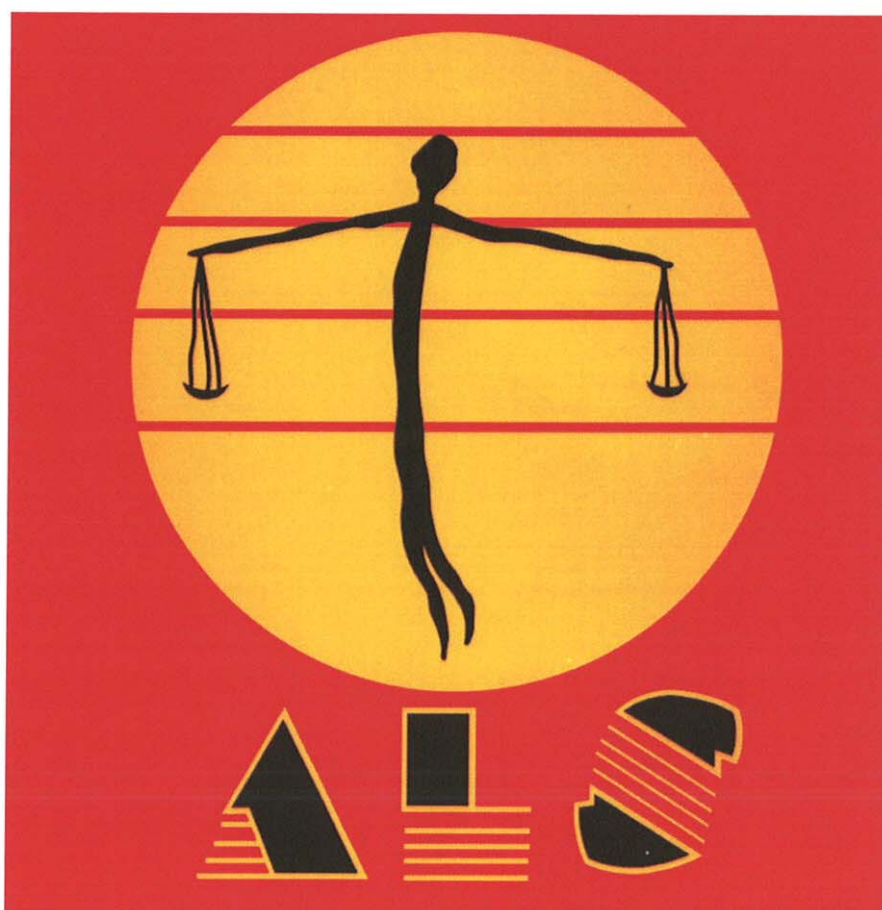


ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC.)

Submission to the
Senate Scrutiny of Bills Committee:

Inquiry into the Future Direction and
Role of the Committee

APRIL 2010



Acknowledgement

The Aboriginal Legal Service of Western Australia (Inc) would like to acknowledge the substantial assistance provided by Mallesons Human Rights Law Group (Perth) in preparing this submission.

1 Summary

This submission focuses on term of reference 1(c) of the Australian Senate Inquiry (**Inquiry**) into the future direction and role of the Senate Scrutiny of Bills Committee (**Committee**).

Aboriginal peoples¹ experience severe disadvantage in comparison to non-Aboriginal peoples in a number of contexts.² As a result, legislation can have a disproportionate impact on the human rights of Aboriginal peoples. The Aboriginal Legal Service of Western Australia (Inc.) (**ALSWA**) considers that the Committee, when considering the consistency of proposed legislation with Australia's human rights obligations, should specifically address:

- Australia's international obligations in relation to the treatment of Aboriginal peoples; and
- the specific impact of proposed legislation on Aboriginal peoples.

ALSWA notes that laws impacting disproportionately on Aboriginal peoples increase pressures on service delivery for Aboriginal Legal Services. ALSWA therefore recommends that there be a legal aid and Aboriginal Legal Service impact clause included in all legislation which potentially impacts upon Aboriginal peoples.

ALSWA supports an expanded role for the Committee considering and reporting on whether proposed legislation complies with Australia's human rights obligations. However, this expanded role is not a substitute for a comprehensive *Human Rights Act* in Australia.

The inclusion of a human rights review function for the Committee should form part of a substantial effort to improve both Parliamentary awareness of human rights obligations; and the consistency of proposed legislation with Australia's human rights obligations.

To this end, ALSWA endorses the Human Rights Law Resource Centre's (**HRLRC**) submission to the Inquiry, and particularly its recommendations that:

- i. the mandates of all relevant Parliamentary Committees should require that the Committee give proper consideration to the Commonwealth's human rights obligations, including Australia's obligations under all international human rights treaties to which it is a party; and
- ii. the Parliament should establish a Joint Committee on Human Rights to lead Parliamentary engagement with an understanding of human rights issues.

ALSWA further notes the importance of Aboriginal participation in the Committee to provide an Aboriginal voice on these issues. We recommend the Committee include Aboriginal Members of Parliament where available, and noting the current absence of such Members, we recommend the Committee be required to engage Aboriginal consultants to provide this direct advice when considering the impact of proposed legislation on Aboriginal peoples.

¹ In this submission, 'Aboriginal peoples' refers to Aboriginal and Torres Strait Islander peoples.

² Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous Peoples, Report on Australia at paragraph 7 accessed 16 March 2010
<http://www.un.org.au/Special-Rapporteur-on-Indigenous--Australia-Report-news105.aspx>.

2 About ALSWA

ALSWA is a community based organisation that 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 (WA).

ALSWA aims to:

- deliver a comprehensive range of culturally-matched and quality legal services to Aboriginal peoples throughout WA;
- provide leadership which contributes to participation, empowerment and recognition of Aboriginal peoples as the Indigenous people 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 16 executive officers³ elected by Aboriginal peoples from their local regions to speak for them on law and justice issues. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law, and human rights law. ALSWA also provides support services to prisoners and incarcerated juveniles. Our services are available throughout WA via 17 regional and remote offices and one head office in Perth.

3 Human rights obligations directly relevant to Aboriginal peoples

Australia has a number of human rights obligations which are directly relevant to the situation of Aboriginal peoples, including obligations under the United Nations Declaration on the Rights of Indigenous People 2007 (**Declaration**)⁴ and the Convention on the Rights of the Child 1989 (**CROC**).⁵ For instance, the Declaration provides Aboriginal peoples with rights:

- (i) to self-determination (Article 3);
- (ii) to participate in decisions that affect them, and to choose their own representatives and use their own decision-making procedures (Article 18);

³ There are two Executive Officers for each of the former 8 ATSIC regions (Metropolitan, Central Desert Region, Murchison/Gascoyne Region, Southern Region, Pilbara Region, Goldfields Region, West Kimberley Region and East Kimberley Region). They are elected by Aboriginal peoples every three years.

⁴ Australian Human Rights Commission, United Nations Declaration on the Rights of Indigenous People accessed 16 March 2010 http://www.hreoc.gov.au/social_justice/declaration/assembly.html

⁵ Office of the United Nations High Commissioner for Human Rights, Convention on the rights of the Child accessed 16 March 2010 <http://www2.ohchr.org/english/law/crc.htm>.

- (iii) to determine and develop priorities and strategies for exercising their right to development particularly in relation to health, housing and other economic and social programmes (Article 23); and
- (iv) to determine and develop priorities and strategies for the development or use of their lands or territories and other resources (Article 32(1)).

Similarly, CROC establishes a number of rights and obligations including:

- (i) the general right that the best interests of children be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (Article 3);
- (ii) the right to privacy (Article 16);
- (iii) with specific reference to Aboriginal peoples, the right to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language (Article 30);
- (iv) the right to freedom from arbitrary or unlawful detention (and the corresponding obligation that 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) (Article 37); and
- (v) States Parties are obliged, whenever appropriate and desirable, to adopt measures for dealing with such children without resorting to judicial proceedings (Article 40).

Aboriginal peoples are more likely to come from low socio-economic backgrounds, and are overrepresented in prison populations. Therefore, it is particularly important for Aboriginal peoples that Australia observe its international human rights obligations under instruments such as the International Covenant on the Elimination of All Forms of Racial Discrimination 1966 and the International Covenant on Civil and Political Rights 1966.

4 Impact of Legislation in Western Australia

The position of disadvantage occupied by Aboriginal peoples, combined with cultural ignorance and racism, means that legislation often has a disproportionately detrimental effect on Aboriginal peoples.

Three WA case-studies bear out this observation. ALSWA notes these cases-studies involve state legislation and therefore would not be directly impacted by a Commonwealth Scrutiny of Bills Committee. The case-studies are used to highlight the disproportionate impact legislation can have on Aboriginal peoples generally. The case-studies are also referred to as a plea for the Commonwealth Government to play a leading role in increasing parliamentary scrutiny of Bills as one of many needed measures to improve human rights in Australia, and set an example for states like WA to follow.

Move-on Notices

Under the *Criminal Investigation Act 2006 (WA)*, the WA police can issue 'move-on notices' requiring people to vacate a defined area for periods of up to 24 hours. This law has had a disproportionate impact on Aboriginal peoples in comparison to other demographics because:

- (i) Aboriginal peoples are more likely to occupy public space for social, economic and cultural reasons and are more likely to be subject to a move on notice;
- (ii) The laws have been used to target Aboriginal peoples who are either mentally ill, homeless and or have alcohol and drug abuse issues.
- (iii) move-on notices often prevent access to welfare, transport, health and other services which are relied upon heavily by many Aboriginal peoples; and
- (iv) lower literacy skills and language barriers may result in a failure by Aboriginal peoples to understand written or verbal move-on notices.⁶

Mandatory Sentencing Laws

Mandatory sentencing laws enacted for property offences in WA in 1996⁷ had a deleterious impact on the Aboriginal community, particularly among young people. Aboriginal children made up 80 per cent of “three strikes” cases in the Children’s Court of WA from February 1997 to May 1998.⁸

Aboriginal peoples were again disproportionately affected because:

- (i) Aboriginal peoples are less likely to be diverted out of the criminal justice system, for example by a police warning, than non Aboriginal peoples;
- (ii) the removal of any judicial discretion in sentencing meant socio-economic and other potentially mitigating factors could not be considered when assessing whether to impose custodial sentences; and
- (iii) Aboriginal peoples are more likely to live in rural and remote areas than non-Aboriginal peoples. The lack of prison facilities in regional areas mean that Aboriginal peoples are more likely to be isolated from family and community whilst serving their sentence. All children sentenced to terms of immediate detention must serve their sentence in a Perth juvenile detention centre.

More recently, the WA Government has amended the *Criminal Code (WA) 1913* so that adults who are convicted of an assault on police that cause bodily harm must be sentenced to a minimum term of immediate imprisonment for nine months. In the case of young people aged between 16 and 18 years who are convicted of assaults on police and other public officers, causing either bodily harm or grievous bodily harm, must be subject to a mandatory term of either imprisonment for three months or juvenile detention for the same period.⁹

ALSWA is most concerned about any form of mandatory sentencing which removes or diminishes the judicial discretion in sentencing. Further, assaults committed on

⁶ ‘Move on laws: A New Mechanism for Police Control’ (2006) *ILB* 62 6(23).

⁷ *Criminal Code (WA) 1913* s410(4).

⁸ Australian Human Rights Commission, http://www.humanrights.gov.au/pdf/social_justice/submissions_un_hr_committee/5_mandatory_sentencing.pdf at page 10 accessed 16 March 2010.

⁹ *Criminal Code (WA) 1913*, s297 & s318.

police which do not cause bodily harm, do not attract mandatory sentencing. The decision as to whether an individual is charged with a mandatory sentencing offence against police rests with the police themselves. This means that the police as the victim of an offence also determine the appropriate penalty. In other words, the police will now decide whether the offence will allege an injury against a fellow police or public officer and therefore whether it will attract a mandatory term of imprisonment. This is a most disturbing development and contrary to time honoured legal principles which have served the community well for centuries. There is something inherently undemocratic about the victim of an offence also determining the appropriate penalty. It is of great concern that Aboriginal peoples will again be disproportionately affected by this new law that blatantly breaches Australia's international human rights obligations.

Stop and Search Laws

The *Criminal Investigation Amendment Bill 2009* is currently before the WA Parliament. The Bill was introduced "in response to an increasing concern by government, police and the community in relation to the proliferation of weapons and the increasing number of incidents of violence and antisocial behaviour in entertainment precincts."¹⁰

ALSWA has grave concerns regarding the introduction of the Bill that proposes to increase police powers to stop and search people in prescribed or declared areas without their consent or the ordinary circumstances of forming a reasonable suspicion that the search is necessary. These extremely wide powers will have a disproportionate effect on vulnerable groups including Aboriginal peoples and inevitably impact on our already over-burdened court and prison systems, increase the risk of police misconduct and constitute grave breaches of fundamental human rights.

ALSWA prepared a detailed submission outlining our concerns about the substance of the Bill and the failure to consider the impact of the Bill on Aboriginal peoples to the WA Standing Committee on Legislation, which is **attached** as **Annexure 1**.

5 Conclusion

Many Aboriginal peoples occupy marginalised and vulnerable positions in Australian society and are therefore often least able or well-equipped to adapt to legislative changes that affect their human rights.

ALSWA supports an expanded role for the Committee in considering and reporting on whether proposed legislation complies with Australia's human rights obligations. When reviewing proposed legislation, we consider that the Committee should also specifically consider and address:

- (i) Australia's international obligations in relation to the treatment of Aboriginal peoples;
- (ii) the specific impact of proposed legislation on Aboriginal peoples; and
- (iii) the legal aid or Aboriginal Legal Service implications of proposed legislation.

¹⁰ R. Johnson, Minister for Police, Second Reading Speech, "Criminal Investigation Amendment Bill 2009", Legislative Assembly, Hansard p. 8024b, 14 October 2009.

ALSWA recommends there be participation and representation of Aboriginal peoples on the Committee, either through the involvement of Aboriginal Members of Parliament or the engagement of an Aboriginal consultant to provide direct advice on these issues.

Further, ALSWA supports more substantial efforts to improve Parliamentary awareness, recognition and protection of Australia's existing human rights obligations.