ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC)

SUBMISSION TO THE STATUTORY REVIEW OF THE CRIMINAL INVESTIGATION ACT 2006 (WA)

29 March 2017

ABOUT THE ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA

ALSWA is a community based organisation which was established in 1973. ALSWA aims to empower Aboriginal peoples and advance their interests and aspirations through a comprehensive range of legal and support services throughout Western Australia. ALSWA aims to:

- Deliver a comprehensive range of culturally-matched and quality legal services to Aboriginal peoples throughout Western Australia;
- Provide leadership which contributes to participation, empowerment and recognition of Aboriginal peoples as the First Peoples of Australia;
- Ensure that Government and Aboriginal peoples address the underlying issues that contribute to disadvantage on all social indicators, and implement the relevant recommendations arising from the Royal Commission into Aboriginal Deaths in Custody; and
- Create a positive and culturally-matched work environment by implementing efficient and effective practices and administration throughout ALSWA.

ALSWA uses the law and legal system to bring about social justice for Aboriginal peoples as a whole. ALSWA develops and uses strategies in areas of legal advice, legal representation, legal education, legal research, policy development and law reform.

ALSWA is a representative body with executive officers elected by Aboriginal peoples from their local regions to speak for them on law and justice issues. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law, child protection and human rights law. Our services are available throughout Western Australia via 14 regional and remote offices and one head office in Perth.

SUBMISSION TO THE STATUTORY REVIEW OF THE CRIMINAL INVESTIGATION ACT 2006

Background

The *Criminal Investigation Act 2006* (WA) ('CIA') commenced operation on 1 July 2007 and is now the primary source of police powers in Western Australia. Section 157 of the CIA requires the Act to be reviewed 'as soon as practicable after the expiry of 5 years from its commencement'. For the purposes of this statutory review, a Review Group was formed in May 2015 (chaired by Ms Carol Conley, Senior Assistant State Counsel, State Solicitor's Office). The Issues Paper has been prepared following consultation with Western Australia Police and the Review Group is now seeking submissions from a wider range of stakeholders.

The Issues Paper states at the outset, that in examining the CIA it is 'important to strike a balance between the needs of officers who are tasked with investigating crime and the rights of those persons who may be affected by the exercise of the powers in the CIA'.[1] The Issues Paper contains 132 separate issues for discussion. In this submission, ALSWA provides a response to many, but not all, of the listed issues. This submission focuses on the areas that most significantly affect our clients.

Use of animals by police (Issue No 4–9)

Injuries to animals

The Issues Paper refers to instances where animals have been injured while being used by police in the exercise of their powers under the CIA.[2] It is further explained that, in other Western Australian legislation and in other jurisdictions, a person who assaults or obstructs an animal being used by a public officer is taken or deemed to have assaulted or obstructed the public officer.[3] This approach would potentially give rise to much higher maximum penalties than offences under the *Animal Welfare Act 2002* (WA). For example, the offence of assaulting a public officer carries a maximum penalty of 10 years' imprisonment in comparison to a maximum penalty of five years' imprisonment for the offence of animal cruelty.

Issue - 4 Should the CIA be amended to provide that if an animal being used by an officer under section 17 of the CIA is assaulted or obstructed, then the person who assaulted or obstructed the animal is taken to or deemed to have assaulted or obstructed the officer handling the animal?

ALSWA does not consider that the CIA should be amended as suggested in the Issues Paper. The examples from Queensland and the Northern Territory do not include a deeming provision in relation to the offence of assault. These provisions simply deem an act of obstructing a police animal to constitute an act of obstructing the police officer. If a person assaults a police animal they are not assaulting the police officer. In contrast, the obstruction of an animal being used by a police officer in the execution of his or her duty may also constitute an obstruction of the police officer. ALSWA strongly opposes any amendments which deem an assault of a police animal to constitute an assault of a public officer. If the penalties currently available for assaulting or harming an animal are not considered sufficient, then this should be separately considered.

Issue - 5 Should the CIA be amended to make it an offence for a person to kill, wound, injure or obstruct an animal being used to assist an officer under the CIA? If so, what should the penalty for such an offence be?

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1 Western Australian Government, *Statutory Review of the Criminal Investigation Act 2006*, Issues Paper (January 2017) 9.

2 Western Australian Government, *Statutory Review of the Criminal Investigation Act 2006*, Issues Paper (January 2017) 23.

3 It is noted that s 49A(3) of the *Prisons Act 1981* deems a prisoner to have assaulted the prison officer handling a dog; however, arguably this deeming provision is for the purposes of the *Prisons Act 1981* only (ie, it means that a prisoner may be liable to an aggravated prison offence for assaulting a prison officer rather than an offence under the *Criminal Code*).

ALSWA accepts that this is a more rational approach but makes no comment on the appropriate penalty.

Issue - 6 Should the CIA be amended to provide that if a person is convicted of killing, wounding, or injuring an animal being used to assist an officer in the exercise of powers under the CIA, then the court may order the offender to pay for the treatment, care, rehabilitation and retraining of the animal and/or to pay for buying or training its replacement?

Compensation and restitution orders are already available under the *Sentencing Act 1995* (WA). ALSWA notes that in many cases making an order to pay for treatment, care, rehabilitation and retraining of animals would be a futile exercise given the likely financial means of the vast majority of offenders. ALSWA assumes that the Western Australia Police have appropriate and sufficient insurance to cover injuries sustained to police animals that are assisting police officers in the execution of their duty.

Injuries to people

Section 17 of the CIA provides that a police officer, who is exercising a power under the Act or using force under s 16, may use an animal to assist if the animal has been trained for the purpose for which it is used and the use of the animal is reasonably necessary in the circumstances. Subject to ss 16(2) and 16(3), the officer 'must take all reasonable measures to ensure the animal does not injure any person or damage property'. Section 16(2) authorises damage to property if it is reasonably necessary to exercise a power under the CIA or to overcome any resistance; however, in regard to the use of force against a person, police are subject to the provisions of Chapter XXVI of the *Criminal Code* (WA). Section 233(1) of the *Criminal Code* provides that that is lawful for a police officer to use such force as may be reasonably necessary to prevent the escape of a person who takes flight or appears to be about to take flight in order to avoid arrest. However, a police officer is not authorised to use force that is intended or is likely to cause death or grievous bodily harm unless the person is reasonably suspected of having committed an offence punishable by life imprisonment and the person has been called on surrender before that force is used. Grievous bodily harm is defined as any bodily injury of such a nature as to endanger, or be likely to endanger life, or to cause, or be likely to cause, permanent injury to health.

ALSWA has represented a number of clients who have been seriously injured by police dogs, in particular, by dog bites. The use of dogs by police raises serious concerns for the safety of members of the public.

Issue - 7 Should the CIA be amended to provide that public officers using animals pursuant to section 17 of the CIA are protected from civil liability in respect of injury or damage caused by the animal?
Issue - 8 Should the CIA be amended to provide that public officers using animals pursuant to section 17 of the CIA are protected from criminal liability in respect of injury or damage caused by the animal?

ALSWA is of the view that any amendment to the CIA to preclude public officers from civil or criminal liability when handling a police animal is unnecessary and inappropriate, given its experiences with police dogs attacking its clients. Police dogs can inflict serious injury (and even death) and, much like tasers or handguns, their improper use should not be exempted from civil or criminal liability. Rarely will Western Australia Police be liable for injuries sustained by suspects during attacks by police dogs in the course of an arrest. Pursuant to ss 16 and 17 of the CIA and s 233 of the *Criminal Code*, police officers will not be held civilly or criminally liable for injuries sustained by police dogs if the dog has been properly trained; the use of the dog was reasonably necessary in the circumstances; the police officer took all reasonable measures to ensure the animal did not injure any person; and the force used was by the dog was not intended or likely to cause grievous bodily harm (unless the offence carries life imprisonment and the person was asked to surrender before the use of force by the dog).

Issue - 9 Should section 17 of the CIA be extended to the use of animals by public officers in the exercise of powers other than under the CIA?

Any extension of the power to use police animals beyond the CIA should be separately considered; ALSWA is unable to provide an informed response without any specific need having being identified by Western Australia Police.

Delegations

Section 12(1) of the CIA provides that a police officer may delegate the performance of a function of the officer under the Act, other than the power of delegation, to another officer. Section 12(2) provides that if an officer delegates the performance of a duty imposed on the officer to another officer, he or she must ensure that the other officer performs the duty.

Issue - 10 Should section 12 of the CIA be amended to require: a delegation to be in writing or a written record to be made of a delegation?

ALSWA considers that where an officer has a particular duty under the CIA (eg, the obligation of the officer in charge of an investigation to inform an arrested suspect of his or her rights), any delegation of that duty to another officer must be in writing.

Use and scope of force

A person exercising a power under the CIA may use any force that is reasonably necessary in the circumstances to exercise the power and overcome any resistance offered. As stated in *Elwin v Robinson*[4] 'if a police officer uses more force than is reasonably required in the circumstances to effect an arrest that use of force is unlawful'.

4 [2014] WASCA 46 at [60].

Issue - 11 Are any changes required to section 16 of the CIA in the context of the use of force to effect an arrest?

ALSWA is of the view that the current law in relation to the use of force is appropriate and no changes are required. Given the coercive nature of police powers, it is appropriate that the use of force by police is subject to a requirement that the force used is reasonably necessary in the circumstances.

Issue - 12 Should section 16 of the CIA be amended to clarify the scope of the power to use reasonable force in the same way as section 70 of the LEPR Act (NSW)?

The Issues Paper explains that in circumstances where police have the power to enter a place, it is not clear whether the current provisions of the CIA permit police to disable an alarm, camera or surveillance device; and pacify an animal used to guard the place. It is stated that:

> The issue arises because the disabling of an alarm, camera or surveillance device or the pacification of an animal used to guard the place may not be necessary to effect entry to the place but rather is effected to prevent advance warning to the occupants of entry to the place or to prevent injury to those entering the place. [5]

Section 70 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) only permits the disabling of an alarm, camera or surveillance device or the pacification of a guard dog if it is reasonably necessary to do so for the purpose of entering the premises. It is not expressly permitted for the purpose of preventing advance warning to the occupants.

ALSWA is of the view that a police officer should only be permitted to disable a specified device at premises or to pacify a guard dog, if it is reasonably necessary to do so for the purpose of entering the premises. Any extension of this power beyond what is reasonably necessary for the purpose of entry, must relate to the specific purpose of the power being exercised. For example, under s 35 of the CIA a police officer can enter a place without a warrant in order to prevent specified acts of violence or damage. Arguably, in such circumstances it may be appropriate for police to have the express power to disable an alarm, camera or surveillance device or pacify a guard dog if it is reasonably necessary to enable entry to be effected in a manner that protects the life or safety of any person or property. However, any wholesale power to disable devices or pacify guard dogs is not appropriate. If the sole purpose is to prevent advance warning to the occupants, then the proper mechanism is to make use of the power to issue a covert warrant (see discussion below). In other words, a general express power to disable alarms, cameras and security devices or pacify a dog should not be inserted into the CIA as a back-door method of expanding the power to issue covert warrants.

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5 Western Australian Government, *Statutory Review of the Criminal Investigation Act 2006*, Issues Paper (January 2017) 38.

Issue - 13 Should a provision be inserted in the CIA which gives officers the power to render a dangerous article safe or prevent it from being used (including by means of the destruction of that article)?

The Issues Paper states that it is unclear whether police have the power to render a dangerous article safe or prevent it from being used, if such an article is found during an authorised search. While it is acknowledged that the doctrine of necessity under civil law or extraordinary emergency under criminal law would be likely to provide a defence to any action taken to render a dangerous article safe, it is proposed that the CIA be amended to expressly provide for this situation. Section 70(4) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) provides that 'a person authorised to search premises pursuant to a warrant may do anything that is reasonably necessary to render safe any dangerous article found in or on the premises'. ALSWA has no objection to an amendment to the CIA to the effect that police officers have the power to do anything that is reasonably necessary to render a dangerous article safe or prevent it from being used (including by means of the destruction of that article) provided that there is a clear definition under the CIA of the term 'dangerous article'. For example, under s 3 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, a dangerous article is defined to mean:

> (a) a firearm, a spare barrel for any such firearm, or any ammunition for any such firearm, or
> (b) a prohibited weapon within the meaning of the *Weapons Prohibition Act 1998* , or
> (c) a spear gun, or
> (d) an article or device, not being such a firearm, capable of discharging by any means:
>> (i) any irritant matter in liquid, powder, gas or chemical form or any dense smoke, or
>> (ii) any substance capable of causing bodily harm, or
>
> (e) a fuse capable of use with an explosive or a detonator, or
> (f) a detonator.

Entering and searching places without warrant

Issue - 14 Should section 131 of the CIA be amended to provide a power to search persons (other than the arrested person or escapee), when exercising powers in section 133 and 134 of the CIA? If so, what limits should be imposed on the exercise of this power?

Currently, s 68 of the CIA confers a power to search people for things relevant to an offence; however, the officer must reasonably suspect that the person has in his or her possession or under his control anything relevant to an offence. The Issues Paper discusses an apparent deficiency with respect to the powers of police to search a person, other than the person who police wish to arrest, within the place or vehicle that is authorised to be searched.[6] The example provided is where an alleged offender flees with stolen property and takes refuge inside a property. The police are authorised to search the alleged offender and search the property but they are not authorised to search three other people present at the premises unless they have a reasonable suspicion that one or all of these three people have the

6 Western Australian Government, *Statutory Review of the Criminal Investigation Act 2006*, Issues Paper (January 2017) 40.

stolen items in their possession. The Issues Paper acknowledges that it would be a 'significant extension of power to allow an officer to search a person merely because they have been in contact with a person who has been arrested for a serious offence, or who is an escapee'. [7]

ALSWA opposes any extension of the power to search a person other than the person the police wish to arrest. The current law is appropriate; to enable police to search anyone who may have been in contact with a suspect is unjustifiably wide and likely to impinge on the rights of members of the community beyond what is necessary for the investigation of offences or the protection of the community. Furthermore, such an extension of the power to search is likely to further enmesh Aboriginal people in the criminal justice system as a result of their interactions with police.

Issue - 15 Should the power to search a place under section 133(2) of the CIA be extended to include any place the person is suspected of having fled prior to being arrested? If so, what limits should be imposed on the exercise of this power?

Section 133(2) of the CIA currently provides that if a person is arrested for a serious offence, a police officer may enter the place in which the person was when he or she was arrested or from which the person fled immediately before being arrested. Further, under s 133(3), the police can also enter and search a place that the person occupies, controls, or manages (if it is not a place referred to in s 133(2). It is stated in the Issues Paper that a person who the police wish to arrest for a serious offence may have entered and fled from several successive properties prior to their arrest and, in the absence of a warrant (or consent of the occupier), police can only search the abovementioned properties. ALSWA does not agree that the power to search a place without warrant should be extended to include any place the person is suspected of having fled prior to being arrested. This may potentially authorise the search without warrant of the premises of any family member, friend or colleague of an arrested suspect. Such an infringement on the right to privacy of member of the community in circumstances where there is no evidence that a search of the premises is in any way connected to the investigation of an offence is not justified. If such an amendment is progressed, it must be subject to the following conditions; first, there must be a *reasonable* suspicion that the person fled to the premises and second, a reasonable suspicion that there is something relevant to the offence located at those premises.

Arrest under s 54(2) of the *Bail Act 1981*

Issue - 16 Should the definition of "arrestable offender" in section 132 of the CIA be amended to include a person who may be arrested under s 54(2)(a) of the Bail Act.

The Issues Paper states that an accused who fails to comply with a condition imposed for a purpose mentioned in cl 2(2)(a), (b) or (e) of Part D of Schedule 1 of the *Bail Act 1982* (WA) does not commit

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7 Western Australian Government, *Statutory Review of the Criminal Investigation Act 2006*, Issues Paper (January 2017) 41.

an offence (ie, a condition imposed to ensure the accused appears in court or does not commit an offence while on bail or does not prejudice the proper conduct of the trial).[8] Such a person cannot be arrested under s 128 of the CIA nor can officers exercise the powers in s 132 of the CIA. The only power of arrest is under s 54(2)(a) of the *Bail Act*. However, there is no power under the *Bail Act* for a police officer to enter a place or vehicle for the purpose of arresting an accused under s 54(2)(a).[9] The example provided refers to a juvenile who has breached a curfew and it is explained that if the juvenile refuses to open the door of his or her premises, the police officer cannot enter the premises to arrest the juvenile.

Section 54(2)(a) of the *Bail Act* provides that a police officer may arrest an accused without warrant and bring the accused before a judicial officer. Section 54(2)(b) provides that a police officer may apply to a judicial officer for a summons or warrant on the basis that the accused has breached a condition of bail (and this would include a curfew condition). ALSWA is of the view that this power is sufficient; if the only basis for arresting a person is a failure to comply with a condition of bail (which does not amount to the commission of an offence of breaching bail), police should not be authorised to enter premises without a warrant. Section 54(2)(b) enables police to apply for a warrant and if a warrant is granted, police will have all the powers in s 132 of the CIA because the accused will fall within the definition of an 'arrestable person'.

Power to enter place to check whether a bailed person is complying with bail conditions

Issue - 17 Should the CIA be amended to allow a police officer to enter a place to check on a person's compliance with a curfew condition imposed under the Bail Act?

The Issues Paper states that police may decide to attend an accused's place to see whether he or she is complying with a curfew condition and if the accused refuses to answer the door police will not be able to satisfy themselves that the accused is complying with their curfew condition.[10] ALSWA highlights that, in practice, curfew conditions require the accused to present themselves at the front door to police and, therefore, failure to do so will amount to non-compliance.

ALSWA is gravely concerned about repeated curfew condition checks undertaken by Western Australia Police. ALSWA has represented many young people who are subject to regular police checks during the night purportedly to ensure compliance with curfew conditions and for some clients this occurs on multiple occasions in one night. This is not appropriate given the disruption to other family members including children. As observed by Amnesty International in its report on Western Australia in 2015:

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8 Pursuant to s 51 of the *Bail Act 1982* (WA) it is an offence to fail to appear in court or to breach a condition imposed for the purpose of ensuring that the accused does not endanger the safety or welfare of any person or does not interfere with witnesses.

9 Western Australian Government, *Statutory Review of the Criminal Investigation Act 2006*, Issues Paper (January 2017) 42.

10 Western Australian Government, *Statutory Review of the Criminal Investigation Act 2006*, Issues Paper (January 2017) 42.

> The application, monitoring and enforcement of curfews imposed as a condition of bail is an issue of concern. Amnesty International consistently heard of police shining a torch through the front window of young peoples' homes up to four times a night, including in the early hours of the morning, and requiring young people to present at the front door on demand. The practice is disruptive of whole families and may escalate early contact with the justice system and cause deterioration in relationships between the community and police. While curfews may be appropriate in certain circumstances, the current approach to curfews needs transparent investigation by the Western Australian Government.[11]

Authorisation to *enter* premises without warrant to check on the whereabouts of young people at any time would exacerbate the situation observed above and, in any event, is an unacceptable intrusion of privacy for the occupants of the premises. It is important to bear in mind that failure to comply with a curfew condition is not an offence. ALSWA is of the view that current powers are sufficient and no reform is required. Overall, ALSWA supports the view expressed by Amnesty that while curfews may be appropriate in certain circumstances, a transparent investigation into the use and enforcement of curfews is required.

Detention of person present at a place the subject of a search

The Issues Paper states that currently police have limited powers to detain a person occupying a place that is being searched. Section 44(2)(g)(iii) provides that a person who is in the place can be detained if the officer reasonably suspects that it is necessary to do so to protect the safety of any person, including the officer, who is in the place when the warrant is being executed. The person can be detained for no longer than is reasonably necessary. It is further stated that operational police consider it would be useful if there was a general power to detain a person present at a place that is being searched which is not conditional on the need to protect the safety of any person. The reasons provided include that it is helpful to have an occupier present during the execution of search to assist (eg, answering questions about the layout of the house); enables an occupier to be questioned about suspicious property located at the premises; provides an opportunity for the occupier to witness the execution of the search; and it facilitates any arrest of the occupier.

Issue - 23 Should the CIA be amended to allow a police officer to detain any person present at a place that is the subject of a search?
Issue- 24 What conditions should be imposed on any power to detain persons present at the place the subject of the search?
Issue -25 What rights should be conferred on a person who is detained at the place the subject of the search?
Issue - 26 Should any person who is detained be taken to be in lawful custody?
Issue - 27 Should the CIA be amended to permit an officer to request the personal details of any person detained at a place during a search, in circumstances which do not satisfy the criteria outlined in section 16 of the CIIPA?
Issue - 28 Should any further ancillary powers be conferred on officers who detain a person at a place during a search?

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11 Amnesty International, *There is Always a Brighter Future: Keeping Indigenous Kids in the Community and Out of Detention in Western Australia* (2015) 6.

In response to the above Issues No. 23–28, ALSWA is of the view that the current powers of detention are adequate. A police officer should only detain a person present at a search if reasonably necessary to protect the safety of any person or if the person is reasonably suspected of committing an offence. ALSWA highlights the comments made in *Donaldson v Broomby*[12]:

> Arrest is the deprivation of freedom. The ultimate instrument of arrest is force. The customary companions of arrest are ignominy and fear. A police power of arbitrary arrest is a negation of any true right to personal liberty. A police practice of arbitrary arrest is a hallmark of tyranny. It is plainly of critical importance to the existence and protection of personal liberty under the law that the circumstances in which a police officer may, without judicial warrant, arrest or detain an individual should be strictly confined, plainly stated and readily ascertainable.

Extending the power to detain persons as proposed, will mean that persons who happen to be present during the execution of a search will be unnecessarily detained and potentially placed under pressure to provide information to police. Such an approach would circumvent the rights of individuals who are not suspected of committing an offence. Persons present at a place being searched should have the right to voluntarily assist police if they so choose without being pressured to assist in order to avoid or be released from detention. ALSWA considers that any power to detain individuals who happen to be present at the scene of a search solely on the basis that they might be able to assist in the investigation is an extreme intrusion of the rights of members of the community.

Covert warrants

Issue - 29 Should the CIA be amended to enable the covert search of a place or a vehicle under a covert search warrant by police officers or other public officers in circumstances other than those currently permitted by the TEP Act?
Issue - 30 Who should be able to apply for a covert search warrant?
Issue - 31 Should a covert search warrant apply to both places and vehicles?
Issue - 32 To which offences should the covert search warrant apply?
Issue - 33 Who should issue the covert search warrant?
Issue – Should applications for covert search warrants be heard in the same manner as applications for covert search warrants under the TEP Act?
Issue - 35 What should the prerequisites be for the issue of a covert search warrant?
Issue - 36 What special considerations (if any) should the person issuing the covert search warrant be required to take into account when deciding whether or not to issue such a warrant?
Issue - 37 What should a covert search warrant authorise?
Issue - 38 When should a covert search warrant be able to be executed?
Issue - 39 For how long should a covert search warrant last?
Issue - 40 Should there be a requirement to make an audiovisual recording of the execution of a covert search warrant?
Issue - 41 What restrictions should apply to access to, and the publication of records relating to, covert search warrants?
Issue - 42 Should the occupier of a place or the person in charge of a vehicle be notified that the place or vehicle has been the subject of a covert search warrant? If so, when?
Issue - 43 Should there be a requirement to lodge a report relating to the execution of a covert search warrant? If so, with whom?

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12 [1982] FCA 58.

Issue - 44 Should there be a requirement for anything seized, and any photographs taken, during the execution of a covert search warrant to be taken before a Supreme Court Judge?

The Issues Paper explains that currently some warrants permit covert entry to premises for a particular purpose (eg, to install a surveillance device); however, there is no power to search these premises. Nonetheless, if the police officer executing such a warrant observes an article relevant to the commission of the offence this may provide grounds for the issue of a subsequent search warrant. The Issues Paper notes that the use of covert search warrants is not confined to terrorism in some other Australian jurisdictions; they extend to serious offences such a homicide, organised crime and criminal paedophilia and other offences where the maximum penalty is life imprisonment.[13]

In response to Issues No. 29–44 above, ALSWA does not support the extension of the power to issue covert search warrants beyond the current provisions in the *Terrorism (Extraordinary Powers) Act 2005* (WA). It is an extreme power for the State to be able to enter and search a person's premises without their knowledge. The Issues Paper has not provided any evidence to justify why covert search warrants should be available for other types of offences or why the existing powers are insufficient. Nevertheless, if the CIA is to be amended to provide for the greater use of covert warrants ALSWA is of the view that the following conditions are required as an absolute minimum:

- a covert warrant should only be issued by a Supreme Court judge;
- the offences for which a covert warrant should be clearly specified rather than simply categorised based on the maximum penalty available (there should be a clear evidenced-based link between the offences selected and the need for covert warrants); and
- if a covert warrant is executed and no charges are laid within 12 months, the person subject to the covert warrant should be notified of the existence and execution of the covert warrant.

Body worn cameras

Issue - 45 Should a provision be inserted into the CIA to facilitate the use of body worn cameras by police officers?

A trial of body worn video cameras commenced in May 2016 in Bunbury and Perth and the trial will review the outcomes where cameras are used compared to circumstances when they are not used.[14] The stated outcomes to be examined are whether the use of body worn cameras:

- Increase early guilty pleas.
- Provide frontline efficiencies in records of interview.
- Reduce the need for use of force by police officers.
- Reduce complaints/false reports against the police.

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13 Western Australian Government, *Statutory Review of the Criminal Investigation Act 2006*, Issues Paper (January 2017) 65–66.

14 https://www.police.wa.gov.au/About-Us/News/Body-Worn-Video-trial.

- Reduce assaults on officers.
- Reduce fear of crime in local communities and increase public reassurance.
- Improve police legitimacy.
- Improve behaviours for police and the community.

The overriding view of ALSWA is that legislative reform in relation to body worn cameras should only occur after the results of the trial are known and made public (in order to enable informed consultation).

Having said that, ALSWA is concerned about the proposed draft provision because it provides police officers with complete discretion to turn the camera on and off as they see fit. The draft provision states that 'an officer may use a body-worn camera to record images or sounds or to record both images and sounds while the officer is performing the functions of his or her office whether under this Act or any other law'. ALSWA believes that any legislative provision authorising the use of body worn cameras must state that the camera must be turned on at all times when dealing with a member of the public. For example, if police officer is driving around in a vehicle there may be no need for the body worn camera to be turned on but if the officer exits the vehicle to speak to a member of the public or is engaged in a pursuit then the camera should be turned on and stay on for entire incident. Furthermore, the proposed draft provision does not require police to inform the person being recorded that they are being recorded by a body worn camera. It simply provides that 'if reasonably practicable, an officer must inform any person being recorded that the officer is wearing a body-worn camera and that the person is being recorded'. ALSWA considers that body worn cameras should only be used if the person being recorded has been first informed that they are about to be recorded, in other words there must be mandatory disclosure to the person being recorded. Finally, any legislative provision must include strict rules about the storage of recordings, videos and photos including a requirement that recordings must not be erased and must be disclosed to the person who has been recorded, if requested pursuant to the prosecution disclosure guidelines under the *Criminal Procedure Act 2006* (WA).

Confidential information

Issue - 51 Should there be a provision in the CIA which permits a person to disclose confidential information to a police officer?
Issue - 52 What types of confidential information should or should not be able to be disclosed?
Issue - 53 What forms of information should be able to be disclosed to a police officer?
Issue - 54 Once a police officer is in possession of confidential information, what restrictions (if any) should there be on the use, recording and disclosure of the information by police officers?
Issue - 55 What protections should be available to a person who discloses confidential information to the WA Police?

The Issues Paper observes that there are statutory duties of confidentiality, contractual duties and duties in equity. Further, breaches of confidentiality may be permitted with consent, where required or permitted by law or where disclosure is in the public interest. It is also noted that the ability of Western

Australia Police to perform their functions of preventing and investigating criminal offences depends to a great extent on the provision of information to police officers.[15]

As observed in the Issues Paper, there are a number of statutory provisions permitting or requiring disclosure of confidential information to a police officer. It is also commented that these provisions are ad hoc. ALSWA does not agree; the current provisions have been enacted after consideration of competing interests. For example, s 129 of the *Children and Community Services Act 2004* (WA) provides protection from liability for persons providing certain information to the CEO of the Department for Child Protection and Family Support. Clearly this provision balances the need to maintain confidentiality with the best interests of children. ALSWA does not consider that there is any need to extend existing provisions. Furthermore, there are adequate powers to compel witnesses to attend court and provide evidence and documents.

Data access orders

Issue - 66 Should the definition of "serious offence" in section 57 of the CIA be amended to accommodate domestic violence related offences through including "prescribed offences"?

ALSWA does not agree that domestic violence related offences should be incorporated into the definition of 'serious offence' by use of 'prescribed offences'. Any additional offences should be expressly inserted into s 57 otherwise new offences can be added via regulations without parliamentary scrutiny.

Issue - 67 Should data access orders be able to be issued by senior police officers in urgent situations?

ALSWA considers that data access orders should continue to be issued by magistrates given the intrusion into privacy. Any issue with urgency could be accommodated by providing resources to enable magistrates to be on call afterhours for the purpose of issuing urgent data access orders.

Definition of responsible person

Issue - 75 Should paragraph (d) of the definition of "responsible person" in section 73 of the CIA be amended so that it refers to a plenary guardian of the incapable person, rather than a guardian?

ALSWA supports this proposed amendment in order to ensure that a limited guardian does not have the power to consent to a forensic procedure.

Rights of persons voluntarily assisting police and arrested persons and duties on officers

15 Western Australian Government, *Statutory Review of the Criminal Investigation Act 2006*, Issues Paper (January 2017) 100.

Division 5 of the CIA sets out the rights of 'arrested people' and 'arrested suspects'. In contrast, s 28 deals with the rights of people who are voluntarily assisting police and who are not in lawful custody. However, s 28 does not distinguish between a suspect who is voluntarily assisting police and a person who is not suspected of committing an offence (such as a witness or victim). ALSWA's approach below is underpinned by the strong view that the CIA should recognise and accommodate the following categories of persons:

1. Persons voluntarily assisting the police who are not suspected of committing an offence (eg, witness or victim) (person voluntarily assisting the police).
2. A person who is suspected of having committed an offence (suspect).
3. Suspect who has been arrested (arrested suspect).
4. Person who has been arrested but who is not suspected of having committed an offence (eg, person arrested under a warrant of commitment for unpaid fines) (arrested person)

ALSWA highlights that Western Australia Police often use the term 'person of interest'.[16] This term is problematic because it potentially includes both witnesses and suspects. ALSWA does not consider that the term 'person of interest' should be used in the CIA.

For the purpose of Div 5 of the CIA, a 'suspect' should be defined as a person suspected of having committed an offence, whether or not he or she has been arrested or charged with the offence.[17] In this regard, it is important to emphasise the observations of Hall J in *The State of Western Australia v Gibson*[18] that the 'question of whether a person is suspected of having committed an offence is not, however, some act of formal decision making – it is a question of fact'. Therefore, which of the four categories above applies in any given situation is dependent on the actual circumstances at the time. A police officer cannot label a person as a person voluntarily assisting police when in fact they are a suspect in order to circumvent the requirements of the law.

Issue - 76 Are there any other rights that should be conferred on a person who is voluntarily assisting an officer?

Issue - 77 Should section 28 be clarified to make it clear: a) that the section only applies to a suspect who is voluntarily assisting police; or b) what additional rights apply when a suspect is voluntarily assisting police (for example, the rights in sections 137 and 138)?

As noted above, ALSWA is of the view that the rights of persons voluntarily assisting police should be separately delineated from the rights of suspects (whether arrested or not). Section 28 currently

16 A person of interest is not defined under the CIA. The COPS Manual states that police officers are not to use the term 'suspect' in the media to describe a person, except where the term is used as it applies within the CIA. It is further stated that 'persons who come into the scope of an investigation are to be referred to publicly as 'persons of interest'' (See COPS Manual AD-40.27).

17 This is the same definition as applies for Part 11 of the CIA see s 115. ALSWA notes that the power to arrest under s 128 is invoked if the police officer reasonably suspects that the person has committed, is committing or is just about to commit an offence.

18 [2014] WASC 240 at [41].

provides that a person who is voluntarily assisting police must be informed that he or she is not under arrest; that he or she does not have to accompany the officer and that, if he or she accompanies the officer concerned, he or she is free to leave at any time (unless subsequently under arrest). ALSWA submits that s 28 should be amended to provide that it does not apply to a person who is suspected of an offence (irrespective of whether that suspicion is reasonable or otherwise). As discussed below, ALSWA is strongly of the view that the rights of arrested suspects contained in ss 137 and 138 should also apply (with appropriate modification) to suspects who have not been (and who cannot be) arrested.

Issue - 78 Are there any other rights that should be conferred on an arrested person or an arrested suspect?

Section 137 provides for the rights of arrested persons and s 138 provides for the rights of arrested suspects. The Issues Paper refers to other rights contained in legislative provisions in other jurisdictions, namely:

- The right to be treated with humanity and respect for human dignity.
- The right of non-Australian nationals to communicate with an embassy or consular officer.
- The right to be provided with reasonable refreshments and reasonable access to toilets.
- The right to be told of any requests for information of his or her whereabouts by relatives, friends or legal representatives.
- The right to be provided with facilities to wash, shower, bathe and if appropriate to shave.
- The right to rest.[19]

ALSWA highlights that under the New South Wales legislation, reasonable facilities must be provided to enable an arrested person or protected suspect to be able to communicate with a lawyer or other person and, so far as is practicable, where the communication will not be overheard.

ALSWA is of the view that the following additional rights for suspects and arrested suspects should be included in the CIA:

- The right to reasonable refreshments; reasonable access to toilets and facilities to wash; and a reasonable opportunity to rest.
- The right to confidential communications with a lawyer.

Furthermore, in recognition of their special vulnerability and the presumption of lack of capacity under s 29 of the *Criminal Code*,[20] suspects aged less than 14 years should have the right to communicate

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19 Western Australian Government, *Statutory Review of the Criminal Investigation Act 2006*, Issues Paper (January 2017) 146.

20 Section 29 of the *Criminal Code* (WA) provides that a 'person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission'.

with a lawyer in person. A right to communicate with a lawyer solely by access to telephone is unreasonable and inappropriate for young people in this age category.

Issue - 79 Should the rights in section 138 be expanded to include the common law rights relating to the principles of voluntariness and fairness?

ALSWA is of the view that the common law rights in relation to the principles of voluntariness and fairness are appropriate. Any attempt to codify the factors to be taken into account when determining whether an admission was made voluntarily or whether its admission into evidence would be unfair is not supported. As assessment of voluntariness and fairness requires consideration of the individual and specific circumstances in any given case and ALSWA supports the flexibility of the common law approach.

Issue - 80 Should some of the rights in sections 137 and 138 be detached from applying as a minimum requirement of arrest and instead attach to Part 11 of the CIA as pre-requisites for the interview of a suspect? If so, which rights should apply post arrest and which rights should apply pre-interview? Which rights should be continuing rights?

All of the rights contained in ss 137 and 138 should apply from the time a suspect is arrested or voluntarily accompanies police and these rights should be continuing rights. Obviously, some of the rights will only apply to particular categories of person (eg, the right to be informed of the reason for arrest only applies to an arrested suspect and a right to be informed of the offence for which the suspect is suspected of having committing only applies to suspects).

Issue - 81 Should a new section be inserted into the CIA which confers rights on suspects or persons of interest (but not arrested suspects) who are voluntarily assisting police with their investigations?
Issue - 82 What rights should be conferred on a suspect or person of interest who is voluntarily assisting police with their investigation?

As stated in the Issues Paper, there is nothing in Part 11 of the CIA that discusses the rights of a suspect who is voluntarily assisting police. It is suggested that a suspect who is voluntarily assisting police should be afforded the following rights:

- Rights in s 28 of the CIA
- Right to necessary medical treatment
- Right to reasonable degree of privacy from mass media
- Right to communicate with a friend or relative
- Right to be assisted by an interpreter
- Right to be informed of the offence that he or she is suspected of having committed
- Right to be cautioned
- Right to reasonable opportunity to communicate with lawyer
- Right not to be interviewed until interpreter provided

It is also stated that a person of interest should have the same rights other than the right to be informed of the offence that he or she is suspected of having committed (and instead this should be the right to be informed of the matter in relation to which his or her assistance is sought).

ALSWA agrees with that a suspect who is voluntarily assisting police (as distinct from an arrested suspect) should be afforded the rights listed above. As explained above, ALSWA is of the view that persons voluntarily assisting the police who are not suspected of being involved in the offence should be afforded the rights in s 28 of the CIA. ALSWA prefers an approach that avoids the use of the term 'person of interest'. In summary, the full suite of rights should apply to suspects irrespective of the extent of the suspicion (in other words, for some suspects the police officer may hold only a vague suspicion whereas for others the police officer may hold a reasonable suspicion that would enliven the power to arrest.

Issue - 83 Does provision need to be made for the arrest of a suspect, or a person of interest who becomes a suspect, who is voluntarily assisting police, but subsequently withdraws their assistance and cannot be arrested under section 128?

If a person is voluntarily assisting police and they choose to leave or withdraw their assistance, that person should only be arrested if the grounds for arrest under s 128 are made out. Otherwise, the right to leave at any time as set out in s 28 of the CIA would be rendered meaningless. Failure or refusal to cooperate with police can never be grounds for an arrest.

Issue - 84 Are there any other circumstances in which an officer should be able to refuse an arrested suspect the right to communicate with another person?

Section 138(4) currently provides that:

> An officer may refuse an arrested suspect his or her right to communicate or to attempt to communicate with a person if the officer reasonably suspects that the communication would result in –
>
> (a) an accomplice taking steps to avoid being charged; or
>
> (b) evidence being concealed, disturbed or fabricated; or
>
> (c) a person's safety being endangered.

The suggestion in the Issues Paper is suggested that additional circumstances could include:

- An accomplice escaping or taking steps to avoid being arrested/apprehended
- An accomplice or accessory being present during questioning
- Hindering the recovery of any person or property concerned in the offence
- Evidence being lost
- A witness being intimidated

ALSWA suggests that s 138(4) be amended to provide:

> An officer may refuse an arrested suspect his or her right to communicate or to attempt to communicate with a person if the officer reasonably believes that the communication would result in –

(a) an accomplice taking steps to avoid being arrested or charged; or
(b) evidence being lost, concealed, disturbed or fabricated; or
(c) a person's safety being endangered; or
(d) an accomplice or accessory being present during questioning.

ALSWA considers that refusing an arrest suspect his or her right to communicate (especially with a lawyer) should not be taken lightly and it has therefore focussed on the most pressing reasons why such a refusal may be justified. ALSWA has also changed 'reasonably suspects' to 'reasonably believes' in light of the serious consequences of such a refusal.

Issue - 85 Should section 10 of the CIA be amended to clarify the duty imposed on officers to use interpreters, qualified persons or other means to inform a person of their rights?

Section 10 of the CIA provides that:

> If under this Act an officer is required to inform a person about any matter and the person is for any reason unable to understand or communicate in spoken English sufficiently, the officer must, if it is practicable to do so in the circumstances, use an interpreter or other qualified person or other means to inform the person about the matter.

ALSWA highlights that where a person is entitled to be informed about a matter under the CIA (eg, informed of his or her rights), it is imperative that the person understands the information. ALSWA submits that s 10 be amended to ensure that the right to an interpreter or qualified person is exhausted before consideration is given to 'other means'. The current wording suggests that the use of an interpreter or other qualified person is of equal value to the use of 'other means'.

ALSWA also notes that s 128 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) provides that an interpreter must be provided unless the custody manager believes on reasonable grounds that the difficulty of obtaining an interpreter makes compliance not reasonably practicable.

ALSWA submits that section 10 be amended to ensure that police first consider the use of an interpreter or other qualified person and only if it is not *reasonably* practicable to obtain the services of an interpreter or other qualified person within a reasonable period, can 'other means' be used.

ALSWA is also strongly of the view that the State government should provide sufficient resources to establish a statewide Aboriginal languages interpreter service based on the Aboriginal Interpreter Service in the Northern Territory so that Aboriginal people have effective access to suitably qualified and trained interpreters at all stages of their interaction with police (and throughout the justice system).

Issue - 86 Should section 138(d) of the CIA be amended to clarify the right of an arrested suspect to not be interviewed until the services of an interpreter or other qualified person are available?

Section 138(2)(d) provides that an arrested suspect is entitled, if he or she is for any reason unable to understand or communicate in spoken English sufficiently, not to be interviewed until the services of an

interpreter or other qualified person are available. ALSWA strongly believes that a suspect who has not been arrested should also have a right to an interpreter.

For the right to an interpreter to be effective in practice, it is vital that police receive proper training and have access to appropriate resources to ensure that they are able to identify whether a suspect is unable to understand or communicate in spoken English sufficiently. In this regard, ALSWA notes that the Corruption and Crime Commission's *Report on Operation Aviemore* recommended the development of ongoing training and refresher courses in dealing with Aboriginal people with particular emphasis on language and culture.[21] Furthermore, in order to ensure that the ineptitude of individual police does not deprive suspects of their right to an interpreter in practice, the CIA should be amended to provide that a suspect has the right to request the services of an interpreter. This right should be in addition to the current right not to be interviewed until the services of an interpreter are available where the suspect is unable to understand or communicate in spoken English sufficiently. This recommended reform will maximise access to an interpreter because it will cover the situation where a police officer does not recognise English language incapacity as well as where the suspect's English capacity is so low that he or she is unable to request an interpreter.

Right to silence

Issue - 87 Should the Western Australian police caution be amended to reflect the United Kingdom caution or the special caution in New South Wales?

The Issues Paper discusses the modification of the traditional right to silence in the United Kingdom and in New South Wales. Section 89A of the *Evidence Act 1995* (NSW) provides that (for a serious indictable offence) an unfavourable inference may be drawn from the failure of an accused to mention a fact while being questioned by police, that he or she could reasonably have been expected to mention in the circumstances existing at the time, and that is later relied upon at trial. However, this provision does not apply unless the special caution was administered *in the presence* of an Australian legal practitioner who was acting for the accused at that time and the accused must have been given a reasonable opportunity to consult with the lawyer about the general nature and effect of special cautions in the absence of the investigating officer.[22] Furthermore, the special caution provisions do not apply to an accused under the age of 18 years or to an accused who is incapable of understanding the general nature and effect of a special caution.

ALSWA is strongly opposed to any legislative reform modelled on the United Kingdom or New South Wales special caution provisions. The right to silence is a fundamental tenet of the justice system and recognised under Article 14(3)(g) of the *International Covenant on Civil and Political Rights* (which provides a right to an accused 'not to be completed to testify against himself or to confess guilt'). The Law Reform Commission of Western Australia (LRCWA) observed in its *Review of the Criminal and*

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21 Corruption and Crime Commission, *Report on Operation Aviemore: Major Crime Squad Investigation into the Unlawful Killing of Mr Joshua Wameke* (2015) Recommendation Three.

22 Western Australian Government, *Statutory Review of the Criminal Investigation Act 2006*, Issues Paper (January 2017) 159.

Civil Justice System in Western Australia, that the basis for the 'right to silence and the privilege against self-incrimination is not the protection of the guilty but the notion that the prosecution must prove its case against the defendant beyond reasonable doubt'.[23] The LRCWA also observed that there are good reasons for a suspect to refuse to answer police questions that are consistent with innocence. These include that the suspect may be unclear about the nature of the offence and applicable legal concepts; that silence may reflect a desire or fear to protect others; that suspects may be confused, embarrassed, or waiting for legal advice; and that suspects may be biased against police due to past unsatisfactory relations.[24] Other reasons include the particular vulnerability of many Aboriginal suspects in police custody stemming from language and cultural barriers as well as the existence of physical disability, cognitive impairment or intellectual disability.

The LRCWA recommended that the existing prohibition on any adverse comment at trial concerning an accused's exercise of the right to silence under police questioning should be maintained.[25] The experience in New South Wales indicates that any change to the current law in this regard is fraught with difficulties. The requirement for the special caution to be administered in the *physical* presence of a lawyer acting for the suspect is not practically achievable in Western Australia given the vast geographical size of Western Australia, the number and conditions of police stations across the state, and the current resourcing constraints of ALSWA and Legal Aid WA. Without considerable additional resources, ALSWA would not be in a position to provide lawyers to attend police stations whenever an Aboriginal person is questioned by police for a serious offence. In any event, even if such resources were provided, the attendance of a lawyer and the provision of advice potentially give rise to a conflict of interest. For example, if an ALSWA lawyer were required to give evidence for the prosecution at trial (eg, in relation to the admission of a record of interview), ALSWA would be unable to represent the accused. Legal Aid and ALS in New South Wales have stated that their lawyers will not provide advice on the effect of silence provisions at the time of questioning because of the risk of conflict of interest.[26]

Furthermore, it is possible that the provision of advice in person at a police station would be considered against the client's best interests because of the potential for adverse comment to be made at trial, following the provision of that advice.[27] Any attempt to circumvent these issues by providing that legal advice concerning a special caution could be provided over the telephone would result in additional difficulties. As observed by Dixon and Cowdery,

> [A]s a means of providing legal advice, use of the telephone is very problematic. There are often problems of privacy and confidentiality. More fundamentally, lawyers need to see (and be seen by) their clients in order to assess their condition and to establish relations of trust and confidence. [28]

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23 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Final Report (September 1999) 201.
24 Ibid 203.
25 Ibid Recommendation 251.
26 Dixon D & Cowdery N, 'Silence Rights' (2013) 17(1) *Australian Indigenous Law* Review 23, 28.
27 Dixon D & Cowdery N, 'Silence Rights' (2013) 17(1) *Australian Indigenous Law* Review 23, 29.
28 Dixon D & Cowdery N, 'Silence Rights' (2013) 17(1) *Australian Indigenous Law* Review 23, 29.

If ALSWA lawyers were to provide advice to its clients about the general nature and effects of a special caution by telephone, major problems in understanding would arise. These issues are magnified exponentially with Aboriginal people (especially in the absence of interpreters). As noted above, the adverse comments may be made at trial if there was a failure of an accused to mention a fact while being questioned by police that he or she could reasonably have been expected to mention *in the circumstances existing at the time*. If those circumstances include the receipt of legal advice over the telephone by a vulnerable and disadvantaged Aboriginal suspect, then the court may determine that the failure to mention the relevant fact was reasonable in those circumstances. In this regard, it has been observed that research conducted in the United Kingdom shows that the level of understanding of the special caution by suspects (and members of the general public) is very low; even under conditions designed to maximise understanding, 'only 10% of suspects and 13% of the general population understood the caution fully'. [29]

ALSWA emphasises that difficulties experienced in understanding the special caution will be compounded for Aboriginal people. As Forster J stated in relation to the standard caution (which is simpler to comprehend) in *R v Anunga*,

> Some Aboriginal people find the standard caution quite bewildering, even if they understand that they do not have to answer questions, because, if they do not have to answer questions, they why are the questions being asked? [30]

ALSWA agrees with the observation of Dixon and Cowdery:

> There is no demonstrated need for the curtailment of the right to silence. On the available evidence, there is no reason to believe that it will achieve its stated objectives. On the contrary, the experience of the English legal system is that this legislation is likely to create another 'notorious minefield' for the courts. Such legislative blundering is likely to have multiple undesirable side-effects. One of these may well be harm to Indigenous suspects and to adversely impact the ALS whose task is to advise and defend Aboriginal and Torres Strait Islander suspects. [31]

ALSWA is strongly opposed to any watering down of the current right to silence in Western Australia.

Finally, as a related issue, ALSWA is of the view that the CIA should provide that if a suspect's legal representative has formally advised police that his or her client wishes to exercise his or her right to silence, no further questioning of the suspect should take place (this should include a prohibition on conducting an interview with the Aboriginal suspect at all). The difficulties for Aboriginal people in terms of understanding, historical mistrust and fear of police, language and cultural barriers means that any further questioning will undermine the person's understanding of his or her right to silence.

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29 Dixon D & Cowdery N, 'Silence Rights' (2013) 17(1) *Australian Indigenous Law* Review 23, 30.
30 As cited in Dixon D & Cowdery N, 'Silence Rights' (2013) 17(1) *Australian Indigenous Law* Review 23, 30.
31 Dixon D & Cowdery N, 'Silence Rights' (2013) 17(1) *Australian Indigenous Law* Review 23, 34.

In *The State of Western Australia v Gibson*[32], the accused was advised that he had a right to speak to a lawyer and he exercised that right by speaking to an ALSWA lawyer over the telephone. The lawyer told the police that the accused did not wish to answer questions but despite that advice, the police continued with the interview.

> Whilst it is always possible that a suspect may not wish to follow their lawyer's advice, in this case the lawyer was no merely advising her client not to answer questions, she was telling the police that it was his wish not to do so. Given that it was readily apparent that the accused was a shy and reserved young man whose first language was not English and who was relying significantly upon Mr Butler to act as a translator, there were obviously good reasons not to continue further with the interview. To continue would raise the very real question of whether the accused's will was being overborne.[33]

Hall J reasons for excluding the interviews with the accused included that:

> The interview continued after the police had been informed by the accused's lawyer that he did not wish to answer any further questions. It was inappropriate for the police to continue with the interview in these circumstances.[34]

This reasoning is consistent with the Anunga Rules which include the well accepted proposition that if an Aboriginal person seeks legal assistance, reasonable steps should be taken to obtain such assistance and if an Aboriginal person 'states he does not wish to answer further questions or any questions the interrogation should not continue'.[35]

Interview friends

Issue - 88 Should section 138 of the CIA be amended to require the officer in charge of the investigation to afford the arrested suspect his or her right to communicate with a relative or friend and a legal practitioner, and to set out how those rights are to be facilitated?

Currently, s 138(2)(c) provides that an arrested suspect is entitled to a reasonable opportunity to communicate or to attempt to communicate with a legal practitioner. Likewise, s 137(3)(c) provides that an arrested person is entitled to a reasonable opportunity to communicate or attempt to communicate with a relative or friend to inform that person of his or her whereabouts. The Issues Paper comments that there is no duty on the police to afford the suspect his or her rights under s 137(3)(c) or s 138(2)(c).[36]

ALSWA agrees that the CIA should be amended to provide that police have a positive duty to provide reasonable facilities to enable a suspect, arrested suspect or arrested person to exercise their right to communicate with a lawyer, relative or friend. The reasonable facilities should specify as a minimum the provision of a telephone and contact details for relevant legal practitioners. In all cases where a person does not nominate their own lawyer, the contact details for Legal Aid WA and ALSWA must be provided to the person. Furthermore, the CIA should state (as is the case in other jurisdictions) that the

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32 [2014] WASC 241.
33 Ibid [134].
34 Ibid [180].
35 See COPS Manual
36 Western Australian Government, *Statutory Review of the Criminal Investigation Act 2006*, Issues Paper (January 2017) 162.

police must allow the communication to take place in circumstances where that communication cannot be overheard, unless it is not reasonably practicable. As noted above, for young people under the age of 14 years the communication must be in person.

Issue -89 Should a provision be inserted into the CIA which sets out when an interview friend may be required and the role of the interview friend?

The CIA does not include any provision about the use of interview friends, although the COPS Manual includes guidelines for questioning Aboriginal people, which include the use of interview friends. As observed by Hall J in *The State of Western Australia v Gibson*[37] an interview friend should be 'a person in whom the accused has confidence, who can speak the suspect's language and who is independent from police... The friend should not play a role of assisting the police in the interrogation by urging or directing the suspect to answer questions'.

ALSWA submits that the CIA should include a specific provision for Aboriginal people modelled on the provisions under ss 23H–23L of the *Crimes Act 1914* (Cth).

The most pertinent parts of the regime under the *Crimes Act 1914* (Cth) are:

- if the person who is to be questioned is an Aboriginal or Torres Strait Islander person, then unless the person has arranged for a lawyer to be present, the police must immediately inform the person that the ALS will be notified that the person is under arrest and must notify the ALS accordingly;[38]
- the police *must* not question the person unless an interview friend is present while the person is being questioned and the person has had an opportunity to communicate confidentially with the interview friend before the questioning commences unless the person has expressly and voluntarily waived the right to have an interview friend present;
- the person can choose his or her own interview friend unless he or she expressly waives that right; has not exercised the right within a reasonable period or the chosen interview friend does not arrive within two hours;
- if an interview friend is not chosen, the police must choose a representative of an Aboriginal legal aid organisation or a person whose name is included in specified list;

ALSWA submits that the CIA should provide that the questioning of an Aboriginal suspect should not occur in the absence of an appropriate interview friend (with relevant exclusions, such as the suspect waives the right to an interview friend, where necessary).

37 [2014] WASC 240, [148].

38 The New South Wales regime extends beyond a person who is intended to be questioned and applies to an Aboriginal or Torres Strait Islander person who has been detained.

In addition, ALSWA notes that the legislation in New South Wales places on mandatory requirement on the police to notify the ALS whenever an Aboriginal person is detained in police custody for an offence. ALSWA strongly urges consideration of enacting similar provisions in Western Australia along with sufficient funding to enable ALSWA to operate a CNS.[39] ALSWA strongly supports the New South Wales model for the following reasons:

- The applicable legislation *requires* police to notify ALS every time an Aboriginal person is in police custody for an offence. Notification is *immediate* and is not dependent on the person in custody requesting the notification. In terms of securing a safe custodial environment and reducing Aboriginal deaths in police custody, it is not effective to simply wait for a detained person to seek contact with ALS because Aboriginal people detained in custody may be intoxicated; suffering from mental illness or cognitive impairment; physically unwell; unable to effectively understand English; and/or under stress.

- Appropriately trained lawyers operate the ALS (NSW/ACT) CNS, 24 hours per day seven days per week. It is a combined legal/welfare model where the lawyer on duty is able to provide *early* legal advice and ensure the protection of fundamental legal rights as well as checking on the person's wellbeing. ALSWA's consultations with staff from ALS (NSW/ACT) indicates that Aboriginal people in police custody frequently disclose medical issues, mental health problems and welfare concerns to the lawyer and these issues had previously not been disclosed to police. The trust and confidence that the Aboriginal community places in Aboriginal Legal Services should not be underestimated. Nor should the level of distrust and suspicion of police by Aboriginal people be overlooked. Moreover, if the on-call lawyer can relieve some of the stress experienced by Aboriginal people in police custody (by informing them of their rights and what is likely to happen to them in the short term; and by ensuring that any immediate family, medical or welfare concerns are addressed) the outcomes for both the person detained and police are highly likely to be more favourable.

- The ALS (NSW/ACT) CNS has been proven to be effective. It was established in 2000 and since that time there have been no deaths in *police* custody for situations covered by the mandatory scheme. Sadly, a 36-year-old Aboriginal woman died in police custody in mid-2016; however, she has been taken into police custody due to intoxication (rather than for an offence) and the ALS (NSW/ACT) CNS had not been notified.

Following the inquest into the tragic death of Ms Dhu when she was in the custody of police in 2014, the state coroner recommended that 'the State Government give consideration as to whether a state-wide 24 hours per day, seven days per week Custody Notification Service based upon the New South

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39 The relevant legislation in New South Wales is Div 3 of the *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW).

Wales model ought to be established in Western Australia, to operate alongside and complement the Aboriginal Visitors Scheme.[40]

ALSWA believes that, in addition to the provision of sufficient funding to employ lawyers and provide mental health and suicide awareness training, the most effective way to provide for a CNS in this state is to amend the *Criminal Investigation Act 2006* (WA) to ensure that police are mandated to notify ALSWA every time an Aboriginal person is taken into police custody (whatever the reason).

Recording the giving of information re rights under the CIA

Issue - 90 Should the CIA be amended to require the officer informing the person of his or her rights to make an audiovisual recording, if practicable, of the giving of the information about the rights and the responses of the person (if any)?

ALSWA submits that the CIA should be amended to require the officer informing the person of his or her rights to make an audio-visual recording, if practicable, of the giving of the information and the responses provided (if any). Furthermore, where an audio-visual recording is not reasonably practicable, the provision of information about rights should be recorded in writing and signed by the person.

Arrest and detention

Issue - 91 Should section 128(2) of the CIA be amended to apply to all offences, and section 128(3) of the CIA deleted, with the COP issuing an instruction regarding the appropriate use of the arrest power for lesser offences?

Section 128 of the CIA sets out the power to arrest; a police officer may arrest a person for a serious offence if the officer reasonably suspects the person has committed, is committing, or is just about to commit the offence. For non-serious offences, there are additional specified conditions that must exist over and above the reasonable suspicion that the person has committed, is committing, or is just about to commit the offence. ALSWA considers that this distinction between the power to arrest for serious offences and the power to arrest for less serious offences should be maintained; arrest should be used as a last resort and is not justified for less serious offences (unless there is an additional justification as currently set out in s 128(3). Moreover, the criteria for the power to arrest for non-serious offences should not be included in COP instructions; a legislative distinction is imperative to ensure that the power to arrest is not used oppressively, unnecessarily or too frequently.

Issue - 92 In the alternative, should the definition of "serious offence" in section 128(1) of the CIA be amended to include: a) a paragraph which states that a serious offence means, inter alia, an offence which "is prescribed for the purposes of this section"; or b) offences that are similar in nature to

40 State Coroner, Inquest into the Death of Ms Dhu (16 December 2016) Recommendation 10.

breaching a restraining order, committing an offence involving family or domestic violence, or breaching an order given at an out of control gathering?

ALSWA does not support the suggestion of extending the definition of a serious offence in s 128(1) of the CIA by adding that a serious offence includes an offence that is prescribed for the purposes of s 128. ALSWA is of the view that Parliament should determine which additional offences are to be included within the definition of serious offence for the purpose of the power of arrest rather than such a determination being made via regulations.

Issue - 94 Does section 128(3)(b) of the CIA need to be amended to provide for additional circumstances in which the power of arrest in that subsection may be exercised? If so, what circumstances?

The Issues Paper refers to legislative provisions in other jurisdictions that stipulate additional circumstances in which the power of arrest for non-serious offences may be exercised.[41] ALSWA has considered these other additional circumstances and notes that most are already caught within the existing circumstances in s 128(3)(b). For example, a circumstance where a police officer is satisfied that arrest is reasonably necessary to 'prevent the fabrication of evidence' would fit within the criterion in s 128(3)(b)(v) (ie, that the person will otherwise obstruct the course of justice). It is also noted that an additional circumstance related to the nature and seriousness of the offence is not appropriate because the seriousness of the offence should be accommodated via the definition of serious offence in s 128(1).

One criterion that is not currently included in s 128(3)(b) of the CIA is where arrest is considered reasonably necessary to ensure the person's attendance at court. ALSWA is strongly opposed to any extension of the power to arrest for non-serious offences for this purpose. The police can issue a summons and if the person fails to attend court, the judicial officer has the power to issue a warrant for arrest where appropriate. Any such reform to s 128(3)(b) is highly likely to increase the rate of arrest of Aboriginal people.

Issue - 95 Should section 128(3)(b)(i) be amended to reflect the investigative limitations in identifying an offender when officers are on the road?

The Issues Paper suggests that the phrase 'it will not be possible, in accordance with law, to obtain and verify the person's name and other personal details' imposes a very high threshold because in modern times it is virtually always possible to obtain and verify a person's personal details if the right resources are available (eg, DNA, retina scanning, facial recognition).[42] It is further observed that in New South Wales, a person may be arrested if the officer is reasonably satisfied that the arrest is necessary to

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41 Western Australian Government, *Statutory Review of the Criminal Investigation Act 2006*, Issues Paper (January 2017) 175–176.
42 Western Australian Government, *Statutory Review of the Criminal Investigation Act 2006*, Issues Paper (January 2017) 177–178.

enable inquiries to be made to establish the person's identity if it cannot be readily established or if the police officer suspects on reasonable grounds that identity information is false.

ALSWA is of the view that the current provision in s 128(3)(b)(i) is appropriate. It provides that a person may be arrested where the officer reasonably suspects that the person has committed, is committing, or is just about to commit, the offence and *that if the person is not arrested*, it will not be possible, in accordance with law, to obtain and verify the person's name and other personal details. The suggestion that the existence of resources such as DNA, retina scanning and facial recognition means that it will always be possible to obtain and verify personal details is misleading because it fails to take into account that the officer can arrest the person if he or she reasonably suspects that without arrest it will not be possible to obtain and verify personal details. Those resources will only be available (if at all) at a police station following arrest.

Issue - 96 Should the CIA be amended to make it clear that an officer may discontinue an arrest at any time? If so, in what circumstances should an officer be able to discontinue an arrest?

ALSWA is of the view that if an officer reasonably believes that the grounds for arrest no longer exist the arrest should be discontinued. For example, under s 128(3) a person may be arrested for an offence that is not a serious offence if the officer reasonably suspects that the person has committed, is committing, or is just about to commit the offence and if the person is not arrested it will not be possible to obtain and verify the person's name and personal details. If, after arresting the person, the person provides his name and personal details and these details are verified then the arrest should be discontinued and the person summonsed for the offence.

Issue - 97 If an officer is able to discontinue an arrest, then should the CIA be amended to make it clear that: a) the arrested person is not entitled to the rights under sections 137 and 138 of the CIA? b) the officer in charge of the investigation is not obliged to inform the arrested suspect of his or her rights as required by section 138(3) of the CIA? c) section 142 of the CIA does not apply to the release of the arrested suspect?

ALSWA is of the view that no changes to ss 137 and 138 of the CIA are required. The rights of arrested people and arrested suspects logically arise at particular stages of the arrest process. For example, ss 138(2)(b) and 138(2)(d) provides that an arrested suspect has the right to be cautioned before being interviewed and, in certain circumstances, the right not to be interviewed without an interpreter. If the arrest is discontinued before any interview is planned then the right to be cautioned prior to the interview and the right to an interpreter naturally fall away.

Issue - 98 Should section 128 of the CIA be amended to set out how an arrest is to be made?

The Issues Paper refers to the common law position in regard to how are arrest is to be effected, namely, that an arrest occurs whenever it is made plain by what is said or done by the police officer

that the suspect is no longer a free person.[43] The Issues Paper poses whether the manner in which an arrest is to be made should be codified in the CIA; however, no reasons are provided for this approach. ALSWA is of the view that the common law test is sufficient and no reform of the CIA is justified.

Issue - 101 Should section 131 of the CIA be amended to require an audiovisual recording to be made of the exercise of the powers of entry and search under sections 132, 133 and 134 of the CIA if reasonably practicable?

Section 45(2) of the CIA provides that 'if reasonably practicable, an audiovisual recording must be made of the execution of a search warrant. Sections 132–134 provide for the power to enter places and stop and enter vehicles for the purposes of arrest and ALSWA agrees that the CIA should be amended to require an audiovisual recording to be made if reasonably practicable whenever a place or vehicle is being searched.

Issue – 102 Are there any other purposes for which an arrested suspect should be detained following arrest?

The Issues Paper states that a police officer may detain an arrested suspect in custody after the suspect is arrested for the following purposes:

- conducting a search under s 133 or s 135 of the CIA;
- investigating any offence suspected of having been committed by the suspect;
- interviewing the suspect in relation to any offence that the suspect is suspected to have committed; and
- deciding whether or not to charge the suspect with an offence.

ALSWA does not consider that there are any other purposes for which an arrested suspect should be detained.

Issue – 103 Should the length of the initial period of detention for an arrested suspect be increased?

ALSWA highlights that the Issues Paper provides no justification for increasing the length of the initial period of detention. No examples have been provided to explain why the current period is insufficient. Bearing in mind that a further period of six hours can be authorised by a senior police officer, there is no basis for increasing the initial period.

Issue – 104 Should a senior officer be able to authorise more than one further period of detention?

For the reasons outlined above, there is no basis for enabling a senior officer to authorise a further period of detention.

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43 Western Australian Government, *Statutory Review of the Criminal Investigation Act 2006*, Issues Paper (January 2017) 182.

Issue - 105 Are there any other factors which should be taken into account in determining a reasonable period of detention?

The detention of an arrested suspect is justified if the detention is for an authorised purpose under s 139(2) and if the period is reasonable having regard to the factors set out in s 141 of the CIA. Those factors are extensive and comprehensively cover the time needed to conduct investigations and gather evidence. ALSWA is of the view that the factors are skewed in favour of police. Factors relating to arrested suspect should also be included in the legislation. For example, any vulnerability due to a person's cognitive impairment or mental illness should be considered when determining a reasonable period of detention. Furthermore, ALSWA submits that the determination of a reasonable period should take into account whether the purpose for which detention is sought could reasonably be postponed and accommodated without the need to hold the accused suspect in police custody.

Issue - 106 Are there any factors which would justify a suspect not being released unconditionally?

ALSWA is of the view that the factors listed in s 142(2) of the CIA are sufficient and no further factors should be included.

Issue -107 Should section 142(8) of the CIA be amended to enable an arrested suspect to be detained in custody for a reasonable period that is to be determined having regard to the time needed: (a) to conduct any further interview with the suspect? (b) to undertake any further investigation; (c) to comply with a data access order?

Section 142(8) provides that if it is decided to charge an arrested suspect with an offence, the suspect may be detained in custody before being released unconditionally or dealt with under the *Bail Act 1982* (WA) for a reasonable period having regard to the:

- the time need to complete any identifying procedure;
- the time needed to complete any forensic procedure; and
- if it is decided not to release the suspect unconditionally, the time needed to comply with the *Bail Act 1982*, the *Mental Health Act 2014* or any other written law.

ALSWA highlights that the police already have the power to detain an arrested suspect for the purpose of interviewing the suspect, investigation the offence before deciding whether to charge the arrested suspect. The periods are substantial and they can be extended on multiple occasions where necessary (as discussed above). ALSWA does not consider that any extension to the power to detain an arrested suspect after charge is appropriate.

Issue - 108 Should section 142(7) of the CIA be amended to delete the reference to section 196 of the Mental Health Act 1996 and replace it with a reference to section 157 of the Mental Health Act 2014?

ALSWA agrees that s 142(7) of the CIA should be amended to refer to the new legislation.

Admissibility of Confessional Evidence

Issue - 119 Should sections 154 and 155 of the CIA apply to confessional evidence obtained in contravention of the CIA?

ALSWA is of the view that the current law in relation to ss 154 and 155 is appropriate and no reform is required.

Issue - 120 Does the definition of "admission" in section 118(1) of the CIA require amendment to make it clear that an admission to a police officer or CCC officer does not include an admission made by a suspect to a third party (or while the suspect is talking to himself or herself), which is simply heard or observed by the officer?

ALSWA is of the view that the current definition of an 'admission' is appropriate.

Issue - 121 Does the definition of "suspect" in section 115 of the CIA require clarification?

ALSWA is of the view that the current definition of a 'suspect' is appropriate.

Issue - 122 Does the definition of "reasonable excuse" in section 118(1) of the CIA require amendment in any respect?

The definition of reasonable excuse in s 118(1) of the CIA is not exhaustive and therefore no reform is required.

Issue - 124 Should special provision now be made in the CIA for the conduct of interviews with Aboriginal persons or Torres Strait Islanders?

As explained above, ALSWA is of the view that special provision should be made in the CIA for the conduct of interviews with Aboriginal persons. In particular, ALSWA submits that there should be a the following legislative requirements:

1. That the police must notify ALSWA whenever an Aboriginal person is detained in police custody.
2. That questioning of an Aboriginal person must not take place without the presence of an appropriate interview friend (unless waived by the person).
3. That if a lawyer acting for an Aboriginal person formally advises the police that the Aboriginal person wishes to exercise his or her right to silence and does not wish to answer questions/participate in an interview, no further questioning of the Aboriginal person should occur.

Finally, ALSWA considers that the Anunga Rules provide an appropriate framework for interviewing Aboriginal people and should continue to guide police in their interactions with Aboriginal people. The recommended specific legislative provisions above coupled with the general legislative requirements recommended throughout this submission (eg, right to an interpreter, right to reasonable refreshments,

right to rest, right to a reasonable facilities to communicate with a lawyer) should ensure that the rights of Aboriginal people are respected and that their special vulnerability in police custody is accommodated.

Conclusion

Depending on the outcome of this Review and whether any legislative reforms are progressed, ALSWA recommends that data be collected and recorded in relation to the impact of any extended powers on Aboriginal people. For example, if there are expanded powers to arrest without warrant and to search premises without warrant, the data analysis should capture how many Aboriginal people are subjected to these powers as well as whether there is any increase in charges arising from increased interaction with police (such as disorderly conduct, resist arrest, obstruct police officer and assault police officer). Any legislative amendments must be accompanied by a requirement for a statutory review within two years of the impact of those amendments, in particular on Aboriginal people.

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