to 48 hours by a visiting justice). The sanction imposed may include a combination of an extension of the earliest release date, a cancellation of gratuities and confinement. For the hearing of the charge, the procedure loosely mirrors the procedure of a criminal trial; however, the detainee is not to be legally represented and the decision-maker is not bound by the rules of evidence.[63]

The Green Paper suggests that the power to extend a young person's earliest release date should be removed because no such power exists for adult prisoners. Further, it is observed that the legislative provisions do not specify what standard of proof applies to detention offences. For adults, minor prison

63 Young Offenders Act 1994 (WA) s 174 & Young Offenders Regulations 1995 (WA) regs 37–39.

offences must be proven on the balance of probabilities but aggravated prison offences are heard in a court of summary jurisdiction and hence, the criminal standard applies.[64] It is proposed that s 173(2)(c) and 173(3) should be amended to remove the power of superintendents and visiting justices to alter the earliest release date of the detainee and that the standard of proof applicable to the hearing of detention offence charges should be included in the legislation or regulations.[65]

ALSWA strongly agrees that amendments to the YOA are required to remove the power to alter the earliest release date of the detainee. Its continued inclusion is contrary to the well-established principle that children should not receive more severe treatment by the justice system than adults. ALSWA also considers that there is merit in distinguishing minor detention offences from more serious detention offences. A minor detention offence should be defined to include only behaviour that does not constitute a criminal offence (eg, disobeying a rule) and the standard of proof need not be specified. The legislative regime must also ensure that the only sanctions available for minor detention offences are a caution, a reprimand or a good behaviour bond. For more serious detention offences, the full range of existing sanctions should be available (other than the power to alter the earliest release date) and the charge must be proved beyond reasonable doubt. In addition, the proceedings for more serious detention offences should be formally recorded and transcribed.

ALSWA is concerned about the interaction of detention offences and general behaviour management regimes. Numerous clients have instructed ALSWA that they have been subjected to restrictive management regimes including lock downs for up to 23 hours per day. Some of these clients have been ostensibly placed in confinement under a management regime yet, separately and, in effect, doubly punished for a detention offence. ALSWA recommends that the legislative provisions should be amended to provide that in determining the appropriate sanction for a detention offence, the superintendent or visiting justice is required to take into account any changes to the management regime of the detainee that occurred because of the alleged detention offence.

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64 Department of Corrective Services, *Young People in the Justice System: A Review of the Young Offenders Act 1994* (December 2016) 50–51.

65 Ibid Proposals 19 & 20, 51.

RECOMMENDATIONS

36. The *Young Offenders Act 1994* (WA) should be amended to:

    (a) remove the power of the superintendent or visiting justice to alter the earliest release date of the detainee as a sanction for a detention offence;

    (b) specify minor detention offences as those offences where the conduct does not amount to a criminal offence and that the only sanctions available for a minor detention offence are a caution, reprimand or good behaviour bond;

    (c) provide that for other detention offences, the offence must be proved beyond a reasonable doubt and the proceedings should be formally recorded and transcribed; and

    (d) provide that when imposing a sanction for a detention offence, the superintendent or visiting justice must take into account any changes to the management regime of the detainee that occurred because of the alleged detention offence.

Interaction with other legislative provisions: mandatory sentencing

The Green Paper discusses the current mandatory sentencing regimes in Western Australia, namely mandatory sentencing laws for assault public officers, aggravated burglaries, dangerous or reckless driving while evading from police, and repeat home burglaries.[66]

At the outset, ALSWA questions why a paper initiated by DCS for the statutory review of the YOA is considering the appropriate statutory penalty for specified offences under the *Criminal Code* and other legislation. The only justifiable basis for this discussion is s 46(5a) of the YOA, which provides:

> Subject to the *Road Traffic (Administration) Act 2008* section 121 and sections 5 and 10 of the *Graffiti Vandalism Act 2016* but despite any other enactments, where a written law provides that a mandatory penalty or that a minimum penalty shall be imposed in relation to an offence, the court dealing with a young person for the offence is not obliged to impose such a penalty.

66 Department of Corrective Services, *Young People in the Justice System: A Review of the Young Offenders Act 1994* (December 2016) 51–56. The discussion includes consideration of mandatory minimum penalties for assault public officer, aggravated burglary, repeat home burglary and dangerous driving while evading police.

The Green Paper suggests that this section 'may create limitations to the intent of other enactments relating to mandatory or minimum sentencing'.[67]

However, s 46(5a) is expressly excluded from the mandatory sentencing laws for assault public officers, aggravated burglaries and repeat home burglaries. However, s 46(5a) is not mentioned at all in relation to the mandatory sentencing laws for dangerous or reckless driving while evading police. Accordingly, s 46(5a) operates to enable the Children's Court to depart from the mandatory minimum sentence in this instance.

The Green Paper suggests that given the existence of the different mandatory sentencing laws 'it is necessary to consider alternative frameworks which are appropriate for young offenders of a certain age while reflecting community expectations in sentencing for certain serious offences'.[68] Three options are considered:

1. A phased approach to mandatory sentencing whereby there is a 'lesser degree' of mandatory sentencing for juveniles aged 16 years and older while the full extent of the mandatory sentencing laws apply for adults. The rationale for this approach is that if mandatory sentencing laws did not apply at all to children, adults may encourage or pressure young people to commit offences on their behalf. This reasoning is flawed. It presumes that offenders typically weigh up their options rationally before committing a criminal offence. The reality is that the vast majority of offenders commit offences due to socio-economic disadvantage or while under the influence of substances and/or affected by mental illness or cognitive impairment.

2. No change to the current laws.

3. An alternative sentencing regimes for children aged 15 years or younger such as a mandatory minimum sentence of a Youth Community Based Order for specified offence or the issuance of a guideline judgement.

ALSWA is strongly opposed to mandatory sentencing in any form. For present purposes, ALSWA recommends the repeal of all mandatory sentencing laws that apply to young people in Western Australia. There are a number of well-reported difficulties with mandatory sentencing laws including that they result in injustice by removing judicial discretion to take into account the individual circumstances of a particular offence/offender; they do not deter 'would-be offenders'; and they contribute to higher recidivism rates because imprisonment and detention are the least successful options for rehabilitating offenders. Rehabilitation must continue to be the key priority for the juvenile justice system and mandatory sentencing laws circumvent other initiatives and reforms designed to maximise rehabilitation and community safety. ALSWA is of the view that mandatory sentencing laws contribute to the unacceptable level of overrepresentation of Aboriginal young people in detention. The LRCWA

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67 Ibid 51.

68 Department of Corrective Services, *Young People in the Justice System: A Review of the Young Offenders Act 1994* (December 2016) 53.

observed in 2006 that according to DCS from 2000–2005 approximately 87 per cent of all children sentenced under the mandatory sentencing laws for repeat home burglary laws were Aboriginal[69] and ALSWA has no reason to believe that these figures would have changed in recent years. Other options such as mandatory minimum sentences of a Youth Community Based Order or guideline judgements are unnecessary.

RECOMMENDATION

37. All mandatory sentencing laws that apply to persons under the age of 18 years should be immediately repealed.

Technical and procedural issues

JJTs

There are three proposals in the Green Paper concerning procedural aspects of JJTs:

- That s 28 of the YOA provide that a court referral to a JJT is reviewable by the President of the Children's Court.
- That the YOA provide that a referral to a JJT made under s 28(3) is an order of the court.
- That s 28(3) of the YOA provide that the court is not to make any other order against the young person concerned at the time when the young person is referred to a JJT.

The apparent basis for these proposals is to ensure that a referral to a JJT is reviewable by the President of the Children's Court. Section 40 of the *Children's Court of Western Australia Act 1988* (WA) provides for a review to the President of an order made against or in relation to a child where there has been a finding that a charge against a child is proved. ALSWA notes that s 28(1) of the YOA provides that a court may refer a young person to a JJT before dealing with the charge; after a plea of guilty has been entered but before the court records a finding that the young person is guilty; after a hearing but before the court records a finding that the young person is guilty; or after the court has found the charge proved but before the court records a finding that the young person is guilty of an offence. Section 28(3) provides that if a court refers a matter to the JJT the court is not to make any order against the young person at the time the matter is referred. Even if s 28 is amended to provide that a referral to a JJT is an order of the court and s 28(3) is amended to provide that the court is not to make any *other* order against the young person, the power to review before the President may continue to be questionable in circumstances where there has not be a finding that a charge against a child is proved.

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

ALSWA suggests that s 40 of the *Children's Court of Western Australia Act 1988* (WA) should be amended to provide that a referral to a JJT *and* a decision not to refer a young person to a JJT may be reviewed by the President of the Children's Court either on the application of the young person or the prosecution. No other amendments are required.

RECOMMENDATION

38. Section 40 of the *Children's Court of Western Australia Act 1988* (WA) should be amended to provide in a separate subsection that a referral to a JJT and a decision not to refer a young person to a JJT may be reviewed by the President of the Children's Court either on the application of the young person or the prosecution.

Recording of a conviction

Section 55 of the YOA provides that the court is to record a conviction where the court finds a young person guilty of a scheduled offence or where it imposes a custodial sentence, unless it is satisfied that there are exceptional reasons for not doing so. Where the offence is not a scheduled offence and a non-custodial sentence is imposed, the court is not to record a conviction unless there are exceptional reasons for doing so. Where the court departs from the general rule due to exceptional reasons, the court is to record its reasons (these reasons would be apparent from the transcript of proceedings). Where a young person is dealt with under s 66 or s 67 and the court refrains from imposing any punishment, the court is not to record a conviction.

The Green Paper proposes that consideration be given to whether oral reasoning provided on a transcript constitutes a recording of a conviction for the purposes of s 55(1).[70] It is further observed that it is not common practice for the Children's Court Magistrates to specifically state on the transcript that a conviction is being recorded.

ALSWA is not aware of any difficulties in practice concerning the recording of convictions under the YOA. Having said that, it appears from the observations in the Green Paper, that clarity may be required. ALSWA suggests that s 55 of the YOA could be amended to provide that where the court has not recorded its reasons for departing from the general rule, a recording of a conviction or not recording of a conviction is taken to have occurred.

70 Department of Corrective Services, *Young People in the Justice System: A Review of the Young Offenders Act 1994* (December 2016) Proposal 15, 43 & 45.

RECOMMENDATION

39. Section 55 of the *Young Offenders Act 1994* (WA) should be amended to provide that unless a court records or refrains from recording a conviction due to exceptional reasons, the recording or non-recording of a conviction as required by the general rules is deemed to have taken place.

Definition of a responsible adult

The term 'responsible adult' is defined in s 3 of the YOA to mean:

> A parent, guardian, or other person having responsibility for the day to day care of the young person but does not include a person who the regulations may provide is not a responsible adult.[71]

The Green Paper proposes amending this definition because it is 'restrictive and makes it difficult to place young people on bail', in particular for Aboriginal families.[72] The proposed definition is the definition of a 'responsible person' under Schedule 1, Part C of the *Bail Act 1982* (WA).[73] This definition provides that a 'responsible person' means a 'parent, relative, employer or other person who, in the opinion of the judicial officer or authorised officer, is in a position to both influence the conduct of the child and provide the child with support and direction'.

There appears to be a degree of confusion underpinning the proposal to amend the definition of a 'responsible adult' under the YOA to reflect the definition of 'responsible person' under the *Bail Act*. The requirement for a responsible person to sign an undertaking for young person is created under the *Bail Act* and the definition under the *Bail Act* applies. Accordingly, the definition of a responsible adult under the YOA is not the source of any difficulties placing a young person on bail. In ALSWA's experience, the *definition* of a responsible person under the *Bail Act* does not create any issues in practice. Instead, issues arise where it is not possible to locate any person who is available or willing to sign the responsible person undertaking. Furthermore, where the young person is under the care of the DCPFS, it is common for the young person to remain in custody on remand because DCPFS is unwilling to sign the undertaking. Often this occurs because of a lack of suitable accommodation options for the young person. As evidenced by the following two case studies, this is on ongoing serious problem that needs to be rectified.

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71 There are no such regulations.

72 Department of Corrective Services, *Young People in the Justice System: A Review of the Young Offenders Act 1994* (December 2016) 58.

73 Ibid Proposal 5, 60.

Case Study A

A is 15 years old. He was charged with wilfully lighting a fire likely to injure or damage. The circumstances of the offence were that he lit several matches and threw them onto a grassed area of an oval causing a fire to start. The fire spread to an area of about two metres by one metre, burning the grass. A left the scene and, subsequently, the fire and emergency services attended and extinguished the fire. A had been under the influence of cannabis at the time and said that he threw the matches out of boredom. He did not intend to cause a fire that could potentially cause significant damage. A had no prior criminal history and had been under the care of DCPFS since he was six years old. When A appeared in court for the charge he was remanded in custody because there was no responsible person willing to sign a bail undertaking for him (including the Department). A spent a total of 55 days in custody before he was sentenced for the offence. During this period, ALSWA regularly made contact with DCPFS to inquire whether any accommodation placements had been found for A.

On the day of sentencing, there was still no accommodation placement put forward for A by the DCPFS (his legal guardian). There was a representative from DCPFS in court as well as A's case manager, the Assistant District Director and the District Director who were present via video-link. One Departmental representative explained that it was difficult to find appropriate accommodation for A because there are agreements between DCPFS and local communities that children who commit arson or light fires won't be placed in specified residential premises.

The sentencing judge specifically questioned the DCPFS representatives about what would happen to A if he was placed on a community-based order. The response was that they would have to try to see if there was anyone in the family who could look after him for a few days until alternative accommodation could be found. The following is an extract from the transcript.

Judge: 'Well, when he leaves the courtroom, where will he go?'

DCPFS Representative: 'Okay. There you've got me on that one. I can't answer that one, sir'.

Judge: '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 me, after over seven weeks, nearly eight weeks in custody where someone will go if they leave the courtroom. I'm struggling'.

It was only after this pressure from the judge, his indication that A 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.

Case Study B

B is 13 years old. He comes from Meekatharra. He is charged with a number of criminal charges. He comes from a dysfunctional and disadvantaged family background characterised by parental alcohol abuse, gross neglect, acute domestic violence and possible sexual abuse. He first came to the attention of the Department of Child Protection and Family Services (DCPFS) as a six year old.

On 18 January, 2017, B was granted bail with the primary condition of bail that the CEO of the DCPFS sign for B's release from custody as a responsible adult as prescribed under the *Bail Act 1982* (WA). B has not been realised to bail and has spent 66 days in custody at Banksia Hill Juvenile Detention Centre. DCPFS has advised ALSWA that B will not be able to be released until suitable accommodation is found for B. Further, a DCPFS caseworker has advised ALSWA that "ideally they (DCPFS) would like him (ie B) remanded in custody" on the basis that B is too difficult to deal with and a juvenile detention centre is a more convenient place to house him. This is an outrageous state of affairs.

ALSWA has considered the definition of a responsible adult under the YOA and does not consider that there is a sufficient justification for reform. The term 'responsible adult' appears in numerous sections under the YOA. For example, s 20(1) requires the police to notify a responsible adult of their intention to question a young person. Section 45 provides that a responsible adult may be required to attend court and, if the responsible adult fails to attend, the court may issue a warrant to apprehend the person. The court may order a responsible adult to pay a fine or part of fine imposed upon a young person under s 58. In addition, under s 70 the court may order that a responsible adult provide security that the young person keep the peace and be of good behaviour for a period not exceeding on year. In the absence of any evidence of problems created by the definition of a responsible adult for the purposes of these provisions under the YOA, ALSWA does not support reform. Furthermore, if there is a particular issue with respect to a single provision, the definition can be amended for that purpose alone. For instance, s 30 sets out the role of a responsible adult for JJTs. Section 30(4) provides that if a responsible adult cannot be located or if it would be inappropriate to involve a responsible adult in the JJT process, the team may appoint a person satisfying the alternative definition is s 30(5). This definition reflects the definition under the *Bail Act* and therefore captures a potentially wider group of people.

RECOMMENDATION

40. The definition of responsible adult under the *Young Offenders Act 1994* (WA) should not be amended.

Transfer of detainees in emergencies

In January 2013, a large number of detainees from Banksia Hill Detention Centre were re-located to sections of Hakea Prison following the riot. The Green Paper proposes that consideration is given to whether a provision is required to expressly provide that in defined emergency situations detainees can be transferred to a prison (if kept separate from its population) and that during any such period that part of the prison is deemed to be a detention centre for the purposes of the YOA.[74]

In *Wilson v Joseph Francis, Minister for Corrective Services for the State of Western Australia*[75] proceedings were instituted in the Supreme Court challenging the lawfulness of the transfer of the detainees to Hakea Prison and the subsequent order by the Minister for Corrective Services to declare specified units within Hakea Prison as a detention centre. Martin CJ found that the various decisions were lawful and valid. He observed that the 'relevant provisions of the Act should be construed as accommodating the temporary transfer of detainees to a place of safety and security when, as a result of an emergency, their continued accommodation within a detention centre is impractical for at least so long as it takes to regularise the lawfulness of their detention'.[76] Martin CJ further stated:

> Examples more extreme than the riot which occurred at Banksia Hill can easily be imagined. If a detention centre was entirely destroyed by natural disaster, such a fire, flood or earthquake, could it be supposed that s 118A of the Act should be construed so as to require detainees to be held at that place, at their peril, until such time as another place had been declared to be a detention centre and the Minister's order to that effect published in the Government Gazette?... the provisions of the Act pertaining to the detention of young persons...should be construed as being subject to unexpected emergencies of the kind to which I have referred, in which event the safety and security of the detainees should be considered to be the paramount consideration.[77]

Bearing in mind this decision, the current provisions are appropriate and no reform is required. ALSWA agrees with the observation in the Green Paper that legislative reform specifying the circumstances in which transfer is permitted may in fact make it more difficult to respond to emergencies. Emergencies are often unforeseen and ALSWA considers that the interpretation of the current provisions demonstrates that there is a clear imperative to refrain from transferring detainees to a prison unless there is no other safe and suitable alternative available.

RECOMMENDATION

41. There should not be any specific amendments to the *Young Offenders Act 1994* (WA) in relation to the transfer of detainees in emergencies.

74 Department of Corrective Services, *Young People in the Justice System: A Review of the Young Offenders Act 1994* (December 2016) Proposal 6, 60.
75 [2013] WASC 157.
76 Ibid [7].
77 Ibid [179].

Membership of Supervised Release Board

ALSWA has no objection to the proposal that a serving or retired police officer nominated by the Commissioner of Police may be a member of the SRRB.[78]

Conferring powers in the YOA in a manner consistent with modern enabling legislation

ALSWA has no objection to the proposal to amend the YOA to ensure it is consistent with modern enabling legislation that usually confers all or most powers on the Minister or CEO and uses instruments of delegation to confer powers on other officers.[79]

Other issues

Past convictions

Section 189(2) of the YOA provides that if a young person is convicted of an offence and a period of two years has elapsed since the date of the conviction or the discharge of any sentence imposed, the conviction is not to be regarded as a conviction for any purpose, except as provided for in s 189. One such exception is s 189(8)(c), which provides that the above general rule does not affect the right of a court to disqualify a person from holding or obtaining a driver's licence or any cancellation or disqualification that occurs by operation of any written law.

Under the *Road Traffic Act 1974* (WA), there are a number of offences where the offender must be permanently disqualified from driving for a third or subsequent conviction. For example, a third conviction for reckless driving or driving while under the influence of alcohol will result in permanent disqualification.

ALSWA is concerned about the impact of these provisions on young people. A young person might accumulate three relevant convictions while under the age of 18 years or accumulate one or more prior convictions while a juvenile and receive the third conviction as an adult. ALSWA considers that an alternative approach is required where one or more of the prior convictions occurred while the young person was under the age of 18 years. Le Meire J observed in *Stockham v Clarke*[80] that:

> Section 189 of the *Young Offenders Act* operates in certain circumstances to relieve offenders of the long term consequences of convictions recorded against them as a juvenile and has a rehabilitative purpose, consistent with the objectives of rehabilitation and reintegration in the community.[81]

Martin CJ has commented that 'it is at least arguable that parliament may have intended that young offenders who assume the privileges of adulthood, such as the privilege of driving, should be bound by the consequences of misuse of that privilege, in the same way as adult offenders'.[82] ALSWA is of the

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78 Department of Corrective Services, *Young People in the Justice System: A Review of the Young Offenders Act 1994* (December 2016) Proposal 7, 60.
79 Ibid Proposal 10, 60.
80 [2014] WASC 157.
81 Ibid [5].
82 *Pavlovic v Spooner* [2014] WASCA 31 [53].

view that this observation fails to accommodate the reality that many young people will drive a vehicle unlawfully prior to obtaining their driver's licence. Such behaviour is no different to other criminal behaviour that occurs during childhood. If a young offender is relieved of the consequences of a conviction after two years for a wide variety of offences such a burglary, assault, stealing, robbery, damage, drug offences and fraud, why should that young person not be relieved of the consequences of a conviction for driving offences. ALSWA recommends that s 189(8)(c) and (d) should be repealed.

RECOMMENDATION

42. Sections 189(8)(c) and (d) of the *Young Offenders Act 1994* (WA) should be repealed.

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