



Ref:TS:RN:2008/0065

16 June 2009

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Dear Mr. Porter,

ABORIGINAL COMMUNITY COURTS

The Aboriginal Legal Service of Western Australia (ALSWA) is writing to you to outline our recommendations about the Aboriginal Community Courts that have been trialled in Kalgoorlie-Boulder and Norseman and to advocate for their extension into other communities.

This submission is to supplement the departmental review that is currently in progress along with the Process Review and Evaluation Summary Report, which was prepared in October 2007.

The ALSWA seeks to:

- outline the positive impact the Courts have had at an offender, panellist, Magistrate, courts staff and community level;
- advocate for the extension and roll out of the Courts in Western Australia into other regions and areas of law; and
- detail minor concerns about the Courts in their current format and make recommendations for reform.

If you would like to discuss this submission further, please contact our Senior Policy Officer, Ms. Tammy Solonec of this Office on 9265 6693.

Yours faithfully,

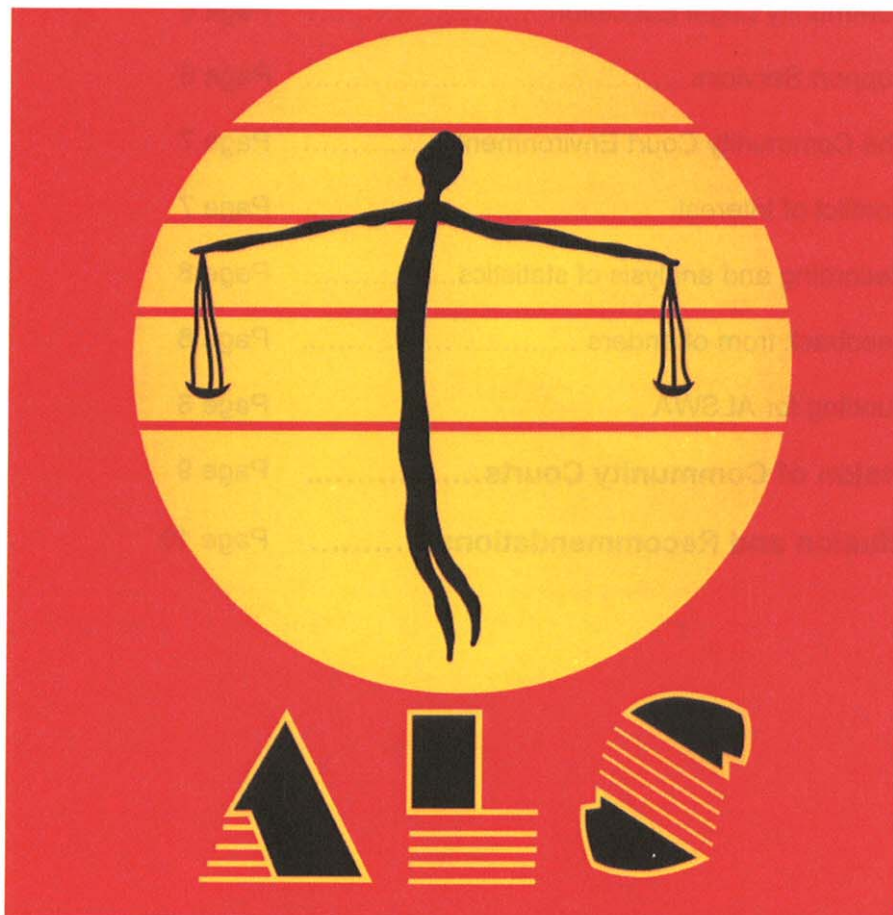
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**ABORIGINAL LEGAL SERVICE OF
WESTERN AUSTRALIA (INC.)**

SUBMISSION TO THE WA ATTORNEY GENERAL

**ABORIGINAL COMMUNITY COURTS
KALGOORLIE-BOULDER AND NORSEMAN**



JUNE 2009

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The Aboriginal Legal Service of Western Australia (Inc.)

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

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

ALSWA has an established WA Aboriginal Advisory Committee ("WAAAC") to advise governments and other bodies about law and justice issues affecting Indigenous peoples living in WA. Members include ALSWA's Chief Executive Officer, the Manager of ALSWA's Court Officers Unit and 16 executive officers¹ elected by Indigenous people from their local regions to speak for them on law and justice issues. WAAAC members and their support staff are responsible for consulting with Indigenous communities to ensure that those views are made available to ALSWA Executive Committee and senior management.

ALSWA's Lawyers and Court Officers contribute invaluable information to submissions. All Court Officers are Indigenous and represent Indigenous people in the Magistrates Courts and the Children's Court under s 48 of the *Aboriginal Affairs Planning Authority Act 1972* (WA). Each regional office also has a Court Officer who provides an understanding of local issues. In more remote areas, Court Officers are often the only local permanent legal service dealing with all aspects of the legal system.

¹ There are two Executive Officers for each of the former 8 ATSIC regions (Metropolitan, Central Desert Region, Murchison/Gascoyne Region, Southern Region, Pilbara Region, Goldfields Region, West Kimberley Region and East Kimberley Region). They are elected by the Indigenous public every three years.

1. Scope of Consultation

This submission was prepared by ALSWA between November 2008 and May 2009 and relates to the Aboriginal Community Courts that have been trialled in Kalgoorlie-Boulder and Norseman ("the Community Courts"). A number of people were interviewed as part of the consultation including Court coordinators, Magistrates, ALSWA staff, panelists, police prosecutors and some staff and panelists from the Koori Court of Victoria.

2. The Positive Impact

The overwhelming response from those that were consulted by ALSWA was that the Aboriginal Community Courts of Kalgoorlie and Norseman ("the Community Courts") have had a positive impact on offenders, panelists, Magistrates, the local Aboriginal community and the wider community. These positive impacts have resulted in reduced recidivism, increased respect from Aboriginal people for the legal system, increased respect for panelists as leaders within their community and improved community relations.

2.1. Reduced Recidivism

Our consultation has revealed that there is anecdotal evidence to suggest that the rate of recidivism for offenders who have participated in the Community Courts has reduced. This is particularly so in the Norseman Court, which we believe is due to it being a smaller and more tight knit community. One lawyer we consulted remarked that now, when the Magistrate's circuit goes to Norseman, the Legal Aid lawyers are run off their feet, and the ALSWA lawyers have relatively few clients. This is a complete turnaround from the position prior to the Community Courts being used and is also a contributing factor as to why we are advocating, as a priority, for the adoption of these courts in small remote and regional communities of WA.

Reduced recidivism can be attributed to a number of factors. One common comment was that in the Community Courts, the Magistrate and panelists have more time to engage with the offender and truly understand the circumstances of their lives, which allows them to choose sentencing options which are appropriate to the circumstances. The fact that the Elders often know the offenders and their family situation was seen as one of the main reasons that in the Community Courts, the sentencing and programs chosen are relevant and realistic for offenders.

2.2. Increased Respect for the Legal System

Those consulted indicated that the offender is more respectful and comprehending of the sentencing remarks in the Community Courts than in if sentenced in a mainstream Court. This increased respect for the legal system stems from a number of factors.

First, in the Community Courts, offenders are given an opportunity to speak for themselves, which makes it an empowering situation. Sometimes, when the offender (even if legally represented), is given the opportunity to tell their side of the story, there is trauma and abuse disclosed to the Courts. The very act of disclosing these traumas, which most Aboriginal people at some stage in their lives have lived through, is part of a healing process for those people

and allows the burdens of their lives to be shared by others in a way where sentencing options can be ordered which seek to address the core reasons for the person's offending.

A second factor is that in the Community Courts, decisions are not rushed and more time is given to offenders ensuring they have a better understanding of court processes and the sentencing remarks.

A third factor for the increased respect of the Court is that it is more relevant to Aboriginal offenders because of the environment (e.g. the round table with everyone at eye level, the Aboriginal and Torres Strait Islander flags and Aboriginal artwork hanging on the walls), the fact that many of the court staff (including the Court Coordinator) are Aboriginal and because respected Elders are panelists.

2.3. Increased Respect for Aboriginal Elders

Bringing offenders before family members from whom they may be estranged allows offenders to reconnect with people who support and understand them and enhances the respect they hold for those people. This has the positive outcome of increasing respect for Elders in the community, which is a return to the old ways prior to colonisation.

One ALSWA lawyer remarked:

"one thing that stood out was the shame of the offenders going before the elders - hung heads etc - compared with the brazenness you often see when the clients are before the Magistrate alone."

Even where the offender is not estranged from their family or community, when they see their Aunt, Uncle or other Elder from their community on the panel, on par with a Magistrate, the level of respect for them increases. In addition, family members who attend to support the offender see the Elders in this respected role. This respect flows onto people in the community and has an extremely positive impact on the Elders and their position as leaders in their communities.

2.4. Improved Community Relations

All panelists interviewed in the ALSWA consultation were of the opinion that relations between police, the judiciary and the Aboriginal communities had improved significantly since the courts opened.

As a result of the trial of the Community Courts, all staff from the Courts took part in Aboriginal cultural awareness training. In addition to this, the process of the Magistrate working with the panelists allowed them to increase their knowledge and empathy of Aboriginal issues and increased their communication skills with Aboriginal people. This is an ongoing process of mentoring for Magistrates.

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| <p>Recommendation 1: That all Magistrates, in conjunction with locally provided cultural awareness training, be appointed for a period to an Aboriginal Community Court as part of their training.</p> |
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3. Improvement to the Community Courts

Whilst ALSWA strongly supports the Community Courts and their extension to other regions (so long as it is in consultation with key stakeholders and the relevant community), we do have some concerns about the current system. Please note that this is not an exhaustive analysis of the Courts, as we assume that is being prepared by the departmental review. Rather, this section of our submission seeks to draw attention to components of the Courts that could be improved.

3.1. Payment of Panelists

ALSWA is pleased that a decision has now been made to pay panelists at a rate of \$110 per day (for up to 4 hours work) and \$200 per day for anything over 4 hours (equating to roughly \$25 per hour). However, it is often the case that Aboriginal people are paid at a rate less than non-Aboriginal persons occupying comparable positions. As well as having mainstream responsibilities, Aboriginal panelists need to possess and apply their cultural knowledge.

Given that we are advocating for a roll out of these courts to other regions, we believe it is important, at the outset, to budget for appropriate remuneration and acknowledgement of panelists. We also support the budget inclusion of other costs including travel expenses, food allowances and training allowances for panelists.

Recommendation 2: That Aboriginal Community Court panelists are paid at a rate that is fair remuneration for their cultural skills, knowledge and responsibilities and that budget allocations allow for incremental increases, travel and food allowances and training expenses.

3.2. Community Legal Education

We believe there is a need for more low literacy community legal education to be developed to promote the Courts. We support the two posters that have been developed by Kalgoorlie-Boulder Community court. We also believe there is a need for active referrals to the Court from agencies like ALSWA, Legal Aid WA and the Goldfield Community Legal Centre.

Recommendation 3: That low level literacy community legal education is developed and updated on a regular basis for use in the Community Courts.

3.3. Support Services

There is a need for the Court, especially the Court Coordinator, to establish relationships with support services in towns where the Courts operate so that sentencing options can be flexible and meet the rehabilitation needs of offenders. Without these relationships, the sentencing options open to the Court will be limited.

Recommendation 4: The Community Court coordinators be supported and funded to develop relationships with key service providers.

3.4. The Community Court Environment

ALSWA is supportive of the methods undertaken so far to make the environment of the Court appropriate for Aboriginal people. This includes the large oval table where everyone sits at eye level, the Aboriginal artwork on the table and walls and the Aboriginal and Torres Strait Islander flags hung in the room.

However, the room that the Community Court is currently occupies in Kalgoorlie-Boulder is not purpose built and therefore is not ideal. For example, although not used, the room does have a raised level for the Magistrate.

ALSWA supports the building of a purpose built Community Court room, in consultation with the local Aboriginal community to be included in the new court complex which is due to be built in Kalgoorlie.

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| <p>Recommendation 5: That there is a budget allocation made for a purpose built Community Court room that has similar features as the Kalgoorlie-Boulder Court for all communities with Community Courts.</p> |
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3.5. Conflict of Interest

In mainstream courts, where any member of the judiciary or a solicitor has some involvement in the matter or is related to the offender, they must disclose that interest and are (generally) prevented from being further involved.

In the Community Courts however, panelists who are related to or who have direct knowledge of an offender are an asset to the Court. It is this relationship which gives the Court, in sentencing, a real understanding of where the person has come from, why they have committed the crime and how they can best be sentenced so the crime does not occur again.

Allowing panelists who know the offender assists in reducing recidivism as offenders are more likely to respect and adhere to sentencing comments from a respected Elder, than a Magistrate they have never met before.

It is hard, if not impossible to reconcile this with the Western, legal concept of Conflict of Interest. However, it is our submission that the two do not need to be reconciled. As the current Kalgoorlie-Boulder Community Court Project Manager Beverley Burns stated:

"There is no need to reconcile the difference in conflict of interest. The Community Court way is different – not wrong. You do want conflict. You need that to make it work. The white man's way is not the best way and is not effective. We need to return to an old way that worked for thousands of years."

Because this approach is in direct contrast to what has been adopted by Western Courts, there do need to be checks and balances to ensure that the relationship between the panelist and the offender does not result in a miscarriage of justice.

Recommendation 6: That a conflict of interest policy for the Community Courts be drafted which explains the contrast between mainstream courts and the reasons behind that contrast.

3.6. Recording and analysis of statistics

The evidence available to ALSWA regarding the reduction in recidivism has been anecdotal only. In order to be able to properly compare a cost analysis with other Courts and to be able to effectively review the Courts, it is essential that offenders who use the Courts are monitored and evaluated (both in a qualitative and quantitative sense) and that their performance (post sentence) is recorded. There also needs to be transparency with regard to these statistics. Finally, the statistics need to be retained for a lengthy period so that proper analysis can be conducted.

Recommendation 7: That there be long term recording of statistics regarding all offenders who go through the Community Courts and that these statistics be made publically available.

3.7. Feedback from offenders

The *Process Review and Evaluation Summary Report*, which was prepared in October 2007 indicated that only one offender had been interviewed. ALSWA also had difficulty in interviewing offenders who had been through the Courts for this submission. It is important that the views and opinions of these people are heard.

Recommendation 8: That efforts are made to conduct confidential and culturally appropriate evaluation from all offenders who use the Community Courts.

3.8. Funding for ALSWA

ALSWA lawyers and court officers working regional WA face ever increasing workloads. For example, the ALSWA Kalgoorlie Office services 11 Magistrate's circuit Courts as well as the District and Supreme Court circuits. In addition, Community Courts invariably take far longer to dispose of an individual matter than Magistrate's Courts placing a further drain on ALSWA's limited resources. In the circumstances, ALSWA submits that serious consideration needs to be given to provide appropriate funding for ALSWA solicitors and courts officers to participate in the Community Courts.

Recommendation 9: That consideration be given to providing additional funding to ALSWA to participate in Community Courts.

4. Extension of Community Courts

ALSWA is supportive of the Community Courts that have been trialled in Kalgoorlie-Boulder and Norseman and advocates for a roll out of similar Courts throughout WA (in consultation with key stakeholders and the relevant Aboriginal community), particularly in remote communities, which are often difficult for Magistrates and lawyers to access.

ALSWA believes that Community Courts have scope for real empowerment of Aboriginal communities in WA.

Once set up, Community Courts may expand in jurisdiction and be given control over matters such as Community bylaws (e.g. restriction of alcohol into a dry community) and some licensing matters (e.g. an application for an extraordinary driver's licence).

ALSWA is aware of the success that circle sentencing has had in Yandeyarra, a remote Aboriginal community in the Pilbara. In a paper written by Dennis Temby,² it was remarked:

"The Yandeyarra Project has been successful in the short term because of the dedicated and enthusiastic approach by its community members to have such a Court in its community. It is significant that the Court and the Court staff travel to the community so that justice is seen to be dispensed within the community itself. The lack of repeat offending in the community in the short term that this Court has been operating is a testament to the enthusiastic community response that the people of Yandeyarra have provided and the support that they have given to the offender.

We are extremely encouraged to think that this Court project can only go from strength to strength."

Recommendation 10: That a Community Court be trialled in a remote Indigenous community as soon as possible. We recommend that remote communities within the same region be considered as a first option so that the courts can be supported by and easily modeled on the Kalgoorlie-Boulder and Norseman courts. Warburton could be considered as the next choice. ALSWA has dedicated Court Officers in Warburton and Laverton and the support of the ALSWA Kalgoorlie Office. Our work in Warburton with the Ward Inquest has shown that there is a strong community of capable people who could fulfill the panelist roles.

² Temby D, 'Yandeyarra Aboriginal Community Court Project' (2006) 1 eLaw Journal (special series) 141, https://elaw.murdoch.edu.au/special_series.html.

5. Conclusion

In this submission, ALSWA has indicated its support for the Community Courts that have been trialed in Kalgoorlie-Boulder and Norseman and advocates for a roll out of similar Courts throughout WA, particularly in remote communities, subject to the following recommendations:

Recommendation 1: That all Magistrates, in conjunction with locally provided cultural awareness training, be appointed for a period to an Aboriginal Community Court as part of their training.

Recommendation 2: That Aboriginal Community Court panelists are given pay parity with Justices of the Peace and that budget allocations allows for incremental increases, travel and food allowances and training expenses.

Recommendation 3: That low level literacy community legal education is developed and updated on a regular basis for use in the Community Courts.

Recommendation 4: That the Community Court coordinators be supported and funded to develop relationships with key service providers.

Recommendation 5: That there is a budget allocation made for a purpose built Community Court room that has similar features as the Kalgoorlie-Boulder Court for all communities with Community Courts.

Recommendation 6: That a conflict of interest policy for the Community Courts be drafted which explains the contrast between mainstream courts and the reasons behind that contrast.

Recommendation 7: That there be long term recording of statistics regarding all offenders who go through the Community Courts and that these statistics be made publically available.

Recommendation 8: That efforts are made to conduct confidential and culturally appropriate evaluation from all offenders who use the Community Courts.

Recommendation 9: That consideration be given to providing additional funding to ALSWA to participate in Community Courts.

Recommendation 10: That a Community Court be trialed in a remote Indigenous community as soon as possible. We recommend that remote communities within the same region be considered as a first option so that the courts can be supported by and easily modeled on the Kalgoorlie-Boulder and Norseman courts. Warburton could be considered as the next choice. ALSWA has dedicated Court Officers in Warburton and Laverton and the support of the ALSWA Kalgoorlie Office. Our work in Warburton with the Ward Inquest has shown that there is a strong community of capable people who could fulfill the panelist roles.