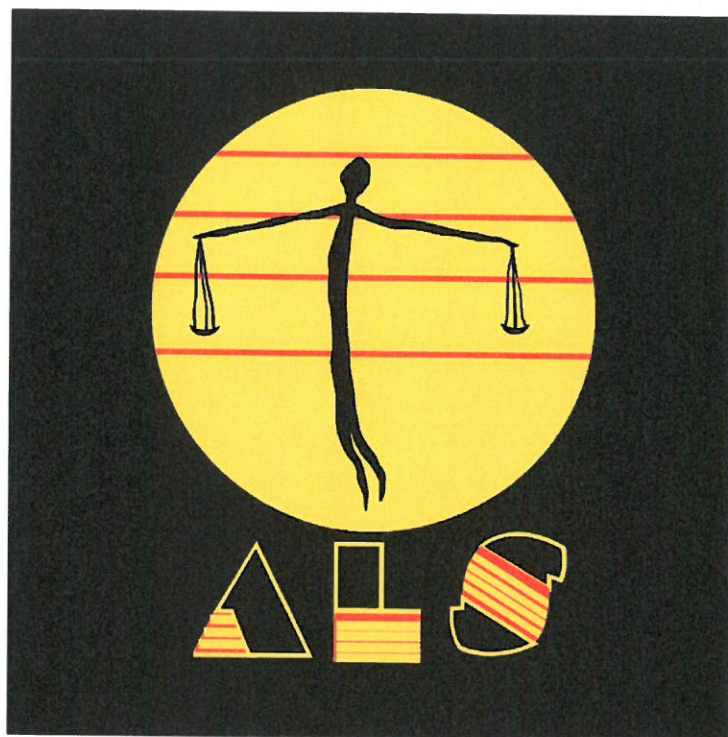


# **Aboriginal Legal Service of Western Australia Limited**



**Submission to the Standing Committee on  
Environment and Public Affairs – Inquiry into  
Mandatory Registration of Children and Young  
People on the Sex Offenders Register**

**21 May 2019**

## 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 peoples<sup>1</sup> 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. 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

The WA Parliamentary Standing Committee on Environment and Public Affairs is conducting an inquiry into the *Community Protection (Offender Reporting) Act 2004* (WA) specifically looking at the mandatory registration of children and young people on the sex offenders register.

The terms of reference are:

On 10 April 2019, the Standing Committee on Environment and Public Affairs resolved as follows:

To inquire into mandatory registration of children and young people on the Community Protection Offender Register (known as the sex offenders register) in accordance with the *Community Protection (Offender Reporting) Act 2004*.

In particular, the Committee will consider the following:

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

- (a) the current criteria for registration on the sex offenders register;
- (b) the advantages and disadvantages of mandatory registration;
- (c) the circumstances that may not warrant mandatory registration;
- (d) the approach employed by other jurisdictions; and
- (e) any other matters considered relevant by the Committee.

## ALSWA SUBMISSION

ALSWA has represented numerous Aboriginal children and young adults who have been subject to mandatory registration on the sex offenders register since its inception. In this submission, ALSWA focuses on four specific categories that it considers clearly demonstrate the need for a discretionary approach:

**(a) Mandatory Registration and Reporting - less serious offending involving underage 'consensual' sexual activity where the age difference is minimal**

ALSWA routinely acts for young clients (usually males) who are prosecuted in relation to Class 1 and 2 offences involving underage willing sexual activity with young Aboriginal females where the age disparity between the parties is minimal.

In many instances the sexual activity the subject of charges has involved no more than sexual touching. Further, many ALSWA clients have engaged in underage sexual activity completely unaware of the legal age of consent.

ALSWA submits that the current scheme of mandatory registration and reporting for Class 1 and 2 offences should be replaced with one where all decisions in relation to whether an offender is placed on the sex offenders register rests with the presiding judicial officer. This is especially critical for children. ALSWA notes that the Law Reform Commission of Western Australia examined these issues in its 2012 report and recommended that there should be judicial discretion for juvenile offenders and that adult offenders should be able to apply to the sentencing court for an exemption order in exceptional circumstances.<sup>2</sup> Nonetheless, ALSWA maintains the view that full judicial discretion should be available for both children and adults.

Further, the presiding judicial officer, not police, should determine whether an offender should be required to report, where reporting should take place, under what circumstances and the duration of registration and reporting. Reporting should also be to the Department of Justice rather than police, especially given the historical fear and suspicion Aboriginal people have of police. The Act should also be amended to permit regular judicial review of reporting requirements.

By providing judicial officers with the discretion to determine whether an offender should be placed on the sex offenders register and whether, how frequently and for how long, they should report will avoid the injustices which often follow from the current scheme which precludes consideration of the individual circumstances of offending and the personal situation of offenders. The case example cited below highlights the issues associated with mandatory registration and reporting where the criminality of the conduct engaged in is of a minor order. Such cases often raise health, cultural and education issues which should not involve the intervention of the criminal law. Poorly educated, unsophisticated young Aboriginal persons,

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<sup>2</sup> Law Reform Commission of Western Australia, *Community Protection (Offender Reporting) Act 2004*, Final Report (2012) Recommendations 1 & 3.

particularly those from regional and remote communities, suffer from enough disadvantages without having to face the additional burden of mandatory registration and reporting arising from conduct where their criminality is at a low level and in circumstances where many do not understand that their conduct breaches the criminal law.

### **The case of AB**

AB faced two charges of indecent dealing with a child over the age of 13 and under the age of 16 years.

AB was 17 years old at the time of charging and the complainant was 13 years and three months old. AB was from a remote Aboriginal community in the Kimberley, the complainant was an Aboriginal female from a town in the Kimberley.

AB had no prior criminal record at the time of charging.

The charges were preferred in 2008, during the Indigenous Justice Taskforce in the Kimberley.

The statement of material facts for the two charges reflects that WG and the complainant met through AB's younger brothers. After a short conversation, the complainant asked AB if she could "see him for the night", which AB knew was an invitation to engage in sexual activity with her. The parties then walked to the local oval in the complainant's town where they began to kiss. The first charge of indecent dealing was constituted by AB placing his hand under the complainant's shirt and fondling her breast while kissing the complainant. The second count is constituted by the complainant unzipping AB's pants, again while the parties were kissing, and by her then masturbating his exposed penis with her hand. AB desisted in this conduct when he noticed the time on his watch and realised he needed a lift home.

It is apparent from the statement of material facts that the sexual activity relied upon to constitute the charges was initiated by the complainant. Further, the conduct comprising the second charge of indecent dealing came about by virtue of the complainant, not AB, unzipping AB's pants, exposing his penis and then masturbating him with her hand. Both offences embraced a very short period of time. The complainant appeared to be a willing and enthusiastic participant in what occurred. There is no evidence of any grooming or like behaviour directed at the complainant by AB. The offending had all the hallmarks of a relatively spontaneous and innocuous form of experimental sexual activity involving two teenagers, with the conduct falling toward the very bottom end of the spectrum of criminality.

When interviewed by police, the complainant referred to having engaged in sexual activity with other males, but not AB. At no stage in her interview with police did the complainant say that she engaged in sexual activity of any kind with AB. Further, there were no eye witnesses to the alleged conduct.

The only evidence inculcating AB in the commission of the offences were admissions made by him in his record of interviews by police. The answers given by AB in his interview with police also highlighted that he was an unsophisticated and immature young Aboriginal male with no understanding of the legal age of consent. AB also told police that he thought the complainant was 16 years old and made comments to the effect that that the complainant had the physical maturity of a female over the age of 16 years.

On conviction, AB became a "reportable offender" pursuant to the *Community Protection (Offender Reporting) Act 2004* and was required to report to police for a period of 15 years from the date of sentence.

This was an extraordinarily onerous obligation on a young person of AB's cultural background over and above any sentence imposed upon him as a consequence of the offending. Young Aboriginal people from remote areas such as the Kimberley are confronted with a number of difficulties with respect to their social, educational and employment circumstances, without being subjected to the added burden of registration and reporting requirements pursuant to the sex offenders register.

The length of time over which offenders are required report often sets up unsophisticated Aboriginal offenders to fail. Many offenders, due simply to the effluxion of time, forget that they are on the register and fail to report or forget to notify police in relation to such matters as a change of address.

ALSWA understands that AB has not offended since being charged in 2008.

Paragraph 34 of the *Director of Public Prosecutions Act 1991 – Statement of Prosecution Policy and Guidelines 2005* – provides as follows in relation to determining whether it is in the public interest to proceed with the charges involving juveniles:

*Special considerations may apply to the prosecution of juveniles. The longer term damage which can be done to a juvenile because of an encounter with the criminal law early in his or her life should not be underestimated. Consequently, in some cases prosecution must be regarded as a severe measure with significant implications for the future development of the juvenile concerned. The welfare of the child must therefore be considered when prosecutorial discretion is exercised.*

Likewise, in the case of *Riggall v The State of Western Australia*<sup>3</sup>, Wheeler JA said the following:

*The matters referred to above, reinforce the view that I expressed in Marris that the presence, or otherwise, of an element of "abuse" is a concept of considerable importance in relation to sentencing for offences of this type. The greater the element of abuse, generally evidenced by matters such as significant disparity in age, or use of force, or other types of pressure, or grooming behaviour, the greater the criminality. Generally, a sensible exercise of the prosecutorial discretion will have the result that, where there is not even arguably an element of abuse, a matter will not come before the court for sentence.*<sup>4</sup>

While Paragraph 34 of the *Director of Public Prosecutions Act 1991 – Statement of Prosecution Policy and Guidelines 2005* and the observations of Wheeler JA in *Riggall* apply to the exercise of prosecutorial discretion, they are also particularly apposite in the context of a sex offenders register, ie every case is different, every offender's circumstances are different, such that individualised justice requires the availability of judicial discretion. Put another way, a mandatory scheme of registration and reporting can be apt to cause injustice.

Further, in *Riggall*, Wheeler JA examined the potential significant impact upon offenders convicted of sexual offences which brings them under the jurisdiction of the *Community Protection (Offender Reporting) Act 2004* (WA):

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3 [2008] WASCA 69.

4 Ibid [48].

*In addition, by virtue of the Community Protection (Offender Reporting) Act 2004 (WA), the appellant now stands convicted of a reportable class 1 offence (s 9). That status continues despite the making of the spent conviction order (s 111). By reason of pt 3 of that Act, the appellant is required for the next 15 years to report annually to the Commissioner of Police and provide to the Commissioner the very detailed personal information prescribed by s 26. Section 30 would require the appellant to provide details to the Commissioner of Police every time he intends to leave Western Australia, unless he leaves for less than seven days, for travel within Australia only. Pursuant to s 61, it appears that the commissioner may approve the suspension of the reporting obligations, but it does not appear that there is any power in any person to terminate them.<sup>5</sup>*

*While the adverse effects of child abuse, as revealed so often in this court, make it clear that children require firm protection from those who would abuse them, I would be inclined to doubt that the Parliament, in enacting the provisions discussed above, considered the question of whether it was appropriate that they apply in exceptional cases such as the present. It may be appropriate that there be some consideration of whether some reform would be desirable, in order to deal with rare cases of this kind. However, that is not a matter for this court.<sup>6</sup>*

AB is a clearly a case where mandatory registration and reporting was not called for.

**(b) Mandatory Registration and Reporting – cognitively impaired, mentally ill, intellectually disabled and socially disadvantaged young Aboriginal offenders**

ALSWA also acts for young clients suffering from significant cognitive impairments (including FASD), mental illnesses, intellectually disabilities and/or enduring significant social disadvantage who are subject to mandatory registration and reporting requirements.

Many of these clients lack the requisite levels of understanding to be able to comply with reporting requirements spanning many years. These clients also lack the family or community supports to enable them to report as required. Clients are often charged with breaches in circumstances where they simply forget to report or otherwise comply with other reporting requirements, ie the breaches do not involve a deliberate attempt to avoid their obligations or to “go underground” in order to commit further sexual offences.

**The case of EF**

In 2008, EF was convicted of one charge of indecent dealing with a child under the age of 13. He was 14 years old at the time of conviction.

A neuropsychological report was before the Court at the time of sentence confirming an earlier diagnosis of a severe intellectual disability. The report also referred to EF's acutely disadvantaged family and social circumstances.

EF was sentenced to a Conditional Release Order for nine months.

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5 Ibid [78].  
6 Ibid [79].

Between 2008 and 2017, EF accumulated 33 separate convictions for failing to comply with a reporting requirement under s63 of the *Community Protection (Offender Reporting) Act 2004*. The vast majority of the breaches involved EF failing to report as required. EF has been placed on two separate suspended imprisonment orders for failing to comply with his reporting requirements. He has also served two separate sentences of immediate imprisonment solely for failing to comply with his reporting obligations.

EF's intellectual disability means that he regularly forgets to report and/or fails to understand that he has to report.

EF has offended on a regular basis since 2008, but usually in relation to dishonesty offences. However, EF has not committed a sexual offence since 2008.

Mandatory reporting has therefore been a pathway to prison for an acutely disadvantaged young Aboriginal person in circumstances where it is very arguable that there was no need for him to be on the register at all or for such a lengthy period of time.

### **The case of GH**

GH grew up in the care of the Department of Child Protection and Family Support, but was homeless from about the age of 15 years onwards as a result of sexual and physical abuse in care. In 2016, when GH was 19 years old, he was contacted via Facebook by a 13-year-old female who was also homeless. GH believed the female was 16 years old. The pair engaged in a single act of 'consensual' sex. GH was charged with sexual penetration of a child under the age of 16 and sentenced to a term of immediate imprisonment. GH was also placed on the sex offenders register and subject to mandatory reporting for the prescribed period of 15 years.

GH has remained homeless since his release from prison.

The conditions of GH'S registration require him to contact police when he obtains a mobile phone or opens a Facebook account.

GH has numerous convictions for breaching his reporting conditions arising from his failure to notify police when he obtains a new mobile phone or opens a new Facebook account.

The difficulty endured by GH because of his homelessness and his generally limited capacities has meant that GH has simply forgotten to notify police when required.

### **(c) Mandatory Registration and Reporting – Very Young Offenders**

Mandatory registration and reporting can be highly problematic and enormously difficult for very young Aboriginal offenders, exposing them to further involvement in the justice system and eventually, the risk of imprisonment. As observed by the Law Reform Commission of Western Australia in its 2012 report on the *Community Protection (Offender Reporting) Act 2004*, children under the age of 16 years are 'themselves legally incapable of consenting to

sexual activity' yet may find themselves subject to the charges relating to sexual offending and subject to the sex offender register.<sup>7</sup>

### **The case of RW**

JK faced six charges of indecent dealing with a child under the age of 13 years.

JK was 10 years old at the time of charging and suffered from ADHD. The complainants were also 10 years of age. The offending occurred at the primary school attended by JK and the complainants.

JK had no criminal history.

JK came from a difficult and disadvantaged family background; having been exposed to serious domestic violence from a young age, his father had no meaningful involvement in his life and his mother had a history of serious substance abuse. When JK was in the care of his mother, she would often be verbally abusive to him. JK was living with an elderly grandmother at the time of charging and the grandmother had obtained a restraining order against JK's mother (her daughter) to prevent her contacting both JK and herself.

Shortly after JK was charged, he was diagnosed with FASD.

The charges involved allegations that JK, while at school, used his hand to touch the complainants on the vagina and/or buttocks, on the outside of their clothing. Each charge appears to involve a spontaneous momentary touching, devoid of any sophistication or guile. There was no suggestion that the conduct was engaged in for the purposes of sexual gratification or deviancy. Rather, the conduct in keeping with that of an immature young child who had limited understanding of personal boundaries and was acting out or playing games. The alleged offending was therefore of a relatively trivial nature and the degree of criminal culpability revealed by the allegations very low, bearing steadily in mind JK's very young age.

The potential issues underpinning the offending very arguably initially required a holistic and therapeutic response, focussing on education and counselling. To that end, JK's school developed a Risk Management Plan (Behaviour) which was tailored to address the risks posed by the type of conduct alleged in the charges.

However, on a finding of guilt JK faced mandatory registration and reporting requirements for seven and a half years. Mandatory registration and reporting for a very long period of time in the life of a vulnerable and very young Aboriginal person was a blunt and likely ineffective tool to bring about positive change. Further, it ran the risk of ongoing exposure to police and involvement in the justice and corrective systems in the (likely) event of future failures by JK to comply with reporting conditions. ALSWA was able to successfully negotiate with the prosecution and JK's charges did not proceed.

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<sup>7</sup> Law Reform Commission of Western Australia, *Community Protection (Offender Reporting) Act 200*, Final Report (2012) ix.

## **Mandatory Reporting and Registration - young adults**

ALSWA has also acted for young adults who have engaged in willing sexual activity with females where on its face the age discrepancy may be significant but the culpability revealed by the offending is low and the need for registration and reporting is questionable.

### **The case of PQ**

PQ pleaded guilty to nine counts of sexual penetration of a child over the age of 13 years but under the age of 16 years. The offences were committed in the course of one episode of sexual activity during a single evening in which the complainant was a voluntary, willing and active participant. PQ was 21 years old at the relevant time, the complainant was 15 years and 2 months of age at the time.

The complainant and PQ first had contact via the mobile telephone messaging facility 'Divas Chat'. The complainant's 'profile' on Divas Chat included the following information: (a) 'Female seeking male, Broome', (b) 19 years of age, and (c) a photograph of the complainant in a bikini. The complainant was staying with her grandmother at Broome whilst on school holidays.

PQ stated in his record of interview that during their conversations on Divas Chat the complainant asked him whether he wished to "hook up" and whether he "liked oral".

The complainant asked PQ via Divas chat to come to her house at 12 midnight and pick her up. He did so. Subsequently, the complainant and PQ undressed one another before proceeding to engage in sexual intercourse.

PQ was released on an 18 month Intensive Supervision Order with the sentencing judge stating that PQ had a: "comparatively short criminal history with three convictions for damage and one conviction for assault. You have no prior history of sexual offending and there is no suggestion that you pose a particular risk in terms of reoffending."

Despite these findings by the sentencing judge, PQ was the subject of mandatory registration and reporting where it is reasonably arguable that registration was not required. Further, reporting for a period of 15 years was manifestly disproportionate to the criminality involved in the offending.

### **The case of WX**

WX was convicted of several counts of sexual penetration of a child under the age of 16. WX was from a very remote Aboriginal community in the Northern Territory and was 22 years old at the time of the offending. The complainant lived in a regional town in the East Kimberley and was 14 years old. The parties had first made contact with each other via a social media site where WX had told the complainant he was 22 years old and the complainant had told WX that she was 19 years old. The complainant asked WX to travel to her town to meet her in person and it was during this time that they engaged in several acts of consensual sexual intercourse at the complainant's home.

WX was sentenced on the basis that, at the time of the commission of the offences, he held an honest and reasonable but mistaken belief that the complainant was over 16. The defence of honest and reasonable but mistaken belief that the complainant

was over 16 was not available to WX as complete defences to the charges by virtue of s321(9) of the *Criminal Code*.

A psychological report which was before the Court at the time of sentence noted that WX suffered from a cognitive impairment consistent with a diagnosis of FASD. WX's answers to police in his record of interview demonstrated a complete lack of understanding of the legal age of consent and the fact that it was unlawful to engage in sexual activity with persons under the age of 16, even if that activity was completely consensual.

Medical records before the sentencing court established that the complainant had had multiple sexual partners prior to the sexual activity with WX. The records also recorded that the complainant was a very physically mature 14 year old "who could easily pass as at least five years older".

WX spent 15 months in custody on remand for the offences before being released on a suspended imprisonment order, accompanied by mandatory registration and reporting for 15 years. Again, mandatory reporting for 15 years is an extremely onerous requirement for a young Aboriginal adult of limited capacities.

Since being sentenced, WX has accumulated several convictions for failing to report as required, with most due to his inability to remember to report or a very transient lifestyle which has seen him move between several Aboriginal communities in WA and the NT.

## CONCLUSION

ALSWA strongly supports reforms to the *Community Protection (Offender Reporting) Act 2004* which provides judicial discretion at the time of sentencing in appropriate cases as to whether registration is required and the duration and nature of any reporting requirements. Reform should also permit regular judicial review of registration and reporting requirements. ALSWA also supports reforms where reporting and registration is administered by the Department of Justice rather than WA Police.



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