

JUSTICE

*A history of the Aboriginal Legal
Service of Western Australia*

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First published in 2011 by
UWA Publishing
Crawley, Western Australia 6009
www.uwap.uwa.edu.au



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National Library of Australia
Cataloguing-in-Publication entry:

Skyring, Fiona.

Justice: a history of the Aboriginal Legal Service of Western Australia.
Fiona Skyring.

ISBN 978 1 921401 63 3 (pbk.)

Includes bibliographical references and index.

Aboriginal Legal Service of Western Australia.—History.
Aboriginal Australians—Legal status, laws, etc.—Western Australia.
Aboriginal Australians—Services for—Western Australia.

342.087209941

Cover photograph of ALS solicitors Graham McDonald and Trevor Riley gathering evidence from Charlie Butler and other men arrested at Skull Creek, Laverton, 1975. Reproduced courtesy of Australian Consolidated Press.
Typeset in 11 point Bembo by Lasertype
Printed by Griffin Digital

WARNING. This book may contain the names and images of Aboriginal people now deceased.

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Introduction

Avy Curley AO, lifelong campaigner for justice for Aboriginal people, wrote about an incident in 1940 at Mount Magnet, a town in the Murchison region of outback Western Australia. Avy Curley, her husband and children lived in nearby Cue where there was no curfew or prohibited area for Aboriginal people, but this was not the norm for Western Australian towns at the time. Under the *Native Administration Act*, which was the amendment to the notorious *Aborigines Act 1905*, the Minister for Native Affairs could declare certain areas and towns to be prohibited to Aboriginal people. Any Aboriginal person in town during the day had to show they were in 'lawful employment' or they could be arrested, and they were not permitted on the streets at all after 6.00 pm. Broome in the far north of the state was among the first to be declared a prohibited area in 1907, and other towns soon followed. Mount Magnet was a prohibited area where Aboriginal people had to be out of town by 6.00 pm. The central business district of the capital city, Perth, was a prohibited area from 1927 until 1954.¹

Avy Curley and her husband George Curley had heard about the curfew at Mount Magnet, so went there to talk with local people and offer their help. After a meeting, they decided to march down the street after sunset, in a group, to challenge the curfew. They sent some of the younger children to the pictures and the older children joined the march, and Avy carried her baby. They congregated at the café in the main street and then they were all arrested by Sergeant Webb. He let Avy Curley go to collect the children from the pictures, and by this stage the group numbered 22 people. The sergeant got the help of

bystanders, local white people, to march everyone, including Avy and the children to the lockup. A few white people joined the Aboriginal protesters in support, but it was only the Aboriginal men, women and children who were herded into a single room lockup and detained overnight. It was the first time Avy Curley had ever spent the night in the lockup, and the next morning her children who were with her woke up hungry and wanting to go home.²

Avy Curley's nephew Clarrie Cameron, like other members of his family, has been a lifelong activist for Aboriginal rights, from his role as the Wiluna representative on the Aboriginal Consultative Committee in the late 1960s, to Chairman of the Yamatji Language Centre and Executive Committee member of the Aboriginal Legal Service. Clarrie Cameron was only a child when his relatives were arrested in Cue in the 1940s. He told me about the event when I spoke with him in Geraldton in 2008.

Clarrie Cameron

Different towns made local by-laws as they saw fit, as they desired. In that year we went to Mount Magnet for the races and then we wanted to go to the pictures...if we were in Cue, they didn't have this rule for Aboriginals not allowed in the street after 6.00 pm. They probably had it 10 or 20 years before that, or something, but at the time I am talking about, Aboriginal people in Cue just went to the pictures same as everybody else. We went to Mount Magnet, went to the races and then after the races everybody headed for the pictures. And it was only, like, the Camerons and the Curleys from Cue who were in the street and at the time we didn't know there was any difference. And Dad [the late Leedham Cameron] walks up the street and he said, "Here's a sign here; 'Aborigines not allowed in the street after 6.00 pm'." Dad and Uncle Wally [Cameron] – either one of those two tore the sign down and grabbed it, "Who the heck put this thing up?"...And we went along to the pictures, and next minute, what I can remember anyway, policeman bailed everybody up, "Get off the street!" And Aunty Avy and Dad and Uncle George and Uncle Wally said, "Like hell! What do you think, we're dogs, or something? Who put that up? No, we're not getting off the street. We're human beings. We're entitled to come to the pictures like

anybody else". They tried to argue with this Sergeant Webb, I think his name was, and he wouldn't listen: "We can't allow Aborigines in the street after 6.00 pm in this town. You either go or you get locked up". And Auntie Avy and Dad, they said, "We'll get locked up"...right at the back, my mum – and I can just remember that she grabbed us couple of boys, she didn't want the kids being locked up. But Auntie Avy and the family, and Uncle Wally and Dad and everyone, they walked into the jail! And all the kids walked in with them.³

Clarrie Cameron remembered that his Uncle Wally was imprisoned for over a year, but that everyone else in the lockup went home the next day. Avy Curley described how the following morning Sergeant Webb let them go, but they had to return that evening to face the charges. Avy Curley tried to get in contact with a solicitor who had helped her in the past, but was reliant on the Mount Magnet post office to be connected by telephone, and the police had told the post office employee to block the call.⁴ That evening people were tried before the magistrate who held court in the yard outside the lockup. They all answered in unison every time the clerk called out a name, and insisted on being tried as a group. They all demanded to know 'What are we being charged for? We haven't done anything wrong'. But they were all charged with loitering and fined £2 each, and Wally Cameron was jailed for a previous offence. Clarrie Cameron considered that his uncle was punished by the magistrate because he was identified as one of the ringleaders of the protest march.⁵

From 1841 through to 1972 in Western Australia, there was a range of laws and regulations that applied only to Aboriginal people. The first legislative action by the colonial government that was specific to 'the Aboriginal Natives of Western Australia' was the 1841 Act constituting the prison for Aboriginal offenders at Rottneest Island, off the coast from Fremantle. Now a popular holiday destination and weekend getaway for Perth residents, Rottneest Island was used as an Aboriginal prison through to the early twentieth century. During World War I an internment camp for 'enemy aliens' was also established there. Between 1838 and 1931, at least 3,670 Aboriginal people were incarcerated at Rottneest. They included men of all ages and boys, some as young as eight years old, brought from regions across Western Australia. The

island is covered with unmarked graves of at least 373 Aboriginal men and youths who died there, although because of gaps in the records it is difficult to be certain of the numbers. Most of these people died from disease exacerbated by appalling conditions, and at least five Aboriginal men were executed at Rottneest.⁶

The 1841 law formally establishing the Rottneest Island prison for Aboriginal people set the pattern for the approach of the colonial and then the State government in Western Australia towards the people whose land the colonists invaded. There were several laws in the nineteenth century that suspended normal judicial process for Aboriginal offenders. Legislation that allowed for both summary conviction and punishment of Aboriginal people epitomised the attitude of lawmakers and the electorate who voted for them; that Aboriginal people could not expect to exercise the same legal rights as everyone else.

Western Australian laws that applied to 'Aboriginal natives' were often stated as being for their protection and welfare, but the laws in fact enshrined systemic violations of Aboriginal peoples' human rights. Until the repeal of most of the *Native Welfare Act* in 1963, the Aborigines Department and its bureaucratic successors could control an Aboriginal person's property or income and the Chief Protector was made the legal guardian of all Aboriginal children. Aboriginal people could be ordered onto segregated and destitute settlements on reserve lands. Aboriginal children and adults could be bound in employment contracts with no guarantee of wages or adequate conditions, and risked arrest if they 'absconded' from abusive employers. For any offence under the *Aborigines Act 1905* and its successive amending Acts, alleged offenders could be arrested without warrant. Aboriginal individuals and families had no right of appeal against the decisions of agents of the department, and often no knowledge that such decisions were being made that directly concerned them. The Chief Protector, later called the Commissioner of Native Affairs and then the Commissioner of Native Welfare in subsequent amendments to the *Aborigines Act 1905*, had sweeping powers to control Aboriginal family life, work and where they lived. As historian Anna Haebich has argued, the department governed with minimal accountability and without the consent of Aboriginal

people themselves, and without the resources to provide anywhere near adequate services.⁷

In Western Australia and across the nation, these laws were made increasingly draconian in the first three decades of the twentieth century. Government concern focused on regulating and segregating Indigenous Australians, whom the majority of the white electorate regarded as an ‘undesirable racial minority’.⁸ Aboriginal people fought back against legislated racial discrimination, but since their civil rights were explicitly denied such challenges were always dangerous. Several Aboriginal witnesses, most of them from Noongar families in the south west, who gave evidence to the Moseley Royal Commission in 1934 objected to coming under the jurisdiction of the *Aborigines Act* in the first place, and protested that the powers the department exerted over them and their families were unjust. The witnesses wanted their relatives released from Moore River Native Settlement, then a place of destitution and inhumane punishment, where they had been sent on the orders of Chief Protector A. O. Neville. Witness John Egan wanted to live and work as a ‘free Australian’. Meanwhile Chief Protector Neville sat through the hearings and was granted leave to cross examine the witnesses.⁹ The 1936 amendments to the *Aborigines Act* following the Moseley Royal Commission replaced the Chief Protector with the Commissioner of Native Affairs, and A. O. Neville continued in the role. The amendments extended the jurisdiction of the Act to include just about anyone of Aboriginal descent the Commissioner decided should be under the jurisdiction of the Act.¹⁰ The amendments reinforced an already totalitarian administration that existed within a supposedly robust democracy.

The legislation in Western Australia used words like ‘half-caste’ and ‘blood’ to define the target population. Glen Kelly, Chief Executive Officer of the South West Aboriginal Land and Sea Council (SWALSC), referred to the impact of this in a speech he gave in October 2009. SWALSC is the native title representative body for Noongar people, traditional owners in the south west of the state.¹¹ The history report tendered by SWALSC as expert evidence in the litigation of the Single Noongar Claim was edited and published as a book, *‘It’s Still in My Heart, This is My Country’: The Single Noongar Claim History*.¹² Addressing the audience at the launch of the book, Glen Kelly said,

prior to 1972 there were at least 67 different categorisations in government legislation of what it was to be an Aboriginal person where notions of race, blood and caste are outlined. Most Noongar people and indeed witnesses in the SNC [Single Noongar Claim] have been classed by various baseless categories of 'caste' and 'blood'...Under such a system we experienced classification as fractional Aboriginality of anything up to a caste of 1/128th Aboriginal blood. What we state is that these racist categories bear no relationship to Noongar society – as if a person's skin colour or the way they were described by the government affected their ability to pass on traditional knowledge, abide by Noongar values and remain deeply attached to Noongar country – and yet these categorisations defined government policies and affected entire generations.¹³

Marcia Langton wrote that many Australians still do not know that there is no reliable evidence for the concepts of race implicit in Australian legal texts and doctrines.¹⁴ Skin pigmentation and hair colour make human beings look different, but we are all members of one species, *Homo sapiens*. This was one of the conclusions of the Conference of Experts, convened by UNESCO in 1964. They also asserted that there was no group that constituted a different 'race' and that the tenets of racism 'could in no way pretend to have any scientific foundation'.¹⁵ A United Nations study in 1982 reiterated that there is only one race, the human race, and found that even though many people still believed there was a scientific definition of 'races' based on physical and cultural difference,

there is no valid proof, from the scientific standpoint, that so-called racial groups have constitutional or innate abilities that are determined genetically.¹⁶

Ivan Hannaford has argued that the notion of race was introduced in Western thought at the end of the seventeenth century and given an ancient lineage to the Greco-Roman period that never actually existed. He has traced the history of what he called this 'powerful modern idea' through to the eugenics and 'race hygiene' movements of the late nineteenth and early twentieth centuries, culminating in the

Nazi doctrine of Aryan racial superiority.¹⁷ These ideas of race, dressed up as science, were used to explain a range of social phenomena from imperialist expansion to legislated segregation. They were central in the development of Australia, ‘a nation so intrinsically defined by whiteness and boundaries of race’, to use Anna Haebich’s words.¹⁸

After World War II, one of the aims of the newly established United Nations was to ensure that the Holocaust could not happen again. Human rights for all people had to be guaranteed and protected. From 1949 through to the mid-1950s, the United Nations sponsored an international team of scientists, sociologists and psychologists to devise a program for eradicating racial prejudice. Heavily influenced by race relations theories developed in the United States, one of the assumptions in the program was that those who harboured prejudice towards other groups could be educated ‘into better ways’ by rational argument and accurate information. Similarly, biological explanations for social phenomena – for instance, that apartheid could be justified by reference to allegedly innate characteristics of the groups being segregated – should be countered by intellectual critique.¹⁹ But as Marcia Langton has argued, this United Nations program has ‘to a large extent been a failure’. Racial prejudice and the Western idea of race are still pervasive.²⁰ In Western Australia, the ‘blood’ and ‘caste’ categories that defined Aboriginal people in legislation were not amended until the 1970s, long after such definitions of race were discredited.

But everyone knows that race still matters. The racialising of people into black, white, Asian, mixed-race, person of Middle Eastern appearance, Hispanic – the list is extensive and varies from place to place – has not abated, and the corporeality of race remains the basis for social tensions.²¹ Angela Davis argued that it is wrong to assume that by rejecting essentialist notions of race we can assert that the history of race and racism is over. New modes of racism in the post-Civil Rights era continue to ‘constitute our social and psychic worlds’. In the past racism reflected the explicitly discriminatory institutions and practices of the state, such as segregation. Today the ‘deep structural life of racism’ is demonstrated in racial inequity in the criminal justice system, a system which is supposed to be ‘colourblind’ in the delivery of justice. Davis uses the phrase ‘young people of colour’ to describe the African American and Hispanic men and women incarcerated at hugely

disproportionate rates in jails in the United States, in a country where one in 100 adults is behind bars.²² I use the word racial throughout this book, because it is essential to the story. The racism of some white Australians towards Aboriginal Australians is a significant factor in the origins and development of the Aboriginal Legal Service of Western Australia. The efforts by a coalition of white people and Aboriginal people to combat racism in its explicit and structural expressions are at the centre of this history.

The ‘tottering superstructure’, to borrow Hannaford’s phrase, of ideas of citizenship defined by racial boundaries is exposed in all its irrationality in Western Australian citizenship laws.²³ From 1829 Aboriginal people in Western Australia were British subjects, and from 1948 they were formally Australian citizens, but until amendments to state laws in 1971 they did not share any of the rights or entitlements of being subjects and citizens. John Chesterman argued that in order to perpetuate Aboriginal peoples’ status as ‘citizens without rights in their own land’, Australian citizenship was ‘empty and barren at its core and blatantly discriminatory in its parts’. The exclusion of Aboriginal people from the nation was a foundational part of Australian citizenship at the time of Federation in 1901, and the Constitution was drafted to allow the States to maintain and develop discriminatory laws.²⁴

The Western Australian Parliament took full advantage of this license and introduced its own citizenship laws in 1944, the *Natives (Citizenship Rights) Act*. Since 1905, Aboriginal people defined by the ‘blood’ and ‘caste’ provisions of the legislation could apply to be exempt from the jurisdiction of the *Aborigines Act*. As with everything in relation to this administration, the Chief Protector and later Commissioner of Native Affairs decided who would be granted exemption and had the power to revoke it at any time, without appeal. Under the *Natives (Citizenship Rights) Act*, Aboriginal people could apply for citizenship status if they had served in the armed forces or complied with other criteria about ‘industrious habits’ and ‘behaviour’. Applicants had to show that they had severed all ‘tribal associations’, had ‘adopted the manner and habits of civilized life’ and did not have leprosy, syphilis, granuloma or yaws (a contagious disease similar to syphilis). Once granted the certificate of citizenship by the local magistrate individuals were, according to the legislation:

deemed to be no longer a native or aborigine and shall have all the rights, privileges and immunities of a natural born or naturalized subject of His Majesty.²⁵

Although certificates provided some defence for Aboriginal people against the authoritarian reach of the department, and certificate holders could control their own money and be legal guardians of their own children, it remained an unstable civil status. They had to pay for the certificates first; 5 shillings for the application and 10 shillings if the application was successful. Then a certificate could be suspended or cancelled on complaint by the Commissioner of Native Affairs or 'any other person', according to the Act. In 1951, amendments to the Act instituted Citizenship Boards of local businessmen and residents to decide applications. These amendments were in response to demands by white people in some districts that the citizenship application process for Aboriginal people should be more difficult, and that cancellation of certificates should be easier.²⁶ In Broome in the mid-1950s, a two-man Citizenship Board made up of the Resident Magistrate and a local businessman cancelled three citizenship certificates in one year alone. By 1955, out of approximately 22,000 Aboriginal people in WA (only an estimate, since Aboriginal people were not counted in the census) only 1138 held citizenship certificates.²⁷

The citizenship certificates were derisively known as 'dog tags'. They were like a little passport, with gold embossed letters on the front cover, and on the pages inside an identity number and space for a photo of the certificate holder. The response of many Aboriginal people to this begrudgingly granted, second class citizenship status was one of anger and contempt. Wangkayi leader James Brennan, from the Goldfields, had fought in the Australian Army during World War II and had been a prisoner of war in Italy. His daughter Gloria Brennan recalled,

I think the thing that hurt him most was that when he came back to Australia he had to go through the indignity of getting a citizenship rights card so as to be able to walk into a hotel to have a drink with the same men he fought side by side with. That really got his pride.²⁸

Others refused to participate in the system. Yawuru Elder Cissy Djiagween in Broome said ‘No way! I’m not gonna get a licence for my own country. I want to be a free person’.²⁹ In the late 1960s, through the Native Welfare Department regional consultative committees, Aboriginal representatives consistently demanded the immediate repeal of the *Natives (Citizenship Rights) Act*. Regardless of the extent to which the department tried to relax the rules governing the application process, it was still offensive to Aboriginal people to have to apply for citizenship in their own country. Frank Chulung is a senior Malangan and Dulbung man who has lived in north Kimberley towns of Wyndham and Kununurra for most of his life. Frank Chulung has worked for the Aboriginal Legal Service since 1974 in various roles: Honorary Field Officer, Field Officer, Executive Committee member and Court Officer. Frank Chulung has also represented East Kimberley Aboriginal people on the National Aboriginal Conference in the 1980s and was the first Chairman of the Kimberley Land Council, with co-Chairman Jim Bieundurry. He recounted his experience of citizenship laws to me:

Frank Chulung

My parents got their citizenship rights in, I believe it was November 1956, because at that time I was 17 years of age, and in their citizenship book my name was included on that list. And the concept of that was I was allowed to take advantage of what mainstream Australia enjoys, and that was until I turned 21. When I turned 21, I was supposed to get my own citizenship rights...because I automatically became an Aboriginal again!...They said, “Oh you are a little white boy. You know, you’ve got the same privileges”. And I said I was still a Blackfella. I was still the same. It never changed me. I used to mix with all my Aboriginal mates and never ever forgot about my friends and relatives. I turned 21 in July 1960, and in those days I always used to be on the move and Kevin Johnson [the Wyndham Native Welfare officer] asked me to go up to his office and when I got up there he started filling out the application for citizenship rights. And I just refused it. And I said, “You know what you can do with it. You can throw it in the rubbish bin or do whatever you want to do with it”.³⁰

The continued operation of racially discriminatory laws in Australia was damaging to Australia's international reputation, but rather than abolish the laws the Federal government through to the 1960s sought to justify them as 'special measures' for the 'protection and assistance' of Indigenous Australians. In 1965 when the United Nations adopted the International Convention on the Elimination of All Forms of Racial Discrimination, Indigenous Australians still did not have the same civil and political rights as other Australians. It was a combination of lobbying by Indigenous and non-Indigenous activists around the country, as well as the Australian government's sensitivity to international criticism that led to the gradual repeal of laws that denied civil rights. Aboriginal leaders such as Charles Perkins used to great effectiveness the argument that Australia's treatment of Aboriginal people was shameful, comparable to the human rights abuses perpetrated by governments in South Africa and the Congo that attracted international condemnation at the time. Chesterman's analysis of External Affairs Department archives shows that while there were some senior bureaucrats and politicians who opposed legislated racial discrimination because it was a human rights abuse, the overall response of government was to minimise the damage caused by domestic and international censure while keeping a slow pace for civil rights reform.³¹

In Western Australia until the early 1970s, amendments proposed by the Native Welfare Department and individual Labor MPs that would have dismantled legislated discrimination against Aboriginal people were continually quashed in the conservative dominated Legislative Council. Stanley Middleton was appointed Native Affairs Commissioner in 1948 and combined his support for policies of assimilation with principles of racial equality. Middleton's vision, although not radical, was a major step forward from that of his predecessors such as A. O. Neville. Middleton condemned the governance of the Aboriginal population based on 'degrees of caste... expressed in vulgar fractions' and supported full citizenship status for Aboriginal people.³² Between 1954 and 1959 the regulations in relation to applications under the *Natives (Citizenship Rights) Act* were changed so that the demeaning criteria for being granted citizenship were removed, children of certificate holders were automatically

included and the process eventually became one of filling out a form, as described by Frank Chulung. Middleton was unable to prevent the amendments to the Act in 1951 that gave the Citizenship Boards power to grant or cancel certificates, but he instructed officers of the department to refuse to supply the Boards with any information from an applicant's departmental file that could be used to deny certificates.³³ Middleton argued for repeal of the Act claiming his stance was,

... strongly supported by the Native Welfare Council (Inc.), the Women's Service Guild (Inc.), the Coolbaroo League of Natives, the *West Australian* in several leading articles, and numerous other bodies within and outside the State as well as thousands of individual members of the public who have attended meetings at which I have given addresses on the subject. In has been just as strongly opposed by pastoralists, farmers and others who employ natives, country people who inherently dislike, distrust and perhaps even fear them and some politicians who represent these people in Parliament and who, for obvious reasons, endeavour to keep natives "in their place" by legislative direction.³⁴

In 1957 a Bill titled *Native Status as Citizens Act* was drafted to confer full citizenship rights on all 'persons descended from the Original Inhabitants of Australia'. This legislation if passed would also have repealed the *Natives (Citizenship Rights) Act*, and would have made substantial amendments to the *Native Welfare Act*. The intention was to remove most Aboriginal people from its jurisdiction unless they sought the assistance of the Native Welfare Department. But the Bill was never passed. In 1964 Harry Strickland, a Labor Member of Parliament, attempted to reintroduce this reforming legislation as a private member's Bill but it was defeated in the Legislative Council.³⁵ The *Natives (Citizenship Rights) Act* remained law in Western Australia until its repeal in 1971 under a newly elected Labor government.

The *Native Welfare Act* was not repealed until 1972. In its place was enacted the *Aboriginal Affairs Planning Authority Act (AAPA Act) 1972*, which for the first time in Western Australian law removed the 'caste' definitions of the Aboriginal population. Under the *AAPA Act*, self-identification and acknowledgement by the Aboriginal community were the words used to describe Aboriginal Western Australians.

Assimilation was no longer official policy. Aboriginal people became for the most part subject to the same laws as other citizens and the roles of the Planning Authority were primarily to liaise within government and co-ordinate consultation with Aboriginal people.³⁶ That was supposed to be the end of racially discriminatory laws in Western Australia.

Legislative reform did not translate into equality before the law for Aboriginal people. Senior bureaucrats in the Native Welfare Department may have opposed Western Australia's discriminatory laws, but many departmental officers and others in the community were dedicated to the ongoing implementation of those laws. Despite repeated protest by Aboriginal representatives against the existence of the *Natives (Citizenship Rights) Act*, the Citizenship Boards continued to convene to assess citizenship applications and Native Welfare officers kept on issuing the certificates. The passport-like citizenship certificate shown to me was issued in 1970. In 1972, a year after the *Natives (Citizenship Rights) Act* was repealed, Robert French and other young lawyers of the Justice Committee of the New Era Aboriginal Fellowship set up a voluntary legal service for Aboriginal people, operating out of rooms in the Aboriginal Centre in Beaufort Street in Perth. This was the start of the Aboriginal Legal Service in Western Australia.

The long struggle by Indigenous Australians for equality before the law is the basis for the origins of the Aboriginal Legal Service. Another legacy of the past that is central to the story is the history of hostility and violence between Aboriginal people and the police in Western Australia. Land-hungry pastoralists and their employees played a major role in frontier violence, and research has shown that the Kimberley pastoral lobby relied on the support of compliant Police Commissioners for police assistance in what was a war of invasion.³⁷ As the frontier extended north and east the wholesale arrests of Aboriginal men and boys as alleged cattle thieves and their removal from their country was an important strategy in appropriating Aboriginal land. Aboriginal people were indiscriminately shot by parties of police and pastoralists in retaliation for attacks on livestock.³⁸ There was a Royal Commission into the killing by police and civilians of Aboriginal people at Forrest River mission in the Kimberley in 1926. There has been debate about the number of Aboriginal victims and in a recent review of available

scholarship and archival sources, historian Geoffrey Bolton wrote that most authorities agreed that about 20 Aboriginal people were killed.³⁹ Aboriginal resistance to dispossession never stopped, but at later times in different areas of the state the violence of the conflict diminished. Aboriginal peoples' human rights were regularly abused at the hands of the authorities entrusted to uphold the law.

Frank Chulung

I do not think [the relationship between Aboriginal people and the police] ever was any good. I mean, from the day the Union Jack was planted in Australia, I think Aboriginals and the police were at arm's length. Ever since the first arrival of the First Fleet...Even now it is not – you only have to look at the prison rate.⁴⁰

In later decades, the police were usually the officials who had the task of implementing racially discriminatory laws in Western Australia, and some police were more enthusiastic than others in this role. The police took away the children and raided camps and dwellings for evidence of 'cohabitation', where Aboriginal women were living with non-Aboriginal partners without the permission of the Chief Protector (this was an offence under the *Aborigines Act 1905*). The police arrested Aboriginal people for normal behaviour, like having a drink with friends, which for 'natives under the Act' was made a criminal activity. There was the ongoing outrage of Aboriginal deaths in police custody and the immunity it seemed the police had to any accusation, from anybody, when their conduct was violent or otherwise unlawful.

But characterising the history of Aboriginal/police relationships as an entirely adversarial one obscures the complexities of both the negotiation of that relationship and of internal police culture itself. Nearly all of the Aboriginal people I spoke with for this book talked of the positive difference a good sergeant could make in a town. Yamatji elder Clarrie Cameron had direct experience of this when he worked for the Aboriginal Legal Service in Port Hedland in the 1980s. In the following excerpt from our conversation, he was talking about police brutality towards Aboriginal prisoners in the lockup. But he went on to talk about how he formed a good working relationship with the local police.

Clarrie Cameron

And the Officer in Charge – it all depends on who is in charge of the police station at the time. The young coppers take their conduct from whoever is in charge. They have a leader, and if he tolerates them and lets them go, well, they get away with it...No, no, you had the good and the bad. You had the rough coppers. At the time in Port Hedland when I started, we had a terrific Inspector of Police, the old man. As a Court Officer with the ALS, I would go and tell him. I would walk into his office and tell him, “You’ve got to pull your boys up”.⁴¹

Because the relationship between the Aboriginal community and the police is so central to the history of the Aboriginal Legal Service of Western Australia, this book is partly also a history of the police, or more specifically a history of efforts to reform the way that police operate in a diverse range of environments. Peter Conole has self-published a history of policing in Western Australia. The reason I hardly refer to his book is that he pays so little attention to the relationship between the police and the Aboriginal community, and to the efforts since 1975 to reform policing. The Laverton Royal Commission – a major post-war investigation into police misconduct and the subject of Chapter 4 in this book – is summarised in a few paragraphs by Conole. The death in police custody in 1983 of young Aboriginal man John Pat is not even mentioned, and the Royal Commission into Aboriginal Deaths in Custody, which was a seminal event in the history of the police in Western Australia, receives a scant four paragraphs.⁴² There is much more to the relationship between police and Aboriginal people, and to the history of the police force itself.

Western Australia has the world’s largest single police jurisdiction, covering 2.5 million square kilometres. The state’s population is concentrated in metropolitan Perth, with much of the rest of Western Australia sparsely inhabited, dotted with small regional towns built to service the pastoral and mining industries. A small town such as Roebourne close to the coast in the Pilbara region is so unlike suburban Perth they may as well be different worlds. Yet policing of these radically dissimilar places is all directed from Perth. Policy formulation and decision making for all government services across

the state are based in Perth, and the problems inherent in centralised service provision to remote and diverse communities are a persistent impediment to effective governance in Western Australia. Some Police Commissioners knew this, and tried to change the way the police force was run. In 2008 I spoke with Bob Falconer, Police Commissioner in Western Australia from 1994 to 1999. He described the way things worked in the police force until reforms in the mid-1990s.

Bob Falconer

I kept saying, “Look – and this is a fact – the people that I’m talking about [the local Officers in Charge or OICs] had never been given the level of autonomy to look for things at the local level”. And what they’d been taught to do is sit and wait for a tablet of stone to be dispatched from Perth saying, “This is what you have to do, or this is what you need to do”. Now, some of them, they had known all along the way it should be done, but the hierarchical structure and the bits of paper – and they were bits of paper, going up and down and through all the pigeon holes...for example, Senior Sergeant to Inspector, to the Chief Inspector, the Superintendent, the Chief Superintendent, to the city.⁴³

Bob Falconer considered that centralised and inflexible management from Perth was a major impediment to creating an effective, modern police service. His goal was to change the way the police operated, and one of the strategies was to empower Officers in Charge to respond to local needs and work directly with local communities. As he said to then Premier Richard Court, Western Australia is huge and diverse and ‘what is necessary, achievable and acceptable in Bunbury will not be so in Broome and vice versa’.

When the Aboriginal Legal Service (ALS) started in the early 1970s the police force was a rigidly hierarchical organisation. The poor relationship between Aboriginal communities and police was reflected in extremely high levels of racial disparity in arrest rates. One of the first proposals made in 1970 by the newly established Justice Committee of the New Era Aboriginal Fellowship, the precursor to the Aboriginal Legal Service, was that they could assist with special training for police working in areas with a high Aboriginal population.⁴⁴ While

there were police in regional and remote towns who were part of the community and had developed good relationships over the years with Aboriginal residents, others did not behave that way. Avy Curley recalled that in Mullewa, in the wheatbelt region west of Geraldton, her brothers were ‘beaten up something cruel’ by police and put into the lockup. Avy Curley took some clean clothes to her brothers and was upset by the way they looked, their faces covered with bruises. As she wrote ‘Aboriginals had no legal aid support in those days as the Police were a law unto themselves’.⁴⁵

Despite the work of some dedicated police, there was a level of mistrust among Aboriginal people towards police that had its roots in a long memory of violence and abuse at the hands of authority. Maisie Weston, former member of the Western Australian Commission of Elders and of the Indigenous Women’s Congress, worked as a Field Officer with the Aboriginal Legal Service in the 1970s. She recalled that in those days Aboriginal people were still scared of the police. The police had been called ‘protectors’ in the past, but Maisie Weston questioned how they could have been protecting Aboriginal people by putting them in jail.⁴⁶ In the 2002 Gordon Inquiry into family violence and child abuse in Aboriginal communities in Western Australia, one of the findings was that ‘distrust of Western Australia Police Service officers is a key barrier to Aboriginal complainants coming forward and making complaints of family violence and child abuse’.⁴⁷ This lack of trust is enduring and deeply engrained, and is one of the factors that define the relationship between the police and Aboriginal people as poor. In 2008 I spoke with Dorothy Cooper, a prison support officer at the Eastern Goldfields Regional Prison in Boulder. We talked about her work as an ALS Court Officer in Laverton in the 1990s and about life in the Goldfields region of Western Australia.

Dorothy Cooper

You’d even scare your kids and say “Be naughty, the police will come and get you” or I’d say “Shush, go to sleep now or the policeman will come and knock on the door and take you away” and things like that so mainly you grew up fearing the police anyway...when the policeman did knock on the door you’d sort of run and especially

if you had a few uncles there or people that had done something wrong they'd think the police were coming for them.⁴⁸

Even when a policeman in Boulder visited Dorothy Cooper's aunt to let her know the good news that her niece was ready to come out of hospital, her aunt was afraid the police officer was there to lay charges against someone in the house. As Dorothy Cooper recalled, 'You always assumed there was trouble. Never ever thought the policeman was bringing you something good'.⁴⁹ There was too long a history of violence and hostility. Attempts to improve the relationship between Aboriginal people and police, and to bring the police themselves to justice when they break the law, is a central theme in the history of the ALS. Over nearly 40 years the progress has not been as good as it could and should have been.

In the early 1970s the long overdue achievement of formal equality for Aboriginal Western Australians had no noticeable impact on Aboriginal poverty. Over a century of dispossession of Aboriginal land and the value of Aboriginal labour, and the tearing apart of generations of Aboriginal families through policies of child removal had left Aboriginal Western Australians severely disadvantaged compared to the rest of the community. Some of the main indicators of living conditions – health and housing – illustrated the gap. A survey of mortality and morbidity rates among Aboriginal children in 1971 showed that, where the figures were available, infant mortality (babies dying before their first birthday) among Aboriginal babies was five to six times that of white babies. This disparity increased to a ratio of around 40 to one for the age group between one and four years old. Analysis of admission statistics for Princess Margaret Hospital in Perth in 1969 (the main children's hospital that treated seriously ill children from all over the State) showed that Aboriginal children comprised 56% of admissions for bowel infections, 27% of admissions for malnutrition, and 43% of admissions for iron deficiency anaemia. As a proportion of the total population of Western Australia at the time, Aboriginal people were approximately 2.5%, so this snapshot of child morbidity in 1969 showed that Aboriginal children were massively over-represented in hospital admissions. Professor William MacDonald from the Department of Child Health at the University of Western Australia wrote that,

The morbidity pattern of Aboriginal children admitted to Princess Margaret Hospital is akin to those of children living in developing countries of Asia and Africa. Of course, there are some differences due to local conditions, but the common disorders are mainly respiratory and bowel infections and parasitic infestation on a background of nutritional disturbances and anaemia. Health wise, we have in effect an underprivileged so-called developing country within our own shores...⁵⁰

Professor MacDonald argued that these morbidity patterns were mainly due to the poor living conditions of Aboriginal children: inadequate and overcrowded housing, and subsequent difficulties for families to maintain reasonable levels of hygiene.

Housing for Aboriginal people in Western Australia in the early 1970s was in a state of crisis. The end result of decades of low or no wages and enforced segregated living on Aboriginal reserves and camps was that relatively few Aboriginal families had adequate housing. Many lived in makeshift shelters and tents, and a 1971 survey of living conditions for Aboriginal pastoral station workers and their families in the Kimberley showed that their accommodation was usually appalling.⁵¹ In urban centres and regional towns, Aboriginal families were openly discriminated against by the State Housing Commission, the provider of public housing, and by white residents who did not want Aboriginal people as neighbours. Because of these prejudices, when the Native Welfare Department embarked on a 'transitional' housing program in the 1950s and 1960s it was limited to building on existing Aboriginal reserves. In Western Australia, 'transitional housing' was a separate type of rental accommodation for Aboriginal families, and they were expected to graduate from one 'stage' to the next under the supervision of the department. Stage 1 houses were small huts with each ablutions block shared among several dwellings, Stage 2 were dwellings with four or five rooms and their own toilet on reserve or town blocks, and Stage 3 were ordinary houses on suburban blocks. Most Aboriginal people had to accept sub-standard housing. Of the 700 new dwellings built for Aboriginal residents in 1967, only 35 of them were Stage 3 conventional homes.⁵²

Lack of housing was a major political issue for Aboriginal rights activists in Western Australia. In July 1971 Aboriginal people and their

white supporters marched on Parliament Housing in Perth to protest. They shouted 'Equal right to black and white! Houses now! Houses now!' Premier John Tonkin met with the protesters and promised to address their concerns but said the government lacked the funds. The Federal Minister, William Wentworth, acknowledged that not enough was being spent on housing for Aboriginal people in Australia, and that about \$19 million was required to build enough houses to meet the backlog. But in 1971 the funds made available for new housing for Aboriginal families in Western Australia were only \$1.68 million. Aboriginal activist and writer Jack Davis claimed that over 11,000 new homes were needed for the Aboriginal population in Western Australia. The lack of decent accommodation had a direct link to poor health. Then, only 15% of Aboriginal families had refrigerators in their homes, and many houses on the reserves did not have electricity.⁵³

The need to reduce the extremely high rate of incarceration of Aboriginal Australians was also on the civil rights reform agenda in the early 1970s. This was one of the issues that led to the establishment of Aboriginal Legal Services not just in Western Australia but around the nation. While Aboriginal people were about 2.5% of the total population of Western Australia, in 1969 they were 41.3% of admissions to jail. Some people served more than one jail sentence in a year, and at any given time Aboriginal people comprised almost 25% of the total prison population.⁵⁴ Aboriginal women were hugely over-represented, and were 64% of the female prison population.⁵⁵ Aboriginal people were arrested and convicted at much higher rates than white people, and were much more likely to be given prison sentences for minor public order offences, like being drunk and disorderly in the street. Imprisonment rates for Aboriginal people for minor offences were just over 60% compared to 12% for white people convicted of the same offences.⁵⁶ Racial discrimination and social injustice were identified as the bases for this further example of the disparity between black and white. A contributor to the New Era Aboriginal Fellowship bulletin in 1971 argued that 'there is no reason to suppose that Aborigines are less law abiding than white people'.⁵⁷

Over three decades later, Aboriginal incarceration rates are much worse than in 1969. A government study in 2003 found that Aboriginal Western Australians were among the most imprisoned people in the world, and things have not improved since then.⁵⁸ Aboriginal people are

now about 3.5% of the population in Western Australia, but are nearly 40% of the adult prison population. Of the 14 jails for adult prisoners in Western Australia, four of them are referred to as Aboriginal prisons because over 75% of their inmates are Aboriginal.⁵⁹ The juvenile detention centre population is overwhelmingly Aboriginal, at about 65% of juvenile prisoners.⁶⁰ Although there are differences in patterns of offending between 1969 and now, and this is dealt with in later chapters, Aboriginal children and adults continue to be locked up for offences at rates that are much higher than for the same offences for non-Aboriginal people. In 2010 the imprisonment rate for Aboriginal people in Western Australia was 26 times the rate for non-Aboriginal people. The Aboriginal juvenile detention rate in 2010 was 45 times that of non-Aboriginal juveniles.⁶¹ How can any reasonable person accept that an Aboriginal youth is 45 times more likely than a non-Aboriginal youth to commit an offence warranting detention?

Aboriginal juveniles are rarely diverted from the court system, in marked contrast to the majority of juveniles who are apprehended by police. The imprisonment rates for Aboriginal juveniles include a high proportion of children and teenagers who have not actually been convicted of anything. In 2004/05 the overwhelming majority – 95% – of young people in detention were in custody without having been convicted. Just over 55% of these juveniles were granted bail but were unable to meet bail conditions, usually that they be released into the care of a responsible adult. And of these young people, only 13% were subsequently given a custodial sentence.⁶² The state government's own investigation into the management of offenders in Western Australia found that,

This remarkably high rate of detention for unconvicted young people seems to be inconsistent with the principle of imprisonment as a sanction of last resort.⁶³

In the 2005 *Inquiry into the Management of Offenders in Custody and in the Community*, Special Inquirer Dennis Mahoney AO QC was not instructed to address the reasons for the extraordinary over-representation of Aboriginal people in the criminal justice system – that was beyond the scope of the investigation – but his report detailed

the dimensions of Aboriginal over-representation. He started with arrest rates, which for Aboriginal people, in particular Aboriginal women, have increased steadily since 1990 while remaining fairly static for everyone else. In 2003, the arrest rate for Aboriginal people was almost twelve times that of non-Aboriginal people, and for Aboriginal juveniles between the ages of 10 and 14 it was 29 times that of non-Aboriginal youth.⁶⁴

The Mahoney Inquiry showed that Aboriginal people were more likely to be arrested for lesser crimes, such as ‘good order’ offences like being drunk and disorderly (38% of total Aboriginal arrests), and driving and vehicle offences (25%). Once arrested, Aboriginal offenders were far more likely than non-Aboriginal people to receive custodial sentences regardless of the nature of the charge.⁶⁵ Aboriginal interaction with the criminal justice system is usually through the lower courts. In 2005 only 27% of Aboriginal offenders committed crimes that took them into the Higher Courts (District and Supreme).⁶⁶

More recent statistics show that arrest and imprisonment rates for Aboriginal people account for much of the 49% increase in the number of adult prisoners in Western Australia between 2001 and 2009. Aboriginal prisoners on remand increased by 67% during that period, but for non-Aboriginal prisoners on remand the increase was only 7%. The total of Aboriginal people in prison under sentence increased by 83% between 2001 and 2009, but the comparable figure for other sentenced prisoners was 39%. Although the situation is worse in Western Australia, it is bad nationally, with an approximate increase between 2001 and 2008 of 50% in the number of Indigenous prisoners in Australian jails. This burgeoning of the Aboriginal prisoner population has occurred at a time when most governments in Australia claim to support the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). As the Hon. Wayne Martin, Chief Justice of the Supreme Court of Western Australia, pointed out, the main recommendations of the Royal Commission sought to reduce the extent of Aboriginal imprisonment, and that given current trends it was ‘clear that the policies that have been adopted by those governments have failed miserably’.⁶⁷

Chief Justice Martin warned in 2009 that the number of Western Australians imprisoned ‘seems to be growing exponentially’, and that

the dramatic increase over the previous 18 month period was partly due to changes in parole policies and practices, with more people remaining in prison rather than being released on parole. The Chief Justice also suggested the increase was due to the sentencing practices of the courts, with more and heavier sentences being imposed. Another factor was that the majority of new prisoners between November 2008 and September 2009 were sentenced to jail for defaulting on fines for previous convictions, most of which were for minor offences at 'the lower end of the spectrum'. In 2009 people with mental illness or intellectual disabilities comprise another significant proportion of prison intake.⁶⁸

The Aboriginal Legal Service continues to argue that over policing of Aboriginal communities is part of the problem, particularly in relation to the hugely disproportionate arrest and imprisonment rates of Aboriginal juveniles. In November 2009 Peter Collins, Director of Legal Services at the Aboriginal Legal Service of Western Australia (ALSWA), expressed concerns regarding the case of a 12 year old Aboriginal boy. The child lived in Northam and was charged by police with receiving a stolen novelty sign and a stolen chocolate frog worth 70 cents, given to him by a friend who had allegedly stolen the chocolate frog and the sign. The boy was held in a police cell for several hours. This case exemplified the problem of over policing, where Aboriginal children were charged with the most trivial offences and police ignored the range of diversionary options they could have used to steer the child away from firstly the police station, then the courts. As Peter Collins stated, 'It's hard not to imagine that if this had happened to a non-Aboriginal kid from an affluent Perth suburb with professional parents that we wouldn't be in this situation'.⁶⁹ Local Police Superintendent Peter Halliday stood by the decision to charge the boy and said that he was satisfied that the police actions were 'entirely appropriate'.⁷⁰

The case received intense media attention, and two days later Western Australia Police Commissioner Karl O'Callaghan decided to drop the charges and refer the case to a Juvenile Justice Team. But the police were adamant that the case of a child arrested for receiving an allegedly stolen chocolate frog did not reflect any systemic problems of racial discrimination in policing. Police Commissioner O'Callaghan told reporters that the events,

...don't highlight racism at all. What they do highlight is a high rate of offending amongst particular groups in the community. That's a community problem that has to be sorted out.⁷¹

In 1971 racial inequality in arrest, conviction and imprisonment rates was identified as a serious problem in the administration of the justice system and, 40 years later, it still is. Chief Justice Wayne Martin said in a speech in September 2009 to staff of the Department of Corrective Services that,

I have often described the gross over-representation of Aboriginal people within the criminal justice system of Western Australia as one of the biggest issues confronting that system. I will continue to do so until there is some indication that we are making progress in reducing the extent of that over-representation. Tragically there is no sign of that progress at the moment. All the statistical indicators relating to the over-representation of Aboriginal people in our justice system continue to get steadily worse.⁷²

On an international scale, Australia is a very wealthy nation, ranking fourth out of all of the countries in the world in the 2003 United Nation's Human Development Index (HDI). But for Indigenous Australians, their health, income and educational levels were ranked at 103rd, in between the HDI ratings for Cape Verde and China. The inequality in wellbeing between Indigenous and non-Indigenous Australians is a defining characteristic of our nation, and the disparity is much worse than that between Indigenous and non-Indigenous people in comparable places like Canada, the United States and New Zealand.⁷³ This is reflected in the 17 year gap in life expectancy in Australia. Closing this gap has been identified by the Federal government as 'a matter of national priority', and in 2009 Prime Minister Rudd pledged to 'lead a new, national effort to close the gap between Indigenous and non-Indigenous Australians'.⁷⁴

The racial disparity in arrest and incarceration rates in Western Australia is part of a national pattern of inequality between Aboriginal and non-Aboriginal people. The extent of Aboriginal poverty and the disparity in wellbeing between Aboriginal and non-Aboriginal people

has not fundamentally changed in nearly 40 years. After legislated racial discrimination was finally dismantled in the early 1970s and Aboriginal people for the first time could claim equal rights to government services, Aboriginal people remained extremely disadvantaged. As Anna Haebich wrote, ‘Tragically, the government and the public blamed *them* for this outcome’ (her emphasis).⁷⁵ The cross-generational poverty that looks like the result of modern welfare dependency was in fact embedded through many decades of dispossession of land and of the value of Aboriginal labour.⁷⁶ I think most Australians still do not understand the historical depth of Aboriginal poverty.

This book is not about why Aboriginal people continue to fill the courts and prisons in Western Australia, although it is an important part of the story. The Aboriginal Legal Service of Western Australia has represented Aboriginal people in the criminal justice system for nearly 40 years, so with more Aboriginal people in prison than ever before, the question that has to be asked is why the extent of racial disparity is actually worse than it was when the Aboriginal Legal Service was established? What tangible benefits have Aboriginal people in Western Australia gained from nearly four decades of the Aboriginal Legal Service? This book is an account of the social and legal reforms initiated by ALSWA, starting with the demand for equality before the law in the early 1970s. ALSWA has been a driving force in implementing the agenda of civil rights and Indigenous rights, and has played a major role in setting those agendas. The Legal Service has also been a catalyst for action against discriminatory practices across a range of government services, from the provision of public housing to education and health services.

This history is also about the periods of internal conflict and criticism from ALSWA’s Aboriginal constituency. At different times in the past, Aboriginal women have argued that the ALS does not meet the needs of women and children, particularly in relation to violence by men against their wives and partners and the devastating impact this has on Aboriginal women and children. During the Royal Commission into Aboriginal Deaths in Custody, Aboriginal Legal Services across the country were challenged by Aboriginal audiences that the legal services were not doing their job properly, and they let too many Aboriginal clients end up in police lockups. But challenges

from within the organisation have never been as great as the external opposition to the Aboriginal Legal Service. The police union, conservative politicians, some editors of the *West Australian* newspaper and others in the media have all at some stage called for the closure of ALSWA.⁷⁷

That still leaves the question of why such a disproportionate number of Aboriginal people continue to get caught in the criminal justice system. A comprehensive answer to that question will take a lot more work than is in this book, but I'll start with a few suggestions. Along with the enduring fact of Aboriginal poverty, the policing of disadvantaged communities has not changed enough to reverse the extreme racial disparity in arrest statistics. One of the central arguments of the report of the Royal Commission into Aboriginal Deaths in Custody was that Aboriginal people do not die in custody at a rate any greater than that of non-Aboriginal people. The problem is that Aboriginal people are massively over-represented in the criminal justice system in the first place. The report's 339 recommendations focus on reducing the widely disproportionate arrest rates and the number of Aboriginal people in custody, so as to reduce further deaths. But only a minority of the recommendations have been implemented and Western Australia's mandatory sentencing laws directly contravene the recommendations. Mandatory sentencing laws impose statutory minimum sentences for particular types of offences or for repetition of the same offence. These laws have been shown to be ineffective in reducing recidivism rates. In 2001 Professor Neil Morgan, then of the Crime Research Centre at the University of Western Australia, said of Western Australia's mandatory sentencing laws that there was 'not a skerrick of evidence that the laws have a deterrent effect'.⁷⁸ These laws also have racially discriminatory effects, increasing the over-representation of Aboriginal people in the criminal justice system, and I address this in greater detail in Chapter 11. The 'law and order' mantra that has become a feature of state politics, not just in Western Australia but across the country, does not produce laws that reduce crime or make the community safer.

The Western Australian responses that exacerbate the already extreme over-representation of Aboriginal people in jails are part of an international trend to incarcerate increasing numbers of people.

In England and Wales the prisons are overcrowded to unprecedented levels, and these countries jail more of their population than almost any other country in Europe. Professor David Wilson, the Chairman of the Commission on English Prisons, said at the launch of the Commission's report in July 2009 that excessive judicial punishment and the corresponding overcrowding in prisons 'threatens to bring the penal system to its knees'.⁷⁹ In the United States, the prison population is a staggering 2 million, with more than one in every 100 adults behind bars. The authors of the Pew Centre's 2008 report on incarceration in the United States argued that three decades of rising imprisonment rates and prison growth has imposed huge costs on governments, with no 'clear impact either on recidivism or overall crime'.⁸⁰ And these high imprisonment rates disproportionately affect what in the United States are referred to as minority communities; mostly but not restricted to African American and Hispanic communities. Although the trends varied from state to state, the national average in 2008 was for one in every 54 men over the age of 18 to be behind bars. For Hispanic/Latino men in the same age group it was one in every 36. The incarceration rate for African American men was one in 15, and for African American men in the 20 to 34 year age bracket it was one man in every nine.⁸¹

In 2008 the United States imprisoned more of its citizens than any other nation in the world, including the far more populous China.⁸² African Americans comprised 38% of the prison population while being only 13% of the overall population. In the United States Latinos are also over-represented in jail in relation to their population share (19% and 15% respectively).⁸³ Like in Australia, racial disparity in the prison population in the United State begins with racial bias in law enforcement and policing. The authors of a report from the Sentencing Project, a research and advocacy organisation based in Washington DC, wrote that racial disparity in the criminal justice system resulted from 'the dissimilar treatment of similarly situated people based on race'.⁸⁴ One example is the American phenomenon of 'driving while black' as a factor in police initiated traffic stops. Research showed that African American drivers were stopped by police at higher rates than white drivers, and had their cars searched more often with no corresponding result in higher rates of contraband that police discovered.⁸⁵ As in

Western Australia, the burgeoning prison population in the United States is not the result of a corresponding increase in crime. Primarily it is the outcome of policy choices that send more offenders to prison and keep these offenders in jail for longer periods.⁸⁶

Analyses of this terrifying picture of one in 100 Americans in jail support the argument that imprisonment is being used by governments as a response to social problems that devastate communities who are already poor and disadvantaged. Locking up more and more people is an increasingly costly strategy that worsens existing disadvantage and does not reduce crime. Ruth Gilmore Wilson investigated the historically unprecedented ‘prison building bonanza’ in California since 1982 that corresponded to an increase in incarceration rates, an increase significant for white people but ‘off the charts’ for people of colour. Gilmore Wilson showed that the crime rate was already decreasing, after peaking in 1980, before the ‘great prison roundups’ began. Historical and criminological research shows that the relationship between crime rates and imprisonment is determined by social theory and practice, and like crime itself changes over place and time. In California in 1988 laws were introduced that made gang membership a crime, and the ‘three strikes and you’re out’ legislation was passed in 1994. These new types of offences helped to fill more and more prisons with mostly African American men from Los Angeles’ poor neighbourhoods.⁸⁷ Gilmore Wilson argued that the policy underpinning this prison-filling plan was a simple one of incapacitation rather than rehabilitation:

Incapacitation doesn’t pretend to change anything about people except where they are. It is...a geographical solution that purports to solve social problems by extensively and repeatedly removing people from disordered, deindustrialized milieus and depositing them somewhere else.⁸⁸

After decades of these policies, governments across the United States are now instituting reforms to address what has become a national catastrophe. Motivated to a large degree by the budgetary crises caused by having to build and maintain more prisons to keep so many people in jail, these American reforms include amendments to laws that impose minimum mandatory sentences. State legislatures

have also introduced laws that divert drug addicts from jail and they have amended laws in relation to parole and probation so that minor violations of parole conditions do not become another way by which people are sent back to jail.⁸⁹ In 2009 nearly half of the states in the Union had reduced their prison populations and in 2011 13 states either closed or contemplated closing prisons as a result of the decline in the number of prisoners. In Michigan alone, as a result of sentencing and parole reforms, the state has closed 21 correctional facilities, including prison camps.⁹⁰

Fundamental reform of the criminal justice system in the United States is the goal of the Congressional commission of review, or blue ribbon commission, instituted in March 2009 with bipartisan support. Democrat Senator Jim Webb from Virginia introduced the National Criminal Justice Commission Bill to create the comprehensive review of the operation of the entire criminal justice system, and stated that,

America's criminal justice system has deteriorated to the point that it is a national disgrace. With five percent of the world's population, our country houses twenty-five percent of the world's prison population. Incarcerated drug offenders have soared 1,200 percent since 1980. And four times as many mentally ill people are in prisons than in mental health hospitals.⁹¹

The Bill has been enacted and the blue ribbon commission is underway in the United States. The Commission has been endorsed by, among others, the police, the National Sheriff's Association and the American Bar Association. As Senator Webb stated, citizens depend on a criminal justice system that is 'reliable and fair', but existing inequities and irregularities in the system undermine fairness.⁹²

No one argues for legislative change that would jeopardise public safety. Everyone wants to be protected from violent and dangerous offenders. But it is now irrefutable that 'tough on crime' policies, mandatory sentencing and locking up more and more people do not have any noticeable impact on crime rates. Prison is not the answer to alcohol and drug addiction and untreated mental illness. Advocates for reform of the justice system in the United States, going right up to the office of the President, argue that the system must deliver justice and

fairness while at the same time ensuring public safety. Promoting racial justice is a fundamental part of restoring confidence in the criminal justice system, and does not conflict with efforts to prevent crime.⁹³

The reforms enacted in the United States are for the most part directly applicable to Western Australia. They are models for solutions to a crisis in the administration of justice. Simply removing Aboriginal people from desperately poor urban, regional and remote communities and putting them in prison, then sending them back to the same service-starved and dysfunctional communities solves nothing. Locking up children because they cannot meet the conditions of bail, namely being placed in the care of a responsible adult, is wrong. Legislators in the United States are starting to fix their justice system and reverse incarceration rates, but in Western Australia the political will to do the same thing does not exist among our lawmakers. While people at the most senior levels of the administration of the justice system, such as Chief Justice Wayne Martin and the Inspector of Custodial Services, Professor Neil Morgan, consistently argue that the need for reform is urgent and desperate and that the over-representation of Aboriginal people in the criminal justice system is a serious failing, the government does appear not to listen. With a few exceptions, MPs of all political brands except the Greens in Western Australia support mandatory sentencing.⁹⁴

Mandatory sentencing has a disproportionate impact on Aboriginal Western Australians and has no impact on rates of re-offending, and the evidence for this has been there for well over a decade. But rather than repealing these discriminatory laws the government has introduced more. In September 2009 legislation imposing minimum mandatory sentences of six months jail on adults who assaulted police, ambulance officers or court and prison officers was enacted. This was partly in response to public outcry after a pub brawl in which policeman Matt Butcher was seriously injured.⁹⁵ The Department of Public Prosecutions failed to gain convictions for the three men accused of assaulting him (their lawyers successfully argued self-defence against the police), and about 3,000 people attended a rally on 17 March 2009 to demand tougher laws.⁹⁶ 'Law and order' is still a vote winner in Western Australia, and no amount of evidence that such policies do not reduce crime can seem to change public attitudes.

In contrast to the March 2009 rally, on 3 April 2009 during the Coronial Inquest into the death in custody of Mr Ward, only a few hundred people joined a protest rally in Perth. Before his death in custody at the age of 46, Mr Ward was an Aboriginal community leader from Warburton in the Western Desert, a renowned artist and senior in customary law. He had been chosen by his countrymen to represent the people of the Ngaanyatjarra lands in a delegation to China, and in negotiations with State and Federal governments. He was instrumental in securing the recognition of native title over the Ngaanyatjarra lands. As Peter Collins commented, Mr Ward's death was comparable to that of a head of state, and at Mr Ward's funeral his grieving family were joined by senior Aboriginal and non-Aboriginal people from across Australia.⁹⁷

Mr Ward had been arrested in the remote town of Laverton, in the north eastern Goldfields on the evening of 26 January 2008. He was charged with drink driving and spent the night in Laverton lockup. The arresting sergeant refused bail and in the morning a local Justice of the Peace (JP), Barrye Thompson, held court in the doorway of Mr Ward's cell and remanded him in custody to appear before the magistrate in Kalgoorlie on 28 January. The van from GSL Custodial Services Pty Ltd (now trading as G4S Custodial Services Pty Ltd), the prisoner transport company, was already on its way to Laverton from Kalgoorlie.⁹⁸ Prisoner transport in Western Australia was privatised in 2001 and despite complaints to the Mahoney Inquiry in 2005 that prisoners, mostly Aboriginal, were transported in conditions that were unacceptable, over long distances in vans in which the air conditioning was inadequate, nothing was done.⁹⁹ Protesters at the April 2009 rally demanded justice for Mr Ward and his family, and an end to inhumane practices in the treatment of the Aboriginal people in custody.

Back in 1975, the Civil Liberties Association had complained that prisoner transport vans were 'ovens on wheels' in the Western Australian summer.¹⁰⁰ Little had changed by 2008. Mr Ward was transported 380 kilometres in the GSL van to custody in Kalgoorlie on a day when the temperature was over 40 degrees Celsius (104 degrees Fahrenheit) and the air-conditioning was not working in the steel pod inside the van where prisoners were held. At the Coronial Inquest evidence was presented that because of the lack of ventilation in the

pod and the failure of the air-conditioning, temperatures reached over 50 degrees and possibly as high as 56 degrees Celsius (133 degrees Fahrenheit). Mr Ward had been given a 600ml bottle of water for the trip lasting about three hours and 45 minutes, and the GSL drivers did not stop to check on his welfare until they had reached Kalgoorlie. He collapsed and died of heat stroke. Despite efforts of hospital staff to resuscitate him, Mr Ward was pronounced dead soon after arriving at Kalgoorlie hospital. He had a large burn on his abdomen from when he had fallen and his skin had come into contact with the searing hot metal in the back of the van. In his report the Coroner found that Mr Ward ‘suffered a terrible death while in custody which was wholly unnecessary and avoidable’ and that his treatment once in the GSL van ‘could hardly have been worse’.¹⁰¹ The Coroner wrote,

A question which is raised by the case is how a society which would like to think of itself as being civilised, could allow a human being to be transported in such circumstances. A further question arises as to how a government department, in this case the Department of Corrective Services, could have ever allowed such a situation to arise, particularly when that department owned the prisoner transportation fleet including the vehicle in question.¹⁰²

In a *Four Corners* television program on ABC after the Coroner released his report, the Chief Executive Officer of ALSWA, Dennis Eggington, said, ‘We don’t treat animals like that...People get put in jail for treating...another creature the same as Mr Ward was treated’.¹⁰³ In an unprecedented move the Western Australian Department of Corrective Services was fined \$285,000. After charges were brought by WorkSafe in relation to breaches of the *Occupational Safety and Health Act*, the department pleaded guilty in May 2011 to failing to provide a safe environment for non-employees, thereby ‘causing the death of Mr Ward’.¹⁰⁴ G4S Custodial Services Pty Ltd also pleaded guilty and was fined \$285,000. As this book went to print one of the security guards driving the van, Graham Powell, pleaded guilty to failing to ensure the health and safety of Mr Ward and he was fined \$9,000. Magistrate Greg Benn, who worked for ALSWA as a solicitor for nearly two decades before being appointed to the bench, told Mr Powell that an

act of ‘human decency’ on his part could have prevented Mr Ward’s death. The other driver, Nina Stokoe, indicated that she would also be pleading guilty when she faces court in October 2011.¹⁰⁵ But no one will go to prison for Mr Ward’s horrifying death. When the government department responsible for the care of people in custody is itself found guilty of causing a prisoner’s death, there can be no more emphatic a warning that the criminal justice system in Western Australia is in desperate need of repair.

The history of the Aboriginal Legal Service of Western Australia is a history of efforts to make the justice system fair, to make it a system that dispenses justice rather than being characterised by inequity. The ALS started with a coalition of Aboriginal and non-Aboriginal people committed to ensuring equality before the law. The challenge to build a justice system that works has never abated. At the centre of that challenge – and it was the same when the Aboriginal Legal Service was established in the early 1970s – is the enduring assumption by too many people in Western Australia that Aboriginal people cannot expect to enjoy the same legal rights as everyone else. In confronting racial inequity in the operation of the criminal justice system and trying to eradicate it, ALSWA has had a far-reaching impact. And the story is not relentlessly depressing, even though Aboriginal incarceration rates are an ongoing scandal. There have been victories and hard won reforms. The Aboriginal Legal Service was at the forefront of the fight for Aboriginal land rights, using innovative strategies to protect and defend land rights at a time when such rights were not recognised under Western Australian or Commonwealth law. ALSWA played an important role in promoting and implementing self-determination, and was one of the first models of an Aboriginal community controlled organisation providing services to Aboriginal clients. The people I interviewed for this book spoke about the profound and positive impact the Aboriginal Legal Service has had on their communities and their lives.

Some reforms in the administration of justice in Western Australia are making a difference and ALSWA plays a leading role in these restorative justice initiatives. One example of successful reform is the Community Courts in Kalgoorlie-Boulder, similar to Circle Sentencing courts in other state jurisdictions. With the support of local

magistrates and the Justice Department, as the Attorney-General's Department was then called, ALSWA has helped to establish an alternative sentencing process for Aboriginal offenders who plead guilty to certain types of charges. All of the outcomes of this reform are positive, and I address the operation of these courts in more detail in Chapter 13. The Aboriginal Legal Service has also been at the forefront of the campaign for interpreting services in the Western Australia courts, since many Aboriginal defendants have standard English as their third or fourth language. Although the lack of interpreting services for Aboriginal defendants in court contravenes the United Nations Covenant on Civil and Political Rights, to which Australia is a signatory, it has taken decades of lobbying by the Aboriginal Legal Service for the Attorney-General's Department to even consider implementing this reform. Aboriginal language interpreting services are nowhere near as comprehensive as they need to be.

From its original position as a radical challenge to the operation of the criminal justice system, the Aboriginal Legal Service of Western Australia is now a central participant in that system and without it the work of the courts in Western Australia would grind to a halt. ALSWA is a leading voice in the issues surrounding the administration of justice over a vast geographical area, one that includes towns and settlements thousands of kilometres from urban centres. In many of these towns, the ALSWA office provides the only legal advice available. Western Australia is about the same size as Western Europe, with a city-sized population spread over 2.5 million square kilometres. Compared to metropolitan Perth, where most Western Australians live, small desert towns like Warburton, Laverton or Tom Price are like another country. The unique challenge of administering a justice system like that in Western Australia is one that involves ALSWA as much as it does the Department of the Attorney-General, since Magistrates' courts across the State are full of Aboriginal offenders. The overwhelming majority of those going through Western Australian courts outside the urban centres are ALSWA clients.

The Aboriginal Legal Service of Western Australia has had an impact far beyond its initial role of defending Aboriginal people in court, and it continues to advocate for laws and practices that defend and protect human rights, and to make the justice system fair.

ALSWA's position as one of the main and most experienced providers of legal services in Western Australia is reinforced by its key role in the justice system. The legal service has been an important training centre for the legal fraternity, and many former employees have gone on to senior roles in the judiciary. Education for Aboriginal staff has always been a priority, and ALSWA now employs the highest number of Aboriginal lawyers of any legal service in Australia. The aspirations of social justice activists, both Aboriginal and non-Aboriginal, have usually been greater than what the Aboriginal Legal Service was ever capable of achieving, but the reforms it has initiated are significant. This book is the story of an organisation as a force for justice, human rights and social change, and the people who made it happen.