

Aboriginal Legal Service of Western Australia Limited



**Submission to the Joint Standing Committee on the
Corruption and Crime Commission in relation to *an
inquiry into the Western Australian Corruption and
Crime Commission's oversight of police misconduct
investigations, particularly allegations of excessive
use of force***

22 January 2020

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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.

BACKGROUND

Terms of reference

Terms of Reference: An inquiry into the Western Australian Corruption and Crime Commission's oversight of police misconduct investigations, particularly allegations of excessive use of force, with an examination of:

1. The nature and prevalence of allegations of excessive use of force by WA police officers.
2. Circumstances in which allegations of excessive use of force are investigated internally by WA Police.
3. Circumstances in which allegations of excessive use of force are investigated and/or oversights by the Corruption and Crime Commission.
4. The Corruption and Crime Commission's 'active oversight' policy and its adequacy in dealing with allegations of excessive use of force.
5. The nature of sanctions for excessive use of force allegations which are substantiated.

ALSWA SUBMISSION

ALSWA's extensive experience in representing Aboriginal and Torres Strait Islander peoples throughout the state of Western Australia on a daily basis as well as its longstanding research and expertise has informed this submission.

Wherever possible, ALSWA refers to case examples to provide evidence of the views expressed in this submission. Extremely busy and passionate ALSWA lawyers have provided these case examples. Many more examples exist but the tight timeframe for submissions coupled with the enormous workload of ALSWA lawyers has made it impossible to provide more. ALSWA asks the Committee to view the case examples included in this submission as a 'sample' of cases rather than as the only evidence of the various problems discussed.

Introduction

Any discussion of the way police and other government departments engage with the Aboriginal community must begin with an understanding of the historical and cultural context.

As the Committee is aware, Aboriginal people are overrepresented in dealings with police. Western Australia has the highest rate of overrepresentation of Aboriginal and Torres Strait Islander adults and juveniles in the criminal justice system. As the Australian Law Reform Commission (ALRC) observed, Aboriginal and Torres Strait Islander people represent 3% of the population but constitute 27% of the adult prisoner population across the nation.¹ However, in Western Australia Aboriginal and Torres Strait Islander people make up almost 40% of the adult prisoner population and 73% of the juvenile detention population. Aboriginal and Torres Strait Islander women are also grossly overrepresented; as at 31 March 2017, 46% of female prisoners were Aboriginal or Torres Strait Islander women (compared to 34% nationally).²

Many of ALSWA's clients experience socio-economic disadvantage, a continuing negative impact of colonisation and dispossession, trauma from the stolen generations, intergenerational trauma, substance abuse, homelessness and overcrowding, lack of education, and physical and mental health issues. These factors can underpin people's enmeshment in the criminal justice system.

ALSWA clients also experience structural bias and discriminatory practices within the justice system itself. There are many examples of this bias such as over-policing; lack of culturally appropriate programs in the community and in prison; mandatory sentencing; punitive bail laws; insufficient resourcing of Aboriginal-specific legal services; and lack of language interpreters.

The former Chief Justice of Western Australia, Wayne Martin has argued that:

Over-representation amongst those who commit crime is, however, plainly not the entire cause of over-representation of Aboriginal people. The system itself must take part of the blame. Aboriginal people are much more likely to be questioned by the police than non-Aboriginal people. When questioned they are more likely to be arrested rather than proceeded against by summons. If they are arrested, Aboriginal people are more likely to be remanded in custody

1 Australian Law Reform Commission (ALRC), *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper (July 2017) [1.30].

2 Western Australian Department of Corrective Services, *Adult Prisoners in Custody Quarterly Statistics March Quarter 2017*; *Young People in Detention Quarterly Statistics March Quarter 2017*.

than given bail. Aboriginal people are much more likely to plead guilty than go to trial, and if they go to trial, they are much more likely to be convicted. If Aboriginal people are convicted, they are much more likely to be imprisoned than non-Aboriginal people, and at the end of their term of imprisonment they are much less likely to get parole than non-Aboriginal people.³

In this regard, it is important to highlight two issues. First, crime statistics (eg, rates of arrest, rates of imprisonment) do not measure the true prevalence of crime in the community nor do they tell us who is responsible for committing those crimes. Instead, crime statistics measure the demographics of those people who are caught and punished for criminal behaviour. As one example, it is an offence in Western Australia to consume alcohol in a public place (street drinking).⁴ The infringement penalty is \$200 and the maximum penalty is a fine of up to \$2000. Many people consume alcohol in contravention of this law (eg, drinking at a family picnic on the river). However, not everyone is charged with street drinking; ALSWA suggests that Aboriginal and Torres Strait Islander people are charged for street drinking far more frequently than non-Aboriginal people.

Second, if higher rates of offending among Aboriginal people were the sole cause of disproportionate incarceration rates then there should be no difference in the rate of overrepresentation between different states and territories. As observed by Morgan and Motteram:

Unless one espouses the absurd notion that Aboriginal Western Australians are many times more evil than their inter-state colleagues, this cannot explain why Western Australia's imprisonment rate is so much higher than the rest of the country.⁵

Western Australia has the worst overrepresentation of Aboriginal people in the criminal justice system, followed by the Northern Territory.

In its discussion paper on the incarceration rates of Aboriginal and Torres Strait Islander Peoples, the ALRC noted:⁶

An Australian Institute of Criminology study in 1988 found that most Australians respected and felt protected by the police forces of the states and territories. However, an Aboriginal and Torres Strait Islander perspective can differ—given the historical nature of the involvement of police in the lives of Aboriginal and Torres Strait Islander peoples post-1788, where

police came to take on the role of protectors of Aboriginal communities situated on reserves and missions. This role involved them in considerable supervision of Aboriginal people's lives. It is symbolised by images of them returning runaways in neck and leg chains ... It also came to involve the removing children from their families.

Many see the 1967 referendum as a 'watershed moment', when Australia voted for the betterment of Aboriginal peoples. Jo Kimara has however suggested that, although policing policies changed following the 1967 referendum, such a change was not necessarily for the better:

Far from being inclusionary, many policing practices became covert and exclusionary. Without specific legislation there was an increase in arrests and incarceration for offences that non-Indigenous people would be unlikely to be arrested for. This was and still is colloquially known as the offence of 'being Black in a public place' and

3 The Honourable Wayne Martin AC, Chief Justice of Western Australia, *Indigenous Incarceration Rates: Strategies for much needed reform* (Law Summer School 2015) 8–9.

4 *Liquor Control Act 1988* (WA) s 119.

5 Morgan and Motteram as quoted in LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) 83.

6 ALRC 'Incarceration rates of Aboriginal and Torres Strait Islander Peoples' Discussion Paper 84, Chapter 12, Police accountability, accessed: <https://www.alrc.gov.au/publication/incarceration-rates-of-aboriginal-and-torres-strait-islander-peoples-dp-84/12-police-accountability/background-31/>

encompasses the notorious trifecta legislation of offensive language, resist arrest and assault police. [references omitted]

The Corruption and Crime Commission released a very useful report on the use of Taser weapons by WA Police in 2010.⁷ This report confirms the disproportionate level of interaction between the police and Aboriginal people in Western Australia. This report found that the use of force through Tasers against Aboriginal people was increasing and the analysis as to gender and Aboriginal ethnicity in relation to Taser use on adults during 2008 and 2009 consistently demonstrated that WA Police officers were using Taser weapons disproportionately against Aboriginal people, and the proportion of such use was increasing.⁸

The nature and prevalence of allegations of excessive use of force by WA police officers

ALSWA receives daily reports from the Western Australian Aboriginal community of allegations of excessive use of force by WA police officers. ALSWA also receives reports of positive community engagement by WA police officers and many police officers who treat people with respect.

While ALSWA does not have the resources for sophisticated statistical analysis, a count of active files shows ALSWA has 79 files currently open in relation to police complaints, the vast majority of these files involve an allegation of excessive force. Since 2015 ALSWA has closed over 100 files in relation to police complaints.

Most complaints arise from police officers using excessive force while effecting an arrest and range from allegations of officers putting handcuffs on too tight, pulling clients' hair, pushing clients' faces in the ground, holding people down for longer than necessary and throwing people into police pods to more serious gratuitous violence such as direct closed-fist punches, clients' being hit in the head with police torches, sexual violence, unnecessary and excessive use of Tasers and use of firearms.

Some clients have received broken bones and major lacerations in their dealings with police. Some tragic cases have resulted in a death and ALSWA has represented numerous grieving family members in coronial proceedings, highlighting unprofessional and inhumane police practices and advocating for reform via coronial recommendations.

Aboriginal people also report regularly to ALSWA allegations of continuing harassment, over-policing, excessive use of strip-searches, verbal abuse including the use of racially derogatory language and/or mocking language, inappropriate seizure of property, disrespectful and paternalistic attitudes and not investigating matters where clients have reported that they have been the victim of a criminal offence. Further, ALSWA has received some information that WA police officers may have intentionally made untruthful statements in witness statements.

Circumstances in which allegations of excessive use of force are investigated internally by WA Police

When ALSWA receives a report of an allegation of excessive use of force, an ALSWA lawyer will take full written instructions and draft a letter of complaint. This letter is

⁷ Corruption and Crime Commission, The Use of Taser Weapons by Western Australia Police, 4 October 2010, accessed: [http://www.parliament.wa.gov.au/publications/taledpapers.nsf/displaypaper/3812682a0781d7c061f4a21f482577ba0029139b/\\$file/tp2682.pdf](http://www.parliament.wa.gov.au/publications/taledpapers.nsf/displaypaper/3812682a0781d7c061f4a21f482577ba0029139b/$file/tp2682.pdf)

⁸ Ibid 93.

then sent to the Police Conduct Investigation Unit, the WA Police Regional Superintendent, the WA Police Internal Affairs Unit, the Commissioner of Police and/or the Corruption and Crime Commission, depending on the seriousness of the allegations and the surrounding circumstances.

ALSWA estimates approximately 80% of the complaints submitted to WA police have an outcome of ‘unsubstantiated’, often due to evidentiary issues. ALSWA is aware of only two matters that have led to criminal charges, and both have resulted in a conviction.

Case Example A

Two young male teenagers, aged 13 and 15 years, were assaulted and racially abused by two police officers in a regional town. The officers then put them in the police pod and drove them to a remote location where they were abandoned in the middle of the night. While the young teenagers were in the police vehicle, the officer intentionally drove in a manner that caused the vehicle to slide on the road. ALSWA’s client was diagnosed with muscle sprain and tenderness after attending hospital. He also experienced anxiety and nightmares. One officer pleaded guilty to Dangerous Driving under s 61 of the Road Traffic Act 1974 (WA) and received a fine at sentencing. The conduct of three additional officers was identified as a serious breach of WA Police policy. One officer resigned during the Loss of Confidence process; one officer received a demotion and a fine under s 23 of the Police Act 1892 (WA); and another officer was demoted.

Case Example B

ALSWA acted for B, a 16 year old from a remote town. He was arrested for disorderly conduct and was taken to the local police station. A police officer ‘slung’ B to the ground which was made of bitumen. B sustained a cut to his left eyebrow, a laceration to his forehead and grazing to his left shoulder. He experienced headaches and could not work for two weeks due to his injuries. B had never been in trouble with the police before the incident but since the incident he has felt fearful and distrusting of police. The officer was convicted of one count of Assault Occasioning Bodily Harm and received a fine and a spent conviction order.

Police dog bite complaints

Since 2015 ALSWA has received approximately 23 reports of police officers using police dogs to apprehend people and the person receiving a bite from the police dog.

An analysis of the incidents in which police dogs in Western Australia have caused injury over a three year period from April 2015 – April 2018 indicate there is something seriously wrong with the way the dogs are being used. From the available data, of the 95 recorded incidents of injuries from dog bites, 41 of the victims were recorded as Aboriginal.⁹ Further, of those victims at least 17 were aged 18 years or younger.¹⁰

In 2008 the Queensland Crime and Misconduct Commission conducted a review of complaints and bite incidents of the Queensland Police Dog Squad (the Queensland Report). The Queensland Report noted that:

Historically, the use of police dogs has not been put under the same level of scrutiny as the use of other types of force by police, either in Queensland or in other jurisdictions. This is somewhat surprising, as the use of a dog to apprehend someone can result in significant injury.¹¹

9 From FOI results released by WA Police to Gilbert & Tobin on 30 August 2018.

10 Ibid.

11 The Queensland Police Dog Squad: a CMC review of complaints and bite incidents, p. vii.

The Queensland Report analysed complaints about bites by Queensland Police Service dogs over the period 1999 to 2006. An earlier review of complaints in 2000 had shown that:¹²

- more than a quarter of complainants were juveniles;
- about one quarter of all complainants were Aboriginal people;
- more than a quarter of complainants who had been bitten were not charged with any offence related to the incident; and
- more than a quarter of people bitten were subject to multiple injuries.

ALSWA concerns about the use of WA Police dogs were raised with the Commission in September 2017 and given the systemic and serious nature of this issue, ALSWA requested the Commission conduct a comprehensive review of WA Police policies and procedures in relation to the use of dogs, as well as an independent investigation of relevant individual complaints. ALSWA understands the Commission was unable to form an opinion of serious misconduct in any of these matters and referred them to WA Police. Some matters were investigated by the Police Mounted Section / Canine Section Training Cell and some were investigated by the relevant district office.

Case Example C

ALSWA acted for C a vulnerable Aboriginal woman who was a passenger in a vehicle. The driver drove off from a police 'booze bus' and got out of the car and ran away. He shouted to C to run too. C was very scared and did not know what to do so she hid. She heard a police officer say 'Show yourself, if not, I'll release the dog.' C was extremely frightened and just froze. The police dog then bit her on the head and shoulder, and ripped her jumper. She was then taken to hospital and had two large lacerations to her scalp and a smaller laceration to her back caused by the dog bite. The head laceration was stapled and her back/shoulder was sutured. She was also treated with a tetanus vaccination. The Commission referred this matter to the Police Mounted Section for investigation. The complaint was unsubstantiated.

Circumstances in which allegations of excessive use of force are investigated and/or overlooked by the Corruption and Crime Commission

As above, ALSWA has assisted over 180 clients with police complaint matters in the last five years (2015-2019). ALSWA has referred less than 7% of these complaints to the Corruption and Crime Commission. Further, over the past two years, ALSWA has only referred a handful of matters to the Commission. The reason for the low number of referrals to the Commission is that ALSWA's experience is that the Commission very rarely conducts its own investigation into complaints against police.

This became a particular concern after the amendments to the Act that came into force on 1 July 2015 resulted in the responsibility for dealing with minor misconduct being removed from the Commission. Invariably, when ALSWA has made a complaint to the Corruption and Crime Commission about police conduct, the Commission has referred the complaint back to WA Police.¹³ In the few cases where ALSWA has requested the Commission conduct its own independent investigation, the typical response has been that the Commission was either 'unable to form an opinion of serious misconduct' or has 'refocused its efforts' and oversees fewer investigations than pre the 1 July 2015 amendments. The outcome is that the Commission

¹² Queensland Report, viii.

¹³ See s 37 of the *Corruption, Crime and Misconduct Act 2003* (WA).

discontinues its involvement in the matter or appears to oversee the investigation in a very limited capacity only. Given the infrequency in which complaints submitted by ALSWA are actively overseen by the Commission, ALSWA has limited information in relation to the operation of the Commission's oversight function.

On 21 April 2016 ALSWA wrote to the Honourable Michael Murray AM QC, Parliamentary Inspector of the Commission raising the above concerns. ALSWA received a response to this letter dated 5 May 2016.

More recently, in the last two years, all responses from the Commission have been that the Commission was 'unable to form an opinion of serious misconduct'. Therefore ALSWA is of the view that the Commission does not sufficiently investigate allegations of excessive use of force by WA police officers nor other unethical behaviour.

Case Example D

ALSWA acted for D, an Aboriginal female (with no prior record) who had been charged with assault police officer. The police officer involved was wearing a body worn video camera. The video showed a scuffle, however, it was difficult to see what happened. The police officer forgot to turn off the video when they returned to their police vehicle. A female police officer asked the male officer words to the effect 'did you arrest her for you or was that for me?' The male officer replied, 'that was for you, she's not allowed to do that to you'. The female officer said 'she didn't actually touch me'. The male officer replied, 'that is ok she is still not allowed to do that to you'. The female said, 'she may have touched me with her jumper'. The male officer subsequently prepared a written statement stating that he 'saw' the client hit the female officer with a closed fist. The prosecution discontinued the charge of assault police officer on the trial date. ALSWA referred this matter to the Corruption and Crime Commission and the Commission subsequently advised ALSWA by letter that it had made a decision to take no action in respect to the allegation as it was unable to form a suspicion of serious misconduct.

Case Example E

ALSWA's client, E, lives in a small town and is constantly harassed and racially abused by a local police officer. The police officer has also told E to leave local shops while he is there, using abusive language on two separate occasions. After the initial WA Police investigation, ALSWA was instructed to refer the matter to the Commission. The Commission responded with a definition of 'serious misconduct' and stated 'the Commission is unable to form a reasonable suspicion of serious misconduct.'

Case Example F

ALSWA acted for F, a 16 year old Aboriginal teenager, who lived in a regional town. Late at night, he was given an infringement notice for street drinking by two police officers. Shortly after, he was arrested, breathalysed and put in the police van. His parents were not notified. He was driven out of town and told to walk home by the officers. The allegations were initially raised with WA Police and ALSWA subsequently reported this matter to the Commission. The Commission assessed and reviewed the complaint and then referred the matter to the WA Police Internal Affairs Unit. The substantive investigation was done by the officer in charge of the local police station.

Both officers were subject to managerial action, consisting of verbal guidance regarding their failure to deliver F into the care of a responsible person. The arrest was found to be lawful and in accordance with WA Police policy. WA Police found there was no evidence to support the allegation F was breath tested nor that he was conveyed out of town and left there, despite F's clear and unequivocal instructions about this to ALSWA.

The need for independent accountability

ALSWA has long advocated for **independent accountability** in relation to police conduct. As the case studies above show, ALSWA does not consider that the current mechanisms to ensure police accountability in Western Australia are sufficient.

Case Example G

ALSWA represented G who was charged with disorderly conduct. The Statement of Material Facts alleged that the client was disorderly by fighting and swearing in public. G instructed that he had been in town with his partner and was approached by a group of non-Aboriginal people who started yelling and challenging them to a fight. Police intervened and separated G from the other group (in the client's words, 'I was the only black man'). While the police were talking to G, one of the females from the other group pushed his partner. G defended his partner by pushing the female away from his partner. The client was then assaulted by a couple of the men from the other group. The police involved were wearing a body worn video camera and the video was played during the trial. The video showed that the G's version of events was exactly what had occurred and G was found not guilty. The others involved in the incident were issued with infringement notices for disorderly conduct instead of being charged.

Case Example H

ALSWA represented H, a 14-year-old Aboriginal boy from a remote town in relation to a complaint about how the police treated him. H and a number of his cousins went for a ride in their aunt's car. H was a passenger and the driver did not hold a licence. A police car started following them. The driver kept driving. The driver then panicked and veered off the road to try to go onto a back, dirt road but the car became stuck in a ditch. The boys all got out of the car and started running.

The police officers caught H and two others. H instructed ALSWA that the officers told them to 'Get down'. He got down and he could feel the officer aiming a gun on the back of his neck. The male officer then said 'Stop crawling away or I'll shoot you with the gun'. Another boy heard the officers say 'Shut up mother fuckers. Get on the ground mother fuckers. Hey don't move or we'll shoot you with the gun. Shut up - you want to die?'

This boy said the police officers tackled him to the ground and hit him in the face and ribs. They then kicked him in the ribs. They also hit him on the leg with a baton.

ALSWA submitted a complaint about this conduct to the WA Police Internal Affairs Unit who subsequently performed an investigation. The WA Police interviewed H and one other boy on one occasion; however, other boys were not interviewed due to difficulties in attending the remote locations. ALSWA is of the view that this client's complaint was adversely affected by his and his cousins' remoteness and the difficulty he had with engaging with police officers.

The WA Police investigation 'established insufficient evidence to sustain any criminal conduct on the part of any police officer or any breaches of Western Australia Police policy.'

This response is the standard response that ALSWA receives to the majority of its serious complaints. **It highlights the need for an independent investigative body to conduct investigations into complaints about Western Australian police.** It is clear that police investigating police is neither effective nor procedurally fair.¹⁴

¹⁴ See Eggington, Dennis; Allingham, Kate --- "Police Investigating Police Complaints: An Urgent Need for Change in Western Australia" [2007] IndigLawB 33; (2007) 6(28) Indigenous Law Bulletin 6.

ALSWA is deeply troubled by the fact that many serious allegations are investigated by the officer in charge of the subject officers. The issues in relation to conflict of interest and a total absence of transparency are manifest.

Conclusion

ALSWA is of the view that the Commission does not sufficiently investigate nor oversee allegations of excessive use of force by WA police officers. Bearing in mind the reality that Aboriginal and Torres Strait Islander people in Western Australia have a deep and historical mistrust of police, the internal investigation of alleged misconduct is not appropriate. ALSWA believes that if the relationship between police and Aboriginal and Torres Strait Islander peoples is to improve, this situation needs to be rectified. Aboriginal and Torres Strait Islander people need to have confidence that complaints will be fully and independently investigated. Moreover, until police are held to higher standards of accountability, injustices and mistreatment will continue to occur and contribute to the over incarceration of Aboriginal and Torres Strait Islander peoples.

Aboriginal Legal Service of Western Australia Limited