

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

Submission to the Law Reform Commission of Western Australia

Community Protection (Offender Reporting) Act 2004

Discussion Paper Project No 101

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1. ALSWA's Response

This submission is made in response to the Law Reform Commission of Western Australia's (LRC) Discussion Paper regarding the *Community Protection (Offender Reporting) Act 2004 (WA)*. The Aboriginal Legal Service of Western Australia (Inc.) (ALSWA) acts for a number of clients affected by this legislation. Our submission is limited to specific responses to the proposals and questions set out in Appendix A of the Discussion Paper.

Proposal 1: Exception for juvenile offenders convicted of a single prescribed offence

ALSWA acknowledges the need for such an amendment.

Question A: Prosecutorial policies

- (i) Yes. ALSWA is of the view that that in determining whether to charge a juvenile with a sexual offence, the DPP ought take into account broader considerations than merely whether an offence has been committed. ALSWA supports the introduction of guidelines consistent with 2.9.2 of the Victoria Office of Public Prosecutions, *Prosecution Policies and Guidelines (2008-10)*. ALSWA is of the view that such a guideline would reflect current community thinking in relation to sexual activity involving juveniles
- (ii) ALSWA sees merit in experienced police officers being involved in prosecutorial discretion given the significant potential impact of laying charges against a juvenile.

Proposal 2: Reporting on behalf of a juvenile reportable offender

ALSWA supports these proposals.

Question B: Reporting on behalf of a juvenile reportable offender

ALSWA supports the ability of any government agency involved with a juvenile offender to assist with reporting conditions. Any measure that aids an offender to comply with reporting requirements is worthwhile.

Proposal 3: Review of reporting frequency for juvenile reportable offenders

ALSWA strongly supports a mechanism for review of periodic reporting obligations.

Question C: Review of reporting frequency for juvenile reportable offenders

- (i) ALSWA recognizes that any review involving a Court process would be more expensive and time consuming than a senior police officer review. However, ALSWA is strongly of the view that a Court review provides for a learned and impartial process.

Therefore, ALSWA recommends a two tiered review process, whereby an offender can firstly seek a review to a senior police officer. If still unsatisfied, an offender can then seek a review to a Magistrate's Court. This Court review ought be on a hearing de novo basis.

ALSWA recommends that the Magistrate's Court is the appropriate forum for this review, given that the Magistrate's Court is more accessible to remote and regional offenders. Further a local Magistrate is more likely to be familiar with the local conditions (such as distance and culture).

- (ii) Given that the life circumstances of a juvenile offender (and in particular Aboriginal offenders) may change quickly, significantly, and often for reasons beyond their control, there ought be no limit on the number of reviews that can be sought.

Proposal 4: Provision of information for juvenile reportable offenders

ALSWA supports the production of easily readable materials. Importantly, these materials should also be produced in a culturally appropriate format which might not necessarily involve a written document (for example a DVD). Information in multiple Aboriginal languages ought be produced for regional and remote areas.

Proposal 5: Power of the Commissioner of Police to suspend reporting obligations and remove a juvenile reportable offender from the register

ALSWA strongly supports this proposal. However, ALSWA proposes a two tier process whereby an offender can apply to the Magistrate's Court for both suspension of reporting conditions and removal from the register should the Commissioner of Police refuse to exercise their discretion to do so. This Court process should be by way of a hearing de novo.

Proposal 6: Sex offender registration is not to provide any mitigation

ALSWA does not support this proposal.

Reporting regimes can be very onerous for some juvenile offenders, especially for those in remote areas. Often this difficulty arises due to factors beyond the control of the juvenile (for example, parental transience, and availability of transport).

Reporting obligations have a direct link to the recognised sentencing principles of deterrence, denunciation and punishment. Courts should be able to have regard to whether a reporting regime (as it applies to the particular juvenile offender's circumstances) is of relevance to those principles. This is in line with current authority with respect to sentencing Aboriginal offenders (see Richards [2008] WASCA 134 regarding the taking into

account of the effect of culture and dislocation from country when serving a term of imprisonment).

Proposal 7: Juvenile offender reporting orders

ALSWA supports proposal 7 save for 2(g) given the need for finality in sentencing and the principles of juvenile justice (sections 7, & 46 of the *Young Offender's Act 1994 (WA)* , in particular section 7(k) regarding child appropriate time frames). It should be a prosecutorial duty to make the relevant application at the time of sentencing.

Proposal 8: Calculation of reporting periods

ALSWA does not support this proposal. A determination that a child should not be a reportable offender ought to be final (save for appeal). Increasing the reportable period for a subsequent offence necessarily ignores those reasons why an offender was not required to be placed on the register for the original offence.

Proposal 9: Provision of information to the court

ALSWA is of the view that a Court should be fully informed before making a determination. However, ALSWA is strongly of the view that only qualified experts in predication and assessment of the risk of sexual reoffending provide evidence on this topic. This field is specialized and complex (and even more so regarding Aboriginal sexual offenders). ALSWA is gravely concerned that actuarial risk assessments (commonly employed by non experts such as community corrections officers) are routinely used but have been widely discredited in the literature and largely ignored by the Court of Criminal Appeal in Western Australia (see Dangerous Sexual Offender authorities).

Question D: Provision of information to the court

See proposal 9 above.

Proposal 10: Right of review for juvenile reportable offenders

ALSWA supports the provision for a judicial review of registration status after a period of time has elapsed. However, ALSWA is of the view that is unreasonable to limit the number of reviews available given that the life circumstances of a juvenile offender (and in particular Aboriginal offenders) may change quickly, significantly, and often for reasons beyond their control.

Proposal 11: Retrospective right of review for juvenile reportable offenders

ALSWA supports this proposal, save for any limitation on the number of reviews (see above responses).

Question E: Alternative approach for juvenile sex offenders

ALSWA supports any approach which rehabilitates offenders and diverts them from the criminal justice system.

However, it is imperative that such a scheme be provided for in legislation (unlike informal schemes such as Court Conferencing, and the Drug Court and DV Court). ALSWA's experience with other therapeutic courts suggests that there must be appropriate incentives for successful completion. This should involve the adoption the Victorian model where any pending criminal charges are dismissed if the order is successfully completed. Further, the legislation should specifically provide that any unsuccessful completion cannot be used to aggravate the appropriate penalty.

This scheme should be open to all juvenile offenders regardless of age. Further it should not be limited to only those offenders that plead guilty. Such a limit would exclude otherwise suitable offenders. For example, an offender who is found not guilty of the offence charged, but found guilty of a lesser offence which was always accepted.

Proposal 12: Notification of reporting obligations to children and persons with special needs

ALSWA strongly supports this proposal.

Proposal 13: Reporting on behalf of an adult reportable offender

ALSWA supports this proposal.

Question F: Reporting on behalf of an adult reportable offender

ALSWA supports the ability of any government agency involved with an offender to assist with reporting conditions. Any measure that aids an offender to comply requirements is worthwhile.

Proposal 14 & Question G: Review of reporting frequency for adult reportable offenders

ALSWA is of the view that the same scheme apply to juvenile and adult offenders. See our response above to Proposal 3 and Question C.

Proposal 15: Limited exemption for adult reportable offenders

ALSWA is fundamentally opposed to mandatory schemes that limit judicial discretion. Therefore, ALSWA strongly supports this proposal. However, ALSWA is of the view that the applicable test ought be 'special circumstances' as opposed to 'exceptional circumstances'. The threshold of exceptional circumstances is too high, given the broad range of factual and personal circumstances involved in sexual offenders/offenders.

Proposal 16: Calculation of reporting periods

ALSWA does not support this proposal. A determination that an offender should not be a reportable offender ought to be final (save for appeal). Increasing the reportable period for a subsequent offence necessarily ignores those reasons why an offender was not required to be placed on the register for the original offence.

Proposal 17 & Question H: Provision of information to the court

See answers to Proposal 9 & Question D.

Proposal 18: Right of review for adult reportable offenders

ALSWA supports the provision for a judicial review of registration status after a period of time has elapsed. However, ALSWA is of the view that is unreasonable to limit the number of reviews available given that the life circumstances of an offender (and in particular Aboriginal offenders) may change quickly, significantly, and often for reasons beyond their control.

Proposal 19: Retrospective right of review

ALSWA supports this proposal, save for any limitation on the number of reviews (see above responses).

2. About ALSWA

ALSWA is a community based organisation that was established in WA in 1973. ALSWA aims to empower Aboriginal and Torres Strait Islander peoples and advance their interests and aspirations through a comprehensive range of legal and support services throughout WA. ALSWA provides legal advice and representation to Aboriginal and Torres Strait Islander 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. ALSWA's services are available throughout WA via 17 regional and remote offices and one head office in Perth. ALSWA is a representative body with 16 executive officers¹ elected by Aboriginal and Torres Strait Islander peoples from their local regions to speak for them on law and justice issues.

¹ 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 and Torres Strait Islander peoples every three years.