

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

**Submission to the Western Australian Parliament**

**PROHIBITED BEHAVIOUR ORDERS BILL (WA) 2010**

**August 2010**



## Contents

1. Executive Summary .....	3
2. Introduction and Scope of the Submission .....	3
3. About ALSWA.....	4
4. The Bill .....	4
5. Purpose of the Bill .....	5
6. The need for PBOs .....	6
6.1 Misconduct Restraining Orders.....	6
6.2 Existing criminal offences.....	7
6.3 Considerations when determining sentence .....	7
6.4 Existing sentence options.....	7
7. Disproportionately detrimental effect of PBOs on Aboriginal peoples .....	8
7.1 Aboriginal peoples in public space.....	8
7.2 Ability to comply with PBOs .....	8
8. Disproportionately detrimental effect of PBOs on other vulnerable groups .....	10
9. Increased pressure on the criminal justice system .....	10
10. Publication of PBOs .....	11
10.1 Contribution to negative stereotypes .....	11
10.2 Personal responses.....	12
10.3 The Vigilante Response .....	12
10.4 Publication of Children’s Details.....	12
11. Scope of the Bill .....	13
11.1 Definition of “anti-social behaviour” .....	13
11.2 Types of activities that can be proscribed under a PBO.....	14
11.3 Connection between proscribed activities and nature of offending .....	14
11.4 Previous findings of guilt to be subject to a PBO .....	15
12. The UK Model: Anti-Social Behaviour Orders (ASBOs).....	15
12.1 Non-compliance.....	16
12.2 Expanding criminal records .....	16
13. Compliance with International Instruments .....	17
13.1 Freedom of association and assembly .....	17
13.2 Rights of the Child.....	17
14. Monitoring and Evaluation .....	18
15. Conclusion .....	18

## 1. Executive Summary

ALSWA strongly opposes the introduction of the *Prohibited Behaviour Orders Bill 2010* (WA) ('the Bill') in its entirety. Western Australia (WA) is already a highly regulated State with an excessively high incarceration rate, compared with other Australian jurisdictions. WA has existing criminal and sentencing laws, including penalties for graffiti and other antisocial behaviour, which appropriately punishes offenders.

The Bill is likely to increase incarceration rates as it provides grounds for imprisonment for relatively minor offences. Given Aboriginal<sup>1</sup> peoples epidemically high incarceration rates, stark over policing and noticeable presence in public spaces, it is likely that the Bill will increase their interaction with the justice system without increased correlation in rates of offending. The Bill also targets other vulnerable and marginalised sections of society including youth, mentally ill and homeless people. If enacted, the Bill has scope to breach civil liberties, including the right of association, without appropriate justification.

The proposed publication of people's names, photographs and general locations which can then be republished by anyone is abhorrent and may result in vigilantism, negative stereotyping and vilification of vulnerable peoples. By allowing publication to automatically extend to children, the Bill contravenes the *International Convention on the Rights of the Child*.

The Bill in its existing form is too broad and does not provide enough protections to ensure that Prohibited Behaviour Orders (PBOs) are made in appropriate circumstances.

ALSWA calls for the Bill to be immediately withdrawn from Parliament.

## 2. Introduction and Scope of the Submission

ALSWA prepared this submission in response to the introduction of the Bill into the Western Australian Legislative Assembly on 24 June 2010.

The introduction of PBOs was a cornerstone of the Liberal Party's 2008 Western Australian election campaign and was initially discussed in the context of WA in a paper published by the Liberal Party entitled "Protecting our Community – Prohibited Behaviour Orders".

While there have been some refinements to the manner in which PBOs are sought to be introduced in WA since the initial ideas floated in the Liberal Party paper, there remain many concerns about the Bill and the discriminatory and damaging impact it will have on certain segments of the WA population including Aboriginal peoples, particularly those with mental illness and young and homeless Aboriginal persons.

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<sup>1</sup> In this submission, Aboriginal peoples refers to Aboriginal and Torres Strait Islander peoples.

### 3. 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 people of Australia;
- ensure that Government and Aboriginal peoples address the underlying issues that contribute to disadvantage on all social indicators, and implement the relevant recommendations arising from the Royal Commission into Aboriginal Deaths in Custody;<sup>2</sup> 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<sup>3</sup> elected by Aboriginal peoples from their local regions to speak for them on law and justice issues. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law, and human rights law. ALSWA also provides support services to prisoners and incarcerated juveniles. Our services are available throughout WA via 17 regional and remote offices and one head office in Perth.

### 4. The Bill

The Bill enables a court to impose a PBO on any person:

- over the age of 16 years;
- who is found guilty of an antisocial offence and has, within the past three years, been found guilty of another antisocial offence; and
- who the court believes is likely to commit another offence if not constrained.

If passed, PBOs could prohibit persons from engaging in any otherwise lawful activity or behaviour that the court considers is reasonably necessary to reduce the likelihood of the

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<sup>2</sup> Royal Commission into Aboriginal Deaths in Custody (1991), available from <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>, 13 July 2010.

<sup>3</sup> 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.

person committing another antisocial offence. A court may order a PBO to operate for between six months and two years.

The Bill requires the court to prioritise the desirability of protecting people or property from antisocial offences above the degree of hardship likely to be caused to the person who is subject to the PBO.

Penalties for breaching a PBO are \$2,000 or two years detention or both in the Children's Court; \$6,000 or two years imprisonment or both in the Magistrate's Court; or \$10,000 or five years imprisonment or both in the District or Supreme Courts.

ALSWA strongly opposes the introduction of PBOs in WA given the disproportionately detrimental effects they will inevitably have on vulnerable sectors of the population, including Aboriginal peoples.

<b>Recommendation 1: That the Bill be withdrawn from Parliament.</b>
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## **5. Purpose of the Bill**

In his Second Reading speech delivered on 24 June 2010 to support the Bill, Attorney-General Christian Porter MLA explained that the Bill aims to address community concern about "lower level, higher volume antisocial criminal offending". Mr Porter reasoned that antisocial offending that is at the lower end of the spectrum of seriousness has a significant cumulative impact on local communities, and that such offending cannot be appropriately dealt with by the courts due to their lack of seriousness when considered in isolation. Consequently, he argued that despite having committed a substantial volume of offences, perpetrators rarely receive sentences of imprisonment for antisocial offences targeted by the Bill.

Mr Porter stated in his speech that "the imposition of a PBO is not intended as a punishment". However, it is clear from his justification of PBOs<sup>4</sup> that a significant purpose of the Bill is to increase the potential sentence that may be imposed for lower level crimes given current dissatisfaction with the imposition of imprisonment for minor.

PBOs offer a means by which persons engaging in minor offending can be subjected to significant sentences for otherwise lawful behaviour, simply due to the nature of their previous offending. Despite this, no evidence has been provided to demonstrate that PBOs will reduce antisocial offending or that existing laws cannot be used more effectively to achieve the alleged benefits of PBOs.

<b>Recommendation 2: That prior to any vote on the Bill, information be sought to demonstrate how PBOs will reduce antisocial offending and why other, existing mechanisms cannot be utilised to achieve this aim.</b>
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<sup>4</sup> Both during the Second reading speech and on ABC morning radio with Geoff Hutchison on 11 August 2010.

Discussion around the Bill has also failed to consider or attempt to address the causes of antisocial behaviour. Lack of appropriate engagement and insufficient community programs often contribute to minor antisocial offending. ALSWA recommends that resources would be better invested combating the underlying causes of antisocial behaviour in affected communities through initiatives such as Justice Reinvestment<sup>5</sup> which engage and support disadvantaged persons, rather than further reprimanding people through the imposition of more conditions and orders.

**Recommendation 3: That the Government pursue more economically rational policies to effect positive community changes to reduce antisocial offending.**

## 6. The need for PBOs

As stated at part 5 above, the Bill does not demonstrate how PBOs will reduce anti-social behaviours. ALSWA contends that there are adequate protections in existing WA legislation to achieve the same outcomes as intended from PBOs including Misconduct Restraining Orders (MROs) and other existing criminal offences and sanctions.

### 6.1 Misconduct Restraining Orders

Part 3 of the *Restraining Orders Act 1997* (WA) ('RO Act') empowers the court to impose MROs. These orders may be made by a court where the court is satisfied that, unless restrained, the respondent is likely to behave in a manner that could reasonably be expected to or will in fact intimidate or offend a person, damage property or likely breach the peace.

Section 35 of the RO Act stipulates matters that the court must consider in deciding whether to impose a MRO including accommodation needs of the respondent and hardship that may be caused to the respondent.

Should the court consider it necessary, the court is empowered to prohibit the respondent from engaging in particular behaviours including being in specified places or with specified people, communicating with specified people, or engaging in specific behaviours at specified times or places.

Given the capacity of courts to create MROs, there is no need to enact the Bill as it largely duplicates existing powers of the court.

**Recommendation 4: That prior to any vote on the Bill, evidence be offered to demonstrate why PBOs are required given that MROs are adequate to achieve the purported aims of PBOs.**

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<sup>5</sup> 2009 Social Justice Report, by the former Australian Human Rights Commissions Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma.

## 6.2 Existing criminal offences

Criminal offences currently exist, with adequate penalties, to have equal deterrent value as PBOs. For example, even without engaging in graffiti, under section 557G of the *Criminal Code* 1913 (WA), (the Code) a person can be charged for possessing a thing with the intention of using it to cause damage consisting of graffiti and be liable to a fine of \$6,000, or for selling a graffiti implement to a child, a maximum fine of \$12,000 for a second or subsequent offence. Therefore, a person in possession of a spray can for the purposes of graffiti is already criminally liable for an offence with a significant penalty and there is no need for a PBO.

## 6.3 Considerations when determining sentence

When a court is determining an appropriate sentence, the court may consider factors such as the seriousness and circumstances of the offence.<sup>6</sup> Additionally, the court will consider aggravating factors<sup>7</sup> and have regard to the offender's criminal record<sup>8</sup> or any previous sentence that the offender has received which has not achieved the purpose for which it was imposed.<sup>9</sup> Therefore, it is already open to the court to sentence an offender more gravely for subsequent offences despite the nature of the offence being relatively minor.

## 6.4 Existing sentence options

Section 39 of the *Sentencing Act* 1995 (WA) establishes a myriad of sentencing options open to the court when sentencing an offender including Pre-Sentence Orders (PSOs), Conditional Release Orders (CROs), fines, Intensive Supervision Orders (ISOs), Conditional Suspended Imprisonment (CSI), Imprisonment and other alternatives. Under a PSO, ISO or CSI, a court may require the offender to undertake a programme, supervision and / or comply with a curfew for a stipulated period. Breaches of the orders could result in a more severe sentence, including imprisonment. Given the existing capacity of courts to constrain peoples' behaviour or make orders relating to their rehabilitation, there is little justification for the additional power of making PBOs as a method of further dissuading people from re-offending.

**Recommendation 5: That prior to any vote on the Bill, evidence be offered to demonstrate how PBOs will have any greater impact on reducing re-offending than existing criminal offences and sentence options.**

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<sup>6</sup> *Sentencing Act* 1995 (WA) subsection 6(2).

<sup>7</sup> *Sentencing Act* 1995 (WA) subsection 6(2).

<sup>8</sup> *Sentencing Act* 1995 (WA) subsection 7(2)(b).

<sup>9</sup> *Sentencing Act* 1995 (WA) subsection 7(2)(c).

## **7. Disproportionately detrimental effect of PBOs on Aboriginal peoples**

ALSWA has grave concerns about the disproportionate effects of PBOs on Aboriginal peoples.

### **7.1 Aboriginal peoples in public space**

Aboriginal peoples are likely to be occupying public spaces in a more visible way compared to other members of the population. This is due to a variety of factors including the ongoing impact of previous policies which have resulted in situations where there is a current lack of home ownership and access to private spaces amongst Aboriginal peoples. Additionally, young Aboriginal people from dysfunctional homes have few suitable, safe, private locations to engage in leisure and entertainment and often cultural occasions such as family commitments require large gatherings of peoples. Generally, Aboriginal peoples are more likely to have experienced or be experiencing poverty and intergenerational trauma than the rest of the Australian population and this may manifest as mental health concerns or homelessness.

Given their more public profile and as a result of discriminatory policing practices, Aboriginal peoples are targeted by police more than other people, particularly where Aboriginal peoples assemble together.<sup>10</sup> This is evidenced by the high rate of Aboriginal imprisonment in WA where at 29 July 2010 the adult prison population numbered 4,723 prisoners of whom 38.9% were Aboriginal.<sup>11</sup> Aboriginal peoples are more likely to find themselves before court and more likely to have a PBO ordered against them.

### **7.2 Ability to comply with PBOs**

Given the unhindered scope of the court to make constraints under PBOs in accordance with the Bill, ALSWA has concerns about the nature of the constraints that a court may impose and the capacity of some Aboriginal persons to comply with them.

For example, a person may be constrained from interacting with a specified person,<sup>12</sup> such as a co-offender. Often, Aboriginal persons, particularly youth, engage in offending in conjunction with other young relatives or community members. Constraints on interaction with co-offenders may be culturally inappropriate and practically impossible.

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<sup>10</sup> See for example, Cunneen, C (2001), *The Nature of Colonial Policing*, in Conflict, Politics and Crime: Aboriginal communities and the police, Allen and Unwin: Sydney.

<sup>11</sup> Government of WA, Department of Corrective Services, Weekly Offender Statistics as at 29 July 2010, [http://www.correctiveservices.wa.gov.au/\\_files/about-us/statistics-publications/statistics/2010/cnt100729.pdf](http://www.correctiveservices.wa.gov.au/_files/about-us/statistics-publications/statistics/2010/cnt100729.pdf)

<sup>12</sup> Subsections 10(3)(c) and (d) of the Bill.



In small Aboriginal communities, particularly remote communities, prohibitions on associating with other individuals may impact on community activities and school attendance and be impractical for communal living and overcrowding.<sup>13</sup>

**Recommendation 6: That the Bill be amended to ensure that a court cannot prohibit an Aboriginal person from interacting with specified individuals who are family or community members, if the person does not pose a threat to the specified individual.**

Additionally, constraints on alcohol consumption that are not supported by rehabilitation programmes are unrealistic and onerous. Given that alcohol addiction is a treatable disease,<sup>14</sup> it is unrealistic to expect compliance with a PBO without ensuring access to treatment services, which are often not available to Aboriginal persons residing in remote WA.

**Recommendation 7: That the Bill be amended to ensure that a court cannot prohibit alcohol consumption unless the person is referred to and able to access alcohol rehabilitation services.**

The Bill enables the court to prohibit persons from entering, remaining on or being near specified premises, localities or places. ALSWA has concerns that such constraints may be oppressive where they impact upon a person's ability to access goods or services in their community or engage in family or community responsibilities or commitments. Limitations on movement are likely to be particularly burdensome in smaller, remote communities in WA.

Since the introduction of move on laws in 2004<sup>15</sup>, ALSWA has seen numerous instances where Aboriginal peoples have been prohibited from entering entire central business districts of townships, and cities and sometimes surrounding suburbs. This significantly infringes upon their capacity to care for themselves and their dependants as they are precluded from accessing necessary goods and services such as health care, banking and provisions.

Furthermore, as stated at Part 7.1 above, Aboriginal peoples are more likely to occupy public spaces and therefore it is important that a court properly consider the implications of any limitations on movements where it may affect abilities to meet cultural or family commitments.

**Recommendation 8: That the Bill be amended to ensure that a court cannot prohibit a person from accessing basic goods or services or meeting cultural or family commitments through PBO constraints on places the person is able to attend.**

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<sup>13</sup> In 2006, almost 41% of remote Indigenous households in WA were classified as overcrowded: Australian Institute of Health and Welfare, *Indigenous Housing Indicators 2005 / 06* (2007) 57.

<sup>14</sup> According to the American Medical Association: [http://www.ama-assn.org/ama1/pub/upload/mm/388/alcoholism\\_treatable.pdf](http://www.ama-assn.org/ama1/pub/upload/mm/388/alcoholism_treatable.pdf), viewed at 5 August 2010.

<sup>15</sup> through amendments to the *Police Act 1892* (WA) that enable police to issue individuals with move on notices ordering them to leave a specified area for a period of up to 24 hours

## 8. Disproportionately detrimental effect of PBOs on other vulnerable groups

In addition to the disproportionate impact that PBOs are likely to have on Aboriginal persons in WA, ALSWA notes with concern that other vulnerable groups are likely to face similar challenges. Most notably, ALSWA recognises that persons with mental health concerns are overrepresented in the criminal justice system<sup>16</sup> and due to repeat appearances before courts, more likely to be subject to a PBO. This vulnerable group are equally unlikely to be able to fully comply with the terms of PBOs, thereby exposing them to greater penalties.

**Recommendation 9: That the Bill be scrutinised by a Parliamentary Committee to establish the impact that it will have on vulnerable groups in the WA population before it is fully debated in Parliament.**

## 9. Increased pressure on the criminal justice system

ALSWA notes with concern that the inevitable corollary of PBOs will be increased pressure on the already overburdened criminal justice system. Applications for PBOs, PBO hearings and breaches of PBOs will consume court time which will delay the court calendar and result in longer adjournment periods and periods spent by accused persons on remand awaiting court. Furthermore, offenders will often require representation in relation to PBO applications and breaches of PBOs which will increase the work of already encumbered Legal Aid and ALSWA services and lawyers. Finally, breaches of PBOs will result in more sentences of imprisonment which will place a significant burden on an already overcrowded prison system in WA.

ALSWA submits that the financial cost to the WA Government of introducing PBOs will be significant. Earlier this year, ALSWA was approached by the WA Department of Treasury and Finance to discuss diversionary programmes to reduce incarceration rates following the submission of an exorbitant proposed budget from the Department of Corrective Services (DCS). DCS estimates that it costs \$285.68 per day to keep an adult in custody, which reflects an annual cost of \$104,273.20 per prisoner. With the continually rising rates of imprisonment, the cost to WA tax-payers is already excessive and it is expected that the increased imprisonment that will accompany the introduction of the Bill will only exacerbate the financial strain.

It is also expected that ALSWA would experience a substantial increase in workload with the introduction of PBOs that would place considerable strain on our already insufficiently resourced service. Noting that the WA government currently provides no resources to ALSWA, ALSWA contends that if the Bill is passed, it should be accompanied by a resource commitment by the WA government to ALSWA to ensure that Aboriginal persons in WA are provided with equitable access to justice.

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<sup>16</sup> See for example, *Mental Illness and the Criminal Justice System*, Beyond Bars alternatives to custody, Fact sheet 9, <http://www.beyondbars.org.au/facts.htm>, viewed 16 July 2009, where it is stated that the level of mental health problems and disorders for people in prison is 3 to 4 times higher among inmates than of the general Australian population.

**Recommendation 10: That if the Bill is passed, the WA Government provides additional resources to ALSWA to ensure that Aboriginal persons in WA have access to appropriate legal representation.**

## **10. Publication of PBOs**

The Bill states that unless a court orders otherwise, the name, photograph, suburb or town of residence of a person and the constraints made under the PBO that affects them must be published by DCS on a website.<sup>17</sup>

While the Act precludes the publication of the exact address of the person, details of any child other than the constrained person or details of the offences for which the person was convicted in the Children's Court,<sup>18</sup> ALSWA submits that these details would be easily identifiable especially if the constrained person resides in a small town or remote community.

As stated, the publication of details of the constrained person and the PBO can be disallowed by the court however the default position will always be the publication of these details, including for children aged 16 years or over.

Alarming, the Bill also enables any person to "republish in any manner" something that has been published in relation to a person and their PBO.<sup>19</sup>

### **10.1 Contribution to negative stereotypes**

The purpose of publishing the details of a constrained person and the terms of a PBO, according to Mr Porter's second reading speech, is to enable members of the public to report breaches of a PBO to police.

ALSWA is concerned that the practice of publishing names and photographs of persons subject to a PBO, particularly persons who are identifiable from a particular race such as Aboriginal persons, will contribute to negative stereotyping and possibly even racial vilification. The publication of names, photographs, addresses and constraints on Aboriginal peoples will contribute to the ostracism Aboriginal peoples face and will be injurious to the reconciliation process.

Several years ago ALSWA became aware of a racist website that enabled people to search residential areas to access the details of Aboriginal residents in those areas. This website has since been removed but illustrates the potential for the publication of details to have significant racist repercussions.

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<sup>17</sup> Subsection 34 (2) of the Bill.

<sup>18</sup> Subsection 34 (3) of the Bill.

<sup>19</sup> Subsection 34 (8) of the Bill.

This is exacerbated by the Bill empowering any person to reproduce in any manner any information published in relation to a person and their PBO. This provision arguably enables community members or the media to republish the information in a derogatory manner.

<b>Recommendation 11: that subsection 34(8) of the Bill be deleted.</b>
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## **10.2 Personal responses**

Whilst the stated purpose of publishing details may not be to punish or embarrass individuals, it is inevitable that most people will be embarrassed by such publication. Where the person is identifiable as belonging to a particular family or cultural group, publication of details may also punish and embarrass the individual's family and community. In the case of Aboriginal peoples, such publication will put individuals and their families into 'shame'.

Alternatively, certain types of recidivist offenders, particularly youth, may perceive the publication of their details as a 'badge of honour' and strive to be the subject of a PBO. Clearly this attitude would contribute to an increase in anti-social offending and be contrary to the purposes of the Bill.

Thus either way, the publication of details will be unnecessarily onerous or counter-productive and therefore should be removed.

## **10.3 The Vigilante Response**

By publishing names, suburb / town and a photograph of a person subject to a PBO, it is likely that in a state like WA, with a relatively small population and many small communities and towns, individuals will be easily identifiable.

While the intention of publication may be to enable people to advise police of breaches of PBOs, there is a real possibility that individuals may attempt to take justice into their own hands or intrusively monitor the actions of a subject of a PBO.

<b>Recommendation 12: That section 34 of the Bill be deleted.</b>
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## **10.4 Publication of Children's Details**

ALSWA contends that there is no justification for a default position of publication relating to children. Whilst ALSWA acknowledges that a court has the power to order that details are not published, ALSWA maintains that, at least in relation to children, non-publication should constitute the default position and if prosecution seek to publish details relating to a child, a specific application for approval should be required.

The publication of children's details contradicts one of the general principles of juvenile justice in WA. The *Young Offenders Act 1994 (WA)* ('the YO Act') states at subsection 7(j):

*"punishment of a young person for an offence should be designed so as to give the offender an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways".*

Furthermore, subsection 7(m) the YO Act states that:

*"a young person who commits an offence is to be dealt with in a way that —  
(i) strengthens the family and family group of the young person;  
(ii) fosters the ability of families and family groups to develop their own means of dealing with offending by their young persons; and  
(iii) recognises the right of the young person to belong to a family."*

ALSWA submits that publication of a child's details will ostracise the child and their family from the community and hinder the ability of a family to deal with the offending of the young person. This will not assist the child in developing a sense of social responsibility nor will it strengthen the child's family group.

<p><b>Recommendation 13: That if publication of details of PBOs and their subjects are retained, the Bill be amended to remove children from the default position of automatic publication and require an application for publication of details with respect to the child to be brought before the court separately.</b></p>
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## 11. Scope of the Bill

In the event that Bill proceeds, the scope in its current form is dangerously broad. It fails to appropriately limit the meaning of "antisocial" offending and the types of lawful activities the court can proscribe under a PBO. It also fails to stipulate the degree of connection required between the nature of the offending and the proscribed activities or behaviours included in the PBO.

Additionally, the Bill enables a PBO to be made against any person found guilty of two offences that constitute "antisocial behaviour" within three years, an alarmingly low threshold. ALSWA recommends the Bill not be passed without significant amendment.

### 11.1 Definition of "anti-social behaviour"

Section 3 of the Bill defines anti-social behaviour as "behaviour that causes or is likely to cause –

- (a) Harassment, alarm, distress, fear or intimidation to one or more persons; or
- (b) Damage to property."

The very broad definition in the Bill essentially could categorise all offending as antisocial behaviour and a relevant offence for the purposes of the creation of a PBO.

Consequently, whenever a court delivers a finding of guilt against a person over 16 years of age, who has been found guilty of an offence by a court within the last three years, it could be open to the court to make a PBO.

ALSWA argues that the practical scope operation of the Bill extends beyond its purpose as explained by the Attorney General.

**Recommendation 14: That the definition of “anti-social behaviour” in the Bill be defined to only include minor, nuisance offences.**

### **11.2 Types of activities that can be proscribed under a PBO**

The Bill does not place any limitations on the nature of the otherwise lawful activities that may be prohibited by a PBO therefore a court may prohibit any behaviour or activities that it considers may contribute to any further offending.<sup>20</sup>

Additionally, the Bill fails to establish any meaningful standard of proof the court must be satisfied of before imposing significant limitations on the subject of the PBO. Given that a PBO will entail consequences in a criminal court, it is contended that the court must be satisfied, beyond a reasonable doubt, that the constraints in the PBO will significantly reduce the likelihood of a person committing a related anti-social offence.

### **11.3 Connection between proscribed activities and nature of offending**

As discussed above, given that the broad definition of “anti-social behaviour” encapsulates all offences as “relevant offences” involving anti-social behaviour, courts are able to impose constraints in PBOs that they consider may reduce the likelihood of any further offending.

The Bill should be amended to reflect that a court can only impose constraints to reduce the likelihood of similar offending that falls within a category of like, anti-social offending or there will be dangers in relation to the limitless scope of constraints on otherwise lawful activities that may be imposed by the courts.

**Recommendation 15: That subsection 10 (2) of the Bill be amended to read “In making a PBO a court may impose such constraints on otherwise lawful activities and behaviour of a person as the court considers necessary to remove or significantly reduce the likelihood of the person committing a relevant offence of a similar nature to the offences for which the person has previous findings of guilt”.**

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<sup>20</sup> *Prohibited Behaviour Orders Bill (WA) 2010*, section 10.

## 11.4 Previous findings of guilt to be subject to a PBO

Subsection 8(2) of the Bill states that grounds for making a PBO exist if a person committed and was found guilty of an offence involving anti-social behaviour and during a period of three years after the first finding of guilt, committed and was again found guilty of a second offence involving anti-social behaviour.

The Bill does not require that the nature of the offending be at all related or similar. ALSWA recommends the Bill be amended to ensure that only previous offences that form a pattern of like offending can be considered in imposing a PBO.

In his second reading speech, Mr Porter justified the Bill by stating that “approximately 75 percent of young offenders who initially came into contact with the system had four or fewer subsequent contacts with the juvenile justice system, but about five percent of the offenders had twelve or more contacts”. There are many factors that contribute to a person coming into contact with the justice system which will take some time to manage to avoid further contact. As stated by Mr Porter, the vast majority of juveniles have five or less contacts with the justice system.

Given this and the fact that lapses in judgement and rehabilitation are usual, ALSWA considers that a threshold of two findings of guilt within three years for a PBO to be considered is too low, particularly considering the minor nature of the offences that PBOs are intended to relate to.

**Recommendation 16: That subsection 8(2) of the Bill be amended to reflect that grounds for making a PBO can only exist where a person has been found guilty of five offences within three years that demonstrate a pattern of like, anti-social behaviour.**

## 12. The UK Model: Anti-Social Behaviour Orders (ASBOs)

The Liberal Government indicated in its original publication on PBOs that the basis of the Bill was the ASBOs that exist in the United Kingdom (UK).<sup>21</sup> ASBOs are civil orders which can be obtained by relevant authorities in civil proceedings in the UK under section 1 or section 1B of the *Crime and Disorder Act 1998* (UK).

The court may grant an ASBO where a defendant is involved in anti-social behaviour that is likely to cause alarm, harassment, or distress to one or more persons not of the same household as the defendant and an ASBO is seen as necessary to protect relevant persons from further anti-social acts by the Defendant.<sup>22</sup>

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<sup>21</sup> Liberal Government, *Protecting our community – prohibited behaviour orders*, [http://74.125.153.132/search?q=cache:MpVqp1JJKpYJ:www.wa.liberal.org.au/index.php%3Foption%3Dcom\\_docman%26task%3Ddoc\\_download%26gid%3D138%26Itemid%3D141+Protecting+our+community+%E2%80%93+prohibitive+behaviour+orders&cd=1&hl=en&ct=clnk&gl=au](http://74.125.153.132/search?q=cache:MpVqp1JJKpYJ:www.wa.liberal.org.au/index.php%3Foption%3Dcom_docman%26task%3Ddoc_download%26gid%3D138%26Itemid%3D141+Protecting+our+community+%E2%80%93+prohibitive+behaviour+orders&cd=1&hl=en&ct=clnk&gl=au), viewed 16 July 2009.

<sup>22</sup> Subsection 1(1), *Crime and Disorder Act 1998* (UK).

As with the proposed PBOs, an ASBO may contain any prohibition even if the constraint is not an anti-social act.

While an application for an ASBO is heard in a civil court and an ASBO is a civil order, breach of an ASBO is a criminal offence and conviction may result in up to five years' imprisonment or two years for a juvenile.<sup>23</sup>

The system of ASBOs in the UK has been strongly criticised and in July 2010, Home Secretary Theresa May indicated a possible end for ASBOs in the UK. Whilst all ASBO criticisms may not be relevant to PBOs, given the latter are based on criminal findings of guilt, some are noteworthy.

### **12.1 Non-compliance**

One of the most obvious failings of the UK system is that more often than not, the orders are not complied with and anti-social offending continues. One report indicated that 55% of people on ASBOs in the UK breached their order within a year.<sup>24</sup> Another report stated that more than four out of ten ASBOs are breached.<sup>25</sup>

### **12.2 Expanding criminal records**

It is argued that as the orders criminalise non-criminal behaviour, people are drawn further into the criminal justice system than they would otherwise be. Already, WA has the highest rate of detention for Aboriginal children in Australia with Aboriginal juveniles being 29 times more likely to be in detention than non-Aboriginal juveniles.<sup>26</sup> At 5 August 2010, 65.7% of youth in detention in WA were Aboriginal.<sup>27</sup> It is widely acknowledged through various reports<sup>28</sup> that there is a need to improve diversionary mechanisms to reduce the contact Aboriginal children have with the justice system. Disappointingly, the Bill will have precisely the opposite effect.

Often, anti-social offending can involve minor offences and may be related to a particular period in an individual's life. Once an ASBO or PBO is created however, it prohibits a person from engaging in behaviours which would otherwise be lawful and therefore although the person may no longer be engaging in anti-social offending, they may continue to lengthen their criminal record and interaction with the justice system despite not engaging in criminal behaviour.

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<sup>23</sup> Bureau of the Consultative Council of European Prosecutors, *Role of the Public Prosecution Service outside the Field of Criminal Justice Questionnaire*, p3, viewed at [http://www.coe.int/t/dghl/cooperation/ccpe/opinions/travaux/OP\\_3\\_England\\_Wales.pdf](http://www.coe.int/t/dghl/cooperation/ccpe/opinions/travaux/OP_3_England_Wales.pdf), 5 August 2010.

<sup>24</sup> National Audit Officer 'Tackling Anti Social Behaviour' (2006): Supra 2 at page 8.

<sup>25</sup> Youth Affairs Council of South Australia, *Anti-Social Behaviour Orders (ASBOs)*, viewed at [http://www.yacsa.com.au/online/docs/01\\_ASBOs\\_Issues\\_Paper.pdf](http://www.yacsa.com.au/online/docs/01_ASBOs_Issues_Paper.pdf), 17 July 2009.

<sup>26</sup> Australian Institute of Health and Welfare (AIHW), 'Juvenile Justice in Australia 2007-2008,' *Juvenile Justice Series No 5*, November 2009, Canberra, at p 4.

<sup>27</sup> Government of WA, Department of Corrective Services, Weekly Offender Statistics as at 11 August 2010, [http://www.correctiveservices.wa.gov.au/\\_files/about-us/statistics-publications/statistics/2010/cnt100805.pdf](http://www.correctiveservices.wa.gov.au/_files/about-us/statistics-publications/statistics/2010/cnt100805.pdf)

<sup>28</sup> Such as Auditor General's Report, 'Performance Examination, The Juvenile Justice System: Dealing with Young People under the Young Offenders Act 1994,' June 2008, WA Report No 4



It is therefore arguable that ASBOs and PBOs may reduce a person's prospects of rehabilitation by increasing their contact with the criminal justice system.

**Recommendation 17: That further research be conducted into the success of ASBOs in the UK to assist in determining whether PBOs are likely to have any positive effects in WA.**

### 13. Compliance with International Instruments

ALSWA is concerned that the Bill breaches the obligations of the Australian government as they relate to several international instruments.

#### 13.1 Freedom of association and assembly

Prohibitions on interacting with specified family or community members, where there is no threat posed to the safety of the specified individual, may impose upon a person's right to associate with their family and other Aboriginal people, which arguably infringes upon the rights of association and assembly<sup>29</sup> and the rights of Indigenous peoples.<sup>30</sup>

#### 13.2 Rights of the Child

Publication of details relating to children removes important privacy and identification protections for children, which will amount to an infringement of Article 16 of the *UN Convention on the Rights of the Child*, which provides:

*"1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.*

*2. The child has the right to the protection of the law against such interference or attacks."*

**Recommendation 18: Given that the introduction of PBOs as proposed in the Bill will result in breaches of Australia's international obligations, that the Bill be withdrawn.**

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<sup>29</sup> See for example, Article 20 of the *Universal Declaration of Human Rights*, Articles 21 and 22 of the *International Covenant on Civil and Political Rights* and Article 15 of the *Convention on the Rights of a Child*.

<sup>30</sup> See in particular, Articles 1, 2, 3, 8, 9, 11 of the *United Nations Declaration on the Rights of Indigenous Peoples*.

## 14. Monitoring and Evaluation

If the Government proceeds with the Bill, it is extremely important that the introduction of PBOs is independently monitored and evaluated and that the continued operation of the Act is subject to its success and the outcomes of the evaluation.

ALSWA recommends that the monitoring and evaluation be well resourced, transparent and require the production of a report in a timely fashion, which is made available to key stakeholders, including ALSWA.

As part of the evaluation, ALSWA recommends that all individuals who are subject to PBOs are independently interviewed to ascertain their opinions on the effectiveness, practicability and fairness of PBOs. Offenders should also be asked about the impact of publication of details on themselves and their family. Breaches of PBOs will also need to be monitored to establish the frequency and nature of breaches and penalties for breaches.

We request that results from this monitoring be made available to ALSWA, including details of the number of PBOs where an Aboriginal person is the subject and the effects of PBOs on Aboriginal peoples.

<b>Recommendation 19: That if the Bill is passed its continued operation be subject to a positive review from a thorough, independent evaluation, the results of which are provided to ALSWA and other stakeholders.</b>
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## 15. Conclusion

ALSWA strongly opposes the Bill and argues that there is no justification for the introduction of PBOs given existing criminal laws, sentencing options and restraining orders.

ALSWA argues that PBOs will disproportionately and detrimentally effect Aboriginal peoples in WA and other vulnerable groups including youth, the mentally ill and the homeless given that they are more likely to occupy public space in a visible way and are less likely to be able to comply with the constraints imposed in PBOs.

ALSWA submits that publication of details of PBOs and the ability to reproduce this information will result in increased vigilantism generally and vilification of Aboriginal peoples specifically.

ALSWA contends that the scope of the Bill in its existing form is too broad and does not provide adequate protections to ensure that PBOs are only made in appropriate circumstances and only include proportionate constraints on the civil liberties of their subjects.

ALSWA calls for the Bill to be withdrawn from parliament.