

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

(ALSWA)

**Submission to the National Justice CEOs Group
Standing Committee of Attorneys-General (SCAG)**

**National Guidelines or Principles for Restorative Justice Programs &
Processes for Criminal Matters**

September 2011



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1. Introduction

This submission is made in response to the invitation by the National Justice CEOs Group, Standing Committee of Attorneys-General (SCAG), to make written submissions on the questions presented in its Discussion Paper on 'National Guidelines or Principles for Restorative Justice Programs and Processes for Criminal Matters'.¹ ALSWA notes the deadline for providing submissions was extended from 2 July to 30 September 2011.

ALSWA is a community based organisation that was established in WA in 1973. ALSWA aims to empower Aboriginal and Torres Strait Islander peoples (Aboriginal 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 peoples in a wide range of practice areas including criminal, civil, family, and human rights law. 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 officers² elected by Aboriginal peoples from their local regions to speak for them on law and justice issues.

ALSWA endorses the submissions prepared by the North Australian Aboriginal Justice Agency Ltd (NAAJA) and the Central Australian Aboriginal Legal Aid Service Inc. (CAALAS).

The justice system is currently failing Aboriginal peoples in WA, demonstrated through increasing rates of offending and reoffending especially in relation to serious offences. Restorative justice programs provide alternatives that are better suited to respond to and overcome sensitive social issues surrounding the nature of offending in Aboriginal communities. In particular these types of programs can provide more meaningful processes and outcomes for both victims and offenders to actually overcome offending behaviour.

ALSWA notes that a range of restorative justice initiatives were strongly recommended in the recent report of the WA Community Development and Justice Standing Committee, 'Making our prisons work': An Inquiry into the efficiency and effectiveness of prisoner education, training and employment strategies.³

ALSWA strongly supports culturally relevant restorative justice initiatives that are designed, developed and delivered in consultation and collaboration with Aboriginal and Torres Strait Islander peoples (Aboriginal peoples). These initiatives must respect, protect and promote the rights of Aboriginal peoples in accordance with the United Nations Declaration on the

¹ The Discussion Paper was released in March 2011 and is available at:

http://www.lawlink.nsw.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_natrestorativejustice

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 and Torres Strait Islander peoples every three years.

³ Further information about the inquiry, including ALSWA's submission and a copy of the Final Report are available at: <http://www.parliament.wa.gov.au/web/newwebparl.nsf/iframewebpages/Legislative+Assembly+-+Current+Committees>

Rights of Indigenous Peoples (UN Declaration) and other relevant international laws and standards.⁴

2. Restorative Justice in WA

Restorative justice principles mainly exist in WA through the operation of Juvenile Justice Teams (JJT),⁵ the Aboriginal Community Courts and other 'problem oriented courts' such as Family Violence Courts and Drug Courts.⁶ Some of ALSWA's concerns with these initiatives include the:

- underutilisation of the JJT for Aboriginal peoples;⁷
- lack of inclusion and participation of Aboriginal peoples in the design and delivery of such programs and initiatives, thereby reducing their relevance and appropriateness for Aboriginal participants;
- that they are only available in limited circumstances or in certain areas (in the case of the Aboriginal Community Court), such as for first or second time offenders and only for minor offences; and
- the lack of culturally relevant rehabilitative programs for Aboriginal peoples to undertake as part of their involvement in restorative justice initiatives.

ALSWA notes the Aboriginal Community Court has operated as a pilot program in Kalgoorlie-Boulder since 2006. ALSWA has advocated for improvements to the current program and for their expansion throughout WA in a submission to the WA Attorney General in 2009.⁸

There remain significant gaps in the operation and existence of restorative justice initiatives in WA, in particular in regional and remote areas. ALSWA notes the lack of such initiatives and the unavailability of community based sentencing generally leads to increased rates of imprisonment or ongoing offending for Aboriginal juveniles and adults. This situation requires urgent attention and ALSWA welcomes the opportunity to provide comments on this issue in the context of the proposal for National Guidelines for restorative justice programs and processes.

⁴ For example the UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.

⁵ See Part 5 of the *Young Offenders Act 1994 (WA)*, which provides for the operation of the JJTs in WA.

⁶ Further information about 'problem oriented courts' and restorative justice generally in WA see Harry Blagg, *Problem Oriented Courts, A Research Paper prepared for the Law Reform Commission of Western Australia*, Project 96, March 2008, at: <http://www.lrc.justice.wa.gov.au/2publications/reports/P96-BlaggRP.pdf>

⁷ See 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 p 5.

⁸ The submission is available at:

http://www.als.org.au/images/stories/publications/Submissions/Aboriginal_Community_Courts_WA.pdf

3. ALSWA's Response

Question 1: Is there a need for national guidelines for restorative justice programs and processes that operate under restorative justice principles for criminal matters?

Yes. This is particularly important for states such as WA, which has higher rates of Aboriginal juveniles in detention than the national average, and similar to other states, has a disproportionate rate of incarceration for Aboriginal adult populations.⁹ The increasing rates of Aboriginal incarceration indicate the current justice system is failing Aboriginal peoples. New strategies are needed to enhance community safety and bring these increasing rates of offending to a halt. National guidelines for restorative justice programs can assist in this process by encouraging all levels of government to adopt new and more meaningful justice strategies for Aboriginal victims and offenders.

National guidelines that are developed in partnership and collaboration with Aboriginal peoples and organisations can assist in developing a consistent approach to guide all levels of government.

However ALSWA shares CAALAS' concerns 'that without a legislative framework to mandate the establishment and appropriate implementation and operation of programs pursuant to restorative justice principles, there is no guarantee such principles are practiced.'¹⁰

Governments and their agencies must be held legally accountable for policies and principles concerning Aboriginal peoples to ensure we move forward in addressing these situations.

ALSWA supports principle 12 of the UN Basic Principles that national guidelines and standards should address the:

- (a) conditions for the referral of cases to restorative justice programs;
- (b) handling of cases following a restorative process;
- (c) qualifications, training and assessment of facilitators;
- (d) administration of restorative justice programs; and
- (e) standards of competence and rules of conduct governing the operation of restorative justice programs.

ALSWA submits that any proposed national guidelines must continue being developed and consulted with Aboriginal peoples and organisations. These consultation processes must be undertaken in accordance with the UN Declaration.

We endorse the recommendations suggested by CAALAS, that:

⁹ Kelly Richards, Trends in juvenile detention in Australia, Trends & Issues in Crime and Criminal Justice no. 416, ISSN 1836-2206, Canberra: Australian Institute of Criminology, May 2011, available online: <http://www.aic.gov.au/publications/current%20series/tandi/401-420/tandi416.aspx>

¹⁰ Submission from CAALAS to National Justice CEO's Group, June 2011, (CAALAS' Submission) p4.

1. National guidelines for restorative justice programs and processes be developed in consultation and collaboration with Aboriginal peoples and organisations.
2. Specific legislation be enacted to mandate the development and implementation of restorative justice programs and initiatives, accompanied by the adoption of appropriate practice directions.

Question 2: What, if any, aspects relating to the process of restorative justice should be included in any national guidelines

ALSWA generally supports the inclusion of the principles addressing the process of restorative justice listed in the Discussion Paper to be included in the guidelines. We wish to highlight the importance of the:

- rights of Aboriginal peoples in accordance with the UN Declaration and Australia's other obligations under international human rights law, which must be promoted, protected and respected throughout restorative justice processes;
- adequate funding and resources for the effective operation of restorative justice programs, including for relevant stakeholders to be present in the design, delivery and evaluation of programs and for the training and development of staff and participants generally;
- ensuring the availability of culturally appropriate rehabilitation programs to complement restorative justice initiatives, for example in relation to mental health and substance abuse;
- voluntary participation in restorative justice programs;
- requirement of participants to accept and acknowledge their guilt in relation to the offence;
- requirement for police involvement where appropriate, which can assist in fostering positive relationships; and
- greater transparency in the process of diversion generally.

We recommend that:

3. The guidelines promote and respect the rights of Aboriginal peoples in accordance with the UN Declaration on the Rights of Indigenous Peoples and Australia's other obligations under international human rights law.
4. The guidelines include requirements for governments to assist in adequately funding and resourcing all aspects of restorative justice programs, including for relevant stakeholders to be present in the design, delivery and evaluation of programs.
5. The guidelines include provision requiring the availability of a range of culturally appropriate rehabilitation programs to complement restorative justice initiatives.

We further endorse the recommendations proposed by CAALAS that:

6. The guidelines include that participation of victims and offenders and their families or representatives in restorative justice practices be voluntary.

7. The guidelines include that offender participation in restorative justice programs require acceptance of guilt in relation to the primary elements of the offence.
8. The police be legislatively required to participate in restorative justice processes, where their participation would be beneficial.
9. The guidelines include that the process of determining which cases are eligible for inclusion in restorative justice programs be transparent and that the responsibility for determining eligibility for such programs be with an agency that is independent of the police and prosecutions.
10. The guidelines require that decisions in relation to eligibility for participation, and successful completion of restorative justice programs and processes be reviewable and appealable at both administrative and judicial level.

Question 3: What, if any, issues relating to victim participation in restorative justice processes should be included in national guidelines?

As stated above, ALSWA supports the voluntary involvement of victim participation in restorative justice processes, including their family and their representatives. Victims must not feel intimidated or unsafe at any time, and be able to withdraw their consent to participate at any stage of the process.

The victim's family and or support network must be involved and balanced with respect for cultural protocols and the rights of individual participants. This is particularly important for young and other vulnerable participants. Cultural protocols can be followed and respected through adequate consultation and collaboration with community prior to and throughout the process, the development and promotion of information and education to community and participants, the involvement of the right people and the adoption of appropriate communication throughout proceedings.

ALSWA endorses the recommendations suggested by CAALAS that:

11. The national guidelines indicate that victim participation in restorative justice processes may involve victim representatives, such as family or friends who can speak of the impact of the offending on the victim and themselves, if a victim is unwilling or unable to participate in a program.
12. The guidelines reflect the requirement of victim satisfaction from restorative justice processes be balanced with other established goals of restorative justice programs.

Question 4: What, if any, issues relating to the organisational or program guidelines should be included in any national guidelines?

ALSWA generally supports the principles listed in the Discussion Paper regarding organisational or program guidelines. However we are concerned that when dealing with Aboriginal peoples there may be issues with impartiality of those involved in the program, and with regards to their qualification and training. These issues do not have to be fatal to the operation of restorative justice programs. This can be overcome through flexibility,

transparency and a real commitment to providing resources to develop the skills and knowledge of people involved through training and development. Additionally, as NAAJA suggested in its submission, there must be provision for community-based frameworks to be developed by Aboriginal peoples that enable community ownership and facilitate broader community development generally.

We recommend:

13. The guidelines include scope for community-based frameworks to be developed by Aboriginal peoples to promote community ownership and development.

ALSWA also endorses CAALAS's recommendation that:

14. The guidelines require internal and inter-agency guidelines for the administration and operation of restorative justice programs to remain transparent and accessible through publication.

Question 5: What, if any, issues relating to safety and security should be included in any national guidelines?

Safety and security of participants are extremely important for ensuring positive outcomes and support for restorative justice programs. ALSWA generally supports the nine topic areas for safety and security included in the ACT, which include:

- preparatory stages;
- conference questions;
- out of bound topics;
- escalation cues;
- safety signals;
- room arrangement;
- session duration; and
- pre-conference and post-conference arrangements (for example transportation and accommodation for those in regional and remote areas required to travel to participate).

ALSWA supports the comments by CAALAS in its submission regarding recognition and strategies for dealing with power imbalances within and between communities and participants generally. This requires flexibility to adapt to challenges as they arise in a culturally appropriate, safe and secure manner.

ALSWA endorses CAALAS' recommendation that:

15. The guidelines include various methods and flexibility by which restorative justice processes can be conducted to avoid direct contact between victim and offenders.

Question 6: What, if any, issues relating to agreements and outcomes should be included in any national guidelines?

ALSWA agrees with CAALAS in supporting the principle under the existing ACT scheme that emphasises the following three key themes:

- Providing a victim with an outcome that is needed or that will help make things better for them;
- Providing an offender with the opportunity to make reparation for the damage done by the offence; and
- Prevention of future reoffending.

We further endorse CAALAS' recommendation that:

16. The guidelines stipulate that agreements and outcomes from restorative justice processes and programs be realistic, fair and do not set an offender up to fail.

Question 7: Are there any other issues that should be included in any national guidelines? If yes, please outline what these issues are.

As stated above, ALSWA suggests that the human rights of Aboriginal peoples and Australia's obligations under international human rights law must be respected and promoted in the guidelines, and that adequate funding and resources be committed to all aspects of restorative justice programs and related rehabilitative programs (see recommendations 3-5).

ALSWA further agrees with CAALAS that participant and community expectations need to be managed. This can be achieved through meaningful consultation with and involvement of Aboriginal peoples and communities throughout the process and in the outcome of restorative justice programs. The guidelines can also provide for clearly defined roles and information about how the community can contribute to and provide feedback about the process.

Question 8: Should there be separate or additional guidelines relating to restorative justice programs and processes that address sexual assault and family violence offences? If yes, please outline what issues should be included.

ALSWA appreciates the sensitivities surrounding cases involving sexual assault and family violence in restorative justice programs. Although controversial, we agree with Justice Marcia Neave's recent comments to *The Age* that restorative justice programs may be more relevant and appropriate in dealing with these types of offences and responding to the needs of victims.¹¹

¹¹ Farah Farouque, *Judge calls for sex trials rethink*, *The Age*, 8 September 2011, <http://www.theage.com.au/victoria/judge-calls-for-sex-trials-rethink-20110907-1jxup.html>

ALSWA supports the development of specific guidelines for these types of cases and suggest the following issues need to be addressed in such guidelines:

- safety, security and voluntary participation of victims as a primary consideration;
- the human rights of victims and offenders be respected and protected;
- availability of appropriate alternatives such as video conferencing or shuttle mediation to protect victims where necessary;
- incorporation of a range of services and organisations to provide additional support for victims and offenders; and
- recognition of specific issues arising in these matters, including:
 - attitudes towards women;
 - the vulnerability of children and their need for specific support; and
 - power relationships and imbalances between victim and offender.

ALSWA endorses CAALAS' recommendation that:

17. Specific guidelines be developed relating to restorative justice programs and processes that address sexual assault and family violence offences.

Question 9: Are there any other types of offences that may require specific considerations in national guidelines? If yes, please outline what these offences and the special considerations are.

ALSWA agrees with the issues raised by CAALAS in their submission which highlights the usefulness of flexibility and avoidance of blanket exclusions from restorative justice programs. ALSWA also supports the development of specific guidelines to deal with offences arising out of Aboriginal family feuding to be developed in extensive consultation with Aboriginal communities.

ALSWA endorses CAALAS's recommendation that:

18. The guidelines indicate that blanket exclusion of particular types of offences from restorative justice practices and processes be avoided. Matters be determined for their eligibility to be dealt with in accordance with restorative justice principles on a case by case basis.