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Review of the Bail Act
Policy Directorate
Department of the Attorney General (WA)
GPO Box F317
Perth WA 6841

Dear Ms Gwilliam,

**REVIEW OF THE *BAIL ACT 1982* (WA)**

The Aboriginal Legal Service of Western Australia (Inc.) (ALSWA) is writing to provide you with our submission in response to the review by the Department of the Attorney General of the *Bail Act 1982* (WA).

The ALSWA makes several recommendations about the operation of bail in Western Australia and maintains strong opposition to the introduction of any system, including an actuarial model, that will limit judicial discretion.

If you would like to discuss this submission further, please contact Mr Peter Collins, Director of Legal Services of this Office on 9265 6666.

Yours faithfully,

**PETER COLLINS**
Director of Legal Services

# ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC.)

**Submission to the Department of the Attorney General**
**Government of Western Australia**

## Review of the *Bail Act* 1982 (WA)

**October 2010**

CONTENTS

**Annexure**

## 1. Introduction and scope of the submission

ALSWA prepared this submission in response to the invitation from the Department of the Attorney General (DotAG) of Western Australia (WA) to make submissions in relation to the review of the *Bail Act* 1982 (WA) ('the Act') being conducted by the Policy Directorate of that Department.

The Issues and Questions Paper ('the Issues Paper') released by DotAG in relation to the review of the Act identifies that the review is being undertaken "in response to the Coroner's 2009 Report on the Inquiry into the death of Aboriginal elder, Mr Ward". The Act is being reviewed to ensure "processes are still appropriate, effective and efficient in the allocation and governance of bail in Western Australia, particularly in remote areas of the State".

ALSWA has been intensely involved in the Ward matter since the tragic and avoidable death in custody of Mr Ward on 27 January 2008. This included working with the Department of Corrective Services (DCS) soon after the death to review policies and recommend change, representing the Aboriginal peoples of WA at the Coronial Inquest and representing the wife and children of Mr Ward in regards to *ex gratia* compensation for the wrongful death.

Mr Ward was a well respected and invaluable Aboriginal Elder from the Ngaanyatjarra lands who painfully and avoidably died as a result of suffering heat stroke in the rear pod of a prisoner transport van owned by DCS and contractually administered by Global Solutions Limited (GSL) Custodial Services (now G4S) on 27 January 2008. Prior to his death, Mr Ward had lived a traditional life as a youth, undertaken education and contributed significantly to his community, including as Chairperson of the Warburton Community Council. He had been involved in matters of native title, land management and interpretation services and maintained a commitment to addressing issues of volatile substance abuse in his community. Mr Ward had also represented his people on a national and international level.

In May 2009, ALSWA provided a submission[1] to the WA Legislative Council's Standing Committee on Environmental and Public Affairs in relation to its Inquiry into the transportation of detained persons and subsequently provided oral evidence to that Committee. In its submission and evidence, ALSWA reiterated recommendations relating to bail, including:

1. Restriction of the delegations of judicial powers to JPs and deputy registrar powers to police. If these delegations continue then the requirement that they are accompanied by more comprehensive training, including regarding the Act and the notion of incarceration as a last resort.

[1] Available at http://www.als.org.au/index.php?option=com_content&view=article&id=105%3Ainquiry-into-the-transportation-of-detained-prisoners&catid=14&Itemid=50

2. The development of strategies to recruit and retain legal professionals (especially Aboriginal professionals) in regional and remote areas to enable all accused persons to be represented in bail hearings, including hearings before a Justice of the Peace (JP).

3. The installation and maintenance of audio visual equipment in all regional and remote police stations, court rooms and ALSWA offices to enable bail decisions to be made by Magistrates and Judges and for accused persons to be represented in bail hearings.

The following submission will briefly refer to the work of ALSWA, before attempting to respond to each of the 42 questions posed in the Issues Paper distributed by DotAG. ALSWA draws on the extensive experience of its lawyers and court officers working with Aboriginal clients in metropolitan, regional and remote areas of WA.

## 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 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 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 16 executive officers[2] 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

[2] There are two Executive Officers for each of the former eight 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.

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. The Purpose of Bail

Before addressing the specific questions raised in the Issue Paper, we seek to briefly outline ALSWA's position with respect to bail.

As stated in the Issues Paper, bail is not a punishment. Similarly, bail should not be utilised as a social engineering tool to unnecessarily control or monitor the behaviour of accused persons:

> *"Bail laws attempt to strike the right balance between, on the one hand, not infringing upon the liberty of an accused person who is entitled to the presumption of innocence and, on the other hand, ensuring that an accused person attends court and does not interfere with witnesses or commit other offences."*[3]

The primary purpose of bail is to ensure that the accused person attends court when required. Also important are the considerations of whether the person is likely to offend while on bail or otherwise interfere with witnesses or the trial process. Bail conditions should be tailored to deal with these issues rather than imposed for any other purpose. In addition, bail should be dispensed with when a Notice to Attend Court is appropriate in all the circumstances.

Importantly, ALSWA submits that the Act should reflect, as a starting point, an entitlement to bail. Put another way, the Act should include a specific provision outlining a presumption in favour of bail.

## 4. Qu 1: Principles of bail in the Act

**Are the principles of bail clearly articulated in the Act?**

### 4.1 Adults

According to the Issues Paper, the principle in relation to bail for an adult is expressed in section 5 of the Act. Section 5 of the Act is entitled "Right of accused to have bail considered under the Act". This is a procedural rather than a substantive provision.

As noted in Part 3 above, the Act should contain a substantive provision as to the entitlement to bail which also refers to the presumption in favour of bail.

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[3] Snowball, L Roth, L Weatherburn, D, 2010, Bail Presumptions and Risk of Bail Refusal: An Analysis of the NSW Bail Act*, Crime and Justice Statistics Bureau Brief* (No. 49), NSW Bureaus of Crime Statistics and Research, Sydney, p1.

**Recommendation 1: The Act be amended to more clearly articulate the principles of bail and incorporate categories of presumptions in favour or against bail rather than simply a right to have bail considered.**

Further, ALSWA endorses the approach taken in bail legislation in other jurisdictions, for example Victoria, where the court must be *satisfied* that there are *unacceptable risks* which attach to the grant of bail before bail can be refused.[4]

ALSWA submits that categories of presumptions in favour or against bail should be clearly articulated in the Act as they are in other jurisdictions.

### 4.2 Children

ALSWA considers that the qualified right to bail of an accused child should be included more clearly in the substantive sections of the Act rather than effectively as a procedural provision in clause 2 , Part C of Schedule 1 of the Act. ALSWA also submits that the requirement that the matters referred to in subclauses 1(a), (b), (d) or (g) *must* be answered in the affirmative *and* no conditions from Part D could be imposed, before bail is refused, should be substantive rather than procedural provisions in the Act.

## 5. Qu 2: Qualified Right to Bail for adults

**Advantages or disadvantages of adopting a qualified right to bail for adults. Should such a right be reflected in the principles of the Act?**

A presumption in favour of bail and / or a qualified right to bail for adults is essential in order to give proper weight to the presumption of innocence. Further, an onus on the prosecution to rebut the presumption in favour of bail and demonstrate unacceptable risk is consistent with the burden of proof in criminal matters.

Any amendments in the Act to reflect the above should be accompanied by appropriate training of authorised police officers and justices of the peace (JPs) making bail decisions. In the absence of such training, ALSWA is concerned that any legislative change will be ineffective.

**Recommendation 2: That authorised police and JPs who are bail decision-makers receive practical training about the right to bail following amendments to enshrine this right in the Act to ensure that remand is utilised as a last resort.**

[4] Section 4(2)(d)

## 6. Qu 3: Protection of vulnerable people

**Should protection of vulnerable peoples (e.g. children) be explicitly stated as a principle in the Act?**

ALSWA assumes that this question is directed at provisions pertaining to alleged victims and prosecution witnesses. ALSWA considers that the Act currently contains provisions that adequately protect vulnerable victims and this does not need to be included as a principle in the Act.

ALSWA submits that the Act and current principles with respect to bail provide decision makers with sufficient discretion to impose bail conditions designed to protect vulnerable prosecution witnesses.

**Recommendation 3: That the protection of vulnerable peoples is not explicitly stated as a principle in the Act.**

## 7. Qu 4: Additional comments on principles of bail

**Do you have any other comments on the principles of bail?**

ALSWA considers that the current structure and language of the Act is unsatisfactory and would best be addressed by an entire redrafting of the legislation.

**Recommendation 4: That the Act be re-drafted in its entirety to better reflect the principles and operation of bail in WA.**

ALSWA recommends that the Act should clearly articulate its objectives and principles in an early section as exists at Part 2 of the *Young Offenders Act 1994* (WA) ('the YO Act') rather than including them obliquely in other sections of the Act.

**Recommendation 5: That in re-drafting the Act, a separate Part be included that explicitly states the principles and objectives of the Act.**

## 8. Qu 5: Schedule 1 in the body of the Act

**Given the importance of these considerations, should the structure of the Act be changed to incorporate information from Schedule 1 into the body of the Act?**

ALSWA agrees that given the importance of the matters to be considered by the decision – maker in determining whether to grant or refuse bail, the relevant matters should be included as substantive provisions in the Act.

**Recommendation 6: That the revised considerations in determining bail are included as substantive provisions in the Act.**

ALSWA provides further comment about the relevant considerations for bail decision-makers at Part 36 below in response to question 32 of the Issues Paper.

## 9. Qu 6: Dedicated chapter for children and young people

**Should the Act contain a dedicated chapter / schedule for children and young people regarding bail?**

The unique status of young people within the WA criminal justice system is underpinned by the *Children's Court Act* and the YO Act. This situation should also be replicated with respect to bail for children and young people. ALSWA submits that the Act should contain specific, substantive provisions which deal with children and young people that reflect their qualified right to bail. ALSWA notes the potential for current bail laws to operate punitively against children and young people. This is evidenced by the fact that at 23 September 2010, 50.9% of the juvenile custodial population in WA was unsentenced.[5]

**Recommendation 7: The Act contain specific, substantive provisions for children and young people regarding bail.**

A specific chapter relating to children and young people and bail should be phrased in simple language to enable young people to better understand the considerations relevant to bail.

**Recommendation 8: That the specific, substantive provisions relating to children and young people and bail be drafted in plain English to facilitate understanding.**

ALSWA notes that Schedule 2 of the Act applies equally to children and young people as it does to adults. The criminality revealed by offences contained in Schedule 2 may vary greatly. However, not all offences fall into the category of serious. The requirement in Schedule 2 to demonstrate exceptional reasons can operate punitively with respect to children and young people.

For example, a child may be on bail for aggravated burglary and then allegedly commit a further aggravated burglary, therefore bringing into operation Schedule 2. Both aggravated burglaries may involve an allegation that the child has entered the home of a relative through an unlocked door or window and stolen small quantities of food because they were hungry. The child's social circumstances may be such that they are unable to demonstrate exceptional reasons to justify a release to bail. However, the offending is not of a type to

[5] Government of WA, Department of Corrective Services, Weekly Offender Statistics as at 23 September 2010, available at http://www.correctiveservices.wa.gov.au/_files/about-us/statistics-publications/statistics/2010/cnt100923.pdf

attract a sentence of detention upon conviction. Yet, the child may spend a lengthy period of time on remand because of Schedule 2.

**Recommendation 9: That children and young people be excluded from the operation of clause 3A Part C of Schedule 1 of the Act in relation to Schedule 2 offences.**

## 10.Qu 7: Bail for offences not carrying a prison sentence

**Should bail always be granted where the offence is one that does *not* carry the possibility of a prison sentence?**

Bail is incompatible with sentencing legislation which does not prescribe a term of imprisonment for an offence. Such offences should only result in the issuing of a Court Hearing Notice in the case of adults and a Notice to Attend Court in the case of children and young people. ALSWA is most concerned that current practices often result in individuals being released to bail for offences that do not attract imprisonment. The individual then fails to attend court in answer to their bail and the breach of bail charge attracts either a term of imprisonment itself or breaches a suspended term of imprisonment. Hence, individuals are imprisoned for the breach of bail offence in circumstances where the original offence could not attract jail. This is grossly unfair.

**Recommendation 10: A Notice to Attend Court should generally be used to progress charges which do not carry a term of imprisonment.**

## 11.Qu 8: Dispensing with bail

**Should bail be dispensed with in some circumstances? If so, what should these circumstances be?**

In ALSWA's experience, Aboriginal peoples are often subject to bail conditions which are unduly onerous and which set them up to fail. Many Aboriginal peoples are grappling with historical and lifestyle issues including inter-generational trauma, itinerant lifestyles, minimal Western education, limited English language skills, economic instability substance abuse, mental health concerns or dysfunctional or irregular family environments. These issues make compliance with onerous bail conditions highly problematic and place them at greater disadvantage than non-Aboriginal accused persons.

For these reasons, ALSWA advocates for the dispensation of bail whenever reasonably appropriate. These conditions would include any occasion on which the accused person poses no risk of non-attendance, re-offending whilst on bail or otherwise interfering with witnesses or the trial process.

**Recommendation 11: Bail conditions should reflect the often unique social circumstances of Aboriginal peoples and should be dispensed with in all cases where an individual poses**

**minimal risk of non-attendance at court, re-offending while on bail and / or otherwise interfering with the trial process.**

## 12.Qu 9: Magistrate review of refusal of police bail - SA practice in WA

**Should a similar practice, as is operating in South Australia, be adopted for bail in WA?**

ALSWA recognises that there are already several Magistrates in WA who conduct bail hearings on weekends or circuit days by telephone and value this service on behalf of our clients. ALSWA would embrace a system similar to that which exists in South Australia being formalised in WA. ALSWA also recommends elements of the Northern Territory (NT) system whereby an on-call magistrate is always available to make bail decisions via telephone.

There is currently adequate technology to facilitate an on-call bail magistrate being contacted to review all bail refusals by authorised police officers and ALSWA submits that this review should always be undertaken by a Magistrate, rather than an individual or combination of JPs.

ALSWA further submits that bail Magistrates should be contacted in both urban and rural areas outside of court sitting times where bail is refused by police to review the decision, particularly for vulnerable individuals which may include children or people with mental health concerns.

**Recommendation 12: That an on-call bail Magistrate system be formalised in WA to ensure that Magistrates always make timely, final decisions to remand accused persons.**

## 13.Qu 10: Police powers only to grant bail

**Should police have the power only to grant bail, and not to refuse it? What advantages and / or disadvantages would arise from such an amendment?**

ALSWA agrees that police should only have the power to grant bail and where they are disinclined to do so, bail decisions should be referred to an on-call bail Magistrate. There is always scope for a conflict of interest where the authorised police officer is also an investigating officer with respect to the charge or charges preferred. The potential for conflict is increased where the authorised officer and the accused are from small, remote communities.

**Recommendation 13: That the Act be amended to only allow police to grant, and not refuse, bail.**

ALSWA reiterates its concern noted at Part 11, that police bail can often be accompanied by onerous conditions that are very difficult to comply with and often set the individual up for a breach of bail. For example, many ALSWA clients have been required under police bail conditions to not consume alcohol while on bail. This ban is usually imposed where the

individual has allegedly offended in circumstances of alcohol consumption and where there is a history of chronic alcoholism. However, such individuals invariably live in communities where there is no access to rehabilitation facilities to assist them to refrain from alcohol consumption.

Were the Act amended to only allow police to grant bail, a situation may arise where police grant bail with such onerous conditions that the accused breaches bail shortly after and finds themselves again in custody. To counter this risk, ALSWA recommends a review on the papers by a Magistrate be conducted within 48 hours for all conditional bail granted by police to ensure that police do not impose unwarranted, onerous bail conditions. ALSWA submits that such a review on the papers would constitute an administrative review only.

**Recommendation 14: That the Act be amended to require a Magistrate to conduct within 48 hours a review on the papers of all conditional bail granted by police to ensure that bail conditions are applied appropriately.**

## 14.Qu 11: Early review by Magistrate of police refusal to grant bail

**Alternatively, should it be legislated that a Magistrate review any Police decision to refuse bail, at the earliest possible opportunity?**

ALSWA supports the propositions in questions 9 and 10 above that police only have the power to grant bail and that where police do not intend to grant bail, the decision be referred to an on-call bail Magistrate. ALSWA considers that a system as suggested in this question constitutes a waste of resources as both police and a Magistrate will need to properly assess the case on its merits to determine the question of bail.

ALSWA supports however that where police will not grant bail, the question of bail must be referred for the decision of a Magistrate as soon as possible, within 3 hours, either in person, by telephone or by video conference.

**Recommendation 15: That where police choose not to grant bail, the bail decision is determined by a Magistrate within 3 hours.**

Given the discussion at Parts 12 and 13 above, ALSWA considers that there is no need for JPs to make bail decisions. However, if authorised JPs are still empowered to make decisions on bail, ALSWA recommends that any refusal of bail by a JP be subject to review by a Magistrate within 3 hours and prior to accused persons being transported for the purposes of remand. This will improve and equalise the quality of justice provided to all persons across WA.

ALSWA accepts that generally, JPs remand accused persons to the next sitting of the Magistrate's Court. However, recently, ALSWA staff report that some JPs from Port Hedland remanded unrepresented juveniles from Karratha in custody for between three and sixteen

days before their next appearance in court. ALSWA submits that lengthy remand by JPs are not only unnecessary but should be avoided at all costs.

**Recommendation 16: That any refusal of bail by a JP be reviewed by a Magistrate within 3 hours and prior to the accused person being transported for the purposes of remand.**

## 15.Qu 12: Who can grant bail to children

**Should the Act outline that the President of the Children's Court, another Judge or a Magistrate be the only authority to refuse bail for a child, and allow police the power only to grant bail for children, and not to refuse it?**

ALSWA supports the Practice Direction of the President of the Children's Court. In addition, ALSWA submits that the terms of the Practice Direction be included in the Act as substantive provisions for all the reasons listed above in relation to limiting police and JP power to refuse bail.

This would address the current situation where, according to Children's Court President, Judge Denis Reynolds, "two thirds of juveniles locked up by police after being refused bail after their arrest are then granted bail at their first court appearance"[6]. Aboriginal juveniles are disproportionately represented in the bail refusals referred to by the President.

Given that the Children's Court now sits at Rangeview Remand Centre on Saturdays and public holidays, if a local Magistrate in a regional area is unavailable to make a bail determination in relation to a juvenile at these times it should be mandatory for a video or audio link to be established between the regional area and Rangeview.

**Recommendation 17: That the Act stipulate that only the President of the Children's Court, another Judge of the Court or a Magistrate is empowered to refuse bail for a child.**

## 16.Qu 13: Other comments regarding the granting of bail

**Other comments regarding the granting of bail**

ALSWA's primary position is that JPs should not have power to refuse bail and, should JPs be disinclined to grant bail, then an appearance before a duty Magistrate should be scheduled within three hours. Further, should JPs retain their current powers with respect to bail then ALSWA submits that Section 16A of the Act should be repealed. The current provision discriminates against accused persons appearing before JPs in urban areas. Section 16A should be replaced with a provision which allows JPS to consider bail even when the accused is subject to Schedule 2 of the Act, with any bail refusal by the JP being reviewed by a Magistrate within three hours.

[6] Banks A, "Most youths held by police granted bail", *The West Australian*, 3 September 2010 p26.

**Recommendation 18: Section 16A of the Act should be repealed and JPs allowed to consider bail in Schedule 2 situations subject to a review of the decision by a Magistrate within three hours.**

## 17.Qu 14: Legal representation for persons having bail considered

**Should the Act provide for legal representation or the ability to nominate a support person for persons having bail considered?**

It is a hallmark of a civilised justice system that any person at risk of losing their liberty in a proceeding such as a bail hearing should be entitled to legal representation. Further, in order to avoid a repetition of the well-documented, tragic death of Mr Ward, the Act should make it mandatory for all accused to be legally represented at the time bail is considered. Evidence at the inquest into Mr Ward's death established that his bail hearing was contrary to law, that he was not properly informed of and able to participate in the bail hearing and that the presiding JP and the police officer who refused bail did not understand their respective legal obligations under the Act. As noted, a repetition of this situation should be avoided at all costs. Representation of accused persons by a lawyer at all bail hearings would go a substantial way to ensuring that bail hearings are conducted lawfully and appropriately.

**Recommendation 19: That the Act should provide for legal representation for all persons having bail considered.**

Although section 8 of the Act touches upon the requirement that an accused understands the proceedings, ALSWA submits that the Act should be amended to require the use of an interpreter in all bail cases where it is reasonably apparent that the accused does not have a sufficient command of English to understand the proceedings, participate in them and understand any information or documentation produced as a consequence of the hearing. ALSWA notes that at present there is no State-wide, properly resourced and adequately qualified interpreter service in Aboriginal languages. This is discriminatory and places Aboriginal accused persons at a distinct disadvantage in comparison to other non-English speaking accused persons who have ready access to accredited interpreters. The importance of an interpreter to assist an Aboriginal accused to surmount language, literacy and cultural barriers is enormous. ALSWA recommends that beyond the inclusion of the requirement to access an interpreter in the Act, the WA Government must make a commitment to establish and properly resource a State-wide interpreter service in Aboriginal languages as is the case in the NT with the Aboriginal Interpreter Service.

**Recommendation 20: That the WA Government adequately resource a state-wide interpreter service in Aboriginal languages to ensure there are sufficient interpreters to meet the needs of accused persons in relation to bail and the criminal justice system generally.**

ALSWA has long supported a requirement that it be mandatory for police to notify ALSWA whenever an Aboriginal person is taken into custody and not released to bail. For example, in New South Wales, there is a legislative requirement making it mandatory for police to contact the ALS in that State whenever an Aboriginal person is taken into custody and not granted bail. The input of an ALS lawyer in these circumstances assists with bail decisions, reduces the numbers of Aboriginal peoples in custody and informs police of any custodial care issues in relation to the detained person.

While ALSWA supports all persons in WA being provided legal representation when having bail considered, it is noted that this amendment would result in a substantial increase in workload for ALSWA that would place considerable strain on our already insufficiently resourced service. Currently, ALSWA is not adequately funded to support a team of on-call bail or custody notification solicitors to meet the demands of our clients. Noting that the WA Government currently provides no resources to ALSWA, ALSWA submits that the WA Government should commit resources to ALSWA to ensure that Aboriginal persons in WA are provided with equitable access to justice.

**Recommendation 21: That the Act be amended to make it mandatory for the police to notify ALSWA whenever an Aboriginal person is taken into custody and not granted bail.**

**Recommendation 22: ALSWA urges the WA Government to provide resources to ALSWA to establish and maintain a 24/7 on-call bail and custody notification service.**

## 18. Qu 15: Mandatory bail conditions for Schedule 2 offences

**Should mandatory conditions be placed on a person granted bail for a serious offence if their first offence is a serious offence as listed in Schedule 2? What should these mandatory conditions be?**

ALSWA does not support the imposition of proscriptive mandatory conditions for accused persons granted bail for serious offences, which undermines the discretion of bail decision-makers to consider appropriate bail conditions on a case-by-case basis.

## 19. Qu 16: Denial of bail, without exceptional circumstances, for a first Sch 2 offence

**Should bail be denied for a first offence which is a serious offence, as listed in Schedule 2, unless the accused can argue exceptional circumstances for their release? What should these exceptional circumstances be?**

No.

ALSWA supports the retention of discretion for all bail decision makers when considering bail in all cases.

## 20. Qu 17: Additional offences in Schedule 2

**Should these offences be included in the list of Serious Offences under Schedule 2?**

As discussed in detail at Parts 9, 18 and 19 above, ALSWA does not support the operation of Schedule 2 and therefore cannot support the inclusion of additional offences under it.

## 21. Qu 18: Exception to bail for sexual offences in the absence of a supporting professional assessment

**Should sexual offences, particularly against children, carry a similar exception to bail as currently exists for the offence of murder, at least until a professional assessment of the likelihood of committing a further similar offence has been undertaken?**

ALSWA asserts that 'professional assessments' should not be required in the determination of bail. A requirement to participate in a professional assessment presumes guilt and undermines the presumption of innocence. Additionally, mandatory participation in a professional assessment in order for bail to be considered would seriously undermine an accused person's right to silence.

The WA judiciary has consistently questioned the utility and reliability of professional assessment in the case of dangerous sexual offender applications pursuant to the *Dangerous Sexual Offenders Act 2006* (WA). As discussed below, these assessments often operate disadvantageously against Aboriginal accused persons given their cultural and societal situations.

ALSWA is also concerned about potential delays in the provision of professional assessments, especially in regional and remote areas, and the likelihood of longer remands in custody prior to the determination of a bail hearing.

**Recommendation 23: That professional assessments of the likelihood of committing further similar offences are not introduced into the Act.**

## 22. Qu 19: Commonwealth offences

**Should offences included in the *Criminal Code Act 1995* (Cth) given that some Commonwealth offences can be dealt with in State courts? What are some offences for inclusion?**

As stated above, ALSWA supports a system whereby bail decision-makers are able to determine each case on its merits. Therefore, ALSWA does not support additional offences being included in a category in which bail is automatically excluded thereby hindering the discretion of bail decision-makers.

## 23.Qu 20: Granting bail for serious offences

**Other comments about granting bail in particular circumstances where the accused has committed a serious offence.**

ALSWA considers that regardless of the nature of the offence charged, the ordinary principles of bail ought to apply in every case. It is imperative that bail decision-makers retain sufficient discretion to consider all relevant material, including the personal circumstances and antecedents of the accused, in determining bail.

### 23.1 Protective Bail

ALSWA also takes this opportunity to raise concerns surrounding protective bail conditions. ALSWA notes that protective bail conditions are often very punitive and unnecessary. For example, non-contact protective bail conditions which are imposed when the accused person and alleged complainant are in an on-going consensual domestic relationship are routinely breached when the alleged complainant instigates contact. Unless exceptional reasons can be established, the accused person will be remanded in custody on breach.

**Recommendation 24: That protective bail conditions reflect the risk to the protected person and are not unduly onerous.**

### 23.2 Exceptional Reasons under Sch 2 of the Act

ALSWA submits that Schedule 2 of the Act be amended to delete the requirement that an accused person demonstrate exceptional reasons why they should not be remanded in custody. Exceptional reasons should be replaced with a requirement to demonstrate either 'special circumstances' or 'show cause' as to why bail should be granted.

**Recommendation 25: That the requirement to demonstrate 'exceptional reasons' in Schedule 2 be replaced with a requirement to demonstrate either 'special circumstances' or to 'show cause' as to why bail should be granted.**

## 24.Qu 21: Specific guidance around bail deliberations for persons in regional and remote WA

**Should the Act or Regulations contain specific guidance for decision-makers when dealing with accused persons in regional and remote parts of WA? If so, what issues should be covered?**

The Act should be amended to include a substantive provision requiring bail decision-makers to take into account the impact of a refusal of bail for an accused person from a regional or remote area where such refusal will result in their detention in a custodial institution a long way from their home, family, friends and country. The Act should also be

amended to include a substantive provision requiring bail decision makers to take into account the impact of refusal of bail on an accused's capacity to comply with lawful, cultural obligations.

**Recommendation 26: That bail decision-makers are required to consider the impact of a refusal of bail for an accused person who will be remanded far from their home, family and country and the impact on an accused person's capacity to comply with cultural obligations.**

## 25.Qu 22: Bail in regional and remote areas of WA

**Other relevant comments or suggestions regarding bail in regional and remote areas of WA.**

As stated at Part 13 above, ALSWA recommends that telephone and video communication be utilised to ensure that where police are disinclined to grant bail, determinations regarding bail be promptly referred to a Magistrate or Judge, rather than a JP.

## 26.Qu 23: Notices to Attend Court

**Is the use of a Notice to Attend Court an effective alternative to arrest and bail, and if not, why not?**

ALSWA submits that Notices to Attend Court and Court Hearing Notices are both an effective and appropriate alternative to arrest and bail. ALSWA considers that the use of a Notice to Attend Court should be the starting point for all police officers in dealing with an accused person and only if the nature of the alleged offending is sufficiently serious and the risk of the accused failing to attend court high, should consideration of arrest and bail be entertained.

**Recommendation 27: That the issue of a Notice to Attend Court be the starting point for all charges and be reasonably deemed unsuitable before arrest and bail is considered.**

## 27.Qu 24: Documentation an impediment to police use of Notices to Attend Court

**Is the nature and extent of documentation associated with issuing a notice to attend court an impediment to their use by police as an alternative to arrest and bail? If so, could this be ameliorated and how?**

ALSWA considers this question to be more closely related to issues of police practice and culture than legislative reform. ALSWA does not support reduced use of Notices to Attend Court as a result of the documentation and process surrounding their use. ALSWA submits that concerns relating to the nature and extent of documentation associated with issuing a Notice to Attend Court are best managed within the WA Police.

**Recommendation 28: That police concerns about the documentation and processes associated with issuing Notices to Attend Court be managed to ensure that it does not impact on the frequency with which these notices are issued where appropriate.**

## 28. Qu 25: Additional comments on court hearing notices / notices to attend court.

**Other comments regarding the use of court hearing notices and / or notices to attend court.**

ALSWA notes with concern the high rates of illiterate Aboriginal persons signing written pleas of guilty in the East Kimberley Region and the practices of some police officers who encourage and support this. ALSWA recommends that where police seek to assist persons to provide a written plea in order to avoid attendance at court, this assistance be provided with the aid of an interpreter to properly explain the charges, prosecution summary and implications of entering the plea. ALSWA recommends that in such cases, in addition to the plea being signed by the accused person, the police officer and interpreter involved are also required to sign a declaration that they provided information to the accused person in the accused person's language, which the accused person understood. The police officer should also be required to contact ALSWA to enable the accused person to receive legal advice.

**Recommendation 29: That accused persons are not encouraged to sign written pleas of guilty to avoid court appearances without proper oral explanations in the appropriate language with the assistance of a skilled interpreter where required. That these steps be recorded through signed declarations by the police officer and interpreter involved. Legal advice should also be available.**

Additionally, ALSWA recommends that Notices to Attend Court and Court Hearing Notices be translated into Aboriginal languages for use in regions to enable Aboriginal persons to better understand, or have explained to them, the options available to them and the consequences of signing a plea of guilty.

**Recommendation 30: That Court Hearing Notices and Notices to Attend Court be translated into common Aboriginal languages to be more accessible to Aboriginal accused persons, particularly in regional and remote areas.**

## 29. Qu 26: Formal Risk Assessment to support bail in WA

**What would be the advantages and / or disadvantages of introducing a formal risk assessment system to support bail in WA? On balance, do you support the trial of such a system in WA?**

ALSWA strongly opposes the introduction of a formal risk assessment system to support bail in WA. Over time, the judiciary in WA has resoundedly and repeatedly rejected risk

assessments based on actuarial models. Actuarial models fail to provide an assessment of risk relating to the offender, but rather provide an assessment based on a comparable group of people to which the offender may be similar. Consequently, the accuracy of an actuarial model in assessing the accused person's suitability for bail is questionable.

As stated by the Law Reform Commission, these models are likely to unduly narrow a bail decision-maker's approach to bail. Additionally, they will fail to consider the individual circumstances of accused persons and important character or situational information outside the identified data gathered for the risk assessment.

There are further concerns relating to the likelihood of an actuarial risk assessment being able to be equitably applied to all Western Australians. As evidenced through other actuarial models, a single risk assessment model is unlikely to be culturally appropriate in recognising the distinctive characteristics of Aboriginal peoples and cultures in WA. Generally, this operates to the detriment of Aboriginal peoples whose personal and family circumstances and history are interpreted unfavourably by sterile, actuarial risk assessments that cannot consider the environment of the person. For example, a risk assessment may score a person poorly due to previous failures to appear in court however it cannot consider the circumstances surrounding those failures such as previous residence at a remote outstation due to cultural, familial obligations compared to a current situation of residing at a metropolitan address.

In considering the examples from the United States provided in the Issues Paper, ALSWA notes that many of the factors for determining the accused person's score would be prejudicial to Aboriginal peoples. Reduced scoring for criteria such as a long-term fixed address, an address local to the arrest jurisdiction, full time employment and certain specified education levels for example, would likely disadvantage Aboriginal peoples who have been disproportionately and detrimentally affected by government policies since colonisation through many acts and omissions including dispossession of traditional lands, lack of citizenship, economic and social marginalisation, limited access to services and protection and assimilation policies. Similarly, the awarding of points for previous classifications of offences, without consideration of the inherent criminality of the individual's involvement, will undoubtedly skew any points regime.

ALSWA considers that the introduction of a risk assessment system into bail will undermine judicial officers and limit their discretion in determining bail. Moreover, such a model is likely to discriminate against Aboriginal peoples as a result of the historical disadvantage they have experienced.

**Recommendation 31: That a risk assessment system is not introduced into the WA system of bail.**

## 30. Qu 27: Providing reasons for decisions outside those recommended by the risk assessment instrument

**If such an instrument were introduced, should decision-makers provide reasons for making a bail decision outside the action recommended by the risk assessment instrument?**

ALSWA does not support the introduction of an actuarial risk assessment system for bail decisions.

## 31. Qu 28: Considerations to be included in a risk assessment instrument for WA

**Are the areas for additional consideration above adequate? Are they relevant? Should further considerations be added, and if so, for what reasons?**

No.

See Parts 29 and 30 above.

## 32. Qu 29: Views on the 'actuarial method' of decision making for bail

**Other views on the 'actuarial method' of decision making for bail.**

Please refer to Parts 29-32 above.

## 33. Qu 30: Categories of bail / release

**Are the above categories of bail / release appropriate? If not, please provide reasons for your answer.**

The categories of bail / release included in Part 3.2 of the Issues Paper are appropriate.

## 34. Qu 31: Current bail conditions reflecting a high deterrence level

**Do you consider the conditions which can be imposed to reflect a high deterrence level? Are there additional conditions which could be imposed?**

Deterrence is a sentencing principle. Deterrence should have no role in the formulation of bail conditions. An emphasis on bail conditions "reflecting a high deterrence level" assumes guilt and is contrary to the presumption of innocence. Further, should the Act be amended to include a presumption in favour of bail, conditions reflecting deterrence would be contrary to this presumption. As already noted, the focus of bail conditions should be on securing the attendance of the accused person at court, minimising risks of re-offending on bail and ensuring that witnesses are protected and the integrity of the trial process is preserved.

## 35. Qu 32: Current considerations in Clause 3(b) Part C of Schedule 1 reflecting a balance of factors in assessing bail?

**Do you consider that the current considerations in Clause 3(b) Part C of Schedule 1 provides for an adequate balance of factors in assessing bail? If not, why not?**

The considerations currently contained in clauses 1 and 3 Part C of Schedule 1 of the Act emphasise the risks attendant on the grant of bail. ALSWA submits that the Act should be amended to include a substantive provision which mirrors section 24 of the NT Bail Act reproduced below.

***"24 Criteria to be considered in bail applications***

*(1) In making a determination as to the grant of bail to an accused person, an authorized member or a court shall take into consideration so far as they can reasonably be ascertained the following matters only:*

*(a) the probability of whether or not the person will appear in court in respect of the offence for which bail is being considered, having regard only to:*

*(i) the person's background and community ties, as indicated by the history and details of his residence, employment and family situations and, if known, his prior criminal record;*

*(ii) any previous failure to appear in court pursuant to a recognizance of bail entered into before the commencement of this section or pursuant to a bail undertaking;*

*(iii) the circumstances of the offence (including its nature and seriousness), the strength of the evidence against the person and the severity of the penalty or probable penalty; and*

*(iv) any specific evidence indicating whether or not it is probable that the person will appear in court;*

*(b) the interests of the person, having regard only to:*

*(i) the period that the person may be obliged to spend in custody if bail is refused and the conditions under which he would be held in custody;*

*(ii) the needs of the person to be free to prepare for his appearance in court or to obtain legal advice or both;*

*(iii) the needs of the person to be free for any lawful purpose not mentioned in subparagraph (ii); and*

*(iv) whether or not the person is, in the opinion of the authorized member or court, incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury or in need of physical protection;*

*(c) the risk (if any) that the accused person would (if released on bail) interfere with evidence, witnesses or jurors;*

*(d) the risk (if any) that the accused person would (if released on bail) commit an offence, a breach of the peace, or a breach of the conditions of bail;*

*(e) the risk (if any) that would result from the accused person's release on bail to the safety or welfare of:*

*(i) the alleged victim of the offence; or*

*(ii) the close relatives of the alleged victim; or*

*(iii) if the alleged victim is a child – any person (other than a close relative) who has the care of the child; or*

*(iv) any other person whose safety or welfare could, in the circumstances of the case, be at risk if the accused person were to be released on bail.*

*(2) For the purposes of this section, the authorized member or court may take into account any evidence or information which the authorized member or court considers credible or trustworthy in the circumstances, including hearsay evidence.*

*(3) In assessing risks to others that could result from the release of an accused person on bail, the authorised member or court must have regard to risks of the following kinds:*

*(a) a risk of violence or intimidation;*

*(b) a risk of property damage;*

*(c) a risk of harassment;*

*(d) any other risk to safety or welfare.*

*(4) If the alleged victim of an offence is a child, or the alleged offence is a serious sexual offence or a serious violence offence, the safety and welfare of the alleged victim must be considered with particular care.*

*(5) In regard to a child's safety and welfare, the following matters are to be considered:*

*(a) the child's age;*

*(b) the age of the accused person;*

*(c) any familial relationship that may exist between the child and the accused person;*

*(d) the living arrangements for the child and for the accused person (assuming the accused person's release on bail);*

*(e) the desirability of preserving the child's living arrangements and family and community relationships;*

*(f) the emotional as well as the physical wellbeing of the child;*

*(g) any other relevant matter.*

*(6) If an alleged victim expresses concern to the prosecutor that the release of the accused person on bail could lead to a risk to the alleged victim's safety or welfare, the prosecutor must, wherever practicable, inform the authorised member or court about that concern and the reasons for it."*

Of particular note is subsection 24(1)(b) of the NT Bail Act which stipulates the interests of the accused person which must be considered in bail deliberations. Given the tyranny of distance in WA and the overcrowding in the prison system, a refusal of bail in a remote area of the State is often accompanied by a period of remand in a facility a significant distance from the location of the alleged offending and the accused's family and legal representation. Thus when remanded, it is not unusual for an accused to be kept in poor conditions, double-bunked in a prison cell several thousand kilometres from their family, in a location that impedes their ability to prepare for their court appearances. Interviews with lawyers are limited to telephone, or in some cases, video-conferencing facilities given the distance and often, in the case of ALSWA clients, this is highly inappropriate given cultural and language barriers.

ALSWA considers it vital that the Act properly protect the rights of accused persons and that this could best occur by the inclusion of more specific criteria for consideration in determining bail decisions.

**Recommendation 32: That the matters to be considered in determining bail in the Act are revised to include considerations about the interests of the accused person, their cultural obligations and their personal circumstances and supports.**

## 36.Qu 33: Other comments or issues regarding this section of the Act.

No further comment.

## 37.Qu 34: Sureties and indirect discrimination

**Do you consider the requirement for sureties indirectly discriminates against certain groups of people?**

ALSWA notes anecdotally that the requirement for a surety, as with the imposition of onerous bail conditions, appears to be unavoidable across WA. In the majority of bail matters in which ALSWA appears, the decision-maker and prosecution expect that a surety will be available.

Traditionally, sureties were required to manage the risk of an accused person failing to attend court. A surety should not be relevant or attached to bail based on the seriousness of the allegations or risk of offending as these are not issues about which a surety can make an undertaking. ALSWA contends however that currently sureties are grossly overused in WA.

Aboriginal accused persons routinely do not have the family and social connections to locate a person with sufficient assets to meet the amount of the surety. This situation is compounded by the fact that the pool of potential sureties can be further limited in the event that persons have outstanding unpaid fines which would disqualify them from acting in the capacity of surety. This is particularly the case in regional and remote communities.

## 38.Qu 35: Ameliorating discrimination relating to sureties

**How could any such discrimination best be ameliorated?**

This could be ameliorated in two ways. First, by bail decision-makers not proceeding on the basis that a surety is always needed in the instance of allegations of serious offending. Second, the quantum of any surety should reflect the financial and economic capacity of any proposed surety.

**Recommendation 33: That sureties are only required where they are necessary to manage a risk of non-appearance by an accused person.**

**Recommendation 34: That the quantum of the surety be proportional to the financial and economic capacity of any proposed surety.**

## 39. Qu 36: Relevance of sureties to social conditions and community expectations. Should they be dispensed with?

**Is the requirement for a surety relevant to current social conditions and community expectations of the justice system? What would be the major advantages and / or disadvantages of dispensing with the requirement for a surety?**

There are benefits to a surety system in so far as it may serve to manage the risk of an accused person attending at court and therefore enable a person who, in the absence of a surety may otherwise pose an unacceptable risk, to be released on bail. However, the current practice of many bail decision-makers requiring a surety in most matters, particularly where the allegations are serious, impacts adversely on Aboriginal accused persons and often has the effect of a defacto remand in custody because a suitable surety cannot be located.

ALSWA recommends that the surety system continue however care be taken to ensure that it is utilised appropriately and amendments along the lines of those outlined in Part 39 be made to ameliorate the discriminatory aspects of the current surety system.

## 40. Qu 37: Other comments or issues regarding sureties under the Act?

No further comment.

## 41. Qu 38: "Responsible Person" requirement for young people

**Could the "responsible person" requirement be altered or enhanced in any way to provide for better outcomes for accused young people?**

ALSWA supports the establishment of regional youth justice services in the Goldfields and Mid-West Gascoyne regions and the intended expansion of these services to the Kimberley and Pilbara over the next 15 months. ALSWA also supports Supervised Bail programs in the metropolitan area which enable young people to be released on bail where family members may be unavailable, unsuitable or unwilling to assume the role of "responsible person".

While these programs and initiatives are welcomed and their benefits to young people are recognised, ALSWA recommends that these services be further expanded to benefit more young Western Australians.

**Recommendation 35: That Regional Youth Justice Services and Supervised Bail programs are further expanded across WA.**

Government departments with employees who might fulfil the role of "responsible person", such as DCP, should be better resourced and provided with appropriate training to perform this role. Unfortunately, with respect to DCP, ALSWA is not aware of a single client in the care of the CEO of DCP who has had a DCP employee act as responsible adult for the

purposes of bail. Far too often, DCP employees regard Aboriginal children as being in the "too hard basket" such that it is far easier for children to remain in custody as bail refused than for DCP to be pro-active in endeavouring to secure the release of children on bail.

**Recommendation 36: Government departments with employees who might fulfil the role of "responsible person", such as DCP, should be better resourced and provided with appropriate training to perform this role.**

ALSWA notes that there are other current bail practices which disadvantage young people. In particular, ALSWA has observed an increasing trend to impose responsible person bail on a young person following an appearance in court pursuant to a Notice to Attend Court. Although a young person may have appeared in accordance with a Notice to Attend Court, at the conclusion of the proceedings, instead of simply adjourning the matter subject to a further Notice to Attend Court, the court imposes responsible person bail. Given that the primary purpose of bail is to ensure attendance at court, it is unnecessary for bail to be imposed when a young person has satisfactorily appeared when required. Occasionally, when responsible person bail is imposed, there will be no responsible person in court or an adult present may not be willing or suitable to act in the capacity of the responsible person, resulting in the child going into custody.

**Recommendation 37: That where a young person complies with a Notice to Attend Court the court refrain from subjecting the young person to bail.**

## 42.Qu 39: Guidance around bail conditions for young people

**Should more guidance be provided to bail decision-makers in setting bail conditions for young people?**

As repeatedly stated above, ALSWA recommends that bail decision-makers only impose conditions that would be considered reasonably necessary to manage risks of offending while on bail, non-attendance at court, interference with witnesses or a compromised trial process. Bail conditions should not be imposed as a means of social engineering, to reflect considerations of deterrence or as a means of punishment.

ALSWA recommends that bail decision-makers be required to provide reasons for the imposition of each condition to ensure that proper consideration is afforded to the individual case before conditions are set.

**Recommendation 38: That bail decision-makers are required to record written reasons for the setting of any bail conditions.**

## 43.Qu 40: Other comments or issues regarding young people and bail in WA.

ALSWA also recommends that police are provided with additional guidance and training about the monitoring of compliance of young people with bail conditions. ALSWA has

frequently had young clients throughout WA who have difficulty finding a responsible person willing to sign a bail undertaking as a result of police practices in monitoring bail. Bail for young people in WA often includes a curfew condition and young people and their families report that the policing of this condition can be very disruptive. Numerous reports indicate that police regularly conduct several checks of a residence, at inconvenient times throughout the night, to ensure that a young person is at home in compliance with curfew conditions. These checks, which require the young person to present at the door, interrupt the sleep of entire households which often include other school aged children in addition to adults. The practical effect is that inhabitants of the household, including the accused young person, are sleep deprived and unable to concentrate throughout the day and engage in productive activities such as schooling or other activities. Adults of the house are equally unable to meet their work, study or other obligations.

While this issue can be managed to some extent by more cautious application of curfew conditions, it is also important that police recognise the effects of their monitoring activities and efforts are made to reform inappropriate police practices relating to bail.

**Recommendation 39: That police receive guidance on how best to monitor compliance with bail conditions without unnecessary disruption.**

## 44. Qu 41: Ensuring adequate understanding of bail conditions by accused persons

**Do current processes provide adequate protection to ensure that the accused fully understands and is able to comply with bail conditions? If not, how could this situation best be improved?**

Due to language difficulties, the lack of an interpreter and busy court lists judicial officers do not have the time to properly explain bail conditions. ALSWA has repeatedly emphasised the need for a State-wide interpreter service in WA and proper recognition and accreditation of Aboriginal interpreters to encourage more Aboriginal peoples to pursue a viable career as an interpreter. Please find attached as Annexure A, a copy of a 2006 ALSWA submission entitled "Aboriginal and Torres Strait Islander Languages Interpreter Service in Western Australia" which elaborates on this topic.

## 45. Qu 42: Other comments on bail in WA.

No further comment

## 46. Conclusion

ALSWA welcomes this review of the Act by the Department of the Attorney General. However ALSWA notes concern surrounding the framing of some questions within the Issues Paper which indicate an intention to reform the Act to reduce the availability of bail to

accused persons. ALSWA hopes that any review of the Act focuses on the fundamental purposes of bail: to ensure the appearance in court of the accused person without their offending whilst on bail, interfering with witnesses or otherwise compromising the trial process. This would recognise the underlying principle of criminal law that all persons are presumed innocent until proven guilty.

It is hoped that any amendments to or redrafting of the Act will reflect these purposes and principles and remove any social engineering or punishment element from the granting or denial of bail and setting of bail conditions.

ALSWA strongly supports, in all instances, the retention of appropriate discretion for bail decision-makers as to the grant of bail and imposition of bail conditions. The imposition of mandatory conditions and requirements with respect to bail would continue the further disturbing trend of the erosion of judicial discretion.

Similarly, ALSWA supports the referral of all bail matters to a Magistrate of Judge where police or a JP do not intend to grant bail. ALSWA submits that this would be achievable via telephone and video conference bail appearances.

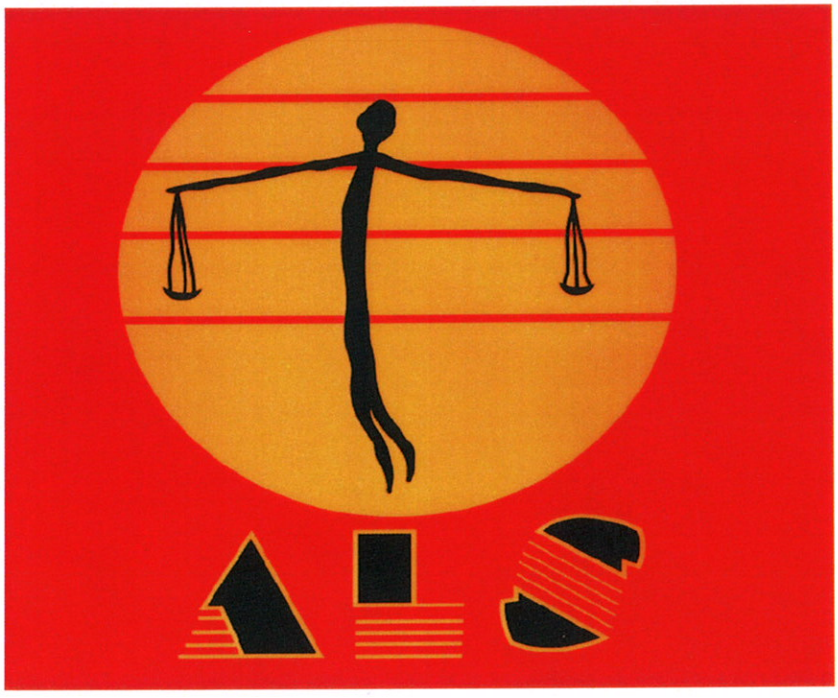
## 47.List of ALSWA Recommendations

1. The Act be amended to more clearly articulate the principles of bail and incorporate categories of presumptions in favour or against bail rather than simply a right to have bail considered.
2. That authorised police and JPs who are bail decision-makers receive practical training about the right to bail following amendments to enshrine this right in the Act to ensure that remand is utilised as a last resort.
3. That the protection of vulnerable peoples is not explicitly stated as a principle in the Act.
4. That the Act be re-drafted in its entirety to better reflect the principles and operation of bail in WA.
5. That in re-drafting the Act, a separate Part be included that explicitly states the principles and objectives of the Act.
6. That the revised considerations in determining bail are included as substantive provisions in the Act.
7. The Act contain specific, substantive provisions for children and young people regarding bail.
8. That the specific, substantive provisions relating to children and young people and bail be drafted in plain English to facilitate understanding.
9. That children and young people be excluded from the operation of clause 3A Part C of Schedule 1 of the Act in relation to Schedule 2 offences.
10. A Notice to Attend Court should generally be used to progress charges which do not carry a term of imprisonment.

11. Bail conditions should reflect the often unique social circumstances of Aboriginal peoples and should be dispensed with in all cases where an individual poses minimal risk of non-attendance at court, re-offending while on bail and / or otherwise interfering with the trial process.
12. That an on-call bail Magistrate system be formalised in WA to ensure that Magistrates always make timely, final decisions to remand accused persons.
13. That the Act be amended to only allow police to grant, and not refuse, bail.
14. That the Act be amended to require a Magistrate to conduct within 48 hours a review on the papers of all conditional bail granted by police to ensure that bail conditions are applied appropriately.
15. That where police choose not to grant bail, the bail decision is determined by a Magistrate within 3 hours.
16. That any refusal of bail by a JP be reviewed by a Magistrate within 3 hours and prior to the accused person being transported for the purposes of remand.
17. That the Act stipulate that only the President of the Children's Court, another Judge of the Court or a Magistrate is empowered to refuse bail for a child.
18. Section 16A of the Act should be repealed and JPs allowed to consider bail in Schedule 2 situations subject to a review of the decision by a Magistrate within three hours.
19. That the Act should provide for legal representation for all persons having bail considered.
20. That the WA Government adequately resource a State-wide interpreter service in Aboriginal languages to ensure there are sufficient interpreters to meet the needs of accused persons in relation to bail and the criminal justice system generally.
21. That the Act be amended to make it mandatory for the police to notify ALSWA whenever an Aboriginal person is taken into custody and not granted bail.
22. ALSWA urges the WA Government to provide resources to ALSWA to establish and maintain a 24/7 on-call bail and custody notification service.
23. That professional assessments of the likelihood of committing further similar offences are not introduced into the Act.
24. That protective bail conditions reflect the risk to the protected person and are not unduly onerous.
25. That the requirement to demonstrate 'exceptional reasons' in Schedule 2 be replaced with a requirement to demonstrate either 'special circumstances' or to 'show cause' as to why bail should be granted.
26. That bail decision-makers are required to consider the impact of a refusal of bail for an accused person who will be remanded far from their home, family and country and the impact on an accused person's capacity to comply with cultural obligations.
27. That the issue of a Notice to Attend Court be the starting point for all charges and be reasonably deemed unsuitable before arrest and bail is considered.
28. That police concerns about the documentation and processes associated with issuing Notices to Attend Court be managed to ensure that it does not impact on the frequency with which these notices are issued where appropriate.
29. That accused persons are not encouraged to sign written pleas of guilty to avoid court appearances without proper oral explanations in the appropriate language with the assistance of a skilled interpreter where required. That these steps be recorded through

signed declarations by the police officer and interpreter involved. Legal advice should also be available.

30. That Court Hearing Notices and Notices to Attend Court be translated into common Aboriginal languages to be more accessible to Aboriginal accused persons, particularly in regional and remote areas.
31. That a risk assessment system is not introduced into the WA system of bail.
32. That the matters to be considered in determining bail in the Act are revised to include considerations about the interests of the accused person, their cultural obligations and their personal circumstances and supports.
33. That sureties are only required where they are necessary to manage a risk of non-appearance by an accused person.
34. That the quantum of the surety be proportional to the financial and economic capacity of any proposed surety.
35. That Regional Youth Justice Services and Supervised Bail programs are further expanded across WA.
36. Government departments with employees who might fulfil the role of "responsible person", such as DCP, should be better resourced and provided with appropriate training to perform this role.
37. That where a young person complies with a Notice to Attend Court the court refrain from subjecting the young person to bail.
38. That bail decision-makers are required to record written reasons for the setting of any bail conditions.
39. That police receive guidance on how best to monitor compliance with bail conditions without unnecessary disruption.



# Submission: Aboriginal and Torres Strait Islander Languages Interpreter Service in Western Australia

Aboriginal Legal Service of
Western Australia (Inc).

**April 2006**

# SUBMISSIONS OF THE ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC) IN RELATION TO AN ABORIGINAL AND TORRES STRAIT ISLANDER LANGUAGES INTERPRETER SERVICE IN WESTERN AUSTRALIA



**Contents**



## Introduction

Unlike for other language speakers, there is no Statewide interpreter service available for Aboriginal and Torres Strait Islander language speakers in Western Australia.

The Aboriginal Legal Service of Western Australia, hereinafter referred to as ALSWA, submits that this situation is indefensible and should be urgently remedied by government, at least in the areas of law/justice and health, for the following reasons:

- 17% of Aboriginal and Torres Strait Islander peoples speak an Aboriginal language at home. This figure rises to 51% in some remote areas. Only 3/4 claim to speak English well[1]
- Aboriginal and Torres Strait Islander peoples make up 40% of the Western Australian prison population. This demonstrates an imprisonment rate 23 times greater than the national imprisonment rate[2] . The Attorney General, Mr McGinty, has recently recognized that these high rates of imprisonment need to be addressed[3].
- Aboriginal and Torres Strait Islander peoples on the whole experience poorer health, and hence more contact with health service providers than other Australians. For example, hospitalisation rates for Aboriginal and Torres

[1] 1996 census Australian Bureau of Statistics at http://www.abs.gov.au/
[2] The Mahoney Report, November 2005, p.279 at http://www.slp.wa.gov.au/publications/publications.nsf/Inquiries+and+Commissions
[3] Media statement – Jim McGinty, 6 February 2006

Strait Islander peoples are 12 times higher for care involving dialysis, and twice as high for respiratory disease and for injury[4]

- Approximately 1 in 5 Aboriginal and Torres Strait Islander peoples living in remote areas have difficulty understanding or being understood by service providers[5].

These statistics indicate there is a pressing need for an interpreter service with officially trained interpreters, throughout Western Australia, for Aboriginal and Torres Strait Islander languages. How to achieve this in a cost effective way is discussed below.

**The Aboriginal Legal Service of Western Australia (Inc)**

ALSWA was established in 1973. It is a community based organization that provides legal advice and representation to Aboriginal and Torres Strait Islander individuals and groups in a wide range of areas. Its service extends throughout Western Australia via 17 regional/remote offices and one metropolitan office.

ALSWA is the preferred legal service provider for Aboriginal and Torres Strait Islander peoples living in Western Australia, and makes submissions on that basis.

ALSWA has also recently established a Western Australian Aboriginal Advisory Committee ("WAAAC") to advise governments and other bodies about law and justice issues affecting Aboriginal and Torres Strait Islander peoples living in Western Australia. Members include ALSWA's Chief Executive Officer, the Manager of ALSWA's Aboriginal Court Officer Unit and 16 executive officers[6] elected by the Aboriginal and Torres Strait Islander peoples from their local regions to speak for them on law and justice issues. WAAAC members and their support staff also are responsible for consulting with the Aboriginal and Torres Strait Islander community to ensure that those views are also made available.

A list of the Aboriginal and Torres Strait Islander individuals and groups consulted for these submissions appears at Appendix 1.

**Context**

WAAAC has identified provision of interpreter services for Aboriginal and Torres Strait Islander peoples as an urgent priority, particularly in the areas of law and justice and health.

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[4] Australian Bureau of Statistics 2001 Census http://www.abs.gov.au/

[5] Australian Bureau of Statistics 2001 Census http://www.abs.gov.au/

[6] There are 2 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 Aboriginal and Torres Strait Islander public every 3 years.

**Issues to be addressed by a Statewide Aboriginal and Torres Strait Islander languages interpreter service**

There are three key issues to be addressed by a Statewide Aboriginal and Torres Strait Islander languages interpreter service. These are:

*1. The prerequisite that a defendant should be able to understand court proceedings and the nature of the evidence against him or her*

It is a fundamental principle of the criminal law that not only should an accused person be physically present for their case, but that they should also be able to understand the proceedings and the nature of the evidence against them. In Ebatarinja –v- Deland [1998] 194 CLR 44 the accused was facing a committal hearing in relation to a charge of murder. He was a deaf mute Aboriginal man from Central Australia who was not capable of understanding committal proceedings and was unable to communicate with his lawyers. It was accepted that it would not be possible to find a suitable interpreter.

The High Court made the following comments at paragraph 26 of the judgment:

> "On a trial for a criminal offence, it is well established that the defendant should not only be physically present but should also be able to understand the proceedings and the nature of the evidence against him or her. In Kunnath v The State, the judicial committee of the Privy Council said:
>
> > "It is an essential principle of the criminal law that a trial for an indictable offence should be conducted in the presence of the defendant. As their Lordships have already recorded, the basis of this principle is not simply that there should be corporeal presence but that the defendant, by reason of his presence, should be able to understand the proceedings and decide what witnesses he wishes to call, whether or not to give evidence and, if so, upon what matters relevant to the case against him".
>
> If the defendant does not speak the language in which the proceedings are being conducted, the absence of an interpreter will result in an unfair trial. In R v Willie, Cooper J is reported to have ordered four Aboriginal prisoners to be discharged on a charge of murder when no interpreter could be found competent to communicate the charge to them."

In Ebatarinja v Deland, the High Court held that as the defendant was not capable of understanding the proceedings, the Court had no power to continue with the committal proceedings. The effect of the decision was that the murder charge was permanently stayed.

2. *The over estimation of English language proficiency of Aboriginal and Torres Strait Islanders*

Many Aboriginal and Torres Strait Islander peoples can speak dialects of English. In most situations therefore, they are not provided with an interpreter for their legal or

health matters. However their English language skills are often insufficient for these purposes.

Aboriginal English is widely spoken across the north of Australia, and there are various dialects, even in one region such as the Kimberley. The dialects are based on the languages and culture of smaller areas[7]. However these Aboriginal dialects differ systematically from Standard Australian English in terms of sound system, grammar, vocabulary, meaning and appropriate use of language. Linguists have labeled this language as Aboriginal English and officially recognize it as a different language from Standard Australian English, which is the language of Western Australia's legal and health systems[8]. The differences are so substantial as to necessitate an interpreter being provided.

The following examples of patterns of communication have been demonstrated to be typical of the communication of Aboriginal English speakers. The following examples were found in a linguistic and sociolinguistic analysis by the then Professor of Applied Linguistics at Edith Cowan University, Professor Ian Malcolm.

*(a) Gratuitous Concurrence*

Gratuitous concurrence is the pattern of communication where Aboriginal and Torres Strait Islander speakers, being posed polar (yes/no) questions, respond predictably "yes". This represents an attempt to appease the questioner rather than necessarily an affirmation or expression of consent to the meaning expressed by the questioner. It is a well known fact that Aboriginal and Torres Strait Islander speakers when confronted with authority figures, especially in settings without the assistance of an interpreter, may simply say "yes" to them in an automatic way, without necessarily meaning it. Gratuitous concurrence can also reflect a communicative insecurity in Standard Australian English.

The following extracts from a police interview in 2000 between an Aboriginal man from the East Kimberley, Antonio Simon, and detectives from Kununurra Police Station provide an example of gratuitous concurrence.

"Q. Your rights are that you don't have to talk to me or answer my questioning, right, answer my questions about last night unless you want to.

A. Yeah.

Q. Do you understand what that means?

A. Yep.

[7] Kimberley Interpretive Service, 'Discussion Paper: Indigenous Language Interpreting Services' June 2004 p. 24

[8] Dr Diane Eades, Linguistic Department, University of New England

Q. All right. Well in your own words what does it mean?

A. It means ..... say that again.

Q. Okay. If I ask you a question.

A. Yeah.

Q. ....Do you have to answer me?

A. (pause) Yeah.

Q. No, no you don't. Right? Because they're your rights."

Aboriginal and Torres Strait Islander speakers often do not respond in the way non Aboriginal speakers expect to questions which involve the presentation of alternatives. Rather than denying one alternative and affirming the other, they respond with a general affirmative, or they focus only on one of the alternatives given.

*(b) Non standard response to polar (yes/no) questions*

Aboriginal and Torres Strait Islander speakers often do not interpret negative questions in the same way as speakers of Standard Australian English, in that the respondent affirms the questioner's intent, rather than denying the statement put forward by the questioner. Thus "You don't want to come" would be answered "Yes" if the person does not want to come.

*(c) Conceptual differences*

Sometimes linguistic usages relate to underlying conceptual differences in the ways in which Aboriginal English and Standard Australian English speakers relate to experience.

In the Simon police interview, when asked "what is court" the accused responded by saying "it's straight across the road there", not understanding that the word court, without the article, in Standard Australian English, refers to an abstraction rather than a particular building.

Further, people generally do not understand that for many English words and concepts there are no equivalents in Aboriginal and Torres Strait Islander languages. Hence Aboriginal and Torres Strait Islander users of mainstream legal and health systems are presented with concepts with which they are totally unfamiliar.

*(d) Cultural differences*

The general Australian population tends to assume that Aboriginal and Torres Strait Islander peoples use cultural communication conventions in the same way as themselves.

For example, in the courtroom, silence may be incorrectly perceived as an admission of guilt, whereas it may in fact mean that the person for cultural reasons cannot speak on the topic or in the presence of certain people in the room, or that they are extremely uncomfortable and embarrassed, or that they are having thinking time or simply that they do not understand. Another example is that many Aboriginal and Torres Strait Islander people are essentially courteous and polite and will answer a question in the manner which they suppose the questioner wishes. People will also answer "yes" to questions they do not understand in order to hurry along an uncomfortable process. In the legal arena, this can have dire effects on the outcome of court proceedings and the person's liberty; in the health arena it can have dire effects on diagnosis, treatment and indeed the person's life.

All of the above examples of patterns of communication occur frequently in settings where Aboriginal and Torres Strait Islander persons are dealing with non Aboriginal authority figures, but particularly so where an Aboriginal or Torres Strait Islander person is being interviewed or asked questions by police in relation to a criminal offence. The examples also highlight the importance of an interpreter to ensure a full and complete comprehension of questions asked and a full and accurate communication of answers to questions. This is because these communication features can lead to an 'admission' which is not authentic.

*3. A lack of official interpreting services has led to ad hoc services becoming the status quo*

In cases where an interpreter is deemed necessary, the inability of courts and service providers to provide interpreters in the languages and numbers required has led to a tradition of ad hoc solutions where bilingual but unaccredited Aboriginal and Torres Strait Islander individuals, including prisoners and members of the public, have been called upon to interpret in legal and health matters.

The wilful murder trial of an ALSWA client, Lindsay Njana[10], in 1997 in the Broome Supreme Court provides a case in point. Lindsay Njana was an 18 year old traditional Aboriginal man from Balgo charged with the wilful murder of his 14 year old girlfriend. It was alleged that she had been beaten to death. The case involved complex issues of pathology in relation to the cause of death. Apart from suffering severe bruising consistent with a beating, the deceased had also sniffed a significant quantity of petrol on the day of her death.

Mr Njana spoke English as his third language. His primary language was an Aboriginal language from the Balgo area called Kukatja. Despite extensive enquiries by ALSWA throughout the Kimberley and the Northern Territory no qualified Kukatja interpreter could be located. Mr Njana's defence counsel was forced to call upon the assistance of an unqualified and unaccredited Aboriginal prisoner serving a sentence of imprisonment at Broome Regional Prison to attempt to interpret for Mr Njana at his trial. This led to the unedifying situation of a prisoner wearing prison issued clothing sitting next to Mr Njana

[10] R v Njana (1998) 99 A Grin R 273

in the dock during a two week trial. After the first day of evidence the prisoner spent most of the rest of the trial asleep with his head resting on the shoulder of Mr Njana. It is inconceivable that Mr Njana was able to comprehend the complex nature of the evidence given against him at his trial for the most serious charge under the Western Australian Criminal Code.

**Existing case law and recommendations**

Judicial recognition of the need for interpreters in the context of police interviews was recognized as long ago as 1976 in the landmark Northern Territory decision in the case of *R v. Anunga*[11]. The principles established in that case have been widely recognized by Western Australian courts as a measure of a fair interrogation: see for example Williams[12],Webb[13], Njana. In particular, Anunga highlighted the need for an interpreter if the Aboriginal suspect did not have the understanding of English at the same level as a non Aboriginal person of "English descent".

The Operating and Procedures Manual of the Western Australia Police directs police conducting interviews with Aboriginal and Torres Strait Islander suspects to comply with the principles established in Anunga: Cops Manual, AD – 1.3. The experience of ALSWA is that police compliance with the directive is problematic.

Recommendation 100 of the Royal Commission into Aboriginal Deaths in Custody provides that governments should take more positive steps to recruit and train Aboriginal people as court staff and interpreters in locations where significant members of Aboriginal people appear before the courts.

More recently, Preventing Violence: The State Community Violence Prevention Strategy 2005 published by the Office of Crime Prevention at Chapter 5.3 "Priorities for Area Development" recommends increased use of interpreters by police and other services to reduce violence involving Aboriginal and Torres Strait Islander peoples.

The Western Australian Law Reform Commission discussion paper on Aboriginal Customary Law was released on 6 February 2006. The Law Reform Commission recommends that the Western Australia Police and relevant Aboriginal interpreter services develop a set of protocols for the purpose of considering whether an Aboriginal person requires an interpreter during an interview; that adequate funding should be provided for the training of Aboriginal interpreters; that the *Evidence Act 1906 (WA)* provide that a person has the right to give evidence through an interpreter; that education about the role of interpreters should be conducted in Aboriginal communities; and that guidelines for using Aboriginal interpreters need to be developed (see proposals 44, 78 to 82)

[11] (1976) 11 ALR 412
[12] R v Williams (1992) 8 WAR 265 at 273
[13] R v Webb (1994) 74 A Grin R 436 at 445

Appendix 2 lists international and Commonwealth instruments that support the establishment of an Aboriginal and Torres Strait Islander language interpreter service to ensure substantive equality.

**Existing Models**

ALSWA has identified four existing models of an interpreter service:

*1. Aboriginal Interpretive Service (AIS) - Northern Territory*

AIS receives $5 million under the Northern Territory Agreement signed 27 July 2000 by the Commonwealth and Northern Territory governments. The Agreement is in place to 2008.

AIS has offices in Darwin and Alice Springs. Both provide services throughout the Territory. Interpreters are present at Darwin Magistrate's Court on a daily basis. In Tennant Creek and Katherine, AIS generally uses Aboriginal Language Centres to locate and provide interpreters[14]. AIS resources on-site interpreters at the Royal Darwin hospital

AIS currently has 136 qualified interpreters covering 104 Aboriginal and Torres Strait Islander languages.

Services offered by AIS to government and non-government agencies are:

- Arrange for interpreters on request
- Arrange travel and accommodation for interpreters
- Pay interpreter, travel and accommodation costs
- Bill the client (ie the relevant agency, not the Aboriginal person who needs an interpreter) for the cost of interpreter, travel and accommodation
- Maintain accurate database records and monitor operations
- Provide training and professional development for interpreters and clients
- Advise clients on how to work effectively with interpreters

AIS imposes these responsibilities on its interpreters:

- Proper qualifications
- Accurate, impartial and confidential interpreting
- Obey the Interpreters' Code of Ethics
- Wherever possible, attend training workshops arranged by AIS

AIS imposes these responsibilities on its clients, in addition to the responsibility to pay costs:

Provide the following information when requesting an interpreter:

- Name, age and gender of non-English speaker
- Name and contact details of officer requesting interpreter
- Language (AIS can help determine the language)/ Where/When/Topic
- Meeting interpreter at the start
- Provide feedback to AIS.

[14] See Appendix 2 for Western Australia language and resource centres

*2. Kimberley Interpreting Service (KIS) in Western Australia*
KIS provides qualified language interpreters in the Kimberley region only. KIS has no intention of expanding and is therefore a regional not a Statewide model, but the model could be adapted to a Statewide service.

Funding from eight different government departments is delivered to KIS through the Department of Indigenous Affairs. KIS's annual operational budget is $120,000 per year. This budget is adequate for basic operations only. KIS is in the process of becoming an independent business.

KIS does not have a budget for the professional development of interpreters; funds are sought on a one-off basis for specific training projects.

KIS works and trains staff in conjunction with AIS and the Batchelor Institute in the Northern Territory. There is currently no government funding to support these training courses.

KIS has 60 registered interpreters and offers 13 Kimberley languages.

*3. Use and support an independent contractor*
ALSWA has been contacted by an independent contractor, Ella Davies, who is interested in setting up an interpreter service in Perth that provides various languages including Aboriginal and Torres Strait Islander languages.

Her proposal is:
- Private business that would subcontract out interpreters
- On-call basis – not permanent employment for interpreters
- Based only in Perth
- Link the business to a larger organization. She proposed ALSWA. Another possibility is a government department.

Ms Davies believes that she should be able to obtain funding from TIS (Translating and Interpreting Service) as she says most of TIS' market has been taken over by private companies such as her own.

*4. Expand Translating and Interpreting Services (Department of Immigration, Multiculturalism and Indigenous Affairs) to include Aboriginal and Torres Strait Islander languages*
The Australian Government, through its Department of Immigration and Multicultural and Indigenous Affairs, provides a Translating and Interpreting Service (TIS):

- TIS is Australia's only national interpreter service, and is available to anyone in Australia

- TIS is available 24 hours a day, 7 days a week, and is accessible from anywhere in Australia for the cost of a local call
- TIS has access to approximately 2000 contractors covering more than 100 languages, but does not currently provide interpreters for any Aboriginal or Torres Strait Islander languages
- Priority is given to people with National Accreditation Authority for Translators and Interpreters (NAATI)
- TIS provides interpreters by telephone or face to face for a fee.

It should be noted that the Department of Attorney General provides free of charge assistance of an on-site or telephone interpreter from TIS if required in a court of law.

**ALSWA's proposed model**
ALSWA proposes the following model:

*Framework*
ALSWA proposes that the development and establishment of a Statewide Aboriginal and Torres Strait Islander languages interpreter service be intertwined with the development of the State Justice Plan. The State Justice Plan reflects the contents of the Aboriginal Justice Agreement, to which ALSWA and the State government are signatories, which provides a framework for improving justice related outcomes for Aboriginal and Torres Strait Islander peoples.

*Interpreter training and qualifications*
*The Career Paths and Training for Interpreters and Translators Report* was released in December 2005 by the Commonwealth Department of Education, Science and Training. The report provides a profile of the industry and training required for interpreters and translators in Australia, including a description of the current profile of Aboriginal and Torres Strait Islander interpreter training and qualifications in Western Australia. The report sets out the skills and knowledge needs of the industry and the scope and level of any potential competency standards and qualifications.

Currently there are two formal methods of training for interpreters:
- Undertaking a test conducted by the National Accreditation Authority for Translators and Interpreters (NAATI). NAATI will only accredit in Aboriginal languages to the paraprofessional level (the lowest level). In line with the recommendation contained in the *Career Paths and training for Interpreters and Translators Report,* ALSWA proposes that this level of qualification be reviewed
- Undertaking a diploma in interpreting at a TAFE College or university.

In Western Australia, there are no courses for interpreters offered on a regular basis. KIS provides courses on a very limited basis[15].

[15] KIS has told ALSWA that Kimberley TAFE is considering offering an Aboriginal language interpreter course. Funding however is proving problematic.

ALSWA proposes that rather than establishing a new agency to conduct training, it is more cost-effective that Western Australia's existing TAFE infrastructure be used to deliver training for interpreters in Aboriginal and Torres Strait Islander languages. Dagmar Dixon is the coordinator of interpreter programs at Central TAFE and is the appropriate TAFE person to consult in this regard.

*Needs of recruits*
Most Aboriginal and Torres Strait Islander people are from a low socio-economic background. ALSWA therefore proposes that scholarships and financial assistance be offered by the training provider in order to attract appropriate recruits.

Such recruits will also need tutorial support during their training and as an ongoing resource in their professional development. This tutoring system should include English language extension and structured help in finding equivalent words in the relevant Aboriginal or Torres Strait Islander language.

It goes without saying that interpreting courses for Aboriginal and Torres Strait Islander languages must be designed in a culturally appropriate manner in consultation with Aboriginal and Torres Strait Islander peoples, particularly those who have previously completed interpreting courses[16]. As part of providing a culturally appropriate course, it is important Aboriginal and Torres Strait Islander peoples have employment opportunities with the training provider, and afterwards with the interpreter service itself.

*Supports for interpreters*
A support network is proposed for all employed interpreters, regardless of language. Experienced Aboriginal interpreters say that a place where interpreters can debrief is essential as the work can often be emotionally draining.

In relation to Aboriginal and Torres Strait Islander interpreters specifically, *Indigenous Interpreting Issues for Courts* was released in 2002 by Dr Michael Cooke. Dr Cooke, in consultation with Aboriginal and Torres Strait Islander peoples, also wrote a background paper on 'Indigenous interpreters and Customary Law' for the Law Reform Commission of Western Australia's Aboriginal Customary Law Project in March 2004. In his writings, Dr Cooke identifies several issues that must be addressed in any Aboriginal and Torres Strait Islander language interpreter service, including:

1. The principles of impartiality, confidentiality and accuracy frequently raise difficulties for Aboriginal and Torres Strait Islander interpreters

Impartiality is problematic when the interpreter is related to the client. A solution is that the interpreter service provides details of the client's name, skin name and community needs to the selected interpreter. This enables the interpreter to identify any cultural conflict of interests that could interfere with the interpreting process.

[16] In Western Australia there are approximately 85 practising interpreters, 47 whom are accredited (Kimberly Interpretive Service, 'Discussion Paper: Indigenous Language Interpreting Services' June 2004).

Confidentiality is an issue when an interpreter is pressed by elders or other community members for information. A solution to this problem is extensive community education programs explaining the role and responsibilities of the interpreters. Dr Cooke also suggests that a formal introduction of the interpreter and explanation of the interpreter's role should occur at the start of every court case[17].

Accuracy is challenged where traditional law demands a particular speaking style by an interpreter that does not match how the non-Aboriginal interviewer is addressing that client. A solution is that the interpreter service provide cross-cultural training for the government and non-government agencies that are the principal clients of the service.

2. The outcome of the trial is sometimes attributed to the interpreter's role in the court process
This problem is attributable to misunderstanding the interpreter's role and is rectified by community education programs and formal explanations at the start of each matter, as described above.

3. An interpreter's age and ceremonial status [and gender – ALSWA adds]determines community acceptance
This factor needs to be taken into account during the recruitment and training process. Dr Cooke reports that younger people are able to interpret for good order offences such as drink driving charges, however for cultural reasons they are unable to interpret for cases that involve serious crimes such as rape or murder. Interpreters for the more serious cases must be older people with cultural authority to deal with these matters

4. AIS usage data indicates that interpreters are not being routinely offered by government agencies such as the Northern Territory police. Instead, Aboriginal and Torres Strait Islander peoples must specifically request an interpreter.

This is inappropriate and the solution is either the routine offering of an interpreter to Aboriginal and Torres Strait Islander peoples for all health and legal matters, or else extensive training amongst both Aboriginal and Torres Strait Islander communities and mainstream service providers about how to identify when an interpreter is needed, particularly in a legal or health matter.

*Client services to be provided*
At a minimum the languages listed in Appendix 3 should be available. These are the most commonly spoken Aboriginal and Torres Strait Islander languages in Western Australia.

[17] ALSWA notes that in the Koori Courts of Victoria, exactly such an introduction and explanation occurs at the start of court cases, in respect of the role of Elders and Respected Persons. This process has been successful in ensuring court users properly understand the role.

The service should be available 24 hours a day, 7 days a week. Police may require an interpreter for interviews at any time. Hospitals may need an interpreter after hours in emergency situations.

The interpreter service should offer training to service providers about how to use an interpreter. The AIS model offers this, as does the WA Deaf Society which offers Auslan (sign language) interpreters.

ALSWA proposes a user-pays service as in the TIS and AIS models.

As many people who will need interpreters live in rural and remote areas, it is important that interpreter services are available in these areas. The service also needs to be available in Perth; there are people from all Aboriginal and Torres Strait Islander language groups in Perth.

*Final structure*
To ensure a cost-effective structure, ALSWA proposes that a model incorporating the above features look like this:

1. In consultation with language centres and TAFE, existing Aboriginal and Torres Strait Islander language centres in Western Australia are assisted to link willing bilingual Aboriginal and Torres Strait Islander individuals from the language centres to a training course offered by Western Australian TAFEs

2. In consultation with TAFE and Aboriginal and Torres Strait Islander peoples (especially interpreters) training courses are developed by TAFE that provide interpreters accredited and trained in the specific issues that affect Aboriginal and Torres Strait Islander interpreters

3. In consultation with TAFE, Aboriginal and Torres Strait Islander peoples (especially interpreters) and TIS, willing graduates be linked to employment with TIS and TIS be developed to offer the services described above required by Aboriginal and Torres Strait Islander interpreters on the one hand, and clients/users who have need of those interpreters on the other. TIS should also be developed to deliver community education about the role of interpreters

4. Co-ordination of all of the above be by a Western Australian Aboriginal and Torres Strait Islander Languages Interpreter Service developed in consultation with Aboriginal and Torres Strait Islander peoples (especially interpreters) and other stakeholders. This agency be funded by government for a period of 5 years to develop and establish lasting processes for the above to occur

5. The service be evaluated at the conclusion of 5 years and every 5 years thereafter.

**Conclusion**
In summary:

1. A Statewide interpreter service for Aboriginal and Torres Strait Islander languages urgently needs to be implemented in Western Australia, especially in relation to legal and health matters

2. Government has provided a Statewide interpreter service for speakers of other languages. Similarly it is government's responsibility to provide an interpreter service for speakers of Aboriginal and Torres Strait Islander languages

3. Comprehensive information about the needs of both interpreters and those who need interpreters, best practice to address these, and interpreting service models, is available to and accessible by government

4. There is already in place in Western Australia an infrastructure that includes Aboriginal and Torres Strait Islander language centres, NAATI, TAFEs and TIS, all of which can be utilised in the provision of a Statewide Aboriginal and Torres Strait Islander interpreter service. What is needed is a means to link them together. ALSWA proposes that creating a short-lived organisation with the specific task of achieving this is a cost-effective way of developing and establishing an appropriate service.

## APPENDIX 1 – ABORIGINAL AND TORRES STRAIT ISLANDER INDIVIDUALS AND GROUPS CONSULTED

| | |
|---|---|
| Victor Woodley | Michael Blurton |
| Preston Thomas | Lorraine Whitby |
| Murray Yarran | Beverly Thomas |
| Trevor Eades | Clarrie Cameron |
| Paul Sampi | Olivia Roberts |
| Phyllis Simmons | Ian Tucker |
| John Bedford | Kevin George |
| Dennis Eggington | Murray Jones |

**Non-Aboriginal individuals consulted:**
Peter Collins
Director Legal Services, ALSWA

Dagmar Dixon
Interpreting course coordinator, Central TAFE WA

**Submission Coordinators**
Kate Allingahm
Policy Officer, ALSWA

Tonia Brajcich
Manager Law & Advocacy Unit, ALSWA

Angela Bromfield
Librarian, ALSWA

## APPENDIX 2 – INTERNATIONAL AND COMMONWEALTH INSTRUMENTS SUPPORTING THE NEED FOR AN ABORIGINAL AND TORRES STRAIT ISLANDER LANGUAGES INTERPRETER SERVICE

*International instruments*

- Declaration on Racial Intolerance (1996)
  Reaffirms commitment to the process of reconciliation with Aboriginal and Torres Strait Islanders peoples in the context of redressing their profound social and economic disadvantage

- Article 14(3) of The International Covenant on Civil and Political Rights (1966)
  This instrument specifically provides for interpreters in criminal proceedings. It was ratified by Australia in August 1980

- Article 7 and Article 10 of the Universal Declaration of Human Rights (1948)
  These Articles state that all are equal before the law and must be offered equal protection by the law without discrimination. Everyone is entitled to fair hearing in the determination of any criminal charges laid against him or her.

- The Convention of the Protection of Human Rights and Fundamental Freedoms (2001)
  This instrument grants an accused person the right to an interpreter if he or she cannot understand or speak the language used in court

- Article 5 of The Convention on the Elimination of All Forms of Racial Discrimination (1965)
  This guarantees the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law

- Article 2(1), Article 9(2), Article 12 and Article 40 (b)(vi) of The Convention on the Rights of the Child 1990
  The listed articles state that a child has the right to be protected against all forms of discrimination, and the right to be heard in judicial and administrative proceedings and to understand any charges laid against him/her and have adequate assistance in placing a defence

- Article 14 of the Covenant on Civil and Political Rights 1966
  This states that all persons shall be equal before courts and tribunals, and that in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair hearing

- Universal Declaration on Linguistic Rights 1996
  This states that all people have the right to use and be heard in their own language in administrative and judicial procedures

- Article 12 of The Indigenous and Tribal Peoples Convention 1989

This states that measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings where necessary, through the provision of interpretation or by other effective means (Australia is currently considering ratification of this convention).

*Commonwealth instruments*

- Racial Discrimination Act 1975 (Cth)
  This Act gives all persons, despite race, colour or ethnic or national origin, rights to equality before the law

- Human Rights and Equal Opportunity Commission Act 1986 (Cth)
  This Act establishes the Human Rights and Equal Opportunity Commission, to make provision in relation to human rights and in relation to equal opportunity in employment, and for related purposes

- Recommendation 100 of the Royal Commission into Aboriginal Deaths in Custody (Cth)
  This recommends that governments should take more positive steps to recruit and train Aboriginal people as court staff and interpreters in locations where significant members of Aboriginal people appear before the courts

- Recommendations 5-11 in Report of the inquiry into Aboriginal and Torres Strait Islander language maintenance 1992 (Cth)
  This recommends that interpreting services should be made available to all communities and agencies, training of interpreters should be funded by the Commonwealth and all government agencies should use interpreters when consulting with Aboriginal and Torres Strait Islander peoples

- Recommendation 4.2 in Equality by the Law: women's access to the legal system (Cth)
  This says that addressing language difficulties that affect an applicant's capacity to cope with the legal system should be a priority of legal aid

## APPENDIX 3 – USEFUL LANGUAGE AND RESOURCE CENTRES

**Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)**
(Formerly known as the Australian Institute of Aboriginal Studies (AIAS))
The Australian Institute of Aboriginal and Torres Strait Islander Studies is a government funded body that funds and promotes research and study on Aboriginal issues. Submissions for funding are accepted and grants made annually in October. Further information and advice can be obtained from the Linguistics Research Officer. A few language projects in WA have been funded through the AIATSIS (GPO Box 553 Canberra 2601, phone (06) 246 1111).

**Aboriginal Languages Association (ALA)**
The Aboriginal Languages Association is an Aboriginal run organisation that started in Alice Springs in 1980. The ALA has produced newsletters and has cooperated in the publication of a book outlining some issues in Aboriginal language policy in Australia.

**Bunbury Aboriginal Progress Association**
A group in Bunbury is developing a teaching kit for Nyungar. The group consists of Nyungar (Aboriginal) people who are working with older people to record what is still known, and have run workshops and conferences for people of the South-West. The address is PO Box 724, Bunbury, WA 6230, phone (097) 219518.

**Centre for Australian Languages and Linguistics (CALL) (formerly School of Australian Linguistics (SAL)) (Batchelor College, Northern Territory)**
The Centre for Australian Languages and Linguistics operates from Batchelor in the Northern Territory. It runs courses for Aboriginal people from all over Australia teaching linguistics and teaching how to write in Aboriginal languages. CALL also runs interpreter/translator courses for speakers of Aboriginal languages. Further information is available from CALL, Batchelor College, PO Batchelor, NT 0845.

**Institute for Aboriginal Development (IAD)**
The Institute for Aboriginal Development runs courses teaching local languages, offers an interpreter service and publishes language courses and language materials. The address is PO Box 2531 Alice Springs, NT 0871.

**Jawa Curriculum Support Centre**
The Jawa Curriculum Support Centre and the Kimberley Regional Office of Catholic Education support schools that use Aboriginal languages through the teacher-linguists they employ. Jawa prints books and other materials to support Aboriginal language programmes in schools. The address is PO Box 365, Broome, WA 6725.

**Kimberley Language Resource Centre (KLRC)**
The Kimberley Language Resource Centre is an Aboriginal controlled organisation which is concerned with language issues in the Kimberley, such as language maintenance, supporting schools that use Aboriginal languages, and recording dying languages. A report written by the KLRC 'Keeping Language Strong' describes the

language needs of Aboriginal people in the Kimberley. A *Handbook of Kimberley languages* has been produced by Bill McGregor working for the KLRC. The address is PMB 11, Halls Creek, WA 6770, phone (091) 686 005.

**Pundulmurra College (Certificate in Aboriginal Language Work)**
This course was set up in 1990 and trains Western Australian Aboriginal people in language recording, writing and literature production. Courses are generally run by a tutor in the students' community, and students come in to Port Hedland for a fortnight of course work. The address is PO Box 2017, Sth Hedland, WA 6722, phone (091) 721477.

**Summer Institute of Linguistics (SIL)**
The Summer Institute of Linguistics is a missionary organisation whose members translate the Bible into Aboriginal languages. The members of SIL have also been involved in literacy courses in Western Australia at Fitzroy Crossing, Halls Creek, Jigalong, around Derby, Port Hedland and Roebourne. A number of books, articles, primers and dictionaries have been produced by SIL. Together with the KLRC they have produced a very useful book for introducing Aboriginal languages into schools. (Richards, E. (n.d.) *Pinarri: introducing Aboriginal languages in Kimberley schools* KLRC/ SIL, Berrimah). It includes exercises and activities and examples from Walmajarri. SIL's address is PO Berrimah, NT 0828, phone (089) 844488.

**Universities**
There is a lot of linguistic work done by university lecturers or graduate students who spend some time in a community learning a language. Their papers and books are written for university students but are usually quite difficult for people outside of universities to read. Their work is often the only way that an Aboriginal language will be recorded.

**Wangka Maya, The Pilbara Aboriginal Language Centre**
An Aboriginal controlled organisation which supports Aboriginal languages in the Pilbara. It supports schools that use Aboriginal languages, and records dying languages. The centre has produced books and dictionaries, and records stories with older Aboriginal people in the area. The address is 3 Edgar St., (PO Box 693) Port Hedland, WA 6721, phone (091) 732621.

**Yamaji Language Centre**
This centre began operation in 1990 and works with languages of the Gascoyne region. The address is c/- PO Box 50, Geraldton, WA 6530.

**Canning Resource Centre**
Tel 08 9311 0500 / 08 9311 0539
Fax 08 9458 3324
Email jenny.johnson@eddept.wa.edu.au
Website www.eddept.wa.edu.au/deo/cannington/

**Fremantle Resource Centre**

Tel 08 9330 4042
Fax 08 9330 4083
Email resource@fedrc.wa.edu.au
Website http://www.fedrc.wa.edu.au

**Swan Resource Centre**
Tel 08 9374 0924
Fax 08 9374 0936
Email swan.resource@det.wa.edu.au

**West Coast Resource Centre**
Tel 08 9343 0155
Fax 08 9343 0166
Email westco@iinet.net.au
Website West Coast Resource Centre

## APPENDIX 3 –TABLE OF MOST COMMONLY SPOKEN ABORIGINAL AND TORRES STRAIT ISLANDER LANGUAGES IN WESTERN AUSTRALIA

| | |
|---|---|
| Perth and surrounds | Aboriginal English (differs from Standard Australian English) and all languages from elsewhere in Western Australia |
| Albany and surrounds | Aboriginal English |
| Broome and surrounds | Karajarri, Djaru, Aboriginal English (Broome style) |
| Bunbury and surrounds | Aboriginal English |
| Carnarvon and surrounds | Wajarri |
| Derby and surrounds | Warwa |
| Fitzroy Crossings and surrounds | Walmajarri |
| Geraldton and surrounds | Aboriginal English |
| Halls Creek and surrounds | Kitja, Djaru, Walmajarri, Kukitja (Balgo) |
| Kalgoorlie and surrounds | Wongatha, Ngaanyatjarra (cross-border languages with NT and SA) |
| Kununurra and surrounds | Miriwung, Djaru, Kitja, Muranphata, Kukitja, Mulungan, Walmajarri and Aboriginal English |
| Laverton and surrounds | As for Kalgoorlie |
| Meekatharra and surrounds | Wonmulla (?) |
| Newman and surrounds | Martu |
| Northam and surrounds | Aboriginal English |
| Roebourne and surrounds | Yindjibarndi, Nguluma, Martu |
| South Headland and surrounds | Martu, Yindjibarndi, Nyangumarta |
| Warburton | As for Kalgoorlie |

References: ALSWA's Executive Committee, ALSWA's Court Officers, and Language Centres.