

ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC)



**SUBMISSION IN RESPONSE TO THE LAW REFORM COMMISSION OF WESTERN AUSTRALIA'S
DISCUSSION PAPER ON THE REVIEW OF THE FIREARMS ACT 1973 (WA)**

25 January 2016

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, and human rights law. Our services are available throughout Western Australia via 14 regional and remote offices and one head office in Perth.

THE LAW REFORM COMMISSION'S INQUIRY

The Law Reform Commission of Western Australia ('LRCWA') published its Discussion Paper on the Review of the *Firearms Act 1973* (WA) in October 2015. Submissions in response to the Discussion Paper are due by 1 February 2016. The LRCWA's terms of reference are to report on the *Firearms Act 1973* and, in particular, to:

1. provide advice on and recommend appropriate legislative and/or procedural changes with regard to the licensing and storage of firearms, definitions and categorisation of firearms, and effects of changes in firearm technology incorporating national initiatives where appropriate.
2. provide advice on and recommend appropriate legislative changes regarding penalties for firearm offences and, in so doing, consider consistency with penalties in other Australian states and territories.
3. review any relevant issues arising from the recent 'Operation Unification', the Auditor General's

Reports on firearms licensing, Joint Standing Committee on Delegated Legislation Report 68, Explanatory Report in relation to the Firearms Amendment Regulations 2013 and any other relevant Parliamentary Inquiry.

4. provide advice on any other relevant matters.

SCOPE OF THIS SUBMISSION

The LRCWA's terms of reference are broad and cover a wide variety of issues including, among other things, the licensing application process; definitions and categories of firearms; the application of the term 'fit and proper person'; the application of the term 'genuine reason'; the storage of firearms and ammunition; the impact of changes in firearm technology; and the relevance of national frameworks and other inquiries. A number of 'other issues' are discussed including the 'use of firearms by Aboriginal people for traditional purposes'.

The vast majority of issues considered in the Discussion Paper are not relevant to the typical day-to-day services provided by ALSWA. However, given its specialist cultural expertise, ALSWA responds below to the section of the Discussion Paper that deals with the use of firearms by Aboriginal people for traditional purposes. ALSWA expresses no view on the remainder of the proposals and questions in the Discussion Paper.

THE USE OF FIREARMS BY ABORIGINAL PEOPLE FOR TRADITIONAL PURPOSES

In its Discussion Paper, the LRCWA observes that Aboriginal people have certain rights to hunt (eg, a statutory right under s 104 of the *Land Administration Act 1997* (WA) and native title rights to hunt). However, there is no express right to use firearms for the purpose of traditional hunting.¹ In the much earlier report for its reference on Aboriginal Customary Laws, the LRCWA commented that the 'legality of the use of firearms by Aboriginal people for hunting on Crown land was unclear'.² ALSWA agrees with the previous observation of the LRCWA that:

Although there are probably still some Aboriginal people that employ entirely traditional hunting and fishing methods, most have adopted more efficient contemporary tools such as firearms, nylon fishing lines, nets, boats and vehicles. In many cases, and as a direct result of colonialism, the knowledge of how to manufacture and use traditional hunting tools has been irrevocably lost. In these circumstances

¹ LRCWA, *Review of the Firearms Act 1973* (WA), Discussion Paper (October 2015) 189.

² LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (September 2006) 311.

to insist on the exercise of Aboriginal harvesting rights only by use of traditional methods means effectively to deny Aboriginal people their customary rights to harvest natural food resources.³

Accordingly, it is necessary to ensure that the current legislative scheme governing the use of firearms enables Aboriginal people to use firearms for the purpose of traditional hunting without risk of prosecution.

As noted by the LRCWA, there are a number of legislative provisions in Western Australia that recognise traditional hunting rights. Section 104 of the *Land Administration Act 1997* provides:

Aboriginal persons may at all times enter upon any unenclosed and unimproved parts of the land under a pastoral lease to seek their sustenance in their accustomed manner.

Section 23 of the *Wildlife Conservation Act 1950* (WA) provides a defence, in specified circumstances, to a charge of taking fauna or flora for the accused to prove that he or she is an Aboriginal person and that the accused took the fauna or flora for an 'Aboriginal customary purpose'. An 'Aboriginal customary purpose' is defined to mean:

- (a) preparing or consuming food customarily eaten by Aboriginal persons; or
- (b) preparing or using medicine customarily used by Aboriginal persons; or
- (c) engaging in artistic, ceremonial or other cultural activities customarily engaged in by Aboriginal persons; or
- (d) engaging in activities incidental to a purpose stated in paragraph (a), (b) or (c);

A similar defence is provided in s 103A(3) of the *Conservation and Land Management Act 1984* (WA).

Significantly in the context of the use of firearms, s 267(2)(h) of the *Land Administration Act 1997* provides that a 'person who, without either the permission of the Minister or reasonable excuse discharges any firearm or other weapon on Crown land, commits an offence and is liable to a penalty of \$10,000 and, in the case of an offence of a continuing nature, to a daily penalty of \$200'. The onus is on the accused to prove that the accused had a reasonable excuse for that act (s 267(10)).

In its Discussion Paper, the LRCWA notes that the Department of Lands considers that the combination of the abovementioned provisions would be considered a reasonable excuse for the purpose of s 267 of the *Land Administration Act 1997*. In other words, these provisions permit an Aboriginal person to discharge a firearm on Crown land.⁴ However, as observed by the LRCWA, the person must still have a firearms licence in order to avoid prosecution an offence under the *Firearms Act 1973*. Further, the *Firearms Act 1973* does not presently accommodate traditional hunting or seeking sustenance because such concepts are not included within the definition of a 'genuine

³ LRCWA, *Aboriginal Customary Laws*, Discussion Paper (December 2005) 370.

⁴ LRCWA, *Review of the Firearms Act 1973* (WA), Discussion Paper (October 2015) 191.

reason' for applying for a firearms licence. Section 11A(1) of the *Firearms Act* provides that a licence cannot be used unless the person can establish a genuine reason for acquiring or possessing the firearm or ammunition. Section 11A(2) defines the term 'genuine reason' as follows:

- (2) A person has a genuine reason for acquiring or possessing a firearm or ammunition if and only if —
- (a) it is for use by the person as a member of an approved shooting club and the person is an active and financial member of the club; or
 - (b) it is for use by the person as a member of an organisation approved under this paragraph; or
 - (c) it is for use in hunting or shooting of a recreational nature on land the owner of which has given written permission for that hunting or shooting; or
 - (d) it is required by the person in the course of the person's occupation; or
 - (da) in the case of a prescribed paintball gun, it is required by the person to conduct or engage in paintball in accordance with this Act; or
 - (e) it is to form part of a genuine firearm collection or genuine ammunition collection; or
 - (f) it is for another approved purpose.

The LRCWA comments that the recreational hunting or shooting provision does not enable proof of a registered or determined native title right to hunt as distinct from a letter of permission from the landowner ('property letter').⁵ It is also noted that there are other offences under the *Firearms Act* (eg, using a firearm on land without consent of the owner or occupier without a reasonable excuse) that may apply to Aboriginal people using firearms for the purpose of traditional hunting. The LRCWA observes that the *Firearms Act* provides no guidance as to how Aboriginal people seeking licences in order to engage in traditional hunting can do so in the first place'.

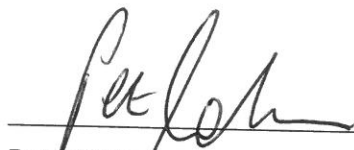
To rectify these issues the LRCWA has made the following proposal in relation to the use of firearms by Aboriginal people for traditional purposes (Proposal 45):

- that the 'genuine reason' requirement in section 11A(1) of the *Firearms Act 1973* (WA) be amended to include 'traditional hunting;'
- where a person has nominated 'traditional hunting' as his or her genuine reason, in lieu of a 'property letter' he or she ought to be able to provide evidence of:
 - his or her membership of a registered or determined native title claim over an area; or
 - his or her identity as an Aboriginal person wishing to engage in traditional hunting in accordance with section 23 of the *Wildlife Conservation Act 1950* (WA), section 23A of the *Conservation and Land Management Act 1984* (WA) and section 104 of the *Land Administration Act 1997* (WA); and

⁵ LRCWA, *Review of the Firearms Act 1973* (WA), Discussion Paper (October 2015) 192.

- that a person's status as an Aboriginal person engaging in traditional hunting, a registered native title claimant or determined native title holder be accepted as 'reasonable excuse' for the purposes of sections 23(10) and 23(10a) of the *Firearms Act 1973* (WA).

ALSWA strongly supports the above proposal in order to provide greater clarity to the law and to ensure that Aboriginal people are not disadvantaged in terms of seeking and obtaining licences under the *Firearms Act* for the purpose of using firearms for traditional hunting.

A handwritten signature in black ink, appearing to read 'Peter Collins', is written over a horizontal line.

Peter Collins

Director, Legal Services

Aboriginal Legal Service of Western Australia (Inc)