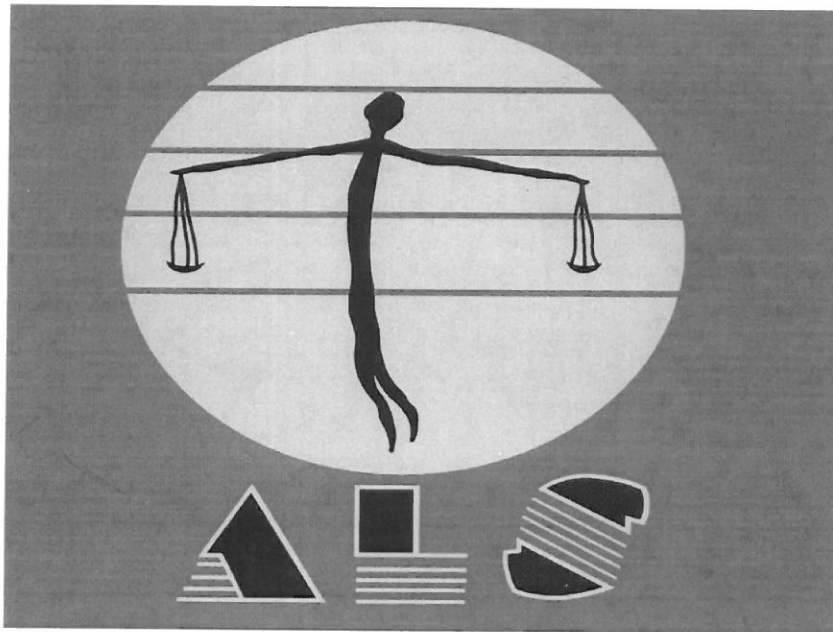


**ABORIGINAL LEGAL SERVICE OF WESTERN
AUSTRALIA LIMITED**



**SUBMISSION IN RESPONSE TO THE DISCUSSION PAPER: AN OFFICE
FOR ADVOCACY AND ACCOUNTABILITY IN ABORIGINAL AFFAIRS IN
WESTERN AUSTRALIA**

18 October 2018

ABOUT THE ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA ('ALSWA')

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 peoples¹ 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 public company limited by guarantee and is governed by an Aboriginal board. The board consists of five elected directors and two co-opted directors who commit time, cultural and business expertise to provide leadership and governance. 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. ALSWA also provides support services to prisoners and incarcerated juveniles. Our services are available throughout Western Australia via 11 regional and remote offices and one head office in Perth.

INTRODUCTION

In June 2018, the Western Australian Government published a Discussion Paper, *An Office for Advocacy and Accountability in Aboriginal Affairs* (the Discussion Paper) and is seeking feedback about its proposal to establish an independent statutory office to strengthen government's accountability to Aboriginal Western Australians.

ALSWA welcomes the opportunity to provide a formal submission in response to the Discussion Paper. In preparing this submission, ALSWA sought feedback from its Board of Directors to ensure that the views of its Aboriginal Directors were taken into

¹ In this submission ALSWA uses the term 'Aboriginal peoples' to refer to 'Aboriginal and Torres Strait Islander peoples.'

account. The Discussion Paper poses three focus questions and these are addressed individually below.

At the outset, ALSWA wishes to emphasise that it supports a *dual approach* to improving the relationship between the Western Australian government and Aboriginal Western Australians and for enhancing the wellbeing of Aboriginal people in this state. In this regard, ALSWA agrees with the observations of the Aboriginal and Torres Strait Islander Social Justice Commissioner, June Oscar, that independent statutory offices to perform an advocacy and accountability function are 'quite separate from that of Aboriginal and Torres Strait Islander representative bodies (or what are now, since the Uluru Statement, sometimes being referred to as 'Voices') such as the National Congress of Australia's First Peoples or those bodies which have been developed, or are currently under development, in the ACT and Victoria'.² ALSWA notes that Victoria has established an Aboriginal Treaty Advancement Commissioner who has the task of establishing an Aboriginal Representative Body to be elected to negotiate with the state on a statewide treaty. This role will cease once the Aboriginal Representative Body is established.

The dual approach put forward by ALSWA is:

1. the establishment of an independent statutory office accountable to Parliament as proposed by the Western Australian government in the Discussion Paper; and
2. the establishment of an Aboriginal Treaty Advancement Commissioner (or something similar) to commence work on the development of a Treaty process in Western Australia by facilitating the establishment of a statewide Aboriginal Representative Body.

These two roles/offices should be separate because the functions and purposes are distinct and, if combined, neither would be able to effectively achieve their respective objectives. Both are essential and ALSWA emphasises that its support for an independent statutory office as set out in the Discussion Paper should not be viewed as an acceptance that this is all that is needed.

1. What are your views about the outline of the office's basic features? Does it miss out on anything important?

ALSWA supports the proposed structure of the office, namely, that the office is a new permanent independent body created by statute. The office holder must be an Aboriginal person who reports directly to Parliament. This will ensure independence and lessen the risk that the office will be disbanded with changes in government.

² Australian Human Rights Commission, Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission to the Director, Aboriginal Policy Unit in response to the Discussion Paper: An office for advocacy and accountability in Aboriginal affairs in Western Australia (7 September 2018) 2.

Sufficient resourcing

It is essential that the proposed new office is properly resourced so it is able to undertake its functions effectively. ALSWA submits below that the new office should have powers to conduct a special inquiry akin to the legislative powers of the Commissioner for Children and Young People. However, the Commissioner for Children and Young People (established in 2007) has not yet exercised these special inquiry powers. It has recently been observed by the Commissioner for Children and Young People that the special inquiry powers have not been exercised because they require specific resourcing which has not been provided.³ This lack of resourcing compromises the independence and effectiveness of the office because it is unable to conduct special inquiries unless the government of the day decides to provide the resources to enable it to do so. Hence, any special inquiries will, in practical terms, only be conducted at the instigation of the government. This flaw in the current arrangements for the Commissioner for Children and Young People must not be repeated with the establishment of the new office for advocacy and accountability for Aboriginal affairs.

Referral function

ALSWA agrees that the office should not deal with individual investigations or individual complaints. However, once the office is established and becomes known it is highly likely that Aboriginal people will contact this office for assistance in relation to individual issues of concern. In order to ensure Aboriginal community support for the office, it is imperative that the office is resourced sufficiently to also perform an effective triage-type referral process. This will mean that the office will require staff who are aware of the various other government or independent investigative bodies available and what matters should be referred to which bodies. This process should be undertaken in a culturally competent manner that provides 'warm referrals' to other relevant bodies. Including a referral function will enhance accountability because it will provide evidence of systemic issues facing Aboriginal people in Western Australia. For example, if the office receives repeated inquiries from Aboriginal people about the way that a particular government agency provides services to Aboriginal people it will serve to pinpoint this as an issue requiring further investigation.

Power to conduct special inquiries

ALSWA notes that the proposed office is similar to the structure of the Commissioner for Children and Young People (ie, independent, created by statute, and reports to Parliament). ALSWA emphasises that a new office for advocacy and accountability in Aboriginal affairs should have at least the same level of powers as the Commissioner for Children and Young People. These

³ Commissioner for Children and Young People: *Oversight of services for children and young people in Western Australia* (November 2017) 24 & 31.

powers include the power to conduct a special inquiry under Part 5 of the *Commissioner for Children and Young People Act 2006* (WA). The specific powers in Part 5 include the power to conduct inquiries on its own initiative or at the request of a Minister; the power to require attendance of any person; the power to require a person to produce a document; the power to require a person to take the oath or make an affirmation and put any question to that person; the power to entry premises with the permission of the owner/occupier or with a warrant issued by the Children's Court. ALSWA submits that the new office must include similar powers of special inquiry.

The Aboriginal Commissioner for Children and Young People in Victoria conducted an extensive inquiry into services provided to Aboriginal children and young people in out-of-home care in 2016. This inquiry reviewed the cases of 980 Aboriginal children in out-of-home care and was described as 'a groundbreaking investigative process'.⁴ The Aboriginal Commissioner for Children and Young People is about to commence an inquiry into Aboriginal overrepresentation in youth justice by examining 250 young people involved in the justice system in Victoria. ALSWA is strongly of the view that the new office must have equivalent powers as the Commissioner for Children and Young People in Western Australia to hold special inquiries into specific issues concerning Aboriginal people in Western Australia (and must be resourced to conduct these inquiries at the outset).

Mandatory responses from government

Furthermore, ALSWA submits that the legislation establishing the office should also include a statutory requirement for the Western Australian government to provide a response to the recommendations of the office within three months of any report being tabled in Parliament.⁵ And, the government response must also be tabled in Parliament. This will ensure greater accountability and transparency and minimise the risk that reports and recommendations of the office are ignored or overlooked. A requirement to provide a formal response means that the government of the day is mandated to actually consider the recommendations and openly present its views in response. ALSWA also suggests that the office

⁴ Commissioner for Children and Young People Victoria, *Always Was, Always Will be Koori Children: Systemic Inquiry into Services Provided to Aboriginal Children and Young People in Out-of-Home Care in Victoria* (October 2016) Extract 5.

⁵ A similar process occurs in the Northern Territory for recommendations made by the coroner. Section 46A of the *Coroners Act* (NT) requires the Attorney General to provide a government agency or the Police Force with a copy of a report or recommendation that contains comments relating to the agency or Police Force. Under s 46B the Chief Executive Officer or Commissioner of Police must within 3 months after receiving the report, provide the Attorney General with a written response to the findings in the report or to the recommendation. The response is to include a statement of the action that the agency or the Police Force is taking, has taken or will take with respect to the report or recommendation. After receiving this response, the Attorney General must without delay report on the coroner's report or recommendation and the response and table a report before the Legislative Assembly within 3 days. In its review of the coronial system in Western Australia, the Law Reform Commission of Western Australia recommended that a public statutory authority or public entity the subject of a coronial recommendation must within three months of receiving the recommendation provide a written response to the State Coroner and that as soon as reasonably practicable after receiving the response, the State Coroner must publish the response: Law Reform Commission of Western Australia, *Review of Coronial Practice in Western Australia*, Final Report (2012) Recommendation 87.

should be required to publicise the responses of the government on its website within a stipulated period of time (although the response will be tabled in Parliament, accessibility will be enhanced for the public, and Aboriginal people, if the responses appear on the office's website).

Aboriginal Reference Group

ALSWA also supports the view expressed in a number of submissions that the new office should be supported by an Aboriginal Reference Group. Such a group should include Aboriginal people from different regional areas across the state as well as Aboriginal people with a range of experience and skills to support the office holder in his or her role of advocating for Aboriginal Western Australians and enhancing government accountability for the delivery of services to Aboriginal people in this state.

Powers to extend to non-government agencies in receipt of government funds for the provision of services to Aboriginal people

Bearing in mind the allocation of significant government funds to private and non-government agencies to provide public services to Aboriginal people, it is imperative that the functions and powers of the office extend to these agencies. In his review of oversight mechanisms for children and young people in Western Australia, the Commissioner for Children and Young People observed that:

Government-funded community sector services have become increasingly involved in the delivery of public services to children and young people in a range of fields, including child protection, youth justice and health and disability services. Privatising or contracting elements of public service delivery should not lead to diminished oversight and accountability.⁶

It was also observed that the Western Australian Auditor General is able to conduct performance audits that provide Parliament with an assessment of the effectiveness and efficiency of public sector programs and it has 'follow the dollar' powers which 'permit examination of the way in which government funds are spent by contracted non-government services'.⁷ On that basis, ALSWA suggests that further consideration should be given to the extent to which the new office's functions and powers extend to private and non-government agencies who are funded by government to deliver public services.

2. What should be the formal name of the office?

ALSWA supports a name for the office that accurately reflects its purpose, powers and functions and therefore agrees with suggestions such as the Office of the

⁶ Commissioner for Children and Young People: *Oversight of services for children and young people in Western Australia* (November 2017) 24 & 31.

⁷ *Ibid* 30.

Independent Commissioner for Aboriginal People in Western Australia (or such other name as incorporates the term 'Commissioner').

3. How should Aboriginal people and organisations be involved in the appointment process of the office-holder? Who should be involved?

The Aboriginal Reference Group suggested above could be appointed prior to the selection of the office holder and therefore it could have a role in the selection process. Overall, ALSWA supports an appointment process whereby Aboriginal people are nominated or self-nominate for the role and are possibly short-listed by the Aboriginal Reference Group. Then, all Aboriginal people in Western Australia should be provided with an opportunity to vote for the office holder if they so wish. Such a process will ensure that the Aboriginal community has trust in the appointment rather than reaching the view that the office holder has been selected because of his or her alignment with the government of the day.

Conclusion

ALSWA supports the Western Australian Government's intention to improve government service delivery and accountability to Aboriginal Western Australians. It also agrees with the views expressed in a number of submissions that there should be a second phase of consultation with Aboriginal people. The *Community Information Sheet* provided in relation to the proposal states that the government will 'write a report on what people have told us'. ALSWA urges the government to enable consultations and further submissions to be provide following the release of this report.

ALSWA also highlights that the *Community Information Sheet* states that 'Aboriginal people want an official representative structure and we will have those discussions with you in the future'. As stated at the beginning of this submission, ALSWA agrees that the establishment of a representative body is a separate process; however, it is of no less importance. Discussions about commencing a treaty process including the establishment of an Aboriginal representative body should not be postponed until after such time as the new office might be funded and legislation passed.



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