

ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC.)

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

**Proposal to investigate the introduction of a 'two tier'
framework for Justices of the Peace in Western Australia**

December 2010



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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 proposal to investigate the introduction of a 'two tier' framework for Justices of the Peace (JPs) in Western Australia (WA).

The investigation is being conducted by DotAG in response to recommendations made by WA Coroner Alastair Hope during the Inquiry into the death of Mr Ward.

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 has 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 submission¹ 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 JPs, including:

1. Restriction of the delegations of judicial powers to JPs. 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.
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 JPs.

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.

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 DotAG Discussion Paper examines the role of JPs in WA as well as other Australian and international jurisdictions such as New Zealand (NZ), England and Wales. The Discussion Paper also poses seventeen questions for consideration and comment in respect of the proposal of a 'two tier' framework for JPs.

The following submission will briefly refer to the work of ALSWA, before attempting to provide ALSWA's position in relation to the functions and powers of JPs in WA. Case studies have also been included throughout the submission to illustrate ALSWA's concerns surrounding JPs. While the specific questions posed in the Discussion Paper have not been answered directly, ALSWA provides comment on those amendments to the JP system that we would seek if select JPs were to continue to have some judicial powers. 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 officers² 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, civil, family 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. Preferred position on JPs in WA – administrative duties only

ALSWA's preferred position is that powers of JPs be restricted to administrative duties only, as in New South Wales (NSW) and the Australian Capital Territory (ACT). We recommend that judicial roles, responsibilities and decisions should be reserved exclusively for members of the judiciary.

Recommendation 1: That JPs be restricted to administrative duties only in WA.

The potential for uneven justice, or even injustice, in the case of unqualified JPs presiding in WA courts is manifest.

Case Study 1: A female ALSWA client was arrested on charges of breaching a violence restraining order. She was in custody. It was her first offence and bail was not opposed by the police. The presiding JP who was new to the role commenced cross examining the accused person directly, despite her being represented by an ALSWA solicitor and having made no admissions of guilt. The JP discontinued when advised by the ALSWA solicitor that her direct questioning of the client was inappropriate under the circumstances.

The case of Mr Ward highlights the catastrophic consequences which can follow inappropriate and in some instances unlawful decisions made by inexperienced or ignorant JPs.

Case Study 2: Three ALSWA clients were arrested by police in Derby. An ALSWA solicitor obtained instructions from the clients over the phone and was waiting to be included in a telephone link up with the JP to provide submissions on the three bail applications. After waiting some time, the ALSWA solicitor telephoned the Derby courthouse and was informed that the matters had been dealt with and one of the clients had been remanded in custody. When the ALSWA solicitor queried why ALSWA had not been contacted to appear on the bail hearing the JP advised that they had been told the three accused persons had received legal advice. It was evident that the JP did not fully understand the distinction between legal advice and legal representation, to which the clients were entitled.

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.

3.1 Current use of JPs in judicial roles

The DotAG Discussion Paper states that of a total of 3,290 JPs in WA, only 439 were recorded as performing judicial duties in court proceedings. According to DotAG, 401 of those JPs perform judicial duties in regional and remote areas. ALSWA is uncertain of the currency of the DotAG statistics but observes from its experience that there has, since the tragic demise of Mr Ward, been a notable reduction in the numbers of JPs performing judicial functions. As DotAG recorded in the Discussion Paper, the resident Magistrate in Carnarvon does not allow JPs to make judicial decisions in that region. Despite this placing a significantly greater burden on the Magistrate and their court staff, the Magistrate has unequivocally maintained that judicial decisions should be made by trained and experienced judicial officers.

ALSWA notes that since the death of Mr Ward and up until very recently in Kalgoorlie, JPs were rarely involved in judicial decision making. In fact, JPs only performed judicial duties when the Magistrates resident in Kalgoorlie were absent during Magistrate Conferences. At all other times, matters were heard and determined by one of the local Magistrates, with use of audio or visual links as required.

ALSWA has been provided with a recent Practice Direction dated 24 November 2010 and entitled "Direction re Saturday Morning and Public Holiday Courts" issued by Kalgoorlie Magistrates. The Practice Direction indicates that Magistrates will no longer preside over Saturday courts which will now be presided over by two JPs. A copy of this Practice Direction is **enclosed**. ALSWA condemns this recent development and is strongly of the view that it is a retrograde measure which enlivens all the concerns and difficulties that surrounded the death of Mr Ward.

In light of the successful reduction in JPs' judicial powers in some regions of WA, ALSWA submits that it would be feasible for the limitation of JP judicial powers to be extended throughout WA.

3.2 Accused persons who are children

Practice Direction 2 of 2008 issued by Judge Reynolds, President of the Children's Court, states that an accused child should not be transported away from a region of a resident Magistrate in country WA unless required by an order of a Judge or Magistrate of the Children's Court and transportation should not occur unless the bail matter has been heard and determined by video or audio link by a Magistrate from the region, or, if unavailable, a Magistrate in Perth. Furthermore, if no Magistrate is available, the Practice Direction states that the bail matter should be referred to the President of the Children's Court to be heard and determined by audio or video link. This Practice Direction clearly stipulates that all bail decisions involving young people in the Children's Court should be made by Magistrates utilising audio or video link as required. Unfortunately, ALSWA is aware that many bail decisions involving accused children are left to JPs in regional areas, occasionally resulting in unnecessary periods of remand and transportation.

Case Study 3: A child appeared before a South Hedland JP in custody on a bail hearing. He was unrepresented. He had turned 14 years old one week prior to the appearance. The JP denied bail and remanded him in detention for 19 days to appear before the next Children’s Court in Karratha. He was transported from Karratha to Rangeview Detention Centre in Perth the following day. ALSWA early listed the charges and they were dealt with by way of a six month Intensive Youth Supervision Order, not requiring any time in detention.

4. JPs retaining judicial powers

As stated above, ALSWA does not support JPs retaining judicial powers. If the Government insists on entrusting non-judicial officers with judicial powers, then court Registrars should exercise these powers instead of JPS.

Recommendation 2: That if persons other than the judiciary are required to make judicial decisions, Registrars be so empowered.

While ALSWA fundamentally disagrees with JPs continuing to have power to make judicial decisions, if this is to continue, ALSWA recognises that the judicial roles of JPs should be limited to the greatest extent possible and subject to rigorous monitoring. Furthermore, JPs with judicial powers must be subject to comprehensive legal education.

If the WA Government continues to empower JPs with judicial decision making, a two tier system is preferable as it ensures greater scrutiny, education and accountability amongst JPs.

ALSWA supports a model such as that which exists in Victoria where all JPs have administrative powers and another position and title exists for the smaller cohort of JPs who have judicial powers (‘second tier’) including presiding over court and issuing search warrants. ALSWA suggests that only those JPs in the second tier be empowered to hear and determine minor prison charges.

Recommendation 3: That if some JPs continue to have judicial powers, this be limited to second tier JPs in a two tier framework.

4.1 Appointment and monitoring of JPs in two tier framework

ALSWA considers that persons should not be appointed as second tier JPs in a region unless the Magistrate(s) of the region have specifically requested that a JP be appointed to undertake judicial functions. Unless Magistrates have requested the appointment, the Governor cannot demonstrate that the second tier JP is “necessary to assist in the administration of justice”.

Recommendation 4: That second tier JPs only be appointed if specifically requested by the Magistrate in that region.

Given the authority vested in the position of a second tier JP, ALSWA further submits that applicants not be appointed to the role without completing psychometric testing. This will enable an analysis of the applicant's ability to communicate, make decisions and calculate cause and effect in certain scenarios. Additionally, ALSWA recommends that prospective second tier JPs should be required to submit to exhaustive probative tests to identify any potential conflicts of interest, particularly in relation to personal, professional or business relationships with local police or other officers associated with the criminal justice system. ALSWA has been concerned for many years now that some presiding JPS in regional areas have relationships with police such that it is inappropriate for them to exercise judicial powers because of a very real perception that they are doing no more than the bidding of police.

Recommendation 5: That second tier JPs should be only appointed upon satisfactory completion of psychometric testing and exhaustive probative checks.

ALSWA supports the current requirement that all applicants must complete an approved training course prior to being appointed as a JP.

In addition, ALSWA recommends that second tier JPs be appointed with an initial probationary period of six months. At the end of the probationary period, a thorough assessment should be completed to determine the number times that the JP was called upon to act judicially (thereby establishing the true need for the second tier JP in the area). A review should also be undertaken of the number of decisions made by the JP which were overturned or substantially amended by a Magistrate. If more than 25% of the second tier JP's decisions were overturned or substantially amended by a Magistrate during the probationary period, then the JP's appointment should be not be extended.

Recommendation 6: That second tier JPs be appointed for an initial probationary period of six months at the end of which an assessment is conducted of the number of times they acted judicially and the percentage of times their decisions were overturned or substantially amended by a Magistrate to determine whether their appointment should be continued.

Additionally, ALSWA recommends that second tier JPs be appointed for two years, rather than indefinite terms. Two years from the time of the second tier JP's appointment, the JP should be subject to a review, similar to the probationary review, conducted by DotAG. Reviews should also consider any complaints that have been received about the JP and confirm that the second tier JP has completed all the requisite training requirements for the position. These reviews should be utilised to determine whether the JP's term should be extended by a further two years.

Recommendation 7: That second tier JPs be appointed for terms of two years and be subject to an assessment at the end of their term to determine whether the appointment should be extended for a further two year term. The review should include a similar assessment to the probationary review as well as a consideration of complaints and completion of training.

This system allows for monitoring of JPs' decisions without undermining judicial independence and the doctrine of separation of powers.

ALSWA recommends that in order for this framework to be introduced, all current JPs be considered first tier JPs and a fresh process of appointment be undertaken, based on Magistrate request, to appoint first tier JPs to the second tier.

Recommendation 8: That if the two tier JP system is adopted, all current JPs automatically be classed as first tier JPs and that second tier JPs be appointed only in accordance with the appointment process in recommendations four to seven of this submission.

4.2 Training of JPs in two tier framework

ALSWA strongly supports the introduction of a rigorous, comprehensive and ongoing training for second tier JPs. As noted in the Discussion Paper, to qualify for appointment as a Magistrate, applicants must have a minimum of 11 years of legal training and education. To ensure equality for all, ALSWA recommends that JPs do not have judicial powers. However, if they do, it is the responsibility of the Government to ensure that JPs are sufficiently trained to make appropriate and lawful judicial decisions. ALSWA suggests that JP training courses should include detailed information about relevant legislation, processes and precedents as well as cultural education for regional and remote areas about local Aboriginal peoples and cultures. Under no circumstances should there ever be a repetition of the appalling circumstances surrounding the bail hearing in the case of Mr Ward.

Training should be ongoing and include practical training and adult education strategies in the form of moot courts and role plays involving Magistrates and legal practitioners. The training packages should also be regularly reviewed by stakeholders such as Aboriginal organisations and legal aid services.

ALSWA recommends that all training include compulsory examinations or testing to confirm it has been completed satisfactorily.

Recommendation 9: That training for second tier JPs be overhauled to improve its comprehensiveness and include more specific cultural information about the area in which the JP operates and its Aboriginal inhabitants. ALSWA recommends that training be ongoing and practical, subject to regular stakeholder review and include compulsory examinations.

5. Use of Audio or Video links

ALSWA supports a system whereby, in the absence of a resident Magistrate, judicial decisions including those relating to bail and sentence are considered by a Magistrate using audio or video links.

Recommendation 10: That audio and video links be regularly used to enable Magistrates, rather than JPs, to hear and determine matters.

Where this is utilised however, ALSWA notes the importance of ensuring the provision of support services for accused persons, particularly Aboriginal accused persons, who are unfamiliar with the technology, experience hearing or language difficulties or are inexperienced with the court system. A local support person is essential to ensure that the accused person properly understands the proceedings and is able to participate fairly in them.

Recommendation 11: That where audio and video links are utilised, a local support person be available to assist accused persons where necessary.

ALSWA also emphasises the importance of video and audio links only being used in circumstances where a client has sufficient opportunity to communicate with their legal representatives, in privacy, prior to the proceedings commencing such that all communications take place on a confidential basis. As things currently stand, too often clients are expected to communicate with their legal representatives prior to a video or telephone link in circumstances where either court personnel, security staff, prison staff, prosecutors or police are present in the same room at the same time. Such a situation is completely unacceptable and undermines the notion of lawyer / client confidentiality.

Recommendation 12: That where audio and video links are utilised, legal representatives be provided ample opportunity to confidentially speak with and obtain instructions from clients prior to any court appearance.

6. Access to legal advice and representation

ALSWA notes the critical importance of accused persons having access to appropriate legal advice and representation. Under no circumstances should any accused person be required to appear before a JP without legal representation. Again, the situation which occurred in Mr Ward's case, where he appeared unrepresented before the JP for his bail hearing, should never be repeated.

Recommendation 13: That all accused persons are provided the opportunity to receive legal advice and have legal representation in any appearance before a JP.

ALSWA strongly advocates for the introduction of a 24 hour 7 day a week (24 / 7) custody notification scheme modelled on the NSW / ACT Aboriginal Legal Service scheme. In NSW / ACT, this service is a dedicated 24 hour service for police to contact the Aboriginal Legal Service (ALS) if an Aboriginal or Torres Strait Islander person comes into custody in NSW or the ACT. An ALS solicitor can offer the person legal advice and address safety issues and family contacts. Police are legally required to contact the ALS in this situation.

The NSW / ACT ALS' Custody Notification Service is supported by the *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)* and *Law Enforcement (Powers and Responsibilities) Regulation 2005 (NSW)* which require the NSW Police Service to immediately contact the NSW / ACT ALS upon arrest of an Aboriginal person.

Due to current funding constraints, exacerbated by the fact that ALSWA receives no funding from the WA State government, ALSWA is currently insufficiently resourced to provide a 24/7 custody notification and advice service.

Recommendation 14: That ALSWA receive state funding to operate a 24/7 telephone legal advice and representation service and that a custody notification scheme is introduced in WA requiring police to notify ALSWA when an Aboriginal person is arrested and denied police bail, based on the scheme in operation in NSW / ACT.

7. Conclusion

Given the considerable power to affect the lives of citizens entrusted to JPs making judicial decisions, ALSWA believes this is an important issue that requires significant consideration and reform in WA.

ALSWA does not support a system whereby JPs are empowered to make judicial decisions.

ALSWA recommends that JPs only have administrative duties and responsibilities and that judicial decisions be left to qualified Magistrates and Judges. It is preferred that all judicial matters be dealt with by a Magistrate or Judge, where necessary via video or audio link. In ALSWA's experience, despite good intentions, a lack of understanding about the legal system or legislation and often a reliance or close relationship with police, undermines the capacity of many JPs to make appropriate decisions. This creates an unacceptable inequality between the justice received by persons appearing before a Magistrate compared to those appearing before JPs.

If the decision is made for JPs to retain some judicial powers in WA, it is recognised that a two tier framework for JPs, whereby first tier JPs perform administrative duties and a smaller second tier of JPs have judicial powers, is preferable. If this approach is adopted, ALSWA recommends that second tier JPs be subject to more comprehensive, rigorous and ongoing training and evaluation. Additionally, ALSWA recommends that JPs only be appointed to the second tier when Magistrates from the region have specifically requested JPs in that position and only after successful completion of psychometric testing and training. ALSWA

recommends that appointments as second tier JPs be subject to a probationary period and regular reviews and only be for two year terms. These conditions will assist DotAG to monitor the need for and quality of second tier JPs.

8. List of ALSWA Recommendations

1. That JPs be restricted to administrative duties only in WA.
2. That if persons other than the judiciary are required to make judicial decisions, Registrars be so empowered.
3. That if some JPs continue to have judicial powers, this be limited to second tier JPs in a two tier framework.
4. That second tier JPs only be appointed if specifically requested by the Magistrate in that region.
5. That second tier JPs should be only appointed upon satisfactory completion of psychometric testing and exhaustive probative checks.
6. That second tier JPs be appointed for an initial probationary period of six months at the end of which an assessment is conducted of the number of times they acted judicially and the percentage of times their decisions were overturned or substantially amended by a Magistrate to determine whether their appointment should be continued.
7. That second tier JPs be appointed for terms of two years and be subject to an assessment at the end of their term to determine whether the appointment should be extended for a further two year term. The review should include a similar assessment to the probationary review as well as a consideration of complaints and completion of training.
8. That if the two tier JP system is adopted, all current JPs automatically be classed as first tier JPs and that second tier JPs be appointed only in accordance with the appointment process in recommendations four to seven of this submission.
9. That training for second tier JPs be overhauled to improve its comprehensiveness and include more specific cultural information about the area in which the JP operates and its Aboriginal inhabitants. ALSWA recommends that training be ongoing and practical, subject to regular stakeholder review and include compulsory examinations.
10. That audio and video links be regularly used to enable Magistrates, rather than JPs, to hear and determine matters.
11. That where audio and video links are utilised, a local support person be available to assist accused persons where necessary.
12. That where audio and video links are utilised, legal representatives be provided ample opportunity to confidentially speak with and obtain instructions from clients prior to any court appearance.
13. That all accused persons are provided the opportunity to receive legal advice and have legal representation in any appearance before a JP.

14. That ALSWA receive state funding to operate a 24/7 telephone legal advice and representation service and that a custody notification scheme is introduced in WA requiring police to notify ALSWA when an Aboriginal person is arrested and denied police bail, based on the scheme in operation in NSW / ACT.