



MD: BC

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**Aboriginal Legal Service
of Western Australia, Inc**

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Dear Ms Ricci

Access to justice for people with disability: Issues Paper, April 2013

I am writing in response to the Australian Human Rights Commission (AHRC) issues paper, *Access to justice in the criminal justice system for people with disability*. This is a brief submission on behalf of the Aboriginal Legal Service of Western Australia (ALSWA), focusing on the main barriers that Aboriginal and Torres Strait Islander peoples with disability encounter when engaging with the criminal justice system in Western Australia.

About ALSWA

The Aboriginal Legal Service of Western Australia is a community-based organisation that was established in 1973, which delivers a comprehensive range of culturally matched and quality legal services to Aboriginal peoples throughout Western Australia. While criminal law matters dominate our practice, we also provide legal advice and representation to Aboriginal peoples in civil law, human rights law and family law. ALSWA also provides support services to adults and juveniles in custody. Services are available via 14 regional and remote offices and our head office in Perth.

With almost four decades' experience of working with Aboriginal peoples within the criminal justice system, ALSWA is uniquely placed to provide frontline feedback about justice and custodial facilities, service delivery and programs throughout Western Australia, as well as the impact of policies and legislation on Aboriginal peoples. ALSWA submissions are informed by the feedback and experience of ALSWA staff and clients.

Disabilities commonly experienced by ALSWA clients

ALSWA's client base is an inherently disadvantaged and vulnerable group across a range of social, economic, health and education indicators. As a result, a disproportionately large number of our clients suffer from disability. The most common forms of disability that we observe are hearing impairment, acquired brain injury (particularly due to ongoing

substance misuse), fetal alcohol spectrum disorder (FASD) and mental illness. Disability compounds the existing vulnerability of our clients, and restricts their ability to participate fully in the criminal justice system, obtain appropriate support and treatment and, ultimately, obtain just outcomes.

The experience of clients with FASD in the criminal justice system is of particular concern to ALSWA, given that the disorder is disproportionately prevalent among Aboriginal peoples. Several of the symptoms associated with FASD predispose sufferers to antisocial and offending behaviour, increasing the likelihood that they will come into contact with the criminal justice system. These symptoms can include a vulnerability to suggestion, difficulty restraining impulses and linking actions to consequences, as well as memory difficulties and social problems. FASD leads to disadvantage across the entire criminal justice process, including the laying of charges by police, police interviews, bail decisions, participation in court hearings and in sentencing, especially with respect to compliance with court imposed sanctions such as community based orders and suspended sentences or imprisonment.

Failure to diagnose and recognise disability

While symptoms of disability – particularly FASD, brain injury and mental illness – may be apparent to ALSWA lawyers and court officers, in many cases clients have not been formally diagnosed and may be unaware that they have a disability. This reflects the socioeconomic disadvantage of our client base, as well as the absence of adequate medical and mental health services in remote and regional areas with the capacity to diagnose FASD, where the majority of Aboriginal peoples in Western Australia live.

Of all the disabilities that we observe in our clients, FASD is the most invisible to the criminal justice system. There is no agreed diagnostic tool for FASD in Western Australia, nor is there a screening and referral process for people with symptoms of FASD who come into contact with the justice system. In the interests of justice, the development of agreed diagnostic and screening tools for FASD must be prioritised in future funding decisions. This will in turn support a greater recognition of appropriate prosecutorial, bail and sentencing options, as well as the development of specialist rehabilitative and support programs for offenders.

In addition, the Western Australian criminal justice system needs clear guidelines for dealing with defendants and witnesses with FASD. There also needs to be comprehensive training in FASD across the justice system, particularly for ‘frontline’ professions who have regular contact with defendants, such as defence and prosecution lawyers, police officers and parole officers. Increased awareness of FASD is necessary to provide a strong foundation for improved screening and referral processes.

With regard to mental illness, it is ALSWA's position that all prisoners should be screened for mental illness upon arrival, and throughout their period in custody. This information would allow the Department of Corrective Services to determine the demand for specialist mental health services and tailored support and rehabilitative programs, both while prisoners and detainees are in custody and following release. As ever, gathering accurate data is the first step towards developing and funding appropriate services and programs.

The Mental Health Court Diversion & Support Pilot Project Children's Program – more commonly known as Links – has commenced services in the Perth Children's Court. Links' primary objective is to identify and assess young people with mental health issues and connect them to appropriate community and mental health services. It is a community diversion program which provides young people with mental illness with the opportunity to seek treatment and support for their mental health needs, before sentencing. The young person must be on bail, and referrals to the Links Team can only be made from the Perth Children's Court. ALSWA welcomes this program, but notes that it is only available out of the Perth Children's Court. We are concerned that juveniles from regional and remote areas will not have access to this service unless transferred to Perth.

Lack of support and indefinite imprisonment for people considered unfit to plead

In Western Australia, the Criminal Law (*Mentally Impaired Accused Act*) 1996 (the MIA Act) allows for the indefinite detention of people who are determined to be unfit to plead because of mental impairment. This Act is deeply flawed – indeed, it is the most draconian legislation in the nation, when compared with similar legislation in other jurisdictions – and it continues to deliver gross injustices for people with a mental illness, intellectual disability or cognitive impairment.

In the case of clients found unfit to plead to serious offences, the MIA Act permits only two outcomes: dismissal of the charge(s) absolutely or the imposition of a (indefinite) custody order. It is rare that courts make orders dismissing serious offences. There is a dire and immediate need to amend the MIA Act to permit courts to impose an intermediary disposition involving a community treatment order, ensuring clients who are unfit to plead are released back into the community under a supervision and treatment regime.

Further, once the subject of a custody order, the MIA Act does not permit judicial review of custody status, does not enshrine regular reviews of custody status and does not allow appeals against decisions made by the Mentally Impaired Accused Review Board (the MIARB). The MIA Act is in urgent need of amendment in this regard as well. The risks involved in an Aboriginal person falling through the cracks once detained under a custody order are considerable. The case involving an Aboriginal man, Marlon Noble, provides a horrifying case in point. Mr Noble was found

unfit to plead to sexual assault offences in 2003. He spent more than 10 years in jail as a consequence, in circumstances where had he pleaded guilty to the offences, the time served in jail would have been a fraction of that period. Although released from jail, Mr Noble continues to remain subject to strict conditions imposed by the MIARB. ALSWA understands that there are approximately 12 Aboriginal people who are currently subject to custody orders after being found unfit to plead because of mental impairment.

With regard to the housing of people held on custody orders, the Western Australian Government recently announced the development of secure accommodation facilities to house people with intellectual or cognitive disability who have been found unfit to plead. This is a welcome development. Currently, however, all persons who have been found unfit to plead are detained in jails, which are routinely ill equipped to deal appropriately and humanely with their needs. ALSWA remains concerned that those persons who have been found unfit to plead because of a mental illness will continue to be detailed in jail.

Another issue of concern with this group is that people who are unfit to plead due to acquired brain injury or intellectual disability are not eligible to receive the Disability Support Pension, while people with a mental illness who are considered unfit to plead are eligible. ALSWA calls on the Federal Government to include the terms 'intellectual disability' and 'acquired brain injury' in the Federal Social Security legislation to overcome this inequity.

Thank you for the opportunity to comment briefly on some of the main issues of concern for Aboriginal peoples with disability who come into contact with the criminal justice system in Western Australia. I regret that ALSWA is not in a position to provide a more detailed response; however, I would be happy to make our staff available to the AHRC to discuss issues in more detail.

Please do not hesitate to contact me if you would like further information.

Yours sincerely

PETER COLLINS
Director of Legal Services