# Statement of Concern

Aboriginal Family Legal Service WA (AFLS) and Aboriginal Legal Service WA (ALSWA) wish to bring immediate attention to two key issues having severe, negative impacts on the lives of Aboriginal people in Western Australia:

1. The chronic lack of investment in Aboriginal Sentencing Courts (First Nations Specialist Courts, also referred to as 'Problem Solving Courts') in Western Australia; and
2. Current policing and justice system practices which mean that Aboriginal people are still less likely to be granted bail than non-Aboriginal people.

## Aboriginal Sentencing Courts

AFLS and ALSWA are deeply concerned by the failure of the Western Australian Government to recognise the value of and adequately invest in Aboriginal Sentencing Courts for Aboriginal persons convicted of summary offences. The purpose of the courts is to address the overrepresentation of Aboriginal and Torres Strait Islander people in the justice system through culturally appropriate, individualised court experiences and alternative sentencing options to custodial sentences. The courts incorporate wraparound services to support offenders, and are an important access to justice initiative.[1]

We refer to and endorse the Law Society of Western Australia Briefing Paper on First Nations Specialist Courts, which provides the key information summarised in this section.

Jurisdictional Analysis

Aboriginal Sentencing Courts have been established in Victoria (Koori Courts), South Australia (Nunga Courts) and Queensland (Muri Courts) to achieve better justice outcomes for Aboriginal people. The general principles of Aboriginal Sentencing Courts are:

1. Elders or respected persons from the community are present in court to assist a sitting Magistrate to understand the lives and culture of Aboriginal people.
2. The accused must face the Magistrate and the Elders.
3. The Magistrate sits at a table with all other participants.
4. Participants talk in plain English, rather than using technical legal language.
5. The accused must intend to make a guilty plea.
6. The accused has the opportunity to talk about their past, reasons for offending, and what they can do about it. Family and community members also have the opportunity to voice their perspective.
7. The accused must live within or have been charged within a certain area, and the offence must be a summary offence.

[1] The Law Society of Western Australia, Briefing Paper: First Nations Specialist Courts, August 2021, https://www.lawsocietywa.asn.au/wp-content/uploads/2015/10/2021AUG24-First-Nations-Specialist-Courts.pdf.

8. The courts must utilise the general sentencing orders available to them, however therapeutic programs such as drug rehabilitation and victim conferencing are often part of the curial process prior to the sentence being delivered.

The approach of the Aboriginal Sentencing Courts to include Elders and respected persons in the process causes offenders to experience shame that cannot be evoked by mainstream courts. This cultural element in sentencing is a key factor in improving outcomes for the offender and their community. Ensuring greater participation of the Aboriginal community in the sentencing process is also an important element of increasing Aboriginal ownership of the administration of the law.[2]

***Western Australia***

The only specialist court in Western Australia is the Barndimalgu Aboriginal Family Violence Court in Geraldton. The Barndimalgu Court provides a more culturally appropriate and therapeutic court-based model for addressing Aboriginal family violence in Geraldton, and includes local Aboriginal community members in the court-based case management process. An evaluation of the Barndimalgu Court found that those offenders who completed Barndimalgu were less likely to reoffend compared to those who were eligible but didn't participate.[3]

In 2006, a specialist Kalgoorlie Community Court program commenced to provide a courtroom sentencing experience and environment that was less intimidating to Aboriginal people. The Community Court was discontinued in 2015 as it did not have a demonstrable effect on recidivism rates comparable to mainstream courts. An evaluation of the court, however, explained that:

- More serious offences (hence more serious offenders) were being referred to the Kalgoorlie Community Court than the mainstream;
- Although the 'time to fail' for the Kalgoorlie Community Court participants was shorter than for mainstream participants, a greater proportion of the failure cases for Community Court participants were less serious than their original offence compared to offenders choosing the mainstream court;
- Kalgoorlie Community Court participants were much less likely to have no prior convictions; and
- The groups were so different in characteristics that the difference in time to fail could not confidently be attributed to whether the offender attended the Community Court or the mainstream court.[4]

In AFLS's opinion, the Community Court was never properly resourced to perform the functions expected of it, and was limited by the Court not being enshrined in legislation as a division of the Magistrates Court. Issues linked to the Community Court largely related to the limited cross-cultural training and lack of support services available for Aboriginal people to address the underlying causes behind their offending, which speaks to the chronic underfunding of culturally appropriate support services for Aboriginal people. In a submission to the Australian Law Reform Commission's Inquiry into

[2] Magistrates' Court of Victoria: Koori Court Unit, Koori Court: Information for Legal Representatives, https://www.mcv.vic.gov.au/sites/default/files/2018-10/Koori%20Court%20-%20Information%20for%20legal%20representatives%20brochure.pdf.

[3] Government of Western Australia Department of the Attorney General, Evaluation of the Metropolitan Family Violence Court and Evaluation of the Barndimalgu Court: Evaluation Report, December 2014, https://department.justice.wa.gov.au/_files/fvc_evaluation_report.PDF.

[4] Aboriginal Legal Service of Western Australia, Submission to the Australian Law Reform Commission's Discussion Paper on Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, September 2017, https://www.alrc.gov.au/wp-content/uploads/2019/08/74._aboriginal_legal_service_of_wa_limited.pdf.

the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, ALSWA noted the same evaluation found that:

> *A lack of mainstream and Aboriginal-specific treatment, intervention and rehabilitation programs and support services coupled with a lack of knowledge and information sharing concerning those programs compromised the effectiveness of the program. Furthermore, planned extra resources for the Community Court were not forthcoming.*[5]

Criticisms

There are two main criticisms of Aboriginal Sentencing Courts:

A. That they have not made a difference in recidivism rates, and
B. Perceived 'reverse discrimination', where Aboriginal offenders, through Aboriginal Sentencing Courts, receive lighter sentences for the same crimes as non-Aboriginal offenders.

In respect of criticism A., Professor Marchetti has noted:

> *Quantitative reoffending analyses fail to show that these innovative justice processes have greater success in changing an offender's behaviour than do conventional court processes, but there is evidence that they are exposing First Nations offenders to more meaningful and culturally appropriate court practices.*[6]

An evaluation of the Barndimalgu Court in Geraldton found that while recidivism rates for offenders participating in Barndimalgu were not significantly different to those in the mainstream court, that participation in case managed behaviour change programs was beneficial for offenders and their families. Victims participating in the court process praised the accessibility of behaviour change programs for offenders, which enabled offenders to understand the effects of their violence on their children and provided them with strategies to deal with matters without resorting to violence. Additionally, access to a case coordinator for victims reportedly "restored a level of confidence, self-esteem and trust in victims," and overall most victims reported being satisfied with the Court program.[7]

In respect of criticism B., there is no evidence to support the criticism that Aboriginal Sentencing Courts are a soft option, and is rather based on the inference that the existence of such courts results in lenient approaches to criminal justice. Offenders in Aboriginal Sentencing Courts are sentenced under the same laws which apply in conventional courts and an evaluation of the Koori Courts in Victoria determined that the Aboriginal Sentencing Court experience is often more meaningful and confronting for an offender than appearance in a mainstream court.[8]

Policy Position

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[5] Aboriginal Legal Service of Western Australia, Submission to the Australian Law Reform Commission's Discussion Paper on Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, September 2017, https://www.alrc.gov.au/wp-content/uploads/2019/08/74._aboriginal_legal_service_of_wa_limited.pdf.
[6] Elena Marchetti, Indigenous Courts and Justice Practices in Australia, May 2004, https://www.aic.gov.au/publications/tandi/tandi277.
[7] Government of Western Australia Department of the Attorney General, Evaluation of the Metropolitan Family Violence Court and Evaluation of the Barndimalgu Court: Evaluation Report, December 2014, https://department.justice.wa.gov.au/_files/fvc_evaluation_report.PDF.
[8] Bridget Mcasey, A Critical Evaluation Of The Koori Court Division Of The Victorian Magistrates' Court, July 2005, https://ojs.deakin.edu.au/index.php/dlr/article/view/298/302/

AFLS and ALSWA strongly urge the reintroduction of Aboriginal Sentencing Courts in Western Australia. The courts should be enshrined in legislation as a division of the Magistrates Court, based on the Victorian Koori Courts model, per the Magistrates' Court (Koori Court) Act 2002. Key features of the Aboriginal Sentencing Courts model must include:

- Considered and planned consultation with Elders and senior leaders from the proposed locations of the specialist courts.
- Identification of the most suitable and culturally appropriate Elders and senior leaders to be involved.
- Provision of assistance and referrals to the accused by an Aboriginal Sentencing Court Officer.
- Access to culturally safe, Aboriginal Community Controlled treatment, intervention and rehabilitation programs to address the causes of offending behaviour.
- Preparedness to model the specialist courts in line with the identified needs of each respective region, rather than adopting a one size fits all approach.
- The use of culturally appropriate processes such as the Aboriginal Interpreting Service.
- Specially trained Magistrates who understand the specific history and culture of the region.
- All sentencing options available to Magistrates in mainstream criminal courts are available, with the primary goal to create sentencing orders that are more culturally appropriate to the Aboriginal accused, thereby reducing the rate of re-offending.
- Clear and consistent operating procedures that also allow for local flexibility.

There must be adequate investment in wraparound services for remote courts so that community-based sentences and diversionary programs are available to the Magistrate to order.

Under the Victorian model, the Koori Court is established under the *Magistrates Court (Koori Court) Act 2002*, which has subsequently been incorporated into the *Magistrates' Court Act 1989*. The Act outlines the jurisdiction of the Koori Court Division and the circumstances in which the Koori Court division may deal with certain offences, as follows:

> **4E. Jurisdiction of the Koori Court Division**
>
> The Koori Court Division has –
> (a) The jurisdiction to deal with a proceeding for an offence given to it by section 4F; and
> (b) Jurisdiction to deal with a breach of sentencing order made by it (including any offence constituted by such a breach) or variation of such a sentencing order; and
> (c) Any other jurisdiction given to it by or under this or any other Act.
>
> **4F. Circumstances in which the Koori Court division may deal with certain offences**
>
> 1. The Koori court division only has jurisdiction to deal with a proceeding for an offence (other than an offence constituted by a breach of a sentencing order may by it) if –
>    a. The accused is Aboriginal;
>    b. The offence is within the jurisdiction of the Magistrates' Court, other than –
>       i. A sexual offence as defined in section 6B(1) of the Sentencing Act 1991; or
>       ii. An offence against section 22 of the Crimes (Family Violence) Act 1987 (breach of an intervention order or interim intervention order)

or an offence arising out of the same conduct as that out of which the offence against section 22 arose; and

c. The accused
   i. Intends to plead guilty to the offence; or
   ii. Pleads guilty to the offence; or
   iii. Intends to consent to the adjournment of the proceedings to enable him or her to participate in a diversion program; and
d. The accused consents to the proceeding being dealt with by the Koori Court Division.

2. Subject to and in accordance with the rules –
   a. a proceeding may be transferred to the Koori Court Division, whether sitting at the same or a different venue;
   b. the Koori Court Division may transfer a proceeding (including a proceeding transferred to it under paragraph (a) to the court, sitting other than as the Koori Court Division, at the same or a different venue.
3. Despite anything to the contrary in this Act, if a proceeding is transferred from one venue of the court to another, the transferee venue is the proper venue of the court for the purposes of this Act.

Western Australia should consider the introduction of a similar legislated model.

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**Questions:**

- Will the State Government commit to broader reintroduction of Aboriginal Sentencing Courts in Western Australia (beyond Barndimalgu), and to involving Aboriginal people and organisations in the design, establishment and evaluation of such court/s?
- Will the State Government commit to enshrining such Aboriginal Sentencing Court/s in legislation as a division of the Magistrates Court?
- Will the State Government commit to underpinning the reintroduction of Aboriginal Sentencing Courts in Western Australia with alternative, non-custodial sentencing options and diversionary programs underpinned by legislation?
- Will the State Government invest in accessible, culturally appropriate and trauma informed support services and diversionary programs to underpin non-custodial supervisory sentences, especially in rural, regional and remote areas?

**Policing and Justice System Practices Preventing Bail of Aboriginal People**

AFLS and ALSWA are additionally deeply concerned that Aboriginal people continue to be less likely to be granted bail than non-Aboriginal people.[9] Under the *Police Force Amendment Regulations 2019 (WA)*, WA Police are required to phone the ALSWA Custody Notification Scheme every time an Aboriginal person is detained in a police facility throughout the state. ALSWA recently reported that there has been a substantial increase in the number of the calls to the CNS in recent years, with an estimated 36,000 calls in 2023.

The various drivers of the over-representation of Aboriginal people on remand were explored by the Australian Law Reform Commission in their Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, including:

1. The likelihood of accused Aboriginal people having prior convictions;
2. Prior failures to appear at court;
3. Lack of a fixed residential address and stable employment;
4. Language barriers, where accused persons are unable to accurately outline their living arrangements, support networks, cultural obligations and other relevant matters to the court;
5. Presumptions against bail (i.e. the accused will not be granted bail unless there are exceptional reasons) or when an accused must show cause, which tend to magnify the obstacles to a grant of bail for an Aboriginal person; and
6. Bail provisions that operate to restrict multiple applications for bail following a bail refusal.

In Western Australia, 'Schedule Two Cases' are matters where there is a presumption against bail. If an accused is charged with a 'serious offence' while on bail or parole for another matter, the court is not to grant bail unless there is an exceptional reason why the accused should not be kept in custody. Schedule 2 of the *Bail Act* defines 'serious offence', which ranges from very serious (murder, aggravated sexual penetration without consent) to less serious (assaulting a public officer, burglary, indecent assault, assault occasioning bodily harm).

Structural Discrimination

In regard to the structural bias and discriminatory practices within the justice system that disproportionately affect Aboriginal people in Western Australia, ALSWA highlighted two key issues in response to the Australian Law Reform Commission's Inquiry:

> *First, crime statistics (e.g. 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.*
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> *As one example, it is an offence in Western Australia to consume alcohol in a public place… many people consume alcohol in contravention of this law e.g. drinking at a family picnic on the river. However, not everyone is charged with street drinking;*

[9] Australian Government: Australian Law Reform Commission, Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133), January 2018, https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/5-bail/background-32/.

*ALSWA suggests that Aboriginal 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.*[10]

The former Chief Justice of Western Australia, Wayne Martin, has similarly 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 than proceeded against by summons. If they are arrested, Aboriginal people are more likely to be remanded in custody 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 that non-Aboriginal people, and at the end of their term of imprisonment they are much less likely to get parole than non-Aboriginal people.*[11]

The structural barriers experienced by Aboriginal people in seeking bail highlight the need for reform to the *Bail Act 1982* (WA). For example, the *Bail Act* provides that when considering bail, the court must take into account, among other things, the "character, previous convictions, antecedents, associations, home environment, background, place of residence, and financial position of the accused.[12] ALSWA observed that these criteria have the potential to disadvantage Aboriginal people applying for bail, highlighting the particular inability of clients to meet bail conditions because they are unable to raise a surety. ALSWA further argue that an assessment of an Aboriginal person's family, kin and community ties would be more appropriate for Aboriginal people applying for bail.[13] The Law Reform Commission of Western Australia, in their Final Report on Aboriginal Customary Laws, has similarly suggested that customary law and cultural factors may explain more fully an Aboriginal person's ties to his or her community, and "provide a reason for which an accused previously failed to

[10] Aboriginal Legal Service of Western Australia, Submission to the Australian Law Reform Commission's Discussion Paper on Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, September 2017, https://www.alrc.gov.au/wp-content/uploads/2019/08/74._aboriginal_legal_service_of_wa_limited.pdf.
[11] The Honourable Wayne Martin AC KC, Chief Justice of Western Australia, Indigenous Incarceration Rates: Strategies for much needed reform (Law Summer School 2015) 8-9.
[12] *Bail Act 1982* (WA) Clause 3, Part C, Schedule 1.
[13] Aboriginal Legal Service of Western Australia, Submission to the Australian Law Reform Commission's Discussion Paper on Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, September 2017, https://www.alrc.gov.au/wp-content/uploads/2019/08/74._aboriginal_legal_service_of_wa_limited.pdf.

attend court. Aboriginal customary law processes may impact upon the choice of appropriate bail conditions."[14]

AFLS notes that the *Bail Act 1977* (Vic) has a standalone provision that requires bail authorities to consider any issues that arise due to the person's Aboriginality, including cultural background, ties to family and place, and cultural obligations. This consideration is in addition to other requirements of the *Bail Act* and as with all other bail considerations, the requirement to consider issues that arise due to the person's Aboriginality does not supersede considerations of community safety. Courts in Victoria have interpreted the provision in the *Bail Act* to permit consideration of the over-representation of Aboriginal people in prison and the effects of policing practices.[15] AFLS considers that similar legislative reform is critical in Western Australia, to address the systemic barriers that disproportionately negatively affect Aboriginal people applying for bail.

In respect of police practices, AFLS purports that over-policing of Aboriginal people is a key contributing factor to incarceration rates, and notes and endorses ALSWA's recommendation to the Australian Law Reform Commission that the most appropriate way of providing accountability for discretionary decisions by police is to mandate police to provide written records justifying decisions not to caution or divert Aboriginal people for first and low-level offences.[16]

Policy Position

AFLS strongly supports ALSWA's position that the *Bail Act 1982* (WA) should be amended to:

1. Create a general presumption in favour of bail so that a court may only refuse bail where there is a substantial risk that the accused will fail to appear in court; commit an offence; endanger the safety, welfare or property of any person; or interfere with witnesses or otherwise obstruct the court of justice.
2. Restrict Schedule Two Cases to the most serious offences only.
3. Ensure that a court only imposes conditions to address any risk (that the accused will fail to appear in court; commit an offence; endanger the safety, welfare or property of any person; or interfere with witnesses or otherwise obstruct the court of justice) if the court is satisfied that the condition is reasonably necessary in all of the circumstances.

AFLS additionally supports ALSWA's position that police should be mandated to provide written records justifying decisions not to caution or divert Aboriginal and Torres Strait Islander people for first and low-level offences. Written records must explain why police selected the option used and why they did not select a less punitive option. This is critical in the context of:

[14] Law Reform Commission of Western Australia, Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture – Final Report, 2006, https://www.wa.gov.au/system/files/2021-04/LRC-Project-094-Discussion-Paper.pdf.
[15] Australian Government: Australian Law Reform Commission, Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133), January 2018, https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/5-bail/background-32/.
[16] Aboriginal Legal Service of Western Australia, Submission to the Australian Law Reform Commission's Discussion Paper on Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, September 2017, https://www.alrc.gov.au/wp-content/uploads/2019/08/74._aboriginal_legal_service_of_wa_limited.pdf.

a. A 12 year old Aboriginal child with no criminal convictions being charged with receiving a stolen freddo frog worth 70 cents, and being arrested by police and detained in police cells because he failed to answer his bail after his mother forgot the court date.
b. A 16 year old Aboriginal boy who attempted to commit suicide by throwing himself in front of a car being charged with damaging the vehicle.
c. A 15 year old Aboriginal boy from a regional area being charged with attempting to steal an ice-cream and subsequently spending 10 days in custody in Perth before the charge was dismissed.[17]

There must also be adequate investment in the provision of culturally appropriate bail support and diversion programs for Aboriginal people in Western Australia, which provide holistic, flexible and individualised support and assistance for clients. This must include action to ensure that Aboriginal people are not remanded in custody because they are unable to meet bail conditions set by police or the court, and assistance to ensure that Aboriginal people comply with their bail conditions and have appropriate support to divert them from further involvement in the criminal justice system. This support must be offered through Aboriginal-run programs delivered by Aboriginal people.

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**Questions:**

- Will the State Government commit to reviewing and amending the *Bail Act 1982* (WA) to:
  1. Create a general presumption in favour of bail so that a court may only refuse bail where there is a substantial risk that the accused will fail to appear in court; commit an offence; endanger the safety, welfare or property of any person; or interfere with witnesses or otherwise obstruct the court of justice.
  2. Restrict Schedule Two Cases to the most serious offences only.
  3. Ensure that a court only imposes conditions to address any risk (that the accused will fail to appear in court; commit an offence; endanger the safety, welfare or property of any person; or interfere with witnesses or otherwise obstruct the court of justice) if the court is satisfied that the condition is reasonably necessary in all of the circumstances.
- Will the State Government support mandating to require WA Police to provide written records justifying decisions not to caution or divert Aboriginal people for first and low-level offences?
- Will the State Government commit adequate financial investment into the provision of culturally appropriate bail support and diversion programs for Aboriginal people in Western Australia?

[17] Aboriginal Legal Service of Western Australia, Submission to the Australian Law Reform Commission's Discussion Paper on Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, September 2017, https://www.alrc.gov.au/wp-content/uploads/2019/08/74._aboriginal_legal_service_of_wa_limited.pdf.