

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

**Submission to the Western Australian Parliament**

**ROAD TRAFFIC LEGISLATION AMENDMENT  
(DISQUALIFICATION BY NOTICE) BILL 2010 (WA)**

**November 2010**



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## 1. Introduction and scope of the submission

The Aboriginal Legal Service of Western Australia (Inc.) (ALSWA) prepared this submission in response to the introduction of the Road Traffic Legislation Amendment (Disqualification by Notice) Bill 2010 ('the Bill') into the Western Australian Legislative Assembly on 23 September 2010.

ALSWA is concerned about the unconstitutional precedent that a system of police imposed disqualification notices creates. The ability for police to impose a penalty against a person for alleged offending undermines the fundamental principle of a presumption of innocence. Moreover, ALSWA submits that empowering the police to impose such a penalty contradicts the constitutionally enshrined separation of powers between the executive arm of government, of which the police are part, and the judiciary. As former Chief Justice Gleeson of the High Court of Australia has stated, "it is for the judiciary, not the police, to determine whether people are guilty or innocent of crimes, and it is for the judiciary, not the police, to punish citizens who have broken the law."<sup>1</sup>

If the Bill is passed, ALSWA has concerns about the impact that this Bill will have on Aboriginal peoples<sup>1</sup> in Western Australia (WA) in its current form. In particular, ALSWA is concerned about:

1. the detrimental and disproportionate impact that disqualification notices that are issued by police are likely to have on Aboriginal peoples;
2. the likelihood of unnecessary increases in arrests, particularly of Aboriginal peoples, as a result of sections 6 and 10 authorising police to arrest persons who commit an offence of driving with a blood alcohol reading equal to or above 0.08 grams of alcohol per 100 grams of blood or failing to provide breath, blood or urine samples when required; and
3. the imposition of more onerous requirements that all applicants must satisfy in order to be granted an extraordinary licence under section 76 of the *Road Traffic Act 1974* (WA) ('the Act').

ALSWA is concerned that the significance and implication of disqualification notices that are issued by police may not be fully understood by Aboriginal peoples and may therefore result in greater numbers of Aboriginal peoples being before the courts for the offence of driving whilst disqualified. This will inevitably result in increased incarceration of Aboriginal peoples.

Additionally, as Aboriginal peoples are often targeted by police<sup>2</sup>, it is respectfully submitted that they will more frequently be the subject of disqualification notices than non-Aboriginal people.

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<sup>1</sup> The Hon A M Gleeson "An Overview", paper presented at the conference *Keeping the Peace: Police Accountability and Oversight* (Royal Institute of Public Administration Australia and NSW Ombudsman, Sydney, 20-21 May 1993).

<sup>2</sup> Examples of this are provided in the December 2009 ALSWA submission to the Inquiry into the High Level of Involvement of Indigenous Juveniles and Young Adults in the Criminal Justice System, available at [http://www.als.org.au/images/stories/publications/Submissions/High\\_Juvenile\\_involvement\\_in\\_Criminal\\_Justice\\_System\\_WA.pdf](http://www.als.org.au/images/stories/publications/Submissions/High_Juvenile_involvement_in_Criminal_Justice_System_WA.pdf)

## 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 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>3</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>4</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.

## 3. Police issued disqualification notices

Section 11 of the Bill inserts sections 71C to 71H into the Act which empowers police to issue an alleged offender with a notice that immediately disqualifies the person from holding or obtaining a driver's licence for two months.

The police officer must have reason to suspect, based on a sample of the person's blood or breath, that the person committed an offence under section 63 or 64 of the Act or by failing to provide a sample of breath, blood or urine, an offence pursuant to section 67 of the Act.

Once so satisfied, the police may issue the disqualification notice by personal service which must contain details of the alleged offence and the person's ability to apply to a court for a revocation of the notice.

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<sup>3</sup> Royal Commission into Aboriginal Deaths in Custody (1991), available from <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>, 13 July 2010.

<sup>4</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.

### 3.1 Separation of powers

ALSWA submits that the power for police to issue a disqualification notice blurs the separation of powers between the executive arm of government and the judicature as it enables police to determine the guilt of an individual and immediately punish them.

Our system of government and justice system are premised on a presumption of innocence and right to a fair trial. These are undermined by legislation which enables police to immediately issue disqualification notices prior to a fair hearing before a court. While it is accepted that police are empowered to issue immediate infringement notices for other offences, largely, these are minor offences and the infringement notice imposes a fine. ALSWA considers that the capacity for police to impose a period of disqualification by notice will have greater consequences if breached as the disqualified person can be arrested and face a sentence of imprisonment in addition to fines and a further period of driver disqualification.

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| <b>Recommendation 1: That the power for police to issue disqualification notices be removed from the Bill.</b> |
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### 3.2 Understanding disqualification notices

Given the consequences of driving whilst disqualified, ALSWA considers that this penalty should only be imposed by the courts, upon a finding of guilt, not by police. When a court imposes a period of disqualification, the gravity of the situation is made evident to the person disqualified and greater attempts are made to confirm that the person properly understands the disqualification and consequences of breaching it by the judicial officer, court staff and the person's legal representative.

Were the police empowered to issue disqualification notices, ALSWA is concerned that persons may not properly understand the implications of a disqualification notice and therefore be more likely to breach the disqualification to their detriment.

While the Bill requires that a disqualification notice include details of the offence and the person's right to apply to the court for a revocation of the notice, it does not require that assistance be provided to ensure that the person understands the information on the notice, including the period and impact of disqualification. This will be especially problematic in the case of Aboriginal offenders who are grossly intoxicated at the time of the alleged commission of the offence. Further, given that many Aboriginal persons in WA have English as a second language and are not fluent or perfectly literate in English, ALSWA is concerned that disqualification notices issued by police will not be properly understood by many Aboriginal peoples.

If the Bill retained the power for police to issue disqualification notices, ALSWA contends that this must be accompanied by a requirement for the police to ensure that a person understand the information contained within the notice. This should require that the police utilise the assistance of an interpreter where necessary.

**Recommendation 2: That if the Bill retain the power for police to issue disqualification notices, additional sections are included to require police to ensure that notices are understood and engage interpreters where required to ensure that persons understand the content and implication of disqualification notices.**

In addition to a legislative requirement for police to assist people's comprehension of disqualification notices when they are issued, ALSWA recommends that police undergo training to emphasise the importance of using interpreters and complying with the legislation. It is noted that although the *Bail Act 1982 (WA)* has long contained a requirement in section 8 that police provide assistance as reasonably required where an accused is unable or insufficiently able, to read, speak or write English in order to have required information conveyed and forms completed, often police do not comply with this statute, generally to the detriment of the accused person. ALSWA is aware of this from anecdotal evidence from clients and it was publicly illustrated in the case for respected Ngaanyatjarra Elder Mr Ward. ALSWA suggests that the Bill include a means of quality control to ensure that police properly meet the good practice requirements that are imposed upon them by statute.

**Recommendation 3: That if the Bill retains the power for police to issue disqualification notices, police are provided adequate training and quality control measures are developed to ensure that they comply with requirements to confirm that persons issued with disqualification notices understand their content.**

### **3.3 Police revocation of disqualification notices**

The Bill seeks to introduce section 71E into the Act which requires the police to revoke a disqualification notice in certain situations, such as if a charge to which the notice relates is discontinued or not laid within 10 days. In these circumstances, section 71E will require the police to provide notice of the revocation to the person issued with the disqualification notice as soon as practicable.

ALSWA submits that a stricter time frame should be included within this section. Disqualification from driving can often cause significant hardship or, at minimum, inconvenience. This is exacerbated in remote and regional areas, where large proportions of Aboriginal peoples reside, that are not serviced by public transport and where distances are often too great to be traversed by foot or bicycle. Any delay in advising a person about a revocation of a disqualification period should be minimised.

**Recommendation 4: That subsection 71E(2), included in section 11 of the Bill, be amended to read "If under this section a member of the Police Force revokes a disqualification notice the member must, as soon as is practicable and within seven days, cause notice of the revocation to be given to - ....."**

#### **4. Increased powers of arrest without warrant**

Currently the Act does not empower police to arrest a person who is solely charged against section 64 of the Act for driving with a blood alcohol content equal to or above 0.08 grams of alcohol per 100 grams of blood. Similarly, police are not authorised to arrest a person for simply failing to provide a breath, blood or urine sample when requested. Instead, the police will issue persons in these circumstances with a notice to attend court, where the matter will be heard and finalised.

Sections 6 and 10 of the Bill seek to increase police powers to arrest without warrant for offences against sections 64 and 67 of the Act respectively.

ALSWA is concerned that the expansion of police powers to arrest will result in more people being in custody and remaining in custody following a refusal of bail. In ALSWA's experience it is a common police practice to target Aboriginal peoples for random breath tests, ALSWA is concerned that Aboriginal peoples will be arrested and imprisoned at even greater rates following this expansion of police powers.

The explanatory memorandum accompanying the Bill explains that this amendment is sought to ensure that charges are dealt with more expeditiously. The inclusion of an arrest power will have no impact on whether the charges are dealt with expeditiously. With the ever increasing overcrowding in the WA prison system, greater police powers to arrest will overburden the system and result in poorer conditions for those persons detained. It is likely that people who are remanded for offences in remote areas will be transported to Perth for periods of remand due to regional prison overcrowding which will delay the court process as a result of reduced contact with legal representation and consequent barriers to the preparation of their case.

ALSWA submits that there is little justification for increasing police powers of arrest in relation to these driving offences and such amendment will only serve to increase the prison population, and particularly Aboriginal representation in that population.

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| <b>Recommendation 5: That sections 6 and 10 be removed from the Bill.</b> |
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#### **5. Extraordinary drivers licences**

While ALSWA accepts that the requirements of extreme hardship outlined in subsection 76(3b) are reasonable, ALSWA submits that if this more onerous requirement is to be applied to all extraordinary driver's licence applications, pressing cultural obligations must be included in subsection 76(3b). Currently, subsection 76(3b) relates only to employment and medical emergencies however cultural obligations and participation are an integral component of Aboriginal life. Shirking certain cultural duties, such as participation in sorry business, carries significant consequences. ALSWA submits that an additional circumstance of extreme hardship should be included in the Act to warrant the granting of an

extraordinary licence whereby a refusal of the application would deprive the applicant or a person who is a member of his family of the only practicable means of travelling to and from important cultural business or complying with significant cultural obligations.

**Recommendation 6: That the Bill include an amendment to subsection 76(3b) of the Act to include a requirement to satisfy cultural obligations as a circumstance of extreme hardship warranting the granting of an extraordinary driver's licence application.**

## 6. Conclusion

ALSWA has significant concerns about the impact that the Bill will have, if passed, on Aboriginal peoples in WA. ALSWA is concerned that the Bill will result in greater numbers of Aboriginal peoples being incarcerated as a result of the increase in police powers to arrest without a warrant. Additionally, ALSWA is concerned that police issued disqualification notices will not be properly explained or understood and consequently, there will be an increase in breaches of disqualification periods resulting in harsher penalties.

More generally, ALSWA fears that the power for police to issue immediate disqualification notices erodes the separation of powers between the executive arm of government and the judiciary and should be avoided. ALSWA submits that if the Bill is to be introduced, it requires amendment.

ALSWA recommends that the Bill require police to properly explain, with the assistance of an interpreter where required, the contents and impact of disqualification notices at the time of their being issued. ALSWA also recommends that if more onerous requirements are being placed on all applicants for the grant of extraordinary driver's licences, inability to comply with cultural obligations should be included as a circumstance of extreme hardship in the Act.

## 7. List of ALSWA Recommendations

1. That the power for police to issue disqualification notices be removed from the Bill.
2. That if the Bill retain the power for police to issue disqualification notices, additional sections are included to require police to ensure that notices are understood and engage interpreters where required to ensure that persons understand the content and implication of disqualification notices.
3. That if the Bill retains the power for police to issue disqualification notices, police are provided adequate training and quality control measures are developed to ensure that they comply with requirements to confirm that persons issued with disqualification notices understand their content.
4. That subsection 71E(2), included in section 11 of the Bill, be amended to read "If under this section a member of the Police Force revokes a disqualification notice the member must, as soon as is practicable and within seven days, cause notice of the revocation to be given to - ....."



5. That sections 6 and 10 be removed from the Bill.
6. That the Bill include an amendment to subsection 76(3b) of the Act to include a requirement to satisfy cultural obligations as a circumstance of extreme hardship warranting the granting of an extraordinary driver's licence application.