2014

20th Anniversary Review

of the

1994 Chief Justice's Gender Bias Taskforce Report

September 2014

Women Lawyers of Western Australia (Inc.)

Women Lawyers
of Western Australia (Inc.)

FOREWORD

In 1993, Western Australia's Chief Justice the Honourable David Malcolm AC QC took what was, in some respects, a radical step for the time: he acknowledged the possibility that gender bias existed in the law and in the administration of justice in Western Australia. He established a Taskforce to examine the substantive law, the Judiciary, and the procedures of the courts and the work of the legal profession, to investigate the extent to which gender bias existed in Western Australia and to make recommendations for its elimination.[1]

The establishment of the Taskforce, with the support of the Chief Justice, and the wide ranging recommendations made by the Taskforce, generated a real momentum for change. The extent of that momentum was demonstrated by a Progress Report released by the State Government in 1997, which addressed its implementation of the Taskforce's recommendations. There is no doubt that the Taskforce's recommendations led to many significant changes both in the law and in the administration of justice in this State.

However, there is also no doubt that the momentum for change waned over time, perhaps as a result of an assumption that any gender bias, which may have existed, had been eliminated. It was timely, then, that in 2011, Women Lawyers of Western Australia (Inc.) decided to identify which of the Taskforce's recommendations had been implemented and those which should still be implemented, to investigate the extent to which gender bias continues to exist in the law and the administration of justice in Western Australia, and to make recommendations for its elimination.

The findings of this 2014 Review are consistent with some observations made in 2005 by Baroness Helena Kennedy QC about the progress made in eliminating gender bias in the law in the United Kingdom. Baroness Kennedy might equally have been speaking of the position in Western Australia, as disclosed in this Report, when she observed:

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[1] For a brief summary of the genesis for the establishment of the Taskforce in Western Australia, see Hon Justice David Malcolm AC, 'Women and the Law – Proposed Judicial Education Programme on Gender Equality and Task Force on Gender Bias in Western Australia', (1993) 1 *Australian Feminist Law Journal* 139, 144.

> ‘There is now greater awareness of the ways in which discrimination works. The institutions have been forced into reforms. Women are more visible in the courts and the legal establishment talks a good talk on domestic violence. It is tempting to swallow the claim that we have moved into a post-feminist era; the battles having been won, the picture is completely changed, and women have the world at their feet…
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> … With the increased numbers of young women in the law schools and the legal profession, with a growing number of women receiving appointments to the Bench, we can be seduced into the premature conclusion that the systemic problems have been solved and it is now just a question of more women working their way through the profession. The illusion of inclusion can deny the reality that professional structures still do not adequately accommodate the reality of women’s lives; …that certain attitudes to women remain unchanged and that women coming before the courts still encounter myths and stereotypes which disfigure the legal process.
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> … The failure is that we still do not take sufficient account of the ways that women’s experience is different from that of men whether as practitioners or as people forced to use the law, as victims of crime or as defendants.’[2]

In summary, this 2014 Review highlights that while much has been achieved since 1994, much more remains to be done to eliminate gender bias in the law and in its administration in Western Australia.

Like the 1994 Report, the 2014 Review Report contains numerous recommendations for further action. Those recommendations are the culmination of three years of work, and extensive consultations with individuals and representative bodies involved in the administration of justice. Many of the recommendations are practical in nature, and specify time frames for their implementation, so that the extent of that implementation can readily be measured in the future.

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[2] Baroness Helena Kennedy QC, *Eve Was Framed. Women and British Justice,* 2nd ed, 2005, Vintage Books, p1-2.

This Report is both a call for further action, and for a renewed commitment to the elimination of gender bias in the law and in the administration of justice in Western Australia. I commend its recommendations to all those committed to ensuring that our legal system operates justly for all in our society.

Justice Janine Pritchard

Supreme Court of Western Australia

Chair of the Steering Committee, 2014 Review Project

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TERMS OF REFERENCE

The broad Terms of Reference for the 2014 Review Project are as follows:

1. To review the extent to which the recommendations made in the 1994 Report of the Chief Justice's Taskforce on Gender Bias (the 1994 Report) have been implemented.

2. To the extent that any recommendations in the 1994 Report have not been implemented, to investigate and make recommendations in relation to whether, and if so how, those recommendations may now be implemented.

3. To investigate the extent to which gender bias continues to exist in the law and the administration of justice in Western Australia, and to make recommendations for its elimination.

4. To consult with such government agencies, organisations, groups or persons as the Steering Committee thinks fit in relation to these matters.

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OTHER CONTRIBUTORS

The names of those consulted during this 2014 Review or those who provided input on particular issues (unless otherwise provided on a confidential basis) are included as an attachment to each Chapter.

The Steering Committee acknowledges and thanks Dr Monica Cass, Senior Evaluation and Research Officer, Policy and Aboriginal Services Directorate of the Department of the Attorney General for her assistance in the early stages of the Review.

The Steering Committee also wishes to acknowledge and particularly thank Abigail Davies, Senior Sessional Member, State Administrative Tribunal for her important role in scoping the 2014 Review Project and for her early contributions to Chapter 2 and the areas relevant to women in the legal profession.

INTRODUCTION

Cathryn Greville, President
Women Lawyers of Western Australia (Inc.)

On behalf of Women Lawyers of Western Australia (Inc.) (**WLWA**), I am pleased to release this 20th Anniversary Review of the Gender Bias Taskforce Report (**2014 Review Report**). This 2014 Review Report is the culmination of over three years of work investigating and documenting the extent to which gender bias exists in the law and administration of justice in Western Australia today.

This work was undertaken through WLWA's 20th Anniversary Review of the 1994 Chief Justice's Gender Bias Taskforce Report Project (**2014 Review**). In the early 1990s, the then Chief Justice of Western Australia, Chief Justice David Malcolm, established a Gender Bias Taskforce. The Taskforce considered all aspects of gender bias in the courts, the legal profession and the administration of justice, and delivered a report in 1994 with its findings (**1994 Report**). The 1994 Report contained 198 recommendations aimed at addressing gender bias affecting women with respect to a broad range of issues such as education, access to justice, women in the legal profession, appointments to the judiciary, the courts, women as victims, Aboriginal

women and violence, particular laws affecting women, police officers and punishment of women.

The 2014 Review commenced in late 2011, with a view to delivering the findings in 2014, 20 years on from the 1994 Report. To that end, WLWA established a Steering Committee, chaired by the Honourable Justice Janine Pritchard. The Steering Committee appointed nine subcommittees to be responsible for reporting in relation to the issues raised by the 1994 Report, and any new issues relevant today. Each subcommittee was tasked with consulting with persons and organisations that were likely to have a useful contribution to make, considering relevant legislation, case law or literature, and drafting a chapter for the 2014 Review Report, to be finalised by the Steering Committee. In addition to the 1994 Report, the subcommittees considered the relevant discussion in the 1997 Progress Report published by the Women's Policy Development Office in Conjunction with the Ministry of Justice.[3]

The Steering Committee considered it essential that a wide range of stakeholders had the opportunity to provide extensive input into the investigation of the issues and the recommendations arising in this 2014 Review. Accordingly, the various subcommittees, overseen by the Steering Committee, undertook extensive consultation which involved receipt of both verbal and written information from a range of stakeholders across the community, business, legal and associated professions, non-government organisations and individuals, and a number of government agencies. As part of the 2014 Review, WLWA commissioned independent consultancy Nexus Network to conduct a survey of the legal profession (the first of its kind since 1999) in relation to issues relevant to chapters 2 and 3.[4]

The procedure adopted for each subcommittee's investigations was tailored to the issues, and is described at the start of each chapter of the 2014 Review

[3] *Progress Report: A Report on Implementation by Government of Recommendations Contained in the Chief Justice's Taskforce Report on Gender Bias* (April 1997) ("1997 Progress Report").

[4] The results of WLWA's Survey of the Legal Profession are discussed in Chapter 2 of this Review Report.

Report. The results of the investigations and analyses of the findings are also set out in the respective chapters of this report.

Through the release of 197 Recommendations, the 2014 Review Report suggests numerous ways to enhance women's participation in the legal profession, justice system and community more broadly, and to combat discrimination in the law. A full list of all Recommendations from each chapter is extracted below under the heading "Summary of Recommendations".

The Steering Committee would like to acknowledge and thank all those who engaged in consultations, provided submissions and feedback at various stages of the review. The persons who were consulted or otherwise contributed to the investigations and preparation of the report are listed at the back of each chapter.

A number of those involved with the preparation of this report had also contributed to the original 1994 Report, either as a member of one of the subcommittees at that time or through involvement with the investigations of the subcommittees. We are very grateful to have benefitted from the knowledge and experience of those people again for this 2014 Review Report.

WLWA also gratefully acknowledges the support that we have received for this project from the Department of the Attorney General, the Hon Chief Justice Wayne Martin AC, the Public Purposes Trust, the Department of Communities: Women's Interests, the College of Law and Francis Burt Chambers. The work of the subcommittees was greatly assisted by funding grants from the Public Purposes Trust, Department of Communities: Women's Interests and the Department of the Attorney General, for which WLWA is extremely grateful.

WLWA is indebted to the hard work and dedication of the Steering Committee, the subcommittee members, and the invaluable and generous time and contributions of so many representatives from different areas of the community, law and justice system. All of these persons assisted with this project as a result of which WLWA is able to release this 2014 Review Report.

It must be acknowledged that the extensive work conducted by the Steering Committee and subcommittee members was entirely voluntary, and completed on top of the members' ordinary (and often considerable) professional, personal and family commitments.

The 2014 Report provides a contemporary perspective on the gender bias issues facing women today. Not only do such issues prevent women from participating fully in the community and accessing the law and justice system, but they also present a fundamental impediment to equality before the law, and for these reasons must be addressed. We encourage members of the profession, government, private and community associations to familiarise themselves with the findings of this 2014 Review Report, and take immediate action to implement the Recommendations contained within it.

WLWA is committed to monitoring the progress of implementation of these Recommendations. We look forward to witnessing the positive change which the implementation of these the 2014 Report Recommendations will achieve.

Cathryn Greville

DISCLAIMER

The views set out in this Report represent a majority of the Steering Committee of the Review Project. They do not necessarily represent the views of all of the members of the Steering Committee, Subcommittees or contributors on every issue.

SUMMARY OF RECOMMENDATIONS

Chapter 1: Women's Access to Justice and the Environment of the Court

1.1 The State Government increases funding, to commence within two years of this 2014 Review Report, for specialist women's legal services and Community Legal Centres ('CLC's'), to address areas of legal need for women including (but not limited to) civil disputes and court advice and representation.

1.2 The State Government increases funding, to commence within two years of this Report, for support services for women, particularly in regional areas.

1.3 The State Government works with the Commonwealth Government to recognise and address the indirect discrimination against the circumstances of women in the application of current legal aid funding, and the specific barriers to justice that women face, in order to tailor the legal aid system to meet the particular needs and experiences of women,[5] and reports to State Parliament within two years of this Report.

1.4 The State Government funds the provision of legal services to women in relation to family law property settlement matters, through grants to the Legal Aid Commission of Western Australia ('Legal Aid WA') and CLCs, with funding to commence within two years from this Report.

1.5 Legal Aid WA, ideally within two years of this Report, amends its grant eligibility guidelines to include scope for grants of legal aid to be made to women facing disadvantage (particularly those escaping family and domestic violence) for property settlement matters.

1.6 The Aboriginal Legal Service ('ALS'), within two years of this Report, implements conflict management policies and procedures and addresses the installation of 'Chinese walls', to overcome potential conflicts between clients and prospective clients.

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[5] Refer to Recommendations 12-15 of the Senate Committee Report: Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (June 2004), page 48.

1.7 State Government service providers, such as Legal Aid WA, CLCs and specialist women's service providers (both legal and non-legal) liaise across the sector on an ongoing basis to ensure mutual understanding of each other's services to assist with cross-referral of women in need of services in an accurate, timely and efficient manner.

1.8 The State Government maintains and more widely disseminates the *Referral Guide for Domestic Violence Services Western Australia*,[6] to ensure that legal and non-legal support service providers, and the legal and non-legal support service professions more broadly, are aware of and can assist with referrals to and from service providers.

1.9 The State Government collaborates with Legal Aid WA, CLCs and other community legal service providers to determine the viability of the provision of a centralised 'one-stop shop' for legal and related services to women by running a pilot program to commence within two years of this 2014 Review Report and then evaluating that program and publishing the findings.

1.10 The Western Australian Department of the Attorney General ('DOTAG'), in consultation with providers of services to Aboriginal women, within 18 months of this Report examines how to best increase the number of Aboriginal people, in particular Aboriginal women, working in the court and justice system, and take steps to implement the findings of that examination within the following 12 months from those findings.

1.11 The State Government, in consultation with the courts and providers of services to Aboriginal women, within 18 months of this Report examines the potential to re-introduce the role of Aboriginal family liaison officers in courts where no such role presently exists, along with effective methods to identify and recruit appropriately qualified

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6 Government of Western Australia, Department for Child Protection, *Referral Guide for Domestic Violence Services Western Australia* http://www.dcp.wa.gov.au/CrisisAndEmergency/FDV/Documents/FDV%20Referral%20Guide%20April%202013.pdf (accessed 12 April 2014).

Aboriginal people to these positions including the provision of relevant training if required.

1.12 The State Government continues to fund and support Djinda Services to ensure appropriate support is available for Aboriginal women victims of domestic violence in the Perth metropolitan area.

1.13 The Magistrates Court of Western Australia and District Court of Western Australia allocate a liaison officer to be tasked with the responsibility of identifying and raising user specific requirements (including cultural and gender awareness issues) with judicial officers in the context of the day-to-day running of the court.

1.14 The Department of the Attorney General, in consultation with providers of services to women of culturally diverse and non-English speaking backgrounds, within 18 months of this Report examines how to best increase the numbers of women from culturally diverse backgrounds working in the court and justice system, and takes steps to implement the findings of that examination within the following 12 months.

1.15 All judicial officers in Western Australia commit to increasing their cultural awareness of issues and barriers facing women from culturally diverse backgrounds, including Aboriginal and non-English speaking women and recent migrants, by undertaking suitable cultural awareness training as a matter of priority, and in any event within two years from this Report.

1.16 The State Government, within two years from this Report, produces or funds the production of a bench book for judicial officers (similar to the *Aboriginal Cultural Awareness Bench Book*[7]) addressing issues surrounding cultural diversity in Western Australia, including in particular the impact of culture, religion and gender combined, and how these issues affect women from culturally and linguistically diverse backgrounds accessing justice and the court system.

1.17 The Department of the Attorney-General establishes a taskforce to consider how to best increase the number of women interpreters from a variety of backgrounds and promote interpreting as an attractive and desirable career path for women, with that taskforce to report within 12 months from the date of this Report and the taskforce's findings to be implemented within the following 12 months.

1.18 The State Government ensures interpreters who provide services to court users receive basic training regarding the court process and legal system, and cultural awareness issues relating to interpreting in court environments, within two years of this Report.

1.19 The State Government commits to and provides funding for legal services for women in rural, regional and remote areas of Western Australia, such funding to commence within two years of this Report.

1.20 The State Government supports and commits to providing access to justice for women in rural, regional and remote areas of Western Australia through the use of modern technology including:

a) real-time video link facilities that allow women, including vulnerable women and victims of crime, to participate in court proceedings from remote locations as they would in person; and

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[7] Fryer-Smith, Stephanie, *Aboriginal Benchbook for Western Australian Courts* (2nd Ed) (2008), available at: http://www.aija.org.au/online/ICABenchbook.htm (accessed 12 April 2014).

b) the provision of legal services to women via online service platforms, such as the Train-N-Track platform developed by Legal Aid WA, and real-time video link facilities with lawyers in other locations, and such technology (and the required trained staff to assist with it) to be operational within four years of this Report.

1.21 The State Government makes available, as a matter of urgency, and in any event within 12 months from this Report, appropriate accommodation within all court buildings for victims of family and domestic violence.

1.22 The State Government gives urgent priority to redefining areas in court precincts to include separate entrances and separate areas for witnesses/accused and applicants/respondents.

1.23 The State Government immediately, but in any event within 12 months of this 2014 Review Report, provides access to toilet and parenting facilities at all court precincts, particularly in rural, regional and remote areas. Should these be at the police station or another shared facility, the State Government ensures that court users are allowed access to the facilities without prejudice and ensure any security concerns are addressed immediately so that they do not serve as an impediment to access.

1.24 The State Government immediately makes refreshment facilities available in all court complexes in Western Australia.

1.25 The State Government:

a) within 12 months from this Report, reviews the best means to implement child minding facilities in all court precincts, using the Family Court of Western Australia's crèche as a desired model, and reports on the results of that review;

b) within two years from this 2014 Review Report, makes child minding facilities available in major suburban and regional court locations, commencing with the newly created Cathedral Square Justice Precinct to ensure there is child minding available for users of the Magistrates Court, District Court and Supreme Court of Western Australia; and

c) thereafter makes child-minding facilities available in regional court precincts.

1.26 The Department of the Attorney General, within 12 months from this Report, devises and publishes an action plan to increase overall diversity in the court environment, including in all positions held at the court.

1.27 The Department of the Attorney General, in consultation with the Heads of Jurisdiction of Courts and Tribunals, develops programs to support women into senior roles within the court environment and implement those programs within 18 months from this Report.

1.28 The Department of the Attorney General, within 12 months from this Report, prepares and disseminates information regarding careers within the court environment, including to high school and tertiary groups and culturally diverse groups within the community.

1.29 The Department of the Attorney General immediately focuses on the retention of court personnel, including by ensuring exit interviews are conducted to ascertain the reasons why staff leave, identifying common attrition factors and putting into place initiatives to alleviate these factors.

1.30 The State Government increases funding for judicial education for all judicial officers in Western Australia, to address current and relevant issues including with respect to gender bias and cultural diversity.

1.31 Cultural awareness training is provided to all judicial officers, commencing with comprehensive initial training immediately upon appointment to the bench and then appropriate ongoing training at least every two years thereafter.

1.32 The Western Australian Department of Education, upon consultation with the Department of the Attorney General, ensures legal education is included as a core subject in school curriculums, and that schools welcome the opportunity to enhance learning objectives surrounding the legal system and cultural awareness.

1.33 The State Government funds the provision of community legal education for Aboriginal and NESB women, including but not limited to demonstrated support for and advertisement of Legal Aid WA's online Train-N-Track platform.

1.34 The State Government supports and funds more education to the community on discrimination and equal opportunity matters, such as that provided by the Equal Opportunity Commission of Western Australia.

1.35 The Department of the Attorney General, in consultation with relevant consumer groups, re-examines the content and form of current information available to court users on the court and legal system and the services available to court users, with a view to identifying and implementing improvements within 12 months of this Report to ensure that information is presented in an accessible and meaningful way, with a particular focus on women from Aboriginal and non-English speaking backgrounds.

1.36 The Department of the Attorney General considers the methods used to disseminate information on the court and legal system and the services available to court users, with a view to identifying and implementing improvements within 12 months of this Report to ensure the broadest possible dissemination of such information in the community, particularly to women from Aboriginal and non-English speaking backgrounds.

1.37 The State Government, within two years of this Report, provides computer, internet and printing facilities for members of the public in all court precincts in metropolitan and regional areas, using the Family Court of Western Australia's self-service facilities as the desired model.

1.38 The State Government examines the use of standing touch screen information kiosks for public use at all court precincts, including in rural, regional and remote areas, to assist with access to essential information.

1.39 The State Government improves all court websites to provide essential information about the court, court processes and the legal system in consumer appropriate formats (not limited to written text) in a range of different languages, with a particular focus on the needs of women from Aboriginal and non-English speaking backgrounds.

1.40 The State Government ensures that court websites are maintained on an ongoing basis and information on court websites is continually updated to reflect changes to law, procedure and consumer needs, including in particular the needs of women from Aboriginal and non-English speaking backgrounds.

1.41 The State Government reviews court fees in family law matters to determine if the current fees charged are proving a barrier to women accessing justice and the Family Court in Western Australia and make representations to the Commonwealth Government as appropriate.

1.42 The State Government addresses, as a matter of urgency, the serious deficiencies in court facilities in existing courts in both metropolitan and rural, regional and remote areas, and in particular addresses:

- the lack of interview rooms;
- the current state of remote/CCTV rooms;
- the availability of appropriate mediation space; and
- the conditions of holding cells.

1.43 The State Government, in consultation with the courts, within 18 months examines the issue of security and identifies and implements improvements to court security to ensure the safety of court staff and users, particularly women and children.

1.44 The Attorney General, within 12 months, undertakes a review of the effect of recent changes to the *Juries Act 1902* (WA) to identify gender

bias against women with family care responsibilities (including childcare, elder care and care of sick or disabled family members) with a view to securing Cabinet approval for a bill to make any necessary amendments to address gender bias in the application of compulsory jury duty on women within the following 12 months.

1.45 The State Government, in consultation with the courts and court user groups (in particular those servicing women with children), over the next 18 months examines the introduction of staggered court listings and an automated listing notification system by text message, with a view to implementing improvements to court listings within two years of this Report.

1.46 The State Government implements a regular training program for all court personnel (including registry staff, associates, ushers, security and other staff) to address topics including (but not limited to) cultural awareness and the issues relevant to the cultural background and gender of court users.

Chapter 2: Career Paths for Women in the Legal Profession in Western Australia

2.1 University promotion committees in Western Australia do not refuse an application for promotion solely on the basis that a woman who is a primary caregiver of a family (including elderly parents) has not achieved the same amount of research and published works as her male counterpart, when all other requirements for promotion have been met.

2.2 Universities in Western Australia review the impact of promotional policies on female staff members with a view to implementing policies that support and encourage women's academic careers.

2.3 The Law Society of Western Australia continues to conduct its Graduate and Academic Standards Committee to monitor and advise on the graduate recruitment process.

2.4 The Law Society of Western Australia recommends guidelines or minimum standards for graduates in relation to aspects such as working conditions, salary, mental health issues, equal opportunity etc.[8]

2.5 The College of Law surveys its students and alumni annually in an attempt to gather data on gender balance in graduate employment.

2.6 The Law Society of Western Australia publishes information on flexible work practices, including guidelines and best practice examples of firms utilising such practices, on its website to inform the profession and broader public about flexible work practices generally.

2.7 The Law Society provides Continuing Professional Development sessions for lawyers (including partners and directors) as well as human resources and non-legal management and support staff regarding flexible work practices in commercial practice, including the implementation of flexible arrangements for men and women, best practice examples and addressing common pitfalls for employers and employees.

2.8 Employers actively implement, promote and appropriately support those on flexible work practices, including co-working and job-sharing arrangements, to ensure that flexible arrangements are available to those who require them, and that flexible workers are not disadvantaged in terms of opportunity and advancement by working in such a manner.

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[8] The Australian Young Lawyers' Committee is currently looking at this issue with a view to implementing a process through the Law Council of Australia.

2.9 Employers address the issues limiting women's careers, including by:

a) the adoption of more flexible conditions for promotion, including amending terms for promotion to remove criteria purely based on post qualification experience (PQE) or hours worked and to include criteria acknowledging work quality and output;

b) the provision of reintegration training for women to assist those on leave or returning from leave to maintain their skills and knowledge, particularly in relation to areas of law, practice and technology;

c) the determination of strategies to counter the view that flexible work equates to low career aspirations;[9]

d) the provision of networking and career-building opportunities for women, including those on maternity leave; and

e) the determination of strategies to ensure the needs of women returning from maternity leave are understood and appropriately accommodated, by engaging in honest and open dialogue with such women about the concerns they have and being prepared to implement change and improve office practices as a result of that dialogue.

2.10 The Law Society of Western Australia and Women Lawyers of Western Australia continue and actively promote their mentoring programs, particularly to women returning from leave.

2.11 The Law Society provides training for practitioners seeking to return to the profession after an extended period of time and such training to include issues relating to technology used in legal organisations, networking opportunities and professional and personal development skills.

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[9] See Australian Human Rights Commission, Accelerating the Advance of Women in Leadership: Listening, Learning, Leading Male Champions of Change 2013 https://www.humanrights.gov.au/publications/accelerating-advancement-women-leadership-listening-learning-leading.

2.12 The Law Society of Western Australia sets, publishes and promotes targets for the number of women in legal practice and ask law firms to report to the Law Society annually on achievement of these targets as a reporting requirement associated with the Law Society's Quality Practice Standard (QPS), or in the case of national and international firms utilising other quality assurance systems as part of the duties of a good corporate citizen.

2.13 Employers implement strategies to achieve these targets including:

a) targeted coaching;

b) sponsors and mentors including case managing those returning from parental leave; and

c) ensuring lawyers (generally senior associates and partners) who work flexibly continue to progress their careers.

2.14 Unconscious bias training be made mandatory and regular (at least every 3 years) as part of the Continuing Professional Development requirements of the Legal Practice Board of Western Australia for the renewal of practicing certificates.

2.15 Employers consider what steps they can take to implement cultural change to ensure that:

a) there is less focus on "face time";

b) there are good role models within the firm and support for women; and

c) formal flexible working arrangements are mainstreamed.

2.16 Employers more appropriately accommodate flexible work practice by:

a) providing remote access and Virtual Private Networks [10] and

b) the implementation of firm wide policies on expectations relating to completion of work outside business hours, to ensure hours of work are reasonable and not abused.

2.17 Employers consider what steps can be taken to assist with access to and the cost of childcare, including preferred supplier arrangements with childcare providers and salary packaging.

2.18 The Western Australian Bar Association appoints a diversity representative to support and promote career progression for women to the Independent Bar.

2.19 Large legal firms appoint a diversity representative to support and promote career progression for women.

2.20 Employers implement, or work to improve, sexual harassment policies and educate staff (both legal and non-legal) about what constitutes sexual harassment and that sexual harassment will not be tolerated in any form, through induction training and ongoing training programs.

2.21 The Law Society of Western Australia:

a) promotes understanding and awareness of the sexual harassment clauses of the Professional Conduct Rules to members of the profession;

b) conducts Continuing Professional Development sessions (attracting CPD points in the areas required by the Legal Practice Board for the renewal of practicing certificates) relating to sexual harassment in workplaces; and

[10] In using the term 'Virtual Private Networks' we refer to technology that enables people to work from locations remote from their workplaces but allows exactly the same data, with the same look and feel as if the person was accessing the computer in the physical workplace.

c) makes practitioners aware of the ability to speak to a senior practitioner and/or Senior Counsel in relation to ethical and professional misconduct issues (including in relation to sexual harassment by another practitioner).

2.22 The Law Society of Western Australia continues its Law Care (WA) counselling and information service and promotes the service and its ability to assist practitioners experiencing difficulties including dealing with instances of unprofessional conduct or professional misconduct.

2.23 The Western Australian Bar Association:

a) reviews, assesses and effectively publicises its Model Briefing Policy;

b) collects feedback from instructing solicitors and barristers as to the nature and rate of engagement of female barristers and any perceived obstruction or incentive to such engagement; and

c) adopts a policy directed to practising barristers that seeks to achieve the objectives of its Model Briefing Policy, including those relating to working flexibly.

2.24 The Western Australian Bar Association implements a formal mentoring program open to all barristers, including junior barristers and those undertaking pupillage that matches barristers with experienced mentors from various chambers, to provide practical advice and support specific to the environment of the Independent Bar.

2.25 The Law Society of Western Australia and the Western Australian Bar Association lobby the Western Australian Government to adopt a policy similar in content and purpose to the Commonwealth's *Legal Services Directions*,[11] especially as it relates to the briefing of women by State agencies.

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[11] Australian Government Attorney General's Department, *Legal Services Directions 2005* http://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Pages/Legalservicesdirectionsandguidancenotes.aspx.

2.26 All barristers' chambers in Western Australia review or introduce parental leave and other policies, to facilitate members taking, and returning from parental leave and those working flexibly.

2.27 The Law Society of Western Australia and the Western Australian Bar Association support Women Lawyers of Western Australia in requesting that the courts avoid or minimise the listing of matters in a way that disadvantages those with family responsibilities, in particular, that matters should generally not be listed before 9.15am or after 4.30pm save for emergencies.

2.28 All private legal firms be encouraged to adopt legal reporting to the Law Society on their expenditure in the same manner as government departments which outline the number of women and men briefed by number of briefs and total fees paid, with the aim to highlight pay inequity where it occurs.[12]

2.29 The Law Society of Western Australia and the Western Australian Bar Association make submissions to the Supreme Court to adopt a policy (similar to the NSW Bar) explicitly stating in the Senior Counsel protocol that a flexible or part-time practice is not a barrier to being appointed Senior Counsel.[13]

2.30 The Western Australian Bar Association implements a program to encourage more women to practice as barristers in all areas of practice, including commercial litigation.

2.31 The DPP supports women with family responsibilities to progress their careers and:

a) adopts more flexible conditions for promotion to ensure that working flexibly does not limit career opportunities;

b) works with the courts to avoid or minimise the listing of matters in a way that disadvantages those with family responsibilities; and

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[12] Law Council of Australia, Submission to the House of Representatives Standing Committee on Workplace Relations, *Inquiry into Pay Equity and Associated Issues Related to Increasing Female Participation in the Workforce*, 23 April 2009.

[13] Leanne Mezrani, 'Breaking Old Habits', *Lawyers Weekly* (online), 11 September 2012 http://www.lawyersweekly.com.au/features/breaking-old-habits.

c) adopts supportive practices to ensure that those working flexibly are afforded the opportunity to conduct complex and lengthy trials in high profile matters.

2.32 The SSO supports women with family responsibilities to progress their careers and:

a) adopts more flexible conditions for promotion (rather than just hours and years worked) to ensure that working flexibly does not limit career opportunities;

b) actively supports and accommodates flexible work arrangements, including providing access to appropriate technology platforms and addressing cultural barriers; and

c) works to ensure the existence of good role models (including those working flexibly), and to provide women on flexible arrangements with access to mentors who are supportive of their arrangement.

2.33 The SSO implements strategies to encourage women to apply for senior positions including through targeted coaching, and formal allocation of sponsors and mentors.

2.34 Employers focus on gender equity with respect to salaries and drawings by:

a) conducting annual equity pay audits to ensure that there is no disparity in salary based on gender;

b) ensuring performance reviews and promotions are based on outcomes and efficiency as opposed to billable hours achieved, and genuinely recognise non-billable contributions such as marketing, mentoring and pro-bono work;

c) ensuring promotion opportunities are not limited for those on flexible work arrangements; and

d) requiring those involved in determining employee performance and pay (including those conducting performance reviews and those setting pay reviews) to complete unconscious bias training to overcome ignorance and unconscious bias.

2.35 All employers adopt a formal mentoring scheme for their junior employees. For small firms where an internal mentoring scheme is impractical, the Law Society provides mentors (through a formal scheme linking employees to mentors from other firms) for eligible employees of the small firm.

2.36 Employers and senior managers actively demonstrate organisational and individual support for an inclusive and diverse culture within their organisation.

2.37 The Law Society of Western Australia within 12 months of the publication of this 2014 Review Report:

a) conducts research and profession-wide forums to discuss and document the steps required of the profession to change the culture away from the current 24/7 mentality (including but not limited to the impact of billing practices);

b) devises a plan by which the Law Society can assist to facilitate resolving the issue within five years; and

c) examines the status and publishes progress reports on the implementation of the changes on an annual basis.

2.38 The Law Society of Western Australia conducts research into alternative legal business models to time billing, in particular with respect to the impact of time billing as a charging method on the stress levels and health of legal practitioners.

2.39 The Legal Practice Board routinely seeks information from those who do not renew their practicing certificates, broken down by gender and post admission years of experience, as to the reasons for that non-renewal, and provide this information on a non-identifying basis annually to WLWA.

2.40 The Law Society of Western Australia continues to prioritise the development and delivery of educational and informational strategies aimed at addressing mental health and wellbeing issues in the profession, and make those strategies available to law students and graduates via University law schools and Practical Legal Training providers.

2.41 The Law Society of Western Australia:

a) sets, publishes and encourages employers to meet voluntary gender targets and goals for women in leadership positions in the legal profession, with the targets and goals to be first published within the next 12 months;

b) requests employers report to the Law Society on progress in relation to those targets and goals; and

c) collates the information received from employers, and from this information publishes profession-wide statistics and trends on gender equity in the profession.

2.42 Employers commit to:

a) reporting both internally to staff and externally to the Law Society on gender targets and goals; and

b) devising an implementation plan to set out how improvements with respect to meeting gender targets and goals will be made, and publicising this plan to staff.

Chapter 3: Appointment to the Judiciary

3.1 In relation to the appointment of judges to the Supreme Court of Western Australia, the Family Court of Western Australia and the District Court of Western Australia

a) The Attorney General continue to invite expressions of interest from qualified persons willing to be appointed to a particular Court;

b) The Attorney General continue to invite the submission of nominations of persons qualified for appointment, provided that the nominee consents to being nominated for appointment;

c) Each invitation for expressions of interest and nominations for appointment to a particular Court be widely advertised so as to bring that invitation to the attention of all members of the legal profession;

d) In considering a recommendation for a judicial appointment, the Attorney General have regard to, but will not be not bound by, any expressions of interest from, or nominations of, suitably qualified candidates.

3.2 The Attorney General continue to undertake consultations with the Chief Justice and other Heads of Jurisdiction of Western Australian Courts and Tribunals, the Bar Association, the Law Society of Western Australia, and Women Lawyers of Western Australia (Inc.), in relation to the identification of suitably qualified candidates, including, specifically, suitably qualified female candidates, whenever a judicial appointment is made.

3.3 The recommendations made in Chapter 2 of this 2014 Review Report be implemented with a view to achieving a substantial increase in the pool of women suitably qualified for appointment to Western Australian Courts and Tribunals.

3.4 Part-time judicial service be made possible in all Western Australian courts. Part-time judicial service means judicial service which:

- is identical to full-time judicial service in all respects except for hours of work and, consequently, remuneration;
- is for a term which extends to a statutory age of retirement;

- excludes the possibility of any other paid work (this is not intended to exclude the conduct of other activities in which judges presently may ethically engage, such as charitable work, which activities do not distract from the performance of judicial duties and do not create a likelihood of significant conflicts of interest);
- is not an 'acting' appointment.

3.5 The Attorney General consult with the Chief Justice and other Heads of Jurisdiction, and any other relevant stakeholders, to determine what legislative changes are required to facilitate part-time judicial service, including:

a) legislation setting out principles designed to preserve the independence of the judiciary while facilitating part-time judicial service, including the core principle that the hours of work of a judicial officer cannot be altered without the consent of both the judicial officer concerned, and the head of jurisdiction; and

b) amendments to the *Judges' Salaries and Pensions Act 1950* (WA) to permit the calculation of the judicial pension by reference to full-time and part-time judicial service.

3.6 The Western Australian Parliament enacts such legislation, as is required to facilitate part-time judicial service, as soon as possible.

Chapter 4: Aboriginal Women, Girls and the Law

4.1 Aboriginal Cross-cultural Awareness courses should:

a) Provide a comprehensive overview of Aboriginal history and culture in order to give an historical perspective encompassing pre-colonial Aboriginal life and the effects of colonisation;

b) Consider the impact past government policies have had on Aboriginal culture, families and communities;

c) Include local Aboriginal women as lecturers in order to ensure Aboriginal women's culture and perspectives are incorporated into the courses so as to raise awareness of victims' needs and rights;

d) Allow sufficient time for participants to discuss issues with Aboriginal people so that the information provided during the course is understood;

e) Allow two days for the complete course but this could be delivered in multiple shorter modules.

4.2 The Department of the Attorney General, within 12 months of the publication of this 2014 Review Report, devises a plan to involve all court staff and employees in Aboriginal cross-cultural awareness courses that meet the recommended standards in Recommendation 4.1. Attendance will be compulsory. Within two years of this review the Department of the Attorney General implements the plan for cross-cultural awareness courses for all court staff and employees.

4.3 The State Government through the Department of the Attorney General works with the Commonwealth Attorney General's Department to reinstate funding for Aboriginal cross-cultural awareness courses for judicial officers and, in the meantime, the Attorney General of Western Australia within 12 months from the date of this 2014 Review Report funds such cultural awareness courses as the State's Indigenous Justice Committee determines are needed by the judicial officers of Western Australia.

4.4 The State Indigenous Justice Committee within 12 months of the date of this report submits a plan to the Department of the Attorney General for the delivery of Aboriginal cross-cultural courses to Justices of the Peace meeting the recommended standards in Recommendation 4.1. Within two years of the date of this 2014 Review Report, the Department of the Attorney General funds the delivery of this plan.

4.5 The Office of the Director of Public Prosecutions (ODPP) restructures its Aboriginal cross-cultural awareness courses in order to meet the recommended standards in Recommendation 4.1. These courses are to be required for promotion in the ODPP and will include local content depending on the locations where the prosecutor or staff member will be working.

4.6 As a matter of urgent priority, dedicated training resources are embedded in the Western Australia Police Academy and Professional Development portfolio to develop and maintain a contemporary and rigorous Aboriginal cross-cultural training program for both recruits and in service training. This program will have the capacity to be inclusive of outside presenters as well as community input. Courses must meet the standards in Recommendation 4.1.

4.7 Participation in all Aboriginal cross-cultural courses is to be mandatory for Western Australia Police recruits and an essential part of police professional development and a pre-requisite for promotion.

4.8 Within 12 months from the date of this review the Western Australia Police reports in its annual report on its progress in achieving these goals.

4.9 The Indigenous Justice Committee considers the number of meetings its members should attend annually in order to ensure the proper working of the committee. Committee members who fail to attend the required number of meetings should be replaced.

4.10 The Indigenous Justice Committee monitors the operation of the courts in so far as those operations affect Aboriginal people, particularly Aboriginal women and children.

4.11 The State Government continues to support and fund the operation of the Aboriginal Community Courts (as set out in Recommendation 9.3 of this 2014 Review Report) and the Barndimalgu Court.

4.12 The State Government supports and funds additional Aboriginal sentencing courts in locations where they are needed to meet the needs of local Aboriginal communities.

4.13 The State Government through the Department of the Attorney General and the Commonwealth government continues to fund and increases the funding for the Family Violence Prevention Legal Service, the Aboriginal Family Law Service, the Southern Aboriginal Corporation, the Marninwarntikura Family Violence Prevention Unit, the Women's Law Centre of Western Australia and Djinda with the goal of ensuring there is a statewide network of culturally secure services available to Aboriginal and Torres Strait Islander women whether in the Perth metropolitan area or in remote regions including funding for after-hours services.

4.14 Within 12 months the State Government, through the Department of the Attorney General determines the location and extent of any gaps in the services to Aboriginal women and reports to the Attorney General and within two years the State Government, with the Commonwealth Government ensures these gaps are filled by increasing the necessary funding.

4.15 The State Government supports the implementation of the National Indigenous Interpreters Framework, and uses it to strengthen service design and delivery to Aboriginal people for whom English is not their primary language.

4.16 State and Commonwealth government funding for the statewide network of culturally secure services for Aboriginal women (recommendation 4.13 above) must emphasise the delivery of community legal education as a way of increasing community understanding of legal issues to enable Aboriginal women to recognise and address legal issues if and when they arise.

4.17 State and Commonwealth Governments commit to funding adequate safe houses for vulnerable people, especially Aboriginal women and children, escaping family and domestic violence. This funding must include resourcing for specialist staff to deal with family and domestic violence as well as co-existing issues such as substance misuse and mental health issues.

4.18 State and Commonwealth Governments commit to funding adequate, secure and affordable housing for those Aboriginal women and children left homeless by family and domestic violence.

4.19 In small and/or remote locations Western Australia Police officers must be pro-active and intervene to ensure the safety of vulnerable witnesses.

4.20 Within 12 months of the date of this review, Aboriginal cross-cultural courses, meeting the recommended standards in Recommendation 4.1 be provided by Western Australia Police for all police officers assigned to work in Multifunctional Police Facilities to ensure cultural competence on the part of those police officers in the delivery of services.

4.21 Within 12 months of the date of this review all State government agencies whose services are needed in Multifunctional Police Facilities including child protection, education, health, mental health, local government, community development, corrective services and courts, review the assignment of workers to those facilities and ensure that services are provided on site where reasonably possible (not as fly-in, fly-out workers) so that workers are able to build trust and confidence with community members.

4.22 Within 12 months of the date of this report all State government agencies who provide services in Multifunctional Police Facilities, provide Aboriginal cross-cultural courses meeting the standards in Recommendation 4.1 to all workers assigned to work in Multifunctional Police Facilities to ensure cultural competence on the part of those workers in the delivery of services.

4.23 Western Australia Police strengthens their efforts to recruit Aboriginal women and men as police officers so that they make up at least 3.0% of the police force.

4.24 Western Australia Police puts in place supports to retain Aboriginal recruits and encourage their advancement in the police service, particularly the advancement of Aboriginal women recruits.

4.25 The current legislative review of the National Native Title Tribunal shall consider the need for gender specific advocates for Native Title claimant groups so that, if culturally appropriate, women claimants may have access to women advocates to support them through the Native Title process.

4.26 The current legislative review of the National Native Title Tribunal shall consider requiring all practitioners conducting Native Title claims, including mediators, barristers, solicitors, anthropologists and other experts be culturally competent in the particular claimant group involved in the case by undertaking Aboriginal Cross-cultural courses meeting the standards in Recommendation 4.1 taught by Aboriginal women from the claim area.

4.27 The Department of Education and Department of Aboriginal Affairs provide scholarships for Aboriginal women anthropology students in Western Australia commencing in the 2015 academic year.

4.28 The State Library of Western Australia in conjunction with the Department of Aboriginal Affairs, the Department of Women's Affairs, the Native Title Representative Bodies and all Western Australian universities, commencing in the financial year 2015, establishes a databank of oral and written (where possible) documentation of Aboriginal historical information relating to genealogy and, where appropriate, connection to Country.[14]

4.29 The Office of the Registrar of Aboriginal Corporations, during the financial year 2015, amends its regulations to require specific reporting from Native Title Representative Bodies, Prescribed Bodies Corporate and Native Title Representative Corporation on gender inclusion for board memberships and executive councils.

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[14] Where sacred information is kept, special protocols will need to be developed to ensure the confidentiality of material related to closed information on sights, traditions and customs.

4.30 The State Minister for Women's Interests develops and provides specific board readiness training for Aboriginal women to enable them to serve on boards, particularly Native Title Representative Bodies and Prescribed Bodies Corporate.

Chapter 5: Victims of Crime

5.1 Separate and private waiting areas be provided in courts for victims and their families and supporters, with priority given to installing these waiting areas in courts dealing with sexual assault and domestic violence.

5.2 Sections 36B (concerning evidence of sexual reputation of complainant), 36C (concerning evidence of the sexual disposition of complainant) and 36BC (concerning evidence of the sexual experience of complainant) of the *Evidence Act 190*WA) be amended so that the prohibitions on adducing evidence of a complainant's sexual reputation, disposition or experience is not confined to proceedings for a sexual offence, within two years of this 2014 Review Report.

5.3 Where the victim of a crime gives evidence that is not pre-recorded, prosecutors and courts consider whether it is appropriate to and, if necessary:

a) interpose that evidence so that the victim of crime can arrive at court and commence giving evidence without waiting around court precincts; or

c) arrange for the victim to give evidence via CCTV from a different location.

5.4 The Victims of Crime Commissioner reviews the use and content of victim impact statements, including:

a) the nature of information that may be included;

b) who may make a victim impact statement;

c) the appropriate time that victim impact statements should be made and who they should be provided to;

d) the obtaining of informed consent from the victim about how the statement is to be used;

e) an identification of the number of complainants who submit a victim impact statement and factors that may prevent this from occurring;

f) a determination of when victim impact statements are to be disclosed;

within two years of this 2014 Review Report being published with a view to making recommendations for appropriate law reform.

5.5 The Victims of Crime Commissioner investigates whether victims of crime feel informed about their rights, the support services available to them, court processes and the progress of their complaints and what could help victims of crime feel better informed, within two years of this 2014 Review Report being published.

5.6 The operation of section 106G of the *Evidence Act* (cross examination of a protected witness by unrepresented accused) be extended to special witnesses.

5.7 Where an accused appears in person, counsel and the Court actively consider whether orders should be made under sections 25A(c) of the *Evidence Act* (cross examination by accused in person) or 106G (cross examination of a protected witness by unrepresented accused) to provide protection for witnesses accepted by the Courts as being vulnerable.

5.8 The Victim Notification Register or other Court databases be used, at the request of a victim of crime, to inform that victim of relevant orders made and sentencing remarks, and victims of crime be informed that they can ask to be given this information.

5.9 Where a woman or girl has been the victim of a sexual assault which is reported to police, she is informed that:

a) she is not obliged to make a statement about the offence unless she wishes to do so but that if she does not, then the offence may not be prosecuted; and

b) if she does make a statement she is not obliged to answer all questions asked during that process. She may of course be told that her statement will be of less utility if she does not answer all questions, and that if the matter proceeds to court she will be required to answer questions if called.

5.10 Where a person has been charged with a sexual offence against a woman or girl and she indicates to Western Australia Police or to the Office of the Director of Public Prosecutions (DPP) that she does not wish the prosecution to proceed, the Western Australia Police or DPP are required to give weight to her views, and to the reasons (if any) given for them, in deciding whether it is in the public interest for the prosecution to proceed. If the Western Australia Police or the DPP decides that it is in the public interest for the prosecution to proceed, they will explain to the victim of the sexual offence the reasons why it is in the public interest to proceed.

5.11 Section 36C (names of complainants not to be published) to be more strictly observed and enforced.

Chapter 6: Restraining Orders

The following recommendations, to be implemented within two years of the publication of this 2014 Review Report:

6.1 Responsibility for obtaining Restraining Orders lies primarily with Western Australia Police.

6.2 As part of standard procedure, Western Australia Police:

a) prepares a written report providing reasons, in circumstances where an officer asks a complainant, rather than the person complained about, to leave home where a domestic violence incident has been reported;

b) provides copies of that report to the complainant and to the person complained about;

c) provides copies of that report to the court if requested by the court; and

d) provides a copy of that report to the court if a person the subject of the report asks Western Australia Police to do so.

6.3 The Western Australian Parliament amends section 62C(c) of the *Restraining Orders Act 1997* (WA) to provide that those reports be provided to:

a) the complainant *and* the person complained about;

b) the court if requested by the court; and

c) the court if the matter the subject of the written report is before the court and a person the subject of the report asks the Western Australia Police to do so.

6.4 The Western Australian Parliament amends the *Restraining Orders Act 1997* to provide that where an application for a restraining order is before the court, the court takes into account as evidence, written reports prepared by or for the Western Australia Police:

a) in relation to the complainant, rather than the person complained about, being asked to leave home; or

b) under section 62C(c) of the Act,

for the purpose of determining whether a restraining order is appropriate in the circumstances.

6.5 Front desk, switchboard and other ancillary staff at police stations are trained to treat and deal with persons reporting domestic violence or breach of a restraining order, with compassion and respect.

6.6 The Western Australian Parliament amends the *Restraining Orders Act 1997* to provide that where a Police Order is granted and the protected person registers the Police Order with a court while the Police Order remains in force, the registered Police Order is deemed to be an interim Restraining Order obtained by the Western Australia Police on behalf of the protected person.

6.7 The Western Australian Parliament repeals section 35A of the *Restraining Orders Act 1997* (Misconduct Restraining Orders for persons other than those in a family and domestic relationship).

Chapter 7: Education; Laws that Discriminate Against Women, Women's Role as Law Makers

7.1 Political parties in Western Australia within two years of this 2014 Review Report:

a) examine their selection procedures to identify systemic discrimination;

b) implement strategies to increase the number of women candidates preselected for winnable seats; and

c) commit to reform of the culture and work practices in Parliament to encourage more women to seek pre-selection.

7.2 The Western Australian Parliament within two years of the publication of this 2014 Review Report establishes a standing committee on equal opportunity that monitors and reports on the status of women in Parliament and identifies ongoing barriers to equal participation by women as members of Parliament.

7.3 In preparing the Women's Report Card, the Department of Communities: Women's Interests liaises annually with the School

Curriculum and Standards Authority for Western Australia to conduct an informal review of the inclusion of gender issues in the curriculum.

7.4 Western Australian Law Schools ensure that study of gender bias and the law (in particular the legal system's inadequacies in dealing with violence against women) is embedded in some compulsory and/or optional units within two years of the 2014 Review Report.

7.5 In preparing the Women's Report Card, the Department of Communities: Women's Interests liaises with the Deans of each Law School on an annual basis to:

a) ensure ongoing awareness within Law Schools of the recommendations made in the Chief Justice's Task Force on Gender Bias 1994 Report and in the 2014 Review;

b) discuss relevant research into areas of gender bias that require attention; and

c) conduct an informal review of the inclusion of relevant gender bias in tertiary legal education curricula.

7.6 The Equal Opportunity Commission, alternatively the Department of Communities: Women's Interests:

a) promotes the rights of parents returning from parental leave to request to return to work on a modified basis;

b) collects information on whether applications are being made to enforce s 38(4) of the *Minimum Conditions of Employment Act 1993*; and

c) considers what *measures need to be taken, including amending the Minimum Conditions of Employment Act 1993 to ensure that an employer's power to refuse a request for a return to work on a modified basis is only exercised on justifiable grounds*.

7.7 The State Government provides the Law Reform Commission of Western Australia with a reference to examine and report on laws concerning sexual vilification and report on the adequacy of those laws

and on any desirable changes to the existing law of Western Australia in relation to this issue within two years of the2014 Review Report.

7.8 WorkCover WA conducts a review of laws relating to workers compensation and RiskCover conducts a review of laws relating to the workers compensation and personal injuries claims, in order to identify those parts of the law which discriminate against women, and to formulate recommendations which can lead to any necessary legislative change, within two years of the 2014 Review Report.

7.9 The Western Australian Parliament amends laws concerning criminal injuries compensation with particular reference to:

a) the compensation payable where the victim of crime applying for compensation was engaged in criminal conduct; and

b) the payment of compensation subject to conditions, or made payable using trusts or some other mechanism, to quarantine compensation to the benefit of the victim of crime applying for compensation, and to make it unlikely that an offender will benefit from any compensation awarded,

within two years of the2014 Review Report

7.10 A new section 334(2)(a) is inserted in the *Health Act 1911* requiring that a person, hospital, health institution or service refers a pregnant woman without delay to a service provider who is known to provide abortion services, within two years of the 2014 Review Report.

7.11 The Western Australian Parliament amends section 334(7)(a) of the *Health Act 1911* to delete the words ‘severe medical condition’ and replace them with ‘severe physical or mental health condition’.

7.12 The State Government permanently fills the position of Equal Opportunity Commissioner as soon as possible and provides the Commission with adequate resources to administer the legislation and deliver its educational programmes.

7.13 The Department of Housing reviews its application of the *Disruptive Behaviour Management Strategy*, particularly in relation to:

a) the proper investigation of complaints, including consideration of the tenant's version of events and whether, if substantiated, the conduct complained of amounts to a breach of the *Residential Tenancies Act 1987*;

b) then on penalisation of a tenant who is not the person responsible for the "strikes" and who has taken reasonable measures to prevent the "strikes";

c) those evictions for minor disturbances;

d) the encouragement of reconciliation and mediation conferences involving the complainant and the disruptive person, as well as the tenant; and

e) the opportunities for tenants and complainants to seek internal review of decisions by the Department of Housing,

within two years of the 2014 Review Report.

7.14 The State Government provides a reference to the Law Reform Commission of Western Australia to examine and report on laws concerning defences to child exploitation crimes (such as those found in section 221A of the *Criminal Code*) and report on:

a) the adequacy of those laws and on any desirable changes to the existing law of Western Australia in relation to this issue; and

b) whether the issue should be referred to the Law, Crime and Community Safety Council to consider the desirability of there being consistent defences across Australia,

within two years of the 2014 Review Report.

Chapter 8: Women and Criminal Laws

8.1 The Western Australian Parliament amends chapter XXXIIIB of the *Criminal Code* (WA) dealing with stalking to:

i) make clear that stalking can be a culmination of a number of different types of behaviour, as well as one type of behaviour being repeated;

ii) make clear that stalking occurs where there has been a 'course of conduct' (which may involve as few as two instances) of any of the behaviours that have been identified which could constitute stalking; and

iii) amend the definition of 'pursue' to provide for one protracted incident to fall within the definition (as provided for in s359B (b) of the Queensland *Criminal Code).*

8.2 The Western Australian Parliament broadens section 306 (4) of the *Criminal Code* (WA) to make it an offence to remove any person from Western Australia with the intention of having female genital mutilation performed on that person.

8.3 The Western Australian Parliament broadens the extraterritorial application of s 306 of the *Criminal Code* (WA) to ensure that both of the following constitute an offence in Western Australia:

i) to perform female genital mutilation on a Western Australian resident, wherever the operation is performed; and

ii) to remove, or make arrangements to remove, a person from Western Australia for the purpose of subjecting them to female genital mutilation.

8.4 In order to improve the enforcement of s 306 of the *Criminal Code* (WA), the State Government financially supports efforts to:

i) establish liaisons with community groups in populations, which could be vulnerable to female genital mutilation;

ii) improve access to interpreters so that police can investigate suspected cases of female genital mutilation;

iii) provide targeted education about the negative impacts of female genital mutilation; and

iv) raise awareness amongst professionals and communities of the female genital mutilation laws.

8.5 The State Government in close consultation with relevant Commonwealth, State and Territory agencies, communities, experts and other stakeholders clarifies the legal and policy position in relation to female genital cosmetic

8.6 The Western Australian Parliament conducts a review of the *Prostitution Act 2000 (WA)* to establish if the provisions relating to juvenile offending, search and seizure and reverse onus are justifiable and conform with human rights principles.

8.7 The Western Australian Parliament

i) considers whether the sex industry should be regulated; and if so

ii) considers what is the appropriate regulatory scheme (and when doing so consider alternative regulatory models such as exists in Sweden)[15];and

iii) considers how discrimination against those who work in the sex industry can be eliminated.

8.8 The Western Australia Parliament enacts a new provision of the *Criminal Code* (WA) in terms that correspond to section 9AH of the *Crimes Act 1958* (Vic) whereby certain types of evidence are recognised as being possibly relevant to determining whether an accused person believed it was necessary to defend him or herself.

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[15] The Swedish model, in which the focus is on the criminalisation of the activities of the clients of prostitution rather than the activities of the prostitutes, was the subject of discussion by US legal scholar Professor Catharine MacKinnon from the University of Michigan Law School in a keynote address on human trafficking, prostitution and inequality at the 2014 UWA Law Summer School.

8.9 The Western Australian Parliament amends 248 of the *Criminal Code* (WA), in order to promote national consistency in the laws of self-defence, so that its terms correspond to the self-defence provisions in the *Criminal Code 1995* (Cwlth), the *Crimes Act 1900* (NSW), the *Criminal Code 2002* (ACT) and the *Criminal Code* (NT).

8.10 Sub-section 248(3) of the *Criminal Code* (WA), which creates a defence of excessive self-defence, be retained and its operation monitored by the State Government to determine its impact upon women.

8.11 The Office of the Director of Public Prosecutions for Western Australia (DPP) reports annually on the results of any prosecutions that concern spousal or intimate partner killings, such as the offence charged and the outcome of the prosecution and including whether a guilty plea was entered or the result of a jury verdict.

8.12 The DPP *Prosecution Guidelines* are amended to the effect that where there has been a history of domestic violence by the accused against the deceased a murder or manslaughter prosecution is preferred where appropriate, in preference to a prosecution under section 281 of the *Criminal Code*.

8.13 An aggravated form of the offence in section 281 of the *Criminal Code* is created which carries a maximum sentence of 20 years. The circumstance of aggravation is that the killing occurred in the context of family or domestic violence.

8.14 The Western Australian Parliament amends the face covering provision in section 16 of the *Criminal Identification (Identifying People) Act 2002* (WA) to require Western Australia Police to conduct the identification process in a way that provides reasonable privacy. This includes the option for a woman to request a female police officer to identify them so far as reasonably practicable. This provision must ensure the validity of the police identification process is not affected by a failure to comply with the privacy requirement.

8.15 The Western Australian Parliament amends the maximum penalty for the offence of refusing to remove a face covering in section 16(6) of the *Criminal Identification (Identifying People) Act 2002* (WA) so that the penalty of 12 months only applies if the person is suspected of committing an indictable offence and a monetary fine applies in all other instances.

Chapter 9: Women and Punishment

9.1 The Department of Corrective Services:

i) continues to monitor and support the ongoing training of Community Corrections staff who prepare pre-sentence reports to ensure the reports are free from gender (or race) bias;

ii) reviews the content of pre-sentence reports annually to ensure they are free from gender (or race) bias; and

iii) supports the inclusion of a formal 'family impact statement' in a pre-sentence report for offenders who have family responsibilities (particularly women) and for whom there is a real risk that imprisonment will be imposed in order to properly inform the sentencing court of the likely impact of various sentencing options on both the offender and their family.

9.2 The Western Australian Parliament amends the *Sentencing Act 1995* to require a sentencing court to hold a sentencing conference when an Aboriginal person is sentenced for a serious offence where there is a real risk of imprisonment and where the offender consents to such a conference being held.

9.3 The State Government of Western Australian continues to support and fund the operation of Aboriginal Community Courts.

9.4 The Western Australian Parliament amends the principles of sentencing in the Sentencing Act 1995 (WA) so that a court, in determining whether or not to impose a custodial sentence on an offender who is a primary care-giver in a family, takes into account the effect of the sentence on the offender's family or dependants.

9.5 The State Government implements the proposals of the 2013 Statutory Review of the *Sentencing Act* 1995 for reforms to current sentencing options, particularly improvements to the flexibility of fines and community based orders, with a view to enhancing the use of non-custodial sentencing options for all offenders (with the aim of reducing the number of women, particularly Aboriginal women, imprisoned for fine default and, more generally, to address the disproportionately high rate of incarceration of women offenders).

9.6 The State Government:

i) urgently conducts a review, which is published within one year of this 2014 Review Report, containing recommendations to support and appropriately fund the improved integration of existing legal services to represent women offenders;

ii) in the case of Aboriginal women offenders, seeks Commonwealth Government funding for the establishment of a separate Women's Aboriginal Legal Service (WALS); and

iii) within one year of the review being published the Western Australian Government, tables a response to the review in the Western Australian Parliament.

9.7 The State Government supports and funds the establishment of a sentencing advisory council in Western Australia or, alternatively, appropriately supports and funds an independent criminal research body at a university to undertake, among other things, research into issues surrounding the sentencing and punishment of women.

9.8 The Department of Corrective Services employs more women prison staff, particularly Aboriginal women, across all facilities accommodating women.

9.9 The Department of Corrective Services offers scholarships and mentoring to Aboriginal women to take up corrective service roles.

9.10 The Department of Corrective Services ensures that within 12 months of this 2014 Review Report all existing and prospective staff at all correctional facilities that accommodate women, complete the *Working with Female Offenders* course as a condition of their employment.

9.11 The State Government:

i) publishes annual sentencing data and trends to better facilitate research into sentencing outcomes and practice;

ii) supports and funds research into:

a) the reasons for, and implications of, differential sentencing outcomes between men and women;

b) the factors driving the high rate of imprisonment of women (including high numbers of women on remand);

c) judges' considerations when applying non-custodial sentences versus custodial sentences; and

d) other factors explaining the decreasing number of community based sentences in Western Australia, by gender and aboriginality, and the effectiveness of non-custodial sentences for women offenders and conditions for success; and

(iii) makes public any findings of such research particularly to the courts and other relevant stakeholders where those findings may impact upon equitable policy and practice concerning the sentencing and imprisonment of women.

9.12 The Department of Corrective Services, as a matter of urgency, provides Aboriginal-specific treatment programs for female prisoners and, in the absence of violent offending and sex offending treatment programs for high needs women, makes more available individual counselling to assist these women to address their offending behaviour.

9.13 The Department of Corrective Services provides better access to programs and education for women who are on remand and serving

shorter sentences (recognising that this has particular importance to Aboriginal women offenders).

9.14 The State Government, as a matter or urgency, develops a dedicated mental health unit for women prisoners, managed by a multi-disciplinary team of clinical/allied health staff, supported by custodial staff who are trained in mental health; and further provides around the clock mental health nursing, psychiatrist and therapy care sufficient to meet prisoners' needs.

9.15 The State Government, as a matter of urgency, invests in contemporary accommodation and service delivery infrastructure at Bandyup, including the replacement of the social visits centre.

9.16 The Department of Corrective Services, as a matter of urgency, extends eligibility for day stays to 'significant' children to enable grandmothers or other significant women in a child's life to be able to develop and maintain such relationships.

9.17 The Department of Corrective Services, as a matter of urgency, provides a regular Department sponsored transport service to Bandyup for social visitors.

9.18 The Department of Corrective Services, as a matter or urgency, ensures Bandyup prisoners, are provided with improved access to legal resources, including departmental computers and other non-legal assistance, to research their cases.

9.19 The Department of Corrective Services, as a matter of urgency, implements the recommendations made in the report attached to this chapter entitled *'Access to Legal Services for Women in Custody'* in order to provide all women in custody with proper access to legal services and representation.

9.20 The Department of Corrective Services, as a matter of urgency, improves access to Boronia's re-entry services for a greater diversity of women offenders. This involves:

i) identifying barriers to transition to Boronia for women offenders from Bandyup and other prisons;

ii) identifying ways to enhance the appeal of Boronia to Aboriginal women who are imprisoned elsewhere in WA;

iii) ensuring that more of the Aboriginal women who are classified minimum-security can progress to placement at Boronia; and

iv) changing the current practice of excluding prisoners from Boronia on grounds of mental health needs by engaging with community based mental health and counselling providers to provide their services to women at Boronia.

9.21 The Prisoner's Review Board monitors, collates and comprehensively reports annually on all relevant parole information and data which would include the number of parole applications received, details of successful and non-successful applications, overview of parole conditions and reasons provided for refusal of parole (including where the applicant has not been able to access relevant programs), and any other relevant information around breaches or suspensions of parole.

9.22 The Department of Corrective Services, as a matter or urgency, ensures every woman offender de for release is provided with improved access to the necessary resources and personnel needed to develop a viable and stable parole plan.

9.23 The Department of Corrective Services oversees improved interaction and development of networks between community based corrections and community based organisations to ensure more effective pathways for referral, follow-up and support for parolees.

9.24 The State Government supports and funds initiatives for mentoring and transitional accommodation for women released from prison.

9.25 The Department of Corrective Services, as a matter or urgency, re-establishes a women's services directorate within the Department of Corrective Services to oversee services to women in prison.

9.26 The State Government, within 12 months of this 2014 Review Report, establishes an independent 'Women's Justice Advisory Group', whose membership is representative of various stakeholders, to co-ordinate, develop and drive strategies to deal with women's offending with a view to addressing the causes of women's offending, finding alternatives to imprisonment for women offenders and reducing the rate of imprisonment of women offenders in WA.

20TH ANNIVERSARY REVIEW OF THE 1994 REPORT OF THE CHIEF JUSTICE'S TASKFORCE ON GENDER BIAS

CHAPTER 1

WOMENS ACCESS TO JUSTICE AND THE ENVIRONMENT OF THE COURT

THE CHAPTER 1 SUBCOMMITTEE, WITH THE ENDORSEMENT OF THE STEERING COMMITTEE, MAKES THE FOLLOWING RECOMMENDATIONS:

1.1 The State Government increases funding, to commence within two years of this 2014 Review Report, for specialist women's legal services and Community Legal Centres ('CLC's'), to address areas of legal need for women including (but not limited to) civil disputes and court advice and representation.

1.2 The State Government increases funding, to commence within two years of this Report, for support services for women, particularly in regional areas.

1.3 The State Government works with the Commonwealth Government to recognise and address the indirect discrimination against the circumstances of women in the application of current legal aid funding, and the specific barriers to justice that women face, in order to tailor the legal aid system to meet the particular needs and experiences of women,[1] and reports to State Parliament within two years of this Report.

1.4 The State Government funds the provision of legal services to women in relation to family law property settlement matters, through grants to the Legal Aid Commission of Western Australia ('Legal Aid WA') and CLCs, with funding to commence within two years from this Report.

1.5 Legal Aid WA, ideally within two years of this Report, amends its grant eligibility guidelines to include scope for grants of legal aid to be made to women facing disadvantage (particularly those escaping family and domestic violence) for property settlement matters.

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[1] Refer to Recommendations 12-15 of the Senate Committee Report: Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (June 2004), page 48.

1.6 The Aboriginal Legal Service ('ALS'), within two years of this Report, implements conflict management policies and procedures and addresses the installation of 'Chinese walls', to overcome potential conflicts between clients and prospective clients.

1.7 State Government service providers, such as Legal Aid WA, CLCs and specialist women's service providers (both legal and non-legal) liaise across the sector on an ongoing basis to ensure mutual understanding of each other's services to assist with cross-referral of women in need of services in an accurate, timely and efficient manner.

1.8 The State Government maintains and more widely disseminates the *Referral Guide for Domestic Violence Services Western Australia*,[2] to ensure that legal and non-legal support service providers, and the legal and non-legal support service professions more broadly, are aware of and can assist with referrals to and from service providers.

1.9 The State Government collaborates with Legal Aid WA, CLCs and other community legal service providers to determine the viability of the provision of a centralised 'one-stop shop' for legal and related services to women by running a pilot program to commence within two years of this 2014 Review Report and then evaluating that program and publishing the findings.

1.10 The Western Australian Department of the Attorney General ('DOTAG'), in consultation with providers of services to Aboriginal women, within 18 months of this Report examines how to best increase the number of Aboriginal people, in particular Aboriginal women, working in the court and justice system, and take steps to implement the findings of that examination within the following 12 months from those findings.

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[2] Government of Western Australia, Department for Child Protection, *Referral Guide for Domestic Violence Services Western Australia* http://www.dcp.wa.gov.au/CrisisAndEmergency/FDV/Documents/FDV%20Referral%20Guide%20April%202013.pdf (accessed 12 April 2014).

1.11 The State Government, in consultation with the courts and providers of services to Aboriginal women, within 18 months of this Report examines the potential to re-introduce the role of Aboriginal family liaison officers in courts where no such role presently exists, along with effective methods to identify and recruit appropriately qualified Aboriginal people to these positions including the provision of relevant training if required.

1.12 The State Government continues to fund and support Djinda Services to ensure appropriate support is available for Aboriginal women victims of domestic violence in the Perth metropolitan area.

1.13 The Magistrates Court of Western Australia and District Court of Western Australia allocate a liaison officer to be tasked with the responsibility of identifying and raising user specific requirements (including cultural and gender awareness issues) with judicial officers in the context of the day-to-day running of the court.

1.14 The Department of the Attorney General, in consultation with providers of services to women of culturally diverse and non-English speaking backgrounds, within 18 months of this Report examines how to best increase the numbers of women from culturally diverse backgrounds working in the court and justice system, and takes steps to implement the findings of that examination within the following 12 months.

1.15 All judicial officers in Western Australia commit to increasing their cultural awareness of issues and barriers facing women from culturally diverse backgrounds, including Aboriginal and non-English speaking women and recent migrants, by undertaking suitable cultural awareness training as a matter of priority, and in any event within two years from this Report.

1.16 The State Government, within two years from this Report, produces or funds the production of a bench book for judicial officers (similar to the *Aboriginal Cultural Awareness Bench Book*[3]) addressing issues surrounding cultural diversity in Western Australia, including in particular the impact of culture, religion and gender combined, and how these issues affect women from culturally and linguistically diverse backgrounds accessing justice and the court system.

1.17 The Department of the Attorney-General establishes a taskforce to consider how to best increase the number of women interpreters from a variety of backgrounds and promote interpreting as an attractive and desirable career path for women, with that taskforce to report within 12 months from the date of this Report and the taskforce's findings to be implemented within the following 12 months.

1.18 The State Government ensures interpreters who provide services to court users receive basic training regarding the court process and legal system, and cultural awareness issues relating to interpreting in court environments, within two years of this Report.

1.19 The State Government commits to and provides funding for legal services for women in rural, regional and remote areas of Western Australia, such funding to commence within two years of this Report.

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[3] Fryer-Smith, Stephanie, *Aboriginal Benchbook for Western Australian Courts* (2nd Ed) (2008), available at: http://www.aija.org.au/online/ICABenchbook.htm (accessed 12 April 2014).

1.20 The State Government supports and commits to providing access to justice for women in rural, regional and remote areas of Western Australia through the use of modern technology including:

a) real-time video link facilities that allow women, including vulnerable women and victims of crime, to participate in court proceedings from remote locations as they would in person; and

b) the provision of legal services to women via online service platforms, such as the Train-N-Track platform developed by Legal Aid WA, and real-time video link facilities with lawyers in other locations, and such technology (and the required trained staff to assist with it) to be operational within four years of this Report.

1.21 The State Government makes available, as a matter of urgency, and in any event within 12 months from this Report, appropriate accommodation within all court buildings for victims of family and domestic violence.

1.22 The State Government gives urgent priority to redefining areas in court precincts to include separate entrances and separate areas for witnesses/accused and applicants/respondents.

1.23 The State Government immediately, but in any event within 12 months of this 2014 Review Report, provides access to toilet and parenting facilities at all court precincts, particularly in rural, regional and remote areas. Should these be at the police station or another shared facility, the State Government ensures that court users are allowed access to the facilities without prejudice and ensure any security concerns are addressed immediately so that they do not serve as an impediment to access.

1.24 The State Government immediately makes refreshment facilities available in all court complexes in Western Australia.

1.25 The State Government:

a) within 12 months from this Report, reviews the best means to implement child minding facilities in all court precincts, using the Family Court of Western Australia's crèche as a desired model, and reports on the results of that review;

b) within two years from this 2014 Review Report, makes child minding facilities available in major suburban and regional court locations, commencing with the newly created Cathedral Square Justice Precinct to ensure there is child minding available for users of the Magistrates Court, District Court and Supreme Court of Western Australia; and

c) thereafter makes child-minding facilities available in regional court precincts.

1.26 The Department of the Attorney General, within 12 months from this Report, devises and publishes an action plan to increase overall diversity in the court environment, including in all positions held at the court.

1.27 The Department of the Attorney General, in consultation with the Heads of Jurisdiction of Courts and Tribunals, develops programs to support women into senior roles within the court environment and implement those programs within 18 months from this Report.

1.28 The Department of the Attorney General, within 12 months from this Report, prepares and disseminates information regarding careers within the court environment, including to high school and tertiary groups and culturally diverse groups within the community.

1.29 The Department of the Attorney General immediately focuses on the retention of court personnel, including by ensuring exit interviews are conducted to ascertain the reasons why staff leave, identifying common attrition factors and putting into place initiatives to alleviate these factors.

1.30 The State Government increases funding for judicial education for all judicial officers in Western Australia, to address current and relevant issues including with respect to gender bias and cultural diversity.

1.31 Cultural awareness training is provided to all judicial officers, commencing with comprehensive initial training immediately upon appointment to the bench and then appropriate ongoing training at least every two years thereafter.

1.32 The Western Australian Department of Education, upon consultation with the Department of the Attorney General, ensures legal education is included as a core subject in school curriculums, and that schools welcome the opportunity to enhance learning objectives surrounding the legal system and cultural awareness.

1.33 The State Government funds the provision of community legal education for Aboriginal and NESB women, including but not limited to demonstrated support for and advertisement of Legal Aid WA's online Train-N-Track platform.

1.34 The State Government supports and funds more education to the community on discrimination and equal opportunity matters, such as that provided by the Equal Opportunity Commission of Western Australia.

1.35 The Department of the Attorney General, in consultation with relevant consumer groups, re-examines the content and form of current information available to court users on the court and legal system and the services available to court users, with a view to identifying and implementing improvements within 12 months of this Report to ensure that information is presented in an accessible and meaningful way, with a particular focus on women from Aboriginal and non-English speaking backgrounds.

1.36 The Department of the Attorney General considers the methods used to disseminate information on the court and legal system and the services available to court users, with a view to identifying and implementing improvements within 12 months of this Report to ensure the broadest possible dissemination of such information in the community, particularly to women from Aboriginal and non-English speaking backgrounds.

1.37 The State Government, within two years of this Report, provides computer, internet and printing facilities for members of the public in all court precincts in metropolitan and regional areas, using the Family Court of Western Australia's self-service facilities as the desired model.

1.38 The State Government examines the use of standing touch screen information kiosks for public use at all court precincts, including in rural, regional and remote areas, to assist with access to essential information.

1.39 The State Government improves all court websites to provide essential information about the court, court processes and the legal system in consumer appropriate formats (not limited to written text) in a range of different languages, with a particular focus on the needs of women from Aboriginal and non-English speaking backgrounds.

1.40 The State Government ensures that court websites are maintained on an ongoing basis and information on court websites is continually updated to reflect changes to law, procedure and consumer needs, including in particular the needs of women from Aboriginal and non-English speaking backgrounds.

1.41 The State Government reviews court fees in family law matters to determine if the current fees charged are proving a barrier to women accessing justice and the Family Court in Western Australia and make representations to the Commonwealth Government as appropriate.

1.42 The State Government addresses, as a matter of urgency, the serious deficiencies in court facilities in existing courts in both metropolitan and rural, regional and remote areas, and in particular addresses:

- the lack of interview rooms;
- the current state of remote/CCTV rooms;
- the availability of appropriate mediation space; and
- the conditions of holding cells.

1.43 The State Government, in consultation with the courts, within 18 months examines the issue of security and identifies and implements improvements to court security to ensure the safety of court staff and users, particularly women and children.

1.44 The Attorney General, within 12 months, undertakes a review of the effect of recent changes to the *Juries Act 1902* (WA) to identify gender bias against women with family care responsibilities (including childcare, elder care and care of sick or disabled family members) with a view to securing Cabinet approval for a bill to make any necessary amendments to address gender bias in the application of compulsory jury duty on women within the following 12 months.

1.45 The State Government, in consultation with the courts and court user groups (in particular those servicing women with children), over the next 18 months examines the introduction of staggered court listings and an automated listing notification system by text message, with a view to implementing improvements to court listings within two years of this Report.

1.46 The State Government implements a regular training program for all court personnel (including registry staff, associates, ushers, security and other staff) to address topics including (but not limited to) cultural awareness and the issues relevant to the cultural background and gender of court users.

MEMBERSHIP OF CHAPTER 1 SUBCOMMITTEE

The Chapter 1 Subcommittee comprises:

Co-Convenors

Gabrielle Clarke (March 2013 onwards) – Director, Gabrielle Clarke Legal

Cathryn Greville – President, Women Lawyers of Western Australia (Inc.); Assistant Director Customer Protection, Economic Regulation Authority of Western Australia.

Subcommittee Members

Her Honour Antoinette Kennedy – former Chief Judge of the District Court of Western Australia; Patron, Ishar Multicultural Women's Health Centre; Patron Emeritus, Women Lawyers of Western Australia (Inc.)

His Honour Judge David Parry – Deputy President, State Administrative Tribunal of Western Australia

Gavan Jones – Director Higher Courts, Court and Tribunal Services, Department of the Attorney General

Belinda Lonsdale – Barrister, Wolff Chambers; Commissioner, Legal Aid WA

Sonia Goldie – former Associate to the Deputy President His Honour Judge David Parry, State Administrative Tribunal of Western Australia

Mary Clark – Principal Legal Officer, Aboriginal Family Law Services

Karen Merrin – Chair of the Community Legal Centres Association Inc.

The Subcommittee would like to thank the following persons for their assistance with consultations and reviewing literature and materials relevant to Chapter 1:

Gillian Bailey – Solicitor, Tottle Partners

Felicity Heffernan – Legal Counsel, Inspire; Pro Bono Legal Advisor, Australia's Response to Trafficking in Humans

Anna Johnson – Chair, Young UN Women Australia Perth Committee; UN Women Australia Youth Delegate to the UN Commission on the Status of Women (2013)

Svetlana Lane – Lawyer and Registered Migration Agent, Svetlana Lane Group[4]; Migration Agent at CASE for Refugees.

Belinda Wong – Lawyer, Clayton Utz

The Subcommittee would also like to thank the members of the Chapter 4 Subcommittee for their comments in relation to issues in Chapter 1 that are relevant to Chapter 4 'Aboriginal Women and Girls and the Law.'

The views set out in this chapter do not necessarily express the views of the individual members of the Subcommittee or the organisations with whom the individual members of the Subcommittee are associated.

FOCUS OF CHAPTER 1

The Chapter 1 Subcommittee of the 20th Anniversary Review of the Gender Bias Taskforce Report (**2014 Review**) was convened to consider the many issues arising from Chapter 1 of the 1994 Report of the Chief Justice's Taskforce on Gender Bias (**1994 Report**)[5] and a subsequent review of that Report conducted in 1997 by the Women's Policy Development Office (**1997 Progress Report**).[6] Chapter 1 of the 1994 Report addressed 'Women's Access to Justice and the Environment of the Court.'

The focus of the Chapter 1 Subcommittee of the 2014 Review has been to investigate the current issues affecting women with respect to the justice system in Western Australia and determine whether changes are required to ensure women are afforded equal access to justice and the court system.[7]

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4 Business Consulting, Interpreting and Translation Services. Svetlana conducts English-Russian interpreting and translation services, including with respect business and legal matters.

5 Western Australian Chief Justice's Taskforce on Gender Bias, *Report of the Chief Justice's Taskforce on Gender Bias* (June 1994), available at: http://www.wlwa.asn.au/projects/2014-gender-bias-taskforce-review.html.

6 *Gender Bias Taskforce Report: Progress Report: A Report on Implementation by Government of Recommendations Contained in the Chief Justice's Taskforce Report on Gender Bias*, compiled by Women's Policy Development Office in conjunction with the Ministry of Justice, April 1997, available at: http://www.wlwa.asn.au/projects/2014-gender-bias-taskforce-review.html

7 The terms 'court', 'judge' and 'judiciary' are used in this Chapter broadly to cover both Courts and Tribunals, and all persons on the bench or in decision-making roles, including Judges, Magistrates and Tribunal Members.

Equality before the law is a fundamental concept of our legal system.[8] Achieving equality before the law requires recognition that different groups in society face different challenges in accessing justice and the court system. In this way it can be said that:

> …both access to, and the delivery of, justice requires understanding of and sensitivity to the special requirements and disabilities of particular sections of the community.[9]

The Subcommittee's investigation and discussion in this chapter is based on this central premise of equality before the law, noting that any aspect or issue that prevents women from attaining equality before the law constitutes gender bias (whether overt or more subtle or unintended), is of significant concern to the broader administration of justice and access to the courts, and requires urgent attention.

As part of the 2014 Review, the Subcommittee investigated the extent to which the Western Australian legal system works in a manner that disadvantages women in terms of access to justice (including with respect to the available funding, resources, legal advice and representation) and the environment of the courts (including with respect to the court administration, court facilities, court culture and the courtroom itself). The Subcommittee's investigation also aimed to identify the special needs of Aboriginal and Torres Strait Islander (**Aboriginal**)[10] women, migrant women and women living in rural, regional and remote (**RRR**) areas when accessing justice and using the court system.

Key issues include the availability of specialised services, resources/information, court personnel, court facilities themselves, treatment of vulnerable witnesses,

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8 Equality Before the Law Benchbook, Western Australia, November 2009 (1st Ed), page 1,0.3, available at: http://www.supremecourt.wa.gov.au/_files/equality_before_the_law_chapter1.pdf). The Equality before the Law Bench Book is intended to provide WA judicial officers with an understanding of the range of values, cultures, lifestyles and life experiences of people from different backgrounds, together with an understanding of the potential difficulties, barriers or inequities people from different backgrounds may face in relation to court proceedings. It offers practical examples of how to take appropriate account of these differences in court and tribunal proceedings.

9 Judicial Commission of New South Wales, Equality before the Law Bench Book (2006) iii, available at: www.judcom.nsw.gov.au/publications/benchbks/equality (accessed 11 April 2014); cited in Equality Before the Law Benchbook, Western Australia, November 2009, First Edition (online at Supreme Court website: http://www.supremecourt.wa.gov.au/_files/equality_before_the_law_chapter1.pdf)

10 In this Chapter and throughout this Review Report, unless otherwise indicated, the word "Aboriginal" is used to refer to Aboriginal and Torres Strait Islander peoples.

minority groups and education for both the community and judicial officers on issues affecting women.

Gender bias issues for Aboriginal women and girls more broadly, issues arising in relation to victims of crime, restraining orders and sentencing of women are dealt with in Chapters 4, 5, 6 and 9 of the 2014 Review Report respectively. Discussion of facilities for women in the justice system, such as women's prisons, is also dealt with in Chapter 9 of the 2104 Review Report.

SUBCOMMITTEE'S INVESTIGATIONS – Rationale and procedure adopted

The Subcommittee conducted formal consultation meetings[11] with representatives from The Legal Aid WA Commission of Western Australia (**Legal Aid WA**), the Aboriginal Legal Service, Australian Federal Police, Western Australian Police, the Department of Public Prosecutions, Criminal Lawyers Association, the Department of Attorney General (**DOTAG**), heads of Jurisdiction of the Family Court of Western Australia, District Court of Western Australia, State Administrative Tribunal of Western Australia, Magistrates Court of Western Australia, Children's Court of Western Australia, and the Chief Justice of the Supreme Court of Western Australia.

The Subcommittee members and members assisting also conducted consultations[12] with the Women's Legal Service, Domestic Violence Legal Workers Network, Women's Information Service, Relationships Australia, Patricia Giles Centre, South Coastal Women's Health Services, Ishar Multicultural Women's Health Centre, Solicitor General Grant Donaldson SC, Craig Slater, President of the Law Society of Western Australia, and The Honourable Linda Savage MLC, Member for East Metropolitan Region. A number of other persons were consulted on a confidential basis. Further information was provided in written form following a number of the consultations.

The Law Reform Commission of Western Australia and State Solicitors Office were approached but did not feel they were in a position to provide meaningful input on the issues relevant to this Chapter.

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11 Meetings held with various parties on 30 October 2012 and 1 November 2012 at the State Administrative Tribunal, 9 November 2012 at the Children's Court and 28 November 2012 at the Supreme Court. For a list of all parties consulted through formal group meetings and one-on-one consultations, please see Attachment 1 to this Chapter.

12 Consultations held with Subcommittee members and members assisting on various dates between November 2012 and May 2014.

A full list of parties consulted is attached to this Chapter as Attachment 1.

During the course of these consultations, in addition to seeking comment on the 1994 Report and any additional issues that those consulted thought relevant to this 2014 Review, the Subcommittee investigated a number of topics relating to the access to justice and the court environment. These include the existence and availability of specialised services, the availability of resources and accessibility of information, court facilities, court personnel, vulnerable witnesses, minority groups, and education of court staff and the wider community regarding issues affecting women.

Further, members of the Subcommittee were familiar with various courts and tribunals in metropolitan and RRR areas having visited these courts during the course of their job requirements, and these members reported to the Subcommittee on the court environment and amenities. Members also visited the courts in the Perth CBD to observe particular aspects of the court environment. Court jurisdictions considered included the Family Court of Western Australia; District Court, Magistrates Court, Supreme Court, State Administrative Tribunal, and the Children's Court. Overall, the Subcommittee was familiar with, was briefed on, or consulted with respect to court precincts including the following: Perth, Armadale, Fremantle, Joondalup, Midland, Rockingham, Albany, Broome, Carnarvon, Geraldton, Kalgoorlie, Karratha, Kununurra, Merredin, Northam, and South Hedland. The Subcommittee also canvassed and received information from a number of consulted parties from government, private practice and the not-for-profit sector regarding RRR courts, and viewed a video on the Aboriginal Family and Domestic Violence Court in Geraldton, Western Australia.[13]

The Subcommittee further conducted a tour of the Family Court of Western Australia's crèche facility, where Subcommittee members were briefed on the facility, met the staff working there and observed it in operation.

Finally, the Subcommittee and members assisting conducted a full review of relevant literature to obtain a complete picture of the issues affecting women who come into contact with the courts and the justice system. The literature review included

[13] Department of the Attorney General; Department of Corrective Services, Barndimalgu Court: Wajarri: To Fix Things – Make Good, Aboriginal Family and Domestic Violence Court, Geraldton, Western Australia (2007).

resources provided or identified through the course of consultations. All resources considered by the Subcommittee are outlined in the Bibliography at the end of this Chapter.

SUMMARY OF RECOMMENDATIONS – 1994 AND 1997

RECOMMENDATIONS FROM THE 1994 REPORT

Chapter 1 of the 1994 Report[14] set out 27 recommendations with respect to the following issues:

- **Legal and support services:** Provision of a support service for women;[15] The need for specialist women's legal services and centres be acknowledged and supported; More resources be made available for women to access information about and support from the legal system; and CLCs be better resourced to cater for legal advice and court representation of women (including 9am to 5pm office hours; a toll free number to a lawyer) – recommendations 5, 4 and 6 respectively.[16]
- **Childcare:** Provision of childcare facilities – recommendation 58.[17]
- **Vulnerable witnesses and victims:** Immediate redefinition of areas in courtroom precincts for witnesses/defendants and applicant/respondents; Separate and private waiting areas be provided within the courts for families and supporters of women victims waiting for a hearing and making applications for restraining orders – recommendations 47 and 49 respectively.

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14 Recommendations set out in Chapter 1 of the 1994 Report at pages 48-49, and also referred to in the 'Summary of Recommendations' set out at pages 5-24 of the 1994 Report. For ease of reference, the recommendations set out here are largely in the order in which they appear in Chapter 1. Note that recommendation numbers refer to the relevant numbering used in the Summary of Recommendations (as the recommendations were not numbered in Chapter 1 itself).

15 Not specifically included in the Summary of Recommendations in the 1994 Report, however similar recommendations in relation to increasing the provision of legal services to women are covered and referred to here as essentially the same issue.

16 Recommendation 9 relating to the funding and development of the Women's Legal Service of Western Australia was also included in the 'Summary of Recommendations' under the heading 'Access to Justice', but did not appear in Chapter 1 of the 1994 Report. In this Chapter, issues relating to legal services for women are discussed under the heading 'Specialist Women's Legal and Support Services' commencing at page 37.

17 This recommendation also appears as recommendation 10 of Chapter 4 of the 1994 Report.

- **Refreshments:** Provision of proper refreshment facilities – recommendation 63.
- **Information:** A system whereby defendants or applicants for restraining orders are provided with a list of organisations or persons who could be of help to them (such as provided by the Family Court) – recommendation 77.
- **Education:** Development of a community legal education system, particularly at school level, to meet the problem of the vast lack of knowledge by women in relation to their rights and protection of them – recommendation 1.[18]
- **Toilets:** The provision of toilet facilities (particularly in country areas) – recommendation 60.
- **Information booths:** Establishment of information booths within the court environment; and the immediate retraining of administrative staff at information booths – recommendations 59 and 53 respectively.
- **Vulnerable witnesses:** Provision of less exposed and enclosed witness box for victims in sexual assault cases – recommendation 56.
- **Court Personnel:** Immediate review of recruitment practices in relation to court personnel; the gender balance of court personnel be examined and the courts be required to adopt an affirmative action policy as a matter of urgency[19] – recommendations 43 and 44 respectively.
- **Judicial education:** Judicial education in relation to the female victim perspective; and into how Aboriginal and NESB women relate to different situations in the courtroom – recommendations 40 and 39 respectively.
- **Courtroom acoustics:** Installation of voice amplification facilities – recommendation 57.
- **Victims:** Establishment of a system to advise relevant persons of an offenders release date – recommendation 198.

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[18] Also addressed by recommendation 1 from Chapter 7 of the 1994 Report – see Chapter 7 of the 2014 Review Report 'Education: Law Making; Civil Laws Which Discriminate' for discussion of this issue.

[19] This also appears as a recommendation in Chapter 5 'Victims of Crime' of the 1994 Report, page 135.

- **Restraining Orders:** Applications for restraining orders be heard in chambers or a closed court – recommendation 78.[20]
- **Victims:** Amendments be made to the *Justices Act 1902* to the effect that Magistrates have no discretion to exclude a person accompanying an applicant for a restraining order.[21]
- **Education:** Provision of financial management education to single mothers.[22]
- **Minority groups:** Special attention be given to the needs of women of Aboriginal[23] and non-English speaking background (**NESB**[24]); women in country or remote areas; and recognition and accommodation of additional difficulties in accessing the criminal justice system – recommendations 50 and 8 respectively.
- **Paralegals:** Paralegal staff be made available to assist these women with court procedures and offer them emotional support – recommendations 7 and 55.
- **Political process:** All political parties examine their selection procedures for systematic discrimination against women and consider and implement strategies to enable women to participate equally in the political process – recommendation 15.[25]

For this 2014 Review, the Subcommittee also took responsibility for examining the following issues that arose from Chapter 5 of the 1994 Report:

- **Children:** Courts should adopt a child protective focus in the design and delivery of their services. Specifically, courts need to provide for adequate

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20 Restraining orders are discussed in Chapter 5 of this 2014 Review Report.

21 This recommendation, whilst appearing in Chapter 1 at page 49, did not appear in the Summary of Recommendations at pages 5-24 of the 1994 Report.

22 This recommendation also did not appear in the Summary of Recommendations.

23 In this Chapter, consistent with the reference in the 1994 Report, we use the term 'Aboriginal' to refer to all Indigenous or Aboriginal and Torres Strait Islander Women.

24 In this Chapter, we use the term 'NESB' to refer broadly to women who come from culturally and linguistically diverse (CALD) backgrounds, which includes recent migrants to Australia, along with those who do not speak or understand English well (whether English is a second language or otherwise).

25 The issue of women in the political system is discussed in Chapter 7 of this 2014 Review Report.

childcare and should take into account school hours and holidays when scheduling trials – recommendation 13 of Chapter 5.[26]

- **Disabilities Plan:** The Ministry of Justice is required to produce a Disabilities Plan for all courts – Recommendation 61.[27]
- **Victims:** Appropriate accommodation within the court building be made for victims of domestic violence – recommendation 48.[28]

A number of other recommendations regarding Aboriginal women and victims or vulnerable witnesses appeared under the heading 'Access to Justice' in the Summary of Recommendations at the start of the 1994 Report. These recommendations are discussed elsewhere in this 2014 Review Report – in Chapters 4 ('Aboriginal Women and Girls and the Law') and Chapter 5 ('Victims of Crime') respectively.

IMPLEMENTATION OF THE 1994 REPORT RECOMMENDATIONS – Chapter 1

The 1997 Progress Report, prepared by the Women's Policy Development Office in conjunction with the then Ministry of Justice, suggested that the majority of the recommendations made in the 1994 Report had been addressed at least in part. It was reported that there were particular advancements with respect to access to justice and the court environment in the areas of victim support, representation, support and education services in regional areas and facilities for vulnerable witnesses including children.

Notwithstanding previously reported advancements, the Subcommittee found that in 2014, a number of these areas require further attention. A summary of the Subcommittee's analysis of the issues and recommendations arising from the 1994 Report and the 1997 Progress Report is set out immediately below. For convenience, the Subcommittee deals with the recommendations grouped by themes.

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[26] This recommendation does not appear in the Summary of Recommendations at pages 5-24 of the 1994 Report. However, the recommendation relates to the same issue as recommendation 58, which appears in the Summary of Recommendations and is discussed in Chapter 1.

[27] Recommendation 14 of Chapter 5, page 151 of the 1994 Report.

[28] Recommendation 36 of Chapter 5, page 165 of the 1994 Report.

Further consideration of new issues identified in the course of this Review is included below under the heading 'Additional Recommendations Arising from 2014 Review' (commencing on page 90 of this chapter).

RECOMMENDATIONS 4, 5 and 6: Specialists women's legal services, support services and resourcing of CLCs

The 1994 Report considered issues such as the existence of and resourcing for specialist services for women. These included services provided by CLCs, specialist women's legal services and centres, private law firms, and the duty lawyer scheme at the court itself, along with impacts such as the direct effect of one's financial situation on access to legal services and justice.

A number of legal and support services have been implemented since 1994. The Women's Law Centre of Western Australia Inc. (**Women's Law Centre**) was established in 2002, with funding from the Commonwealth Attorney General's Department, (replacing the Women's Legal Service of Western Australia, established in November 1993) and providing legal services for women in Western Australia.[29] Another Commonwealth initiative is the Family Relationships Advice Line,[30] which provides confidential information, guidance and advice on relationship, separation and parenting matters and the family law system.

The establishment of the Legal Aid WA Domestic Violence Legal Unit (**DVLU**)[31] in October 1994 and the development and expansion of the Victim Support Service and Child Witness Service (previously established in 1992)[32] by DOTAG are further notable advancements. The DVLU advises and assists women with restraining order matters, and provides advice and referrals with respect to other issues that may arise when trying to escape family and domestic violence.[33] The Victim Support

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29 The Commonwealth Attorney General's Department, the Public Purposes Trust, Lottery West and other donations fund the Women's Law Centre. Women's Law Centre website: http://www.wlcwa.org.au/ (accessed 30 April 2014).

30 http://www.familyrelationships.gov.au/Services/FRAL/Pages/default.aspx

31 Legal Aid WA website: http://www.legalaid.wa.gov.au/LegalAidServices/specialist/Pages/DomesticViolenceLegalUnit.aspx

32 Victims of Crime website: http://www.victimsofcrime.wa.gov.au/V/victim_support_services.aspx?uid=6434-5121-4723-5876

33 The term 'family and domestic violence' (**domestic violence**) is used throughout this Chapter to refer to any type of: "Violent, threatening, coercive or controlling behaviour that occurs in current or past family, domestic or intimate relationships... This encompasses not only physical injury but direct or indirect threats, sexual assault, emotional and psychological torment, economic control,

Service (**VSS**) provides free, confidential counselling and support services for victims of crime, including information and assistance with respect to court processes, writing a victim impact statement, applying for a restraining order, and 'court companionship'. The Child Witness Service assists children called to give evidence in court by providing information about the process and progress of legal proceedings, thereby reducing the trauma they may experience.[34] Both services have offices in Perth and certain regional locations. VSS is not adequately funded to cover the vast State, leading to a reported service gap with respect to women and children in remote areas.[35]

The Subcommittee's investigations identified the following additional services that provide assistance to women (although not exclusively):

- CLCs – 29 in total, comprised of 19 metropolitan and ten regional services;[36]
- Aboriginal Legal Service of Western Australia (**ALS**) – operates in Perth and 17 regional locations,[37] providing representation to Aboriginal men and women in areas of criminal law, family law and civil and human rights law.
- Aboriginal Family Law Services – focusing on the protection of Aboriginal women who are subject to family and domestic violence. Commonwealth funded but only operates in regional areas, with no metropolitan presence in Perth.[38]

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property damage, social isolation and behaviour which causes a person to live in fear" – Department for Victorian Communities, *The Victorian Women's Safety Strategy* (2002), p20; cited in State Government of Victoria, Department of Human Services, 'Building Partnerships between mental health, family violence and sexual assault services: Project Report (2006), page 3, available at: http://www.health.vic.gov.au/mentalhealth/family-violence/partnerships0706.pdf

[34] 'Child Witness Service', Victims of Crime website: http://www.victimsofcrime.wa.gov.au/C/child.aspx?uid=0883-9898-1908-9198 (accessed 30 April 2014).

[35] Consultations with the Supreme Court and the Magistrates Court. The VSS is discussed in Chapter 5 'Victims of Crime.'

[36] A list of CLCs included at the end of this Chapter as Attachment 3.

[37] These are Albany, Broome, Bunbury, Carnarvon, Derby, Fitzroy Crossing, Geraldton, Halls Creek, Kalgoorlie, Kununurra, Laverton, Meekatharra, Newman, Northam, Roebourne, South Hedland and Warburton. See:http://www.als.org.au/

[38] http://www.communitylaw.net/36-Aboriginal-Family-Law-Services/View-details.html The Subcommittee understands that the State Government also provided funding in the area of Aboriginal family violence in 2013.

- Legal Aid WA – with offices in 11 locations,[39] providing services to members of the community, duty lawyers for unrepresented people in the Magistrates Courts, legal information by telephone and community legal education programs throughout the State.
- Legal Aid WA offices in the Family Court – Legal Aid WA provides a duty lawyer service at the court, with two full-time lawyers and two full-time paralegals there, five days per week.[40] A large proportion (50%) of staff time accounts for the provision of information referrals for other services, and it was reported that a very coordinated approach is used to 'triage' people into services including CLCs, Legal Aid WA itself and ALS.[41]
- Family Court Client Administration Officers – an Officer is allocated to each file, ensuring the client has a constant point of contact within the court, rather than having to re-tell their story a number of times. The Officers have private offices in the registry to meet with clients to maintain confidentiality.[42]
- Independent Children's Lawyers – operating in the Family Court where children require independent representation separate from their parents, in accordance with the guidelines lay down in the case of *Re K Appeal*.[43]
- Women's Information Service – staffed by trained volunteers (Monday to Friday 9am - 4pm) who respond each year to thousands of telephone enquiries from across the State seeking information and/or referral for health issues, finances, legal matters, counseling and domestic violence. The Women's Information Service is run through the Department of Local Government and Communities.[44] The Department publishes a handy Pocket Directory[45] listing

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39 Currently operates in Perth, Fremantle, Midland, Bunbury, Albany, Kalgoorlie, South Hedland, Broome, Kununurra, Christmas Island and Carnarvon. See: http://www.legalaid.wa.gov.au/Pages/Default.aspx

40 It was reported that whilst the court did lose this for a while, it is now back in place – Consultation with Family Court.

41 Consultation with Legal Aid WA. The court is very positive about this service, which ensures court users are able to obtain assistance with urgent advice and small documents, and it takes the pressure off registry staff - Consultation with the Family Court of Western Australia.

42 Consultation with the Family Court.

43 *Re K Appeal* [1994] FLC 92-461 (10 March 1994).

44 http://www.communities.wa.gov.au/communities-in-focus/women/womens-information-service/pages/default.aspx

45 Available online at: http://www.communities.wa.gov.au/communities-in-focus/women/womens-information-service/Documents/WIS_PocketDirectory.pdf

the names and contact details for various organisations able to assist women – notably including contacts under Aboriginal services, accommodation, advocacy and welfare, counselling, crisis and emergency, legal, sexual assault and domestic violence.

- Law Society's Law Access Program – enables persons who are otherwise not able to obtain assistance for matters beyond the capacity of CLCs to seek a pro bono placement with law firm members which can assist with some meritorious matters (including some family and civil law matters).[46] It is recognised that Australian lawyers donate a large amount of time, expertise and resources to pro bono work, however the demand remains higher.[47]

The establishment in 2004 of the Family and Domestic Violence Legal Workers Network (**FDV Network**),[48] consisting of legal and other professionals working in the area of family and domestic violence, is another positive advancement.

However, due to continued strain on resources and an ever increasing demand, CLCs and Legal Aid WA remain limited in the assistance they can provide, with most CLCs unable to represent clients in court. Other services also report funding constraints and capacity issues. With respect to women in RRR areas, there has been an increase in services available in regional areas of the State, including access to VSS, Legal Aid WA contact centres and CLCs now located in RRR areas.[49] Some community legal education, workshops for solicitors and community workers are available in regional areas. Since the 1994 Report there has been regional initiatives such as teleconferencing - with organisations such as the Pilbara Community Legal Service, non-legal organisations such as the North West Women's Association in Derby and women's refuges - about the needs of women in the north west of the State.[50]

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46 See Law Society of Western Australia, Law Access Pro Bono Scheme: https://www.lawsocietywa.asn.au/pro-bono-scheme.html

47 National Pro Bono Resource Centre, *Transforming Access to Justice: Issues and Ideas* (2nd National Pro Bono Conference, Sydney, 20-21 October, 2003), Page 32.

48 WA based network of legal and other professionals working in the field of family and domestic violence (FDV) to promote and protect the rights of people experiencing FDV violence. As well as undertaking policy and law reform, FDV Network provides training, network opportunities, regular sector updates and other resources to solicitors and other workers who assist victims of family and domestic violence. The FDV Network Coordinator is hosted (with the support of other community legal centres) by the Women's Law Centre (www.wlcwa.org.au).

49 A full list of CLCs is included as Attachment 3.

50 1997 Progress Report, page 8.

Access remains an issue for women outside of these areas of service provision however, including the most remote areas of WA, and there are continuous needs in this area. In 2014, there is also an increased need for relevant services for women from Aboriginal and NESB communities (discussed below at page 49). More funding is required to ensure that specialist women's legal services and CLCs have sufficient resources to meet on-going demand. The issue of insufficient funding and unmet need is considered in detail, and further recommendations made, below (commencing at page 37).

RECOMMENDATION 58: Childcare facilities

Childcare facilities have not been implemented since the 1994 Report. Only the Family Court currently provides child-minding facilities for court clients. At the time of the 1997 Progress Report, the Ministry of Justice was reportedly running a pilot project to give court clients access to child minding services at the Rockingham Magistrates Court. It was reported that 'the service may be used by people who would otherwise need to bring their children with them to court.'[51] The pilot project commenced in June 1996, and was to be reviewed after 12 months with a view to expanding it to other courts. The program was run on the basis that if it were successful, the Courts Services Division would promote it and negotiate with child care agencies within the vicinity of the courts to ensure the child care needs of women were addressed. Unfortunately the Subcommittee was unable to find any further information regarding the pilot project. However the current situation at Rockingham and other courts confirms that the recommendation has not been implemented. The Subcommittee considers that this recommendation remains important to women's access to justice and still requires immediate attention. Discussion of this issue is at page 74 below.

RECOMMENDATIONS 47 AND 49: Vulnerable witnesses and victims

[See also the discussion of a related issue, accommodation for victims in court precincts, which commences at page 36 below]

According to the 1997 Progress Report, the recommendation to immediately redefine areas in courtroom precincts for vulnerable witnesses was supported by the Minister

[51] 1997 Progress Report, pages 10-11.

of Justice, consistent with its Justice Charter. The 1997 Progress Report stated that facilities for vulnerable witnesses including separate waiting areas and closed circuit TV would be 'considered in any new court complexes in line with the state wide Building Facilities Review.' Separation of vulnerable witnesses and victims is dealt with in the Courts Standard Design Brief[52] (which the Subcommittee understands is applied to new courts rather than improving/retrofitting old ones),[53] which provides that there should be a separate circulation system for witnesses who require special support (both adult and child witnesses), connecting a discrete external entry/exit point to the remote witness and related support accommodation in the courthouse. However, while facilities for vulnerable witnesses are now considered in all *new* court complexes, this remains a significant impediment to women in *existing* court precincts and accordingly requires attention. This issue is discussed in detail at page 67 below.

RECOMMENDATION 63: Refreshment facilities

In 1997, the provision of refreshment facilities was to be implemented as part of the future planning for court buildings. The Courts Standard Design Brief states that:

> "A coffee cart or automatic vending facilities shall be provided to service both Court Users and general public as long as security provisions are not compromised. The provision of this facility is encouraged as a 'meeting place' and a relaxing environment prior to entering the secure court environment as well as servicing the needs of the buildings users and public generally. The spatial and servicing requirements shall be met only with equipment to be provided by the courts."[54]

It is accepted by the Subcommittee that regional courts do not have a sufficient volume of people to support the establishment of cafés within the court precinct, however self-service refreshment facilities should be available at all courts. Whilst there are currently vending machines and water fountains located in *most* courts, the Subcommittee found that this is not the case in *all* courts and accordingly requires urgent attention. Refreshment facilities are discussed below at page 70.

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52 Government of Western Australia, Department of the Attorney General, Courts Standard Design Brief (February 2010), available at: http://www.courts.dotag.wa.gov.au/_files/courts_design_brief.pdf (accessed 22 April 2014).

53 Whilst a lot of recommendations in the 1994 Report are included in the Court Design Brief, a number of key problems remain with respect to older court buildings such as the Children's Court, and Perth Magistrates Court (Central Law Courts).

54 Courts Standard Design Brief, page 57.

RECOMMENDATION 77: Information for restraining order applicants/defendants

This recommendation has been implemented. The court orderly has a factsheet that is kept in the restraining order Court 57 of Perth Magistrates Court: one for the person protected by a restraining order and one for the person bound by the restraining order. This information is provided to applicants (and sometimes defendants) who come into contact with the VSS. Further, the information is available online via the Magistrate's Court website, DOTAG's website and the Legal Aid WA website.[55]

RECOMMENDATION 1: Community legal education

Legal Aid WA delivers community education in the metropolitan area and works co-operatively with regional offices to deliver community legal education (**CLE**) in the non-metropolitan region. This includes education by the Legal Aid WA's Domestic Violence Legal Unit ('DVLU'), whereby legal staff become involved in CLE programs where their workloads allow. The DVLU's CLE program is aimed at benefitting victims of domestic violence, the vast majority of whom are women, and covers topics surrounding domestic violence including specific focus on application for restraining orders and community training workshops for support groups. Further CLE is provided by other organisations. For example, the Equal Opportunity Commission Western Australia (**EOC**) conducts rights-based training covering areas including anti-discrimination, positive workplace culture (covering the adverse effects of discrimination in the workplace), substantive equality, and a contact officer course and grievance management for managers.[56] The Francis Burt Law Education Centre[57] now offers legal education to school aged children.

Despite these advancements however, there is a particular need for CLE targeted for women of Aboriginal and NESB communities, to assist with their basic understanding of the legal and justice system and what assistance is available. CLE need is discussed below at page 89.

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55 See: DOTAG: http://www.courts.dotag.wa.gov.au/R/restraining_orders.aspx; Magistrates Court: http://www.magistratescourt.wa.gov.au/R/restraining_orders.aspx; and Legal Aid WA:http://www.legalaid.wa.gov.au/InformationAboutTheLaw/DomesticandOtherViolence/MisconductRestrainingOrders/Pages/Default.aspx

56 Consultation with the EOC.

57 http://www.lawsocietywa.asn.au/education

RECOMMENDATION 60: Toilets

According to the 1997 Progress Report, the provision of toilet facilities was to be considered as part of the Building Facilities Review and implementation was subject to the capital works funding priorities. The Courts Standard Design Brief states that:

> "Accessible toilets must be provided in accordance with the BCA [Building Codes Australia] for staff, judiciary, public, the jurors in both jury assembly and delivery room. Unisex toilets are preferred for public use as they enable a disabled person to be helped by someone of the other sex."[58]

The Subcommittee found that not all regional courts have toilet facilities at the court precinct in compliance with the Courts Standard Design Brief.[59] This remains a significant outstanding issue that must be addressed. This issue is discussed in detail below at page 68 (along with consideration of parenting facilities).

RECOMMENDATIONS 59 and 53: Information booths and training of administrative staff

According to the 1997 Progress Report, the then Ministry of Justice's *Justice Charter* set out a series of customer service strategies and customer service standards that were to be clearly articulated in day to day operational terms. It was reported that this was reinforced by the 1997 Court Services Customer Service Charter and related customer service initiatives that were launched in April 1997. A generic course for customer service training was available and the Courts Services were to ensure staff was able to attend regular training courses on an ongoing basis.

Court publications and information brochures have since been updated and new fact sheets in relation to court processes and procedures are now provided in court registries. The Magistrates Court does not have information booths (and therefore no information booth staff), as this is now considered to be available via the Internet. Similarly, there are no information booths in other courts. The Family Court no longer provides information sessions at the court itself,[60] although its website does include information in different formats, such as video and PowerPoint presentations,

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58 Courts Standard Design Brief, page 40 (under heading 'Disability').

59 For example, the courthouse in Newman.

60 These sessions ceased in 2011 – Family Court of Western Australia, Practice Direction No 1 of 2011, 'Information Sessions' (12 September 2011), available at: http://www.familycourt.wa.gov.au/_files/InfoSessionPD.pdf

along with written material on its website. The website is also accessible to those with limited literacy, as resource material is available to listen to as well as read. The website further refers users to a number of CLCs should users wish to locate an information session.[61] Further, there are tailored publications, such as the Self Represented Litigants Handbook[62] at the Family Court, and further handbooks for children's cases[63] and property matters,[64] all of which are available online and at each lectern in court rooms.[65]

Access to information about the legal system and court processes is an ongoing requirement that requires continuous assessment to ensure information meets the needs of court users. In 2014 there is room for further improvement. The Subcommittee considers that without a user-friendly website (discussed further below at page 91), access to information remains deficient. The Subcommittee's findings in relation to access to information specific to the needs of court users today is set out below at page 87.

RECOMMENDATION 56: Witness box for victims in sexual assault cases

The recommendation to provide a less exposed and enclosed witness box for victims in sexual assault cases has been addressed in that victims are no longer in a witness box in the courtroom itself, but are able to give evidence from a remote location within the courthouse. This change was made shortly after the 1994 Report. A victim of a sexual assault is now ordinarily declared a "special witness" under section 106R(1) of the *Evidence Act 1906* (WA). If declared a special witness, sexual assault victims are protected by amendments to the *Evidence Act 1906*

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61 http://www.familycourt.wa.gov.au/I/information_sessions.aspx?uid=1490-0844-3804-1507

62 This booklet is designed to help those people who do not have a lawyer to present their cases in the Family Court of Western Australia, aimed to make it easier for those people to navigate through the court system – Self Represented Litigants Handbook Self Represented Litigants Handbook, available at: http://www.familycourt.wa.gov.au/S/SRL_handbook_page.aspx Unfortunately at the time of preparing this Chapter, the handbook was unavailable because it was being revised to include the Shared Parenting legislation which came into effect in 2013.

63 Family Court of Western Australia, *A Guide to Representing Yourself in the Family Court of Western Australia – Childrens' Cases* (2007), http://www.familycourt.wa.gov.au/_files/Handbook_Childrens_Cases.pdf

64 Family Court of Western Australia, *A Guide to Representing Yourself in the Family Court of Western Australia – Property Cases* (2008), available at: http://www.familycourt.wa.gov.au/_files/Handbook_Property_Cases.pdf

65 Consultation with the Family Court.

(WA).[66] Under the provisions set out in ss.106A-106T of the *Evidence Act,* vulnerable witnesses are spared from having to give evidence in open court and instead, in appropriate circumstances, are able to pre-record their evidence or alternatively are able to give evidence during a trial by means of closed circuit television, or a screened room. Use of remote rooms and re-recording of evidence is now commonplace.[67] The facilities for vulnerable witnesses, including remote witness facilities capable of being used by adult and child witnesses, are also covered in the Courts Standard Design Brief.[68] Vulnerable witnesses are discussed at page 67 below. The adequacy of remote rooms is discussed below at page 96.

RECOMMENDATIONS 43 and 44: Court personnel

There is a recognised need to continue to support women into senior levels and increase the general diversity of those working within the legal system. It was reported in 1997 that these issues were being addressed in the then Ministry of Justice's 'Women's Plan' and 'Aboriginal Plan'.[69] There are now several women Clerk of Courts, including in regional and rural areas.[70] Whilst it was a recruitment issue in 1994 to attract women Magistrates to country areas, the Subcommittee was advised that this is no longer a problem, with a number of women wanting to go to the country in recent years.[71] In some courts, women make up the majority of court staff, or the majority of particular segments of the court, yet this has not led to gender balance in higher-level roles. Further, diversity in court personnel remains an issue, and is discussed below at page 78.

RECOMMENDATIONS 39 and 40: Judicial Education

It is acknowledged that today there is considerably more information available (and perhaps increased general awareness amongst members of the judiciary) on issues affecting multiple user groups than was the case in 1994. Part of the reason for this is the existence of written materials specifically aimed to assist the bench, such as

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66 In particular, as a result of the *Acts Amendment (Evidence of Children and Others) Act 1992,* and the *Criminal Law Amendment (Sexual Assault & Other Matters) Act 2004.*

67 Evidence of Children & Special Witnesses – Guidelines for the Use of Closed-Circuit TV, Videotapes and Other Means for the Giving of Evidence 2005: http://dppnet/policies/policy/Policy/Evidence%20of%20Children%20and%20Special%20Witnesses%20Policy%20-%20Guidelines%20for%20the%20use%20of%20closed-circuit%20TV.docx

68 Courts Standard Design Brief, page 54.

69 1997 Progress Report, page 27.

70 Consultation with the Attorney General.

71 Consultation with the Magistrates Court.

the Equality Before the Law Bench Book and the Aboriginal Cultural Awareness Bench Book, which provide written information to judicial officers regarding the diverse ways in which women might be disadvantaged in their dealings with the justice system.[72] However, there are no regular programs of cultural awareness for judicial officers, and no resources specifically allocated for this purpose. There is scope for further written information about the issues affecting NESB court users, particularly new migrant groups to Australia. Whilst previously there were occasional seminars federally funded by the National Judicial College, this funding is now exhausted. Further issues were raised regarding the provision of training to judges more broadly. Judicial education and cultural awareness training are discussed in detail below at page 81.

RECOMMENDATION 57: Courtroom acoustics: Voice amplification facilities

This recommendation was addressed in conjunction with video facilities, having been part of the State-wide Building Facilities Review outlined in the 1997 Progress Report. Consultations confirmed that video conferencing and voice amplification facilities are now installed in all DOTAG managed courthouses throughout Western Australia.[73] However, an issue was raised with respect to the variations that exist in the technology from court to court. The Subcommittee encourages DOTAG to continuously examine the technology in all courts to ensure it is up to date and working properly in all courts around the State.

RECOMMENDATION 198: System to advise of an offenders release date

The recommendation for a system to advise of an offender's release date has been implemented. The *Victims of Crime Act 1994* (WA) was proclaimed in January 1995, recognising the role of victims in the criminal justice system for the first time,[74] and providing guidelines as to how victims should be treated by public officers and

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72 See for example, in particular Chapter 7.5.2 'Female Aboriginal Witnesses', *The Aboriginal Benchbook for Western Australian Courts*, 2nd Edn (2008), available at: http://www.magistratescourt.wa.gov.au/l/indigenous_services.aspx?uid=8135-2150-1466-1241; Chapters 10 'Women', 12 'Diverse Sexuality, sex and gender' and 13 'Family and Domestic Violence', *Equality before the Law Benchbook* (2009), available at: http://www.supremecourt.wa.gov.au/_files/equality_before_the_law_benchbook.pdf

73 Written consultation material from the State DPP confirmed that voice amplification facilities are available in all metropolitan and regional courts in which the State DPP appears.

74 1997 Progress Report, page 11.

bodies.[75] Included in those guidelines is a requirement that a victim who has so requested should be informed about the impending release of the offender from custody and, where appropriate, about the proposed residential address of the offender after release. Accordingly, the notification of an offender's release date to a victim is now managed through the Victim Notification Register (VNR) scheme run by the Department of Corrective Services.[76]

There is now a pamphlet regarding the VNR produced by the State Government,[77] which provides basic details about the VNR, and includes a registration form to request (on a confidential basis) to be provided with relevant information. Links to the VNR are included on both the Victims of Crime (WA) and DOTAG websites.[78]

It is noted that the success of the VNR is, however, dependant on a victim keeping their personal information up to date and informing the Registrar of any changes in personal details, such as change of address. The Subcommittee notes there is potential to publicise the existence of the VNR more widely (especially to minority groups), as it was apparent during consultations that there is not broad awareness in the community about its existence, particularly amongst women.

RECOMMENDATION 78: Restraining Order applications

The recommendation that applications for restraining orders be heard in chambers or a closed court has been implemented. Section 27 of *Restraining Orders Act 1997* (WA) allows for an application for a restraining order to be held in the absence of the respondent and in closed court. Gender bias in relation to restraining orders is addressed in Chapter 6 of the 2014 Review Report.

RECOMMENDATION 16: Amendments to the Justices Act

In relation to the recommended amendments to the *Justices Act 1902*(WA) to the effect that Magistrates have no discretion to exclude a person accompanying an applicant for a restraining order, the Subcommittee notes that this recommendation is no longer relevant. The *Justices Act 1902* was retitled the *Criminal Procedure*

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75 The issue of Victims of Crime is covered in detail in Chapter 5.

76 Department of Corrective Services website: https://www.correctiveservices.wa.gov.au/victim-services/victim-notification-register.aspx

77 Government of Western Australia, Department of Corrective Services, 'Victim Notification Register' (Pamphlet, 2010), available at: https://www.correctiveservices.wa.gov.au/_files/victim-services/vnr-brochure.pdf

78 See http://www.victimsofcrime.wa.gov.au/ and http://www.dotag.wa.gov.au/

(Summary) Act 1902 (WA) in 2004, and was then repealed on 2 May 2005. Discussion of how restraining orders currently operate in WA is included in Chapter 6 of the 2014 Review Report.

RECOMMENDATION 17: Financial management education

There are services able to assist with financial management issues, such as the Consumer Credit Legal Service (WA) Inc., and Financial Counsellors of Western Australia. These organisations assist with applications for financial rebates or assistance such as the Hardship Utilities Grants Scheme (HUGS).[79] The Subcommittee does however note the resourcing issues and long waiting periods required to get into these services in many cases. Consultations revealed that women remain considerably under-educated around money matters, and this is particularly evident with respect to women facing disadvantage.[80] The Subcommittee includes funding of financial services in its discussion of support services available for women commencing at page 37 below.

RECOMMENDATIONS 50 and 8: Needs of Minority Groups – Aboriginal, NESB and RRR Women

According to the 1997 Progress Report, improving access to justice had been given particular attention in the Aboriginal Plan and the Women's Plan that were relevant at the time, and was a particular consideration in the then Review of Services to Adult Women Offenders.[81] In addition, a 'Language Service Plan' had been developed for NESB clients and the difficulties experienced by NESB groups were to be further considered in the then Review of Services to Adult Women Offenders.

A number of DOTAG's services, including the Victim Support Service, are now represented more strongly in different regions of the State. In 1997, Legal Aid WA's regional offices were committed to developing contact centres where people could obtain legal aid application forms and guidance about accessing legal assistance.

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79 Run by the Department of Child Protection and Family Support, the HUGS scheme provides financial assistance to help people with financial difficulties to pay water, gas and electricity bills so their supply is not cut off. http://www.dcp.wa.gov.au/servicescommunity/Pages/HardshipUtilitiesGrantScheme(HUGS).aspx

80 See e.g., Consultation with Pat Giles Centre.

81 1997 Progress Report, page 23.

Servicing regional areas continues to be a focus for Legal Aid WA, with offices in a number of RRR locations.[82]

Despite these advancements however, there remains a significant need for increased State funding for support services to meet the need of RRR and minority groups. RRR women face particular disadvantage, depending on location and access to appropriate services. Interpreting services also remains an issue for NESB and Aboriginal women, and there are complexities surrounding access to justice for recent migrant groups in particular. The Subcommittee recognises that staying informed of and addressing the needs of minority groups is a complex, multifaceted issue, yet requires ongoing attention. The needs of Aboriginal, NESB and RRR groups are dealt with in detail below at pages 46 (Aboriginal and NESB women) and 61 (RRR women).

RECOMMENDATIONS 7 AND 55: Paralegal staff

In relation to the recommendation for paralegal staff to assist women with court procedure and offer emotional support, the Subcommittee refers to the employment of paralegals in CLCs and Legal Aid WA, including providing assistance on the information line and minor assistance programs. There are few paralegals in RRR areas of Western Australia. In addition to the paralegals at Legal Aid WA, the 1997 Progress Report advised that Ministry of Justice staff were trained to provide advice on practice and procedure (as opposed to legal advice, counselling or support), and emotional support was (and still is) available to victims through the VSS.[83] As stated above, the Legal Aid WA DVLU provides women with information about their legal rights in situations of domestic violence.

The Subcommittee makes no further recommendations regarding use of paralegal staff; rather, the Subcommittee notes the changed thinking and concern about the use of paralegal staff. The area of greatest need is legal services for women namely legal advice and representation. Women require legally qualified persons to provide these services. There is a real risk that any assistance or advice provided by paralegal staff will be construed to constitute legal advice, and it is recognised that there is often a fine line between assistance and advice. If staff is engaged to

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82 Legal Aid WA has offices in 11 locations including the Pilbara, Christmas Island, West Kimberley and Midwest and Gascoyne region - http://www.legalaid.wa.gov.au/Pages/ContactUs.aspx

83 1997 Progress Report, pages 23 and 29.

provide emotional support and other assistance, this is best referred to as non-legal forms of assistance.

The Subcommittee is of the view that in 2014, the needs of women in relation to the justice system would be more readily addressed by greater funding for Legal Aid WA and duty lawyers (including access to the internet and CLCs) and funding for Victims of Crime support groups and services, rather than by the provision of 'support workers' such as 'paralegals,' as discussed in the 1994 Report.[84] These aspects of the court and justice system are addressed below at pages 37 (women's services), 87 (information) and 91 (websites).

RECOMMENDATION 13 OF CHAPTER 5: Child protective focus, childcare and school hours/holidays

The provision of adequate childcare is discussed above under the summary of recommendation 58 (page 23), and in detail below at page 71 onwards.

In relation to a child protective focus more generally, section 106 of the *Evidence Act 1906* (WA) allows for a child to be declared a *special witness.* This leads to arrangements to allow the child witness to give pre-recorded evidence or to have a court approved support person present whilst giving evidence, to give evidence outside the courtroom but within the court precinct and for evidence to be transmitted to the courtroom by way of closed circuit TV. This is again dealt with in the Courts Standard Design Brief.

The need to accommodate school hours and holidays when scheduling matters (both trials and other hearings and mediations) is recognised by the courts. However, difficulties are experienced in practice in some busy jurisdictions with ultimate discretion resting with the presiding judicial officer (who is not necessarily inherently mindful of these types of issues) – refer to discussion of judicial education below at page 85. For example, the Supreme Court has advised that it has shifted the mid-year and summer recess to coincide with school holidays, and the Chief Justice has changed his earliest starting time to 9.30am to accommodate women with children.[85] The Magistrates Court reported that:

- it generally does not run matters during school holidays;

[84] Written consultation with the DPP.
[85] Consultation with the Supreme Court.

- it acknowledges the difficulty in taking school hours into account when scheduling trials, given the lengthy court lists;
- it will provide leeway to allow the accused time to see the duty lawyer or counsel prior to appearing (often later that morning), notwithstanding the police arrest list includes a bail time of 8.30am, and
- it can be flexible to accommodate issues, where issues are brought to the court's attention,[86]

WLWA is pleased that it has generally received support from Heads of Jurisdiction with respect to court starting times, and that lawyers and court users can and should bring any availability issues to the court's attention as early as possible so that these needs can be accommodated.

RECOMMENDATION 61: Disabilities Plan

This recommendation has been implemented. By 1997, the then Ministry of Justice had developed a Disabilities Plan for the whole of the department in line with legislative requirements. Issues remain however with respect to how to satisfy that plan in practice. Disability access still requires continuous monitoring and improvement. Consultations revealed that wheelchair access for litigants is still lacking in some courts, such as Courtroom 41 at the Magistrates Court, in which a wheelchair does not fit between barriers to get to the bar table.[87] To eliminate disadvantage experienced by disabled persons (including women), there is a clear need for wheelchairs to be able to get to the bar table and also to the witness box. The Subcommittee strongly encourages the State Government to revisit compliance with its disabilities plan with respect to disabled access to court precincts.

RECOMMENDATION 48: Appropriate accommodation for victims of domestic violence

As discussed above in relation to vulnerable witnesses (recommendations 47 and 49 at pages 23 and 24), this issue still requires attention in court design. Upgrades are required to court buildings, particularly in RRR areas, to address the problem. Some metropolitan and most RRR courts are out-dated and do not have separate areas or

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86 Consultation with the Magistrates Court.
87 Consultation with the Magistrates Court.

entries for witnesses, the accused and opposing parties, resulting in lack of separation from the person who harmed them. This issue overlaps with Chapter 5 of the 2014 Review Report 'Victims of Crime' and is discussed in detail below from page 64.

THE SUBCOMMITTEE'S DISCUSSIONS AND RECOMMENDATIONS ARISING FROM THE 1994 REPORT

The Subcommittee has reviewed the issues discussed and recommendations arising in the 1994 Report, and determined that the following matters remain outstanding in 2014 and require attention to ensure they are adequately implemented:

1. Specialist women's legal and support services;
2. Aboriginal and NESB women;
3. Interpreters;
4. RRR women;
5. Vulnerable witnesses –separate areas and accommodation for domestic violence victims;
6. Toilets;
7. Refreshments;
8. Child minding;
9. Court personnel – diversity and education;
10. Judicial education; and
11. Community legal education (CLE).

The Subcommittee's analysis of these issues is set out immediately below, along with the Subcommittee's further recommendations arising from the review of the 1994 Report. These recommendations address the Subcommittee's considered view of what action is required to address the issues raised in the 1994 Report that remain outstanding and problematic today.

1) SPECIALIST WOMEN'S LEGAL AND SUPPORT SERVICES

It is vital that women have access to legal and non-legal support services to fully participate in the legal system, and have confidence in the courts and administration of justice. The Subcommittee's investigations revealed that there is currently a demonstrable need for legal services that can deal with the demand and the issues faced by women (in civil, family and criminal law aspects).[88]

As identified in the 1994 Report,[89] it remains the case in 2014 that women still have fewer financial resources available to them, and remain in a lower socio-economic and more disadvantaged group than men,[90] meaning that they are less able to take advantage of legal services, to retain quality counsel, and therefore to access justice on an equal footing with men. Some of the reasons behind this disparity include the fact that women tend to be in lower paid work, work part time, and are commonly in and out of the workforce, due to responsibilities for caring for children and the elderly. Further, women are more often than men victims of crime,[91] particularly family and domestic violence, and those who have been victims of sexual abuse very often suffer serious mental health issues.[92] The incidence of domestic violence is underestimated in Australia; with such violence occurring in all social classes, races and cultures and with women comprising the majority of victims, whilst men constitute the majority of perpetrators.[93] Accordingly, the need for specialised

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88 See e.g., Information provided by Written Consultation with the Women's Information Service – Women's Information Service database (record of calls): non-identifying information including whether the caller was personal or from another party, the category (i.e. how/why its related to legal issues) and an outline of the information or referral given.

89 Page 33,1994 Report.

90 See e.g., Department for Communities, *2012 Women's Report Card: Measuring Women's Progress* (2012) http://www.communities.wa.gov.au/Documents/Women/WO31%20Women's%20Report%20Card%202012_web.pdf

91 92.3%of sexual assaults in Western Australia being committed against women – Department for Communities 'Women and the Media: Who do they think they are?' (Discussion Paper, 2012) http://www.communities.wa.gov.au/Documents/Women/Women%20in%20the%20Media%20Discussion%20Paper%20FINAL.pdf

92 State Government of Victoria, Department of Human Services, 'Building Partnerships between mental health, family violence and sexual assault services: Project Report (2006), page 3, available at: http://www.health.vic.gov.au/mentalhealth/family-violence/partnerships0706.pdf

92 'Child Witness Service', Victims of Crime website: http://www.victimsofcrime.wa.gov.au/C/child.aspx

93 Senate Committee Report: Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (June 2004), page 41, available at Parliament of Australia, Senate Committee Report: Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (June 2004) http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2002-04/legalaidjustice/report/contents

services for women as a gender group, and accessibility for those who are financially dependent, is extremely high. These issues are further compounded for women from Aboriginal[94] or CALD backgrounds, women living in RRR areas,[95] elderly women and young women, all of whom experience even higher rates of social inequity, discrimination and disadvantage.[96]

In addition to civil and family legal matters, a need certainly exists with respect to criminal law advice and representation. It must be kept in mind that whilst women were not traditionally the main users of criminal defence services, women are increasingly being charged with 'serious offences'.[97] The need for better legal services for women offenders is addressed in the 2014 Review Report at Chapter 9.

It is generally accepted that the need for both affordable and accessible legal and support services has grown, and it is envisaged to either continue or increase further in the future. Juxtaposed against this strong need is the fact that many women simply cannot afford private lawyers, eligibility for government funded Legal Aid WA is restricted, especially in family law matters, and CLCs are struggling to deal with the level of demand and can only work within the resources that they have available.

With respect to dealing with emotional stress surrounding a court visit, whilst there are some independent and targeted community groups that provide limited financial and/or emotional support for people involved in litigation (for example, Legacy[98]), this support is limited to those who fit specific criteria within the charitable purposes of the organisation and there is limited awareness of these services. DOTAG's volunteer Court Welfare Services[99] is a great initiative. It does however rely on volunteers who are required to undergo six months of supervision before being

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94 The needs of Aboriginal women are discussed in detail in Chapter 4 'Aboriginal Women and Girls.'

95 Issues specific to women in rural, regional and remote (RRR) areas are discussed below at page 64.

96 See e.g. Western Australian Equality Before the Law Benchbook, November 2009 (1st Ed), p1.2.1 available at: http://www.supremecourt.wa.gov.au/_files/equality_before_the_law_chapter1.pdf).

97 For example, The Australian Institute of Criminology reported in *Australian Crime: Facts and figures* 2011 that assault offending in general has increased substantially between 1996-97 and 2009-10. Furthermore, the rate of female assault offending increased by 49 percent over this period (see: http://www.aic.gov.au/publications/current%20series/facts.aspx).

98 www.legacy.com.au - Legacy is a voluntary organisation providing practical assistance to Australian families suffering financially or socially after the death of a spouse or parent during or after their Defence Force service.

99 DOTAG, Handbook and Services Guide 2014, available at: http://www.department.dotag.wa.gov.au/_files/DotAG_handbook.pdf (accessed 2 May 2014).

rostered on one morning each week for a year, and it was reported that there are not enough women volunteers who can commit to this.[100]

Of course, it is recognised that there are situations that may be better addressed by non-legal means such as relationship or psychological counselling. For example, a successful outcome may be one where a woman is in a more mentally stable position and can care for her children.[101] Accordingly, non-legal support services are very important for women and should not be underestimated. Information about these services should also be readily available to women both at the court and other venues that women attend such as health clinics and community centres.

Legal Services Funding and Service Gaps

A report commissioned in 2009[102] entitled *Legal Aid WA Funding: Current Challenges and the Opportunities of Cooperative Federalism,* confirmed that Legal Aid WA funding in Australia is grossly inadequate, with adverse consequences for many vulnerable people, especially women. Several areas of particular concern with respect to the current Legal Aid WA system were highlighted, including the fall in real per capita funding of Legal Aid WA contrasted with an increase in demand, minimal Legal Aid WA for civil cases, means testing that excludes some people who are at or below the Henderson Poverty line,[103] the fact that State and Territory governments bear the majority of public costs associated with Legal Aid WA, and the significant decline of public purpose funds (previously a significant component of funding). This report concluded that the 'chronic under-funding' of Legal Aid WA imposes additional costs on the justice system due to a resulting failure to settle cases early, mistrials, appeals, re-trials, inappropriate incarceration and other consequences.[104]

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100 Consultation with The Hon. Linda Savage MLC

101 Consultation with Relationships Australia.

102 *'Legal Aid WA Funding: Current Challenges and the Opportunities of Cooperative Federalism'* (December 2009), available at: Law Council's website at: http://www.lawcouncil.asn.au/programs/national-policy/legal-aid/links.cfm.
The Law Council, the Australian Bar Association, the Law Institute of Victoria and the Victorian Bar Council jointly commissioned this Report, to examine the federal and state funding arrangements for Legal Aid WA. It focuses on core court-related Legal Aid WA provided through Legal Aid WA Commissions (**LACs**).

103 The 'Henderson Poverty line', as defined in the 1973 Commonwealth Commission of Inquiry into Poverty, is a standard social welfare level that represents the minimum income level required to avoid a situation of poverty for a range of family sizes and circumstances – see http://melbourneinstitute.com/miaesr/publications/indicators/poverty-lines-australia.html

104 Quail, Hylton and Cathryn Greville, 'Dire Need for Increased Legal Aid Funding: Report' (2010) 37 (4) *Brief* 15.

Further, on 17 December 2013 the Federal government announced significant further funding cuts across the legal assistance services, including to CLCs and Aboriginal legal services.[105] This announcement was made despite the considerable economic benefit that CLCs are reported to have – reportedly a cost-benefit ratio of 1:18, namely returning a benefit to society of 18 times the cost.[106]

CLCs are often overwhelmed and do not have sufficient resources to conduct their services. This issue is more acute in regional areas. The Women's Law Centre is limited in the assistance it can provide, usually only one-off or minor assistance.[107] It was reported that the Centre considers that it plays more of a supportive role: often involving advocacy to obtain Legal Aid WA, or apply for reconsideration of a grant refusal (which is not an appropriate use of CLC time but necessary because of the shortage of Legal Aid WA funding).[108]

It is of great concern to the Subcommittee that the lack of funding results in a lack of capacity, resources and staffing, leading to major service gaps.[109] There is an ongoing tension between providing assistance to a greater number of clients in less resource intensive cases and providing appropriate services and representation for clients involved in difficult and complex matters.[110] Funding also affects other practical aspects of the service, such as whether it can afford to be located centrally (for example, in the CBD).[111] The only way that this issue can be overcome is to increase funding.

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105 Nationally, cuts of $43.1 million over 4 years to legal assistance services, including $19.6 million from the CLC sector, and a proposed $12 million over two years for Aboriginal legal services – Community Legal Centres Association (WA) Inc. and the King & Wood Mallesons Human Rights Law Group, Human Rights in Western Australia: A Report Card on Developments in 2013, pages 33, 54 http://www.mallesons.com/Documents/Human%20Rights%20Report%20Card%202013.PDF

106 According to a 2012 economic cost benefit analysis by Judith Stubbs and Associates, included in The National Associations of Community Legal Centres, Submission to the Productivity Commission's Access to Justice Issues Paper, study conducted by Judith Stubbs and Associates; cited in Human Rights in Western Australia: A Report Card on Developments in 2013, page 54-5.

107 Consultation with the Women's Law Centre.

108 Consultation with the Women's Law Centre.

109 For example with respect to no fee or low cost property assistance – discussed further below at page 44.

110 Senate Committee Report: Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (June 2004), page 43, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2002-04/legalaidjustice/report/contents

111 Consultation with the Solicitor General, Grant Donaldson SC.

This is of course certainly not the first time that these issues have been raised. During the Subcommittee's consultations a significant amount of frustration was expressed that problems have been already identified and solutions suggested in a number of key inquiries, yet there has been a delay implementing these solutions. There have also been several national campaigns and reviews targeting an improvement in legal services, including those available to women, such as campaigns run by Community Law Australia,[112] and the Federal Government's Review of legal assistance programs.[113]

The Subcommittee is concerned that, as identified in the 1994 Report, women remain systematically disadvantaged by the fact that there is an indirect gender disparity in the way that legal aid is granted.[114] Legal Aid WA funding is strongly biased towards criminal law[115] because criminal matters in which there is a possibility of imprisonment are given the highest priority, due to the High Court decision in *Dietrich*.[116] Men tend to require legal aid with respect to criminal law matters, whereas the majority of applicants for and recipients of legal aid for family law matters are women and children. Overall, more men than women receive grants of aid, and there are fewer limitations on grants made in criminal law proceedings than family law, creating an indirect gender bias.[117] It has been said that it is ironic that women and children are often the victims of the criminal offences for which men receive legal aid, but are left unrepresented in any legal proceedings they may wish to initiate as a result.[118] In this regard, the Subcommittee supports the

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112 Details available at: http://www.communitylawaustralia.org.au/

113 Attorney-General's Department, available at: http://www.ag.gov.au/LegalSystem/Legalaidprograms/Pages/Reviewoflegalassistanceprograms.aspx

114 Senate Committee Report: Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (June 2004), page 41.

115 Senate Committee Report: Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (June 2004), page 41.

116 *Dietrich v R29* (1992) 177 CLR 292. See Senate Committee Report: Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (June 2004), page 46.

117 Legal Aid WA's figures for 2012-13 show that the criminal law grant rate was 74%, with 4,403 of those grants going to males and only 988 to females; family law matters were granted at a rate of 60% from applications, with 1846 of those matters for female applicants and 747 for male applicants; civil law grants were made at a rate of 48% with 249 of those being granted to female applicants and 162 to male applicants. See the Legal Aid Annual Report 2012-2013, pages 12-13, available at: http://www.legalaid.wa.gov.au/LegalAidServices/About/Documents/Annual%20Report%202012-13.pdf

118 Senate Committee Report: Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (June 2004), page 46-7.

recommendations made by the Senate *Legal and Constitutional References Committee* that the Commonwealth Government address discrimination against the circumstances of women in the application of the current Legal Aid WA funding and priorities, and that the Commonwealth and State Governments recognise and address the gender specific barriers to justice that women face in order to better structure and tailor the legal aid system to meet the particular needs and experiences of women.[119]

The Subcommittee refers to Chapter 9 of the 2014 Review Report (recommendations 9.6, 9.18 and 9.19) in relation to legal services for women offenders, and makes the following recommendations:

1.1 The State Government increases funding, to commence within two years of this Report, for specialist women's legal services and Community Legal Centres, to address areas of legal need for women including (but not limited to) civil disputes and court advice and representation.

1.2 The State Government increases funding, to commence within two years of this Report, for support services for women, particularly in regional areas.

1.3 The State Government works with the Commonwealth Government to recognise and address the indirect discrimination against the circumstances of women in the application of current Legal Aid WA funding, and the specific barriers to justice that women face in order to tailor the legal aid system to meet the particular needs and experiences of women,[120] and reports to State Parliament within two years of this Report.

Property Settlement Matters

The Subcommittee's consultations also revealed a particular service gap with respect to disadvantaged women requiring low cost or free assistance in property settlement matters, especially in relation to situations where domestic violence is present. Currently, there are limited services available for women in these circumstances. Matters may pass between CLCs, who are equipped to give advice

119 See Recommendations 12-15 of the Senate Committee Report: Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (June 2004), page 48.

120 Refer to Recommendations 12-15 of the Senate Committee Report: Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (June 2004), page 48.

but not act in court proceedings and private lawyers, whose fees constitute the majority of the settlement in many cases. Further, the Subcommittee was advised that many lawyers not experienced in domestic violence cases do not understand the issues surrounding their client's circumstances and find clients difficult to deal with, particularly those who are crumbling under the stress of their home situation.[121]

The FDV Network advised that, in response to this identified gap, a number of CLCs have established evening legal clinics providing assistance with property settlement issues.[122] Staffed by volunteer solicitors, advice provided at these clinics is limited to one-off (ad-hoc) advice only, with no capacity to provide ongoing assistance. Further, due to high demand and limited resources, the clinics can only assist a small number of clients with less complex matters. Given the nature and dynamics of domestic violence (such as high stress crisis situations with an inherent power imbalance between parties) and the complexity of the legal and financial issues involved in family law property matters, one-off advice is not particularly helpful to these clients. Rather, they require ongoing professional advice and advocacy, particularly in the case where the client is an Aboriginal or NESB woman, or has physical or psychiatric health issue as a result of the violence.

In Western Australia (no doubt compounded by local property values), women seeking property settlement assistance are typically ineligible for a grant of legal aid, due to being asset rich on paper (but income poor). The Subcommittee was advised that this is also the case for many parties whom have a debt or negative equity situation under the current eligibility guidelines. It has been noted that this is of particular concern where family violence is involved, because of the financially controlling and abusive behaviours that will commonly limit a victim's access to any finances, increase the victim's reliance on the perpetrator, reduce opportunities for leaving the situation and potentially put the victim at risk of further violence.[123]

It was submitted that there is considerable judgment around women staying in domestic violence relationships but very little help to get them out.[124] Many women find it impossible to find a lawyer who will take on their case if they have little money.

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121 Consultation with the Pat Giles Centre.

122 The Subcommittee notes that a number of persons consulted spoke about women requiring appointments within school hours so that they were able to access the services.

123 Consultation and materials provided by the Domestic Violence Legal Workers Network.

124 Consultation with the South Coastal Women's Health Services.

It was reported that with little financial resources at their disposal, often women give up and let the man keep the house, leaving them in a worse financial position than before.[125]

It was also reported to the Subcommittee that there are websites offering help for women to do their own property settlement, such as 'Aussie Legal', but only women who have appropriate skills and literacy ability would be able to use them. Moreover such women would have to be in a reasonable state of mind to conduct a property settlement on their own behalf, and many women who have experienced domestic violence are extremely frightened and agitated and would be unable to concentrate sufficiently to conduct their own property settlement.

The Subcommittee endorses a recommendation in the recent Human Rights Report Card 2013[126] with respect to funding CLCs and Legal Aid WA in relation to family law property settlement matters.[127]

The Subcommittee makes the following recommendations:

1.4	The State Government funds the provision of legal services to women in relation to family law property settlement matters, through grants to Legal Aid WA and CLCs, with funding to commence within two years from this 2014 Review Report.
1.5	Legal Aid WA, ideally within two years of this 2014 Review Report, amends its grant eligibility guidelines to include scope for grants of legal aid to be made to women facing disadvantage (particularly those escaping family and domestic violence) for property settlement matters.

Improvements to Existing Services

The Subcommittee's investigations revealed a number of areas in which the existing services for women could be enhanced or improved.

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125 Consultation with the South Coastal Women's Health Services.

126 Community Legal Centres Association (WA) Inc. and the King & Wood Mallesons Human Rights Law Group, Human Rights in Western Australia: A Report Card on Developments in 2013, http://www.mallesons.com/Documents/Human%20Rights%20Report%20Card%202013.PDF (Human Rights Report Card 2013).

127 Human Rights Report Card 2013, page 162: http://www.mallesons.com/Documents/Human%20Rights%20Report%20Card%202013.PDF

Conflict Issues

Conflict issues are an impediment to the provision of legal services to women in Western Australia. The Subcommittee's investigations revealed significant concern about women not being able to obtain services from particular providers because the provider has previously or is acting for the other party or accused. There are very few cases where a service provider can represent women if they are already representing male partners. It is often the case that the man obtains the service first, especially when the matter involves criminal charges, leaving the woman to seek alternative legal advice and representation elsewhere. This is particularly an issue for the ALS. Whilst it was reported that the Aboriginal Family Law Service could usually assist with conflicted Aboriginal clients, these services only operate in regional areas, creating further difficulty for women in the metropolitan area.[128]

The Subcommittee recognises that conflicts are commonly overcome in commercial law firms through the implementation of conflict management policies and procedures, and installation of 'Chinese walls' between sections of the firm to overcome conflict. This occurs with the clients' consent even where the firm is acting for opposing parties in the same matter. There is scope for conflict avoidance methods to be explored with respect to ALS in particular, to overcome the issue of women not having access to services due to ALS already representing their partner on a criminal matter.

The Subcommittee makes the following recommendation:

1.6	The Aboriginal Legal Service, within two years of this Report, implement conflict management policies and procedures and address the installation of 'Chinese walls', to overcome potential conflicts between clients and prospective clients.

Interagency Collaboration

The Subcommittee acknowledges the beneficial cross-referral relationships between service providers in the not-for-profit sector. Examples of collaborative referrals include the family relationship area and arrangements between consumer

[128] Consultation with the Aboriginal Legal Service.

representative organisations about the sharing of information.[129] In this regard, the Subcommittee notes that the Department for Child Protection's Referral Guide for Domestic Violence Services[130] is an excellent resource, which should be kept updated and distributed to legal and support services providers and the legal and related professions broadly to increase awareness of the valuable resource and services available. The Subcommittee expects that the majority of lawyers and persons seeking such services would not be aware of the existence of this guide, which obviously limits its effectiveness.

Some areas of service provision would benefit from improved interagency collaboration. The cross-referral process is important to ensure women are aware of and have access to required services (including where conflicts arise). Increased communication between services and understanding of service capacity would enhance the ability to deal with referrals in a timely manner whilst avoiding tying up valuable resources at both ends.

The Subcommittee makes the following recommendations:

1.7 State Government service providers, Legal Aid WA, Community Legal Centres and specialist women's service providers (both legal and non-legal) liaise across the sector on an ongoing basis to ensure mutual understanding of each other's services to assist with cross-referral of women in need of services in an accurate, timely and efficient manner.

1.8 The State Government maintains and more widely disseminates the *Referral Guide for Domestic Violence Services Western Australia*,[131] to ensure that legal and non-legal support service providers, and the legal and non-legal support services professions more broadly, are aware of and can assist with referrals to and from service providers.

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129 Access to information in an appropriate form is discussed below at page 91.

130 Government of Western Australia, Department for Child Protection, *Referral Guide for Domestic Violence Services Western Australia* http://www.dcp.wa.gov.au/CrisisAndEmergency/FDV/Documents/FDV%20Referral%20Guide%20April%202013.pdf (accessed 12 April 2014).

131 Government of Western Australia, Department for Child Protection, *Referral Guide for Domestic Violence Services Western Australia* http://www.dcp.wa.gov.au/CrisisAndEmergency/FDV/Documents/FDV%20Referral%20Guide%20April%202013.pdf (accessed 12 April 2014).

Centralised Legal Services – 'One-stop shop'

The Subcommittee's consultations raised the issue of the piecemeal provision of legal and other services (based on areas of law), in an already underfunded sector of the community. The fragmented manner in which services are currently provided serves to create further difficulties for those women who are dealing with disadvantage on a number of levels and commonly, are under significant stress.

It was suggested that Western Australia should have a centralised service for women – a 'one-stop shop' – where a woman can go to obtain help with all legal issues, such as property, custody and restraining orders.[132] Such an initiative would bring together under one roof, vital services to collect forensic evidence, and provide legal advice, health care and other support, and specialised services to reduce attrition in the justice chain.[133] There is a potential to reduce the administrative costs by consolidating the administrative functions of a number of centres, to ensure that resources can be directed to providing the specialised service. The concept of a 'one-stop shop' is supported in the literature,[134] and warrants further investigation.

The Subcommittee makes the following recommendation:

1.9	The State Government collaborates with Legal Aid WA, CLCs and other community legal service providers to determine the viability of the provision of a centralised 'one-stop shop' for legal and related services for women by running a pilot program to commence within two years of this 2014 Review Report, and then evaluating that program and publishing the findings.

2) ABORIGINAL AND NESB WOMEN

The Subcommittees notes that the myriad of complex issues facing Aboriginal[135] and NESB women means that they are considerably disadvantaged in accessing justice and the court system. The experience of these groups illustrates that not all women

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132 Consultation with the South Coastal Women's Health Services.

133 See e.g., UN Women, Progress of the World's Women 2011-2012: In Pursuit of Justice (ref no 8 in list).

134 See e.g., UN Women, Progress of the World's Women 2011-2012: In Pursuit of Justice (ref no 8 in list).

135 This Chapter only deals with Aboriginal women with respect to access to the Court system. Other issues affecting Aboriginal women and girls are discussed further in detail in Chapter 4 of the 2014 Review Report.

have equal access to and equality before the courts, and they indeed confront a system completely alien to their culture and traditions.

It is clear that language issues prove to be a significant impediment. The 1994 Report explained that language is a particular problem for Aboriginal and NESB women because even those who can speak some English (even if limited), traumatic experiences or the foreign court environment may cause her to forget the English she would normally understand/be able to use.[136] It is reported that women commonly have lower levels of English than their husbands.[137] Both groups must overcome prejudice surrounding their lack of or lack of good English speaking ability.

Further, often those with different cultural backgrounds to Anglo-Saxon Australia do not trust authority figures such as police or judicial officers, due to trauma, corruption or experiences in their home country. The option to access justice via the police, court or legal services, is completely foreign to women in some communities. From a cultural and social perspective, they commonly do not feel they have a voice; women's issues are invisible in their communities and are considered to belong to the whole family.[138] For example, Aboriginal people often see the court system as irrelevant to them, because it does not respond to Aboriginal families in a way that is useful and means something to them from a traditional and cultural perspective.[139] The needs of the African community are considered so high that during the Subcommittee's consultations, it was suggested that there should be an African Legal Service equivalent to ALS.[140]

In fact, levels of understanding of Australian norms, such as understanding of divorce and parenting embodied in Australian family law, are so low that these groups have been termed 'law avoidance societies.'[141] For example, it is recognised that there are socio-cultural norms that emphasise family privacy and serve to discourage ethnic minority families from seeking help outside the family including

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136 1994 Report, page 44.

137 Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Feb 2012), page 33.

138 Consultation with Western Australia Police (WAPOL).

139 Consultation with the Aboriginal Legal Service and Legal Aid WA.

140 Consultation with Ishar Multicultural Women's Health Centre.

141 Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Feb 2012), page 35.

from mainstream family services.[142] Women from Aboriginal and NESB communities who may look for assistance outside their communities face ostracism, backlash, payback and retribution from within, which is of course a strong deterrent from seeking justice.[143] This fear of backlash further exacerbates the need for culturally appropriate services and advice to support women on an ongoing basis.[144]

In addition to the complex issues that face NESB women generally, the problems of migrant women are considered acute because they are left with the responsibility of the children and can feel isolated, and their partners are frustrated because they cannot get the same job status in Australia as they held in their home country.[145] Visa dependency and geographical and economic barriers create further disadvantage. Many migrant and refugee women arrive in Australia on temporary visas, and it has been reported that women may succumb to sponsor threats of deportation and endure violence and other abusive behaviours such as financial control as a result of their situation.[146] Physically accessing court and other services is difficult for many Aboriginal and NESB women, particularly those in RRR areas,[147] who may not have access to finances and live in areas not serviced by public transport. Other factors inhibiting travel include seasonal flooding, travel time and travel costs, whether for fuel, taxi fares or even public transport. Mothers in these areas who are experiencing relationship breakdown against a background of family violence may face insurmountable difficulties.[148]

On the other hand, women with the means and opportunity to work face different issues. The Subcommittee was advised that when given the opportunity, adult women migrants tend to learn English and basic assimilation education more quickly than their male partners, so that they are often finding a job sooner than their

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142 Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Feb 2012), page 35.

143 Consultation with WAPOL.

144 Consultation with WAPOL.

145 Consultation with the Department of the Attorney-General.

146 Almost half (47.6%) of the immigrant and refugee women accommodated in refuges in Victoria in 2009-10 were women without permanent residency – Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Feb 2012), page 44.

147 Access to justice for RRR women is discussed below at 64.

148 Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (Feb 2012), page 47.

partners and becoming the breadwinner (or receiving Centrelink payments). This leads to conflict in cultures where traditionally the male deals with the money.[149]

All of these women typically benefit greatly from a "friendly face" and non-legal support person to walk them through the court system and provide emotional and practical support. Some NESB clients face difficulties with respect to court presentation and some, such as Muslim African women, face multiple overlapping cultural, religious and gender issues. An example was given during consultations regarding a situation in the Children's Court where a Muslim woman was left in the waiting area with men, surrounded by male ushers. This was a huge concern to them and she was understandably very reluctant to be there.

To overcome cultural and linguistic issues,[150] there is a need to establish:

a) services specific to the individual needs of Aboriginal and NESB women as a minority group facing gender bias and social and financial disadvantage; and

b) understanding and assistance by culturally aware judicial officers and court staff (including some with similar backgrounds) when coming into contact with the courts and justice system.

Services specific to Aboriginal Women

With respect to Aboriginal women, there are a number of Aboriginal specific services that are either in place or have previously been in existence, in particular:

- **Aboriginal Family Law Service** – As noted above (at page 20), this service operates in regional areas but not in the metropolitan area, leaving women in Perth in some cases facing difficulty in accessing culturally appropriate violence orders.[151]

- **Djinda Services** – A new service in place since 13 December 2013 and funded by DOTAG, Djinda provides specialist legal support for Aboriginal people who have experienced or are at risk of family and domestic violence or sexual assault. Djinda provides legal advice and representation in the Perth metropolitan area in relation to violence restraining orders, assisting victims (survivors of family violence and sexual assault), child protection, criminal

149 Consultation with Relationships Australia.
150 Discussed further below under the heading 'Interpreters' at page 59.
151 Consultation with the Supreme Court.

injuries compensation where it relates to family violence and family law including child support. It will also provide community legal education and outreach services. The service is delivered by Aboriginal and non-Aboriginal women who often have personal experience and an understanding of family violence.[152] The commencement of this service is an excellent recent development.

- **Aboriginal family consultants** – The Subcommittee's investigations revealed that whilst the Commonwealth Government had previously funded two Aboriginal Family Consultants at the Family Court, this funding is no longer provided and accordingly consultants no longer exist in the court. The court therefore has to rely on its few Aboriginal staff members to assist court users when required.[153] This is the case despite the recognised benefit and favourable reviews with respect to the position, and the Family Law Council's recent recommendation that there should be Aboriginal cultural officers in courts or some other agency to ensure Aboriginal people can access the court system.[154]

- **Aboriginal Liaison Officers** – In 2012-13, DOTAG continued to provide guidance to Aboriginal people attending courts in Albany, Broome, Carnarvon, Kununurra, South Hedland and Perth.[155] DOTAG states in its Annual Report that "There is widespread agreement among clients, Aboriginal stakeholders, judicial officers and justice system stakeholders that the work of the Liaison Officer is highly valuable. There is a strong significance to Aboriginal people having a well-informed Aboriginal court officer, with deep cultural connections, available to provide them information and assistance."[156]

Whilst the Subcommittee acknowledges the difficulty in finding appropriately qualified Aboriginal people to fill the positions of **Aboriginal Family Liaison Officers**, it is nevertheless an important area with potential for development of existing staff into

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152 Women's Law Centre website: http://www.wlcwa.org.au/our-services/djinda-services/; Relationships Australia's website: http://wa.relationships.com.au/en/news-and-events/Archive%20News%202013/Launch-of-Djinda-Services.aspx

153 Consultation with the Family Court.

154 Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (Feb 2012), page 101.

155 DOTAG Annual Report 2012/13, Available at: http://www.department.dotag.wa.gov.au/_files/DotAG_AR_2013.pdf (accessed 12 April 2014).

156 DOTAG Annual Report 2012/13, page 18.

these positions, further recruitment drives and dissemination of career path information at high school level.

1.10 The Western Australian Department of the Attorney General, in consultation with providers of services to Aboriginal women, within 18 months of this Report examines how best to increase the number of Aboriginal people, in particular Aboriginal women, working in the court and justice system, and takes steps to implement the findings of that examination within the following 12 months from those findings.

1.11 The State Government, in consultation with the courts and providers of services to Aboriginal women, within 18 months of this Report examines the potential to re-introduce the role of Aboriginal family liaison officers in courts where no such role presently exists, along with effective methods to identify and recruit appropriately qualified Aboriginal people to these positions including the provision of relevant training if required.

1.12 The State Government continues to fund and support Djinda Services to ensure appropriate support is available for Aboriginal women victims of domestic violence in the Perth metropolitan area.

1.13 The Magistrates Court of Western Australia and District Court of Western Australia allocates a liaison officer tasked with the responsibility of identifying and raising user specific requirements (including cultural and gender awareness issues) with judicial officers in the context of the day-to-day running of the court.

Services specific to NESB Women

The Subcommittee's recognises that the following extremely beneficial services exist for NESB women:

- **CASE for Refugees**[157] – established in 2002 and based in Victoria Park, CASE provides free legal advice, representation and advocacy to refugees, humanitarian visa holders and people from culturally and linguistically diverse (CALD) backgrounds that live in Western Australia. Services include migration

[157] http://caseforrefugees.org.au/. See 'CASE for Refugees: Celebrating 10 Years" (2012) 39 (9) *Brief,* Law Society of Western Australia, 26-7.

legal advice, general legal advice, a Judicial Review Asylum Seeker Project, CLE and continuing professional development for lawyers and migration agents.

- **Association for Services to Torture and Trauma Survivors** (ASeTTS) – based in Perth, ASeTTS provides services to people who are humanitarian entrants or are from a refugee type background and who have experienced torture or trauma in their country of origin, during their flight to Australia or while in detention. Services include short-term torture and trauma counselling, flexible counselling for adults, children, couples and families, youth services, advice and programmes regarding cultural transition and food and nutrition, along with research and training. Funded by corporate sponsorship, fundraising and fee for service initiatives, ASeTTS employs around 30 full-time staff and has the support of a further 90 volunteers.[158]

- **African Women's Council of Australia** – formed as a result of the identified need for an African women's voice, the Council strives to build self-esteem in African women living in Australia, prevent or control behaviour which may result in African women or their children suffering domestic violence, emotional abuse, sexual abuse or physical abuse or lead them to suicide and self harm. Chaired by a Western Australian academic, Dr Casta Tungaraza from Murdoch University, the Council is an advocacy organisation established to mobilise support and develop strategies to ensure inclusion, visibility and reflection on the voices, concerns and demands of women at the local, national and international agenda.[159]

- **Ishar Multicultural Women's Health Centre Inc.** – established in 1992 and based in Mirrabooka, Ishar (based on the word 'Isha' meaning 'woman' in Hebrew) provides information to clients and service providers, counselling, training, support and referrals to other agencies or health professionals according to need. The Centre aims to meet the real requirements of women from different cultural backgrounds, offering outreach, in-house group work, advice, and mediation and advocacy services.[160] It also provides emotional

158 http://www.asetts.org.au/
159 http://www.omi.wa.gov.au/omi_organisation_listing.cfm?organisation=746
160 http://www.ishar.org.au/

support to women to assist them in dealing with emotional stress surrounding a court visit.

It was reported that most clients of the Centre never expect that issues with their children will lead to contact with the legal system.[161] Due to the poor understanding of the legal system, part of the Ishar's program now includes education about the law – for example, driving laws and disciplining children (given the concern that if they discipline their children, they risk the children calling the Department of Child Protection and having them taken away). Ishar's program also covers financial education, which is particularly important given that the Centre mostly deals with unskilled migrants who do not understand the system surrounding Centrelink payments, taxation, and so on.

The Subcommittee makes the following recommendation:

1.14 The Department of the Attorney General, in consultation with providers of services to women of culturally diverse and non-English speaking backgrounds, within 18 months of this Report examines how to best increase the numbers of women from culturally diverse backgrounds working in the court and justice system, and takes steps to implement the findings of that examination within the following 12 months.

Cultural Awareness – Court Staff and Judiciary

Given the number of Aboriginal and NESB women (and men and children) who come into contact with the courts, and the specific needs of these groups of women, it is critical to the administration of justice that we have culturally aware court staff and judicial officers. Concern was raised regarding a lack of awareness of social, cultural and religious issues that may arise for women, particularly regarding recent migrant groups, women of Muslim background and African migrants. To assist with cultural awareness, Legal Aid WA advised that it runs training sessions for staff to help them identify and understand the issues, and that ALS and CLC staff are invited to join them. Similar sessions would be extremely beneficial to court staff and judicial officers – The provision of cultural awareness training to Judges and court staff is covered below at pages 83 and 101 respectively.

[161] Consultation with Ishar Multicultural Women's Health Centre.

The general view expressed during consultations was that the court should be made aware of culturally sensitive/specific issues (from a practical access perspective and otherwise) before these people come to the court. For example, the Magistrates Court is able to put arrangements in place where judicial officers are aware of issues, however otherwise find it difficult to keep on top of with the sheer number of trials/hearings per day.[162] There are however obviously practical difficulties with this – for example, with respect to self-represented litigants who are not aware of the need to or do not take the steps to inform the court of any relevant cultural issues.

Indeed, the recruitment and training of Aboriginal people as court staff and interpreters in the courts was the subject of other recommendations over 20 years ago.[163] The same is now important with respect to NESB communities. In this regard, the Subcommittee refers to and repeats Recommendation 1.14 above in relation to recruitment of court staff.

The Subcommittee (by majority) makes the following recommendation:

1.15 All judicial officers in Western Australia commit to increasing their cultural awareness of issues and barriers facing women from culturally diverse backgrounds, including Aboriginal and non-English speaking women and recent migrants, by undertaking suitable cultural awareness training as a matter of priority, and in any event within two years from this Report.

Relevant Resource Material (NESB)

There is an Aboriginal Bench book which covers language, communication, interpreting, cultural, health and other barriers specific to Aboriginal court users[164], however there are no such detailed resources available to inform judges or court staff with respect to issues particular to NESB women. Currently there are two bench books in Western Australia dealing with the following matters:

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162 Consultation with the Magistrates Court.

163 RAIDOC Report, Recommendation 100.

164 For example, the Aboriginal Bench Book has chapters which cover issues such as language and communication (including cultural barriers to effective communication; Aboriginal English, and strategies for effective communication); Pre-Trial Matters (including Aboriginal interpreting, severe health problems such as endemic rates of hearing loss, fitness to plead), Interpreting (including competency in English, the alienating effect of the court environment for untrained interpreters, resource implications and judicial misgivings about role and function of interpreters). See http://www.aija.org.au/online/ICABenchbook.htm

- The Aboriginal Cultural Awareness Bench Book (**Aboriginal Bench Book**)[165] is an initiative of the National Indigenous Cultural Awareness Committee of the Australian Institute of Judicial Administration. The Aboriginal Bench Book purports to respond to judicial concerns about Aboriginal accused persons, witnesses and convicted offenders who become embroiled in the criminal justice system. Those concerns are shared by the broader community and are underscored by principles of international law.[166] It seeks to assist judicial officers in criminal proceedings involving Aboriginal persons.[167] Notably, this Aboriginal Bench Book is limited to criminal law matters.[168]
- The Equality before the Law Bench Book[169] (**Equality Bench Book**) is designed as a companion to the Aboriginal Bench Book for use in Western Australian Courts. The Equality Bench Book is intended to provide WA judicial officers with an understanding of the range of values, cultures, lifestyles and life experiences of people from different backgrounds, together with an understanding of the potential difficulties, barriers or inequities people from different backgrounds may face in relation to court proceedings. It offers practical examples of how to take appropriate account of these differences in court and tribunal proceedings.

There is further scope for detailed material on NESB court users that acknowledges both the shared issues and issues particular to specific groups, including the interplay between issues of gender and cultural diversity. The Subcommittee's consultations revealed there is insufficient information and training for judges on cultural and gender issues combined, for example how to accommodate Muslim African women in the court system.

The Subcommittee makes the following recommendation:

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165 Fryer-Smith, Stephanie, *Aboriginal Bench Book for Western Australian Courts* (2nd Edn) (2008), available at: http://www.aija.org.au/online/ICABenchbook.htm (accessed 12 April 2014).

166 *Aboriginal Benchbook for Western Australian Courts*, 1:1, Introduction.

167 *Aboriginal Benchbook for Western Australian Courts*, 1:2, Objectives of the Benchbook.

168 Although it was noted that AUSTLII now has a dedicated service for decisions in which Australian Courts have considered Aboriginality: http://www.austlii.edu.au/au/cases/other/AUCCACS/

169 Equality Before the Law Benchbook, Western Australia, November 2009 (1st Edn), page 1,0.3, available at: http://www.supremecourt.wa.gov.au/_files/equality_before_the_law_chapter1.pdf.

1.16 The State Government, within two years from this Report, produces or funds the production of a bench book for judicial officers (similar to the *Aboriginal Cultural Awareness Bench Book)*[170] addressing issues surrounding cultural diversity in Western Australia, including in particular the impact of culture, religion and gender combined, and how these issues affect women from culturally and linguistically diverse backgrounds accessing justice and the court system.

3) INTERPRETERS

The issue of interpreters and interpreting services in court was raised in the 1994 Report and considerable developments have been made in this area. Australian language and court jargon contains nuances that mean that those who speak basic English can experience significant difficulty in the formal court environment. This is especially the case in relation to the suggestibility of leading questions, the unfamiliar question-answer style of communicating, and the fact that it is easy to misconstrue evidence due to the semantic and grammatical differences of non-standard dialects of the Australian language.[171] These problems are often not recognised by lawyers, court staff and even judicial officers without an awareness of cultural and linguistic issues relevant to particular ethnic/indigenous groups. It has been said that until there is greater training and accreditation for indigenous interpreters, the judiciary retains a crucial role to offset the linguistic disadvantage faced by non-English speaking indigenous witnesses.[172]

The Subcommittee's investigations revealed that issues currently faced by Aboriginal and NESB women with respect to interpreting services are largely centred around;

- the accessibility of appropriate interpreters (availability, dialect for example);
- the courts making the necessary arrangements to ensure an interpreter is present when required;

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170 Fryer-Smith, Stephanie, *Aboriginal Bench Book for Western Australian Courts* (2nd Edn) (2008), available at: http://www.aija.org.au/online/ICABenchbook.htm (accessed 12 April 2014).

171 Cooke, Dr Michael, *Indigenous Interpreting Issues for Courts*, The Australian Institute of Judicial Administration Incorporated (2002).

172 Cooke, Dr Michael, *Indigenous Interpreting Issues for Courts*, The Australian Institute of Judicial Administration Incorporated (2002).

- the availability of a pool of sufficiently skilled interpreters, with the knowledge and understanding of the needs of interpreting in court situations; and
- the cost (too high for many) of interpreters should one not be provided by the court, including with respect to obtaining advice and providing instructions prior to a court hearing.

Interpreting is a critical access to justice issue, and the law is clear on the issue – if an accused does not understand what is happening, it is a mistrial. Courts are therefore extremely alert to the need for interpreters, yet the Courts still face difficulties sourcing appropriate interpreting services.

The following documents are examples of current information available about interpreters in the court system:

- **State Administrative Tribunal (SAT)** – Pamphlet entitled 'A guide for Interpreters in SAT' which sets out the methods of interpretation used in the SAT, the interpreter's duties and obligations to the SAT and how the need for an interpreter will be assessed in different cases.
- **Family Court website information** – regarding the court-funded interpreter service state that it is provided to those with limited English fluency or a hearing impairment who need to use the services of the court or have business before the court, including proceedings, conciliation and pre-hearing conferences, court counselling conferences, court mediation (if available), during information sessions conducted by the court, and when obtaining information (either by telephone or in person) from court staff regarding the practice/procedures, function or operation of the court.[173]
- **Commonwealth Translating and Interpreter Service** (**TIS**)[174] – provides telephone interpreters and a limited number of face-to-face interpreters. Ordinarily this is a fee-paying service (although some CLCs have been given an exemption subject to certain limitations), and the service does not extend to

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173 Family Court website: http://www.familycourt.wa.gov.au/I/interpreter_services.aspx?uid=7921-7777-8163-1394

174 http://www.tisnational.gov.au/

court representation. Further, TIS services are not available after hours, which is when most CLCs hold their advice sessions.[175]

The Subcommittee's investigations revealed that:

- There are issues with the availability of interpreters, especially in Aboriginal dialects, with courts often having to bring interpreters to WA from interstate.[176]
- Issues arise with respect to the gender of interpreters engaged for both Aboriginal and NESB clients. Often there is a need to find an interpreter of the same gender, so women are permitted to talk and are comfortable in doing so. This limits the pool of potential interpreters to assist Aboriginal and NESB women.
- There is no established interpreter service for Aboriginal women, which is particularly an issue for Western Desert People. Whilst clients in the Kimberley have access to some interpreting services through Kimberley Interpreting Service[177], it was reported that in the rest of the State it is highly likely that there are a lot of people who go to court and do not understand what is happening.[178]
- Interpreter services do however exist in other states. For example, in the Northern Territory the Department of Community Services provides an Aboriginal Interpreter Service that covers interpreting in interviews, by telephone, at community meetings, at rostered sessions at court and hospitals, and audio recordings (but not written translations).[179]
- It remains an issue getting an interpreter who doesn't know the woman they are to interpret for – a particular issue given the genuine fear that matters will be relayed back to the community – and one which influences women to proceed in many cases without an interpreter altogether.

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175 Senate Committee Report: Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (June 2004), page 144.

176 Consultation with the District Court.

177 Kimberley Interpreting Service is the only Indigenous language interpreting service in Western Australia, is accredited by the National Accreditation Authority for Translators and Interpreters in more than 18 Kimberley and central desert Indigenous languages to clients anywhere in Australia - http://www.kimberleyinterpreting.org.au/

178 Consultation with the Supreme Court.

179 Northern Territory Government, Department of Community Services, Aboriginal Interpreter Service, http://www.ais.nt.gov.au/

- Women often have to re-tell their story multiple times to each new service and at each court event.[180]
- Another issue of language proficiency affecting access to government services is the pervasive use of 'jargon' (both public service and legal jargon), which can be intimidating and operate to dissuade clients from asking questions or requesting clarity.[181]
- Interpreter request forms are in English only, and are not accessible to illiterate or innumerate clients without assistance.[182]
- A recent survey conducted by the Family Law Council found that the quality of interpretation services varied, with unsatisfied respondents reporting difficulties with interpreters straying into advice-giving, difficulties with interpreters not understanding legal concepts, and culturally inappropriate practices, such as men interpreting for women in matters where this is not culturally appropriate, and having one interpreter for both clients in a family violence case.[183]
- CLCs and refuges reported their own practical problems with getting interpreters at court proceedings, even where booked, and the related (and unreasonable) expectation of many lawyers that support services will organise an interpreter. This leaves non-legal support services in a particularly difficult position – if they leave it to the lawyer to arrange an interpreter it adds to the bill and if they leave it to the courts it sometimes will not happen.[184]
- The cost of interpreters can be exorbitant, for example, reportedly $900 for interpreting marriage documents.[185] This makes the provision of suitably trained and culturally appropriate interpreting services a critical issue for women's access to justice and the court system.

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180 Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Feb 2012), page 33.

181 Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Feb 2012), page 33.

182 Consultation with Women's Law Centre and Domestic Violence Legal Workers Network (Toni Kennedy).

183 Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Feb 2012), page 34.

184 Consultation with the Pat Giles Centre.

185 Consultation with Legal Aid WA and Aboriginal Legal Service.

DOTAG reported that it had met with the Department of Multicultural Affairs to discuss increasing the wages of interpreters, in an attempt to attract more people to the job.[186] The Subcommittee supports this initiative and the encouragement of the study of a second language in secondary education. DOTAG also advised that the Chief Judge of District Court had met with the Department of Multicultural Affairs to speak about languages required, and that work was being done on getting more interpreters in the District Court. The Subcommittee encourages further work in this area to ensure interpreting services can be provided to all Aboriginal and NESB women who require them.

The Subcommittee refers to the recommendation by the Family Law Council that training in family law form a specialist component of accreditation for legal interpreters, and considers that some basic training in all areas of legal interpreting relevant to the interpreter's particular practice would be beneficial in alleviating interpreting quality and understanding issues set out above.

The Subcommittee makes the following recommendations:

1.17 The Department of the Attorney-General establishes a taskforce to consider how to best increase the number of women interpreters from a variety of backgrounds and promote interpreting as an attractive and desirable career path to women, with that taskforce to report within 12 months from the date of this 2014 Review Report and the taskforce's findings to be implemented within the following 12 months.

1.18 The State Government ensures interpreters who provide services to court users receive basic training regarding the court process and legal system, and cultural awareness issues relating to interpreting in court environments, within two years of this 2014 Review Report.

[186] Consultation with DOTAG.

4) RRR WOMEN

Women in RRR areas experience all of the same issues experienced by women court users referred to above but compounded by their geographical location. For example, there are further difficulties in accessing services relevant to Aboriginal women, accessing interpreters for Aboriginal and NESB women (particularly in Aboriginal and African dialects), and appropriate court facilities.[187] Women in RRR areas not only face a lack of services specific to their needs, but also face a smaller pool of lawyers working in RRR areas from which to seek legal advice. There are increasing numbers of women in this situation, with the current rates of Aboriginal women living in RRR areas and the increase in the numbers of migrant women moving to these areas.[188]

Women in isolated towns do not have facilities such as women's shelters or safe houses, and the cost of transportation to facilities in regional centres is often prohibitive. It is recognised that in some areas, it may be impossible for women to get police to attend domestic violence incidents, or even to talk directly to police in their local area.[189] Further, research has shown there is a higher reported incidence of domestic violence in RRR communities than in metropolitan areas, but as funding levels are generally lower, women in these areas are often denied access to essential legal services.[190]

A combination of these issues in the context of geographical isolation together with, in many cases a lack of family or community support, makes access to justice virtually impossible for many women. The Subcommittee supports the Senate Committee's position that it is unacceptable that women living in RRR areas should be denied basic services and the right to access justice simply because of where they live.[191]

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187 Gender bias with respect to court facilities is discussed below at page 97. Women who are in custody in RRR areas are also a particular issue, and discussed in Chapter 9 of this 2014 Review Report.

188 Consultation with Relationships Australia.

189 Senate Committee Report: Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (June 2004), page 70.

190 Senate Committee Report: Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (June 2004), page 70.

191 Senate Committee Report: Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (June 2004), page 72.

Whilst the Subcommittee acknowledges that the problem of delivering justice in RRR areas is multi-layered, it considers that any obstacles that can be fixed (such as with respect to court facilities and childcare) should be addressed immediately to lessen the gender bias experienced by RRR women.

Unfortunately, programs dedicated to addressing the RRR need, such as the Country Lawyers Placement Program (**CLPP**)[192] – which was found to have dramatically increased the level of services and numbers of clients it was able to assist[193] – have been dropped in funding cuts. Put simply, funding is required to ensure women in RRR areas are able to access justice.

The Subcommittee makes the following Recommendation:

1.19 The State Government commits to and provides funding for legal services for women in rural, regional and remote areas of Western Australia, such funding to commence within two years of this Report.

The Subcommittee recognises that technology will assist in resourcing RRR areas and providing services on the ground. It is notable that the needs of women in RRR areas are now better met than in 1994 with the advancement of technology such as the Internet and mobile phones. Yet this requires both access to and the ability to pay for Internet services. Access for women to resources, such as the Internet and Community Legal organisations throughout the State should remain a goal,[194] as should the provision of telephone advice line services for women in RRR areas.

The Subcommittee supports two of Legal Aid WA's initiatives, which are helping to provide resources and support to people in RRR areas. The first is a project funded by the Commonwealth Government's national broadband network funding over two years, which provides video link facilities to enable clients from Legal Aid WA's Midwest and Gascoyne regional office in Geraldton to get in contact with lawyers wherever they may be – whether the lawyers are Legal Aid WA lawyers or not. This means that clients situated kilometres away can provide instructions to lawyers

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192 A collaborative project involving Legal Aid WA, CLCs, ALS, Indigenous Family Violence Prevention Legal Services, The Law Society and the Legal Practice Board, the CLPP had been in operation since 2008. It is no longer funded, with the last CLPP lawyers completing their 3-year contracts. During the time of the program, the vacancy rate had been eliminated and there was full employment in offices in RRR areas – Consultation with Legal Aid WA.

193 Leah Watkins – Starfish Consulting, Better get a lawyer: An Evaluation of the Country Lawyers Placement Program (December 2010).

194 Written consultation with DPP.

through the facility, which the Subcommittee understands will be free of charge for all lawyers in the not-for-profit sector.[195] The Subcommittee is advised that the project is being rolled out with the aim of the facility being available to the public at the start of the 2014 financial year.

The second initiative is Legal Aid WA's Train-N-Track online platform, which has been in operation since February 2012. The platform is currently aimed at allowing lawyers to complete continuing professional development (CPD) accredited online training, book in-person training, track CPD requirements, print CPD certificates and request an offline workaround if working in the regions and experiencing slow internet connectivity.[196] The Subcommittee understands that Legal Aid WA plans to extend this platform to clients in the near future to be able to provide them with legal information.

Legal Aid WA also has a number of online resources available to the public, including in video format,[197] which are extremely useful to clients with access to the Internet.

The Family Court advised that it is close to implementing Skype technology to enable witnesses to give evidence and take part in proceedings from any location, including remote locations, rather than needing to attend courts to use video-link up facilities. Evidence could then be given from locations in Perth outside of the court itself in situations where it is not safe for the witness to attend court. Work was reportedly being carried out to ensure Skype was secure to use[198], and the Subcommittee encourages investigation of this type of technology to increase flexibility in accommodating vulnerable witnesses and victims.

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195 Consultation with Legal Aid WA.

196 Legal Aid WA website: http://www.legalaid.wa.gov.au/LegalResources/Train-N-Track/Pages/Default.aspx

197 See e.g., 'When Separating' available at: http://www.legalaid.wa.gov.au/whenseparating/Pages/Default.aspx

198 Consultation with the Family Court.

The Subcommittee makes the following recommendations:

1.20 The State Government supports and commits to providing access to justice for women in rural, regional and remote areas of Western Australia through the use of modern technology including:

a) Real-time video link facilities that allow women, including vulnerable women and victims of crime, to participate in court proceedings from remote locations as they would in person; and

b) The provision of legal services to women via online service platforms, such as the Train-n-Track platform developed by Legal Aid WA Western Australia, and real-time video link facilities with lawyers in other locations, with such technology (and the required trained staff to assist with it) to be operational within four years of this Report.

5) VULNERABLE WITNESSES & COURT SPACES

Victims of Domestic Violence

Appropriate accommodation in court complexes for victims of domestic violence was raised as an issue in 1994 and remains significant today, with domestic violence existing in the community at alarming rates. The extent of domestic violence revealed in the family law system is significant. The Australian Institute of Family Studies identified that over half of the family law files they examined contained allegations of DV.[199] The demand for services arising from domestic violence situations is so great that it was suggested to the Subcommittee that domestic violence victims should be considered as a minority group themselves.

At the same time, the Magistrates Court has become an intersection point for people and families in crisis, with roughly 90 per cent of all cases in Australian courts dealt with by Magistrates, and offending inextricably bound up with the social, personal and medical problems of those persons.[200] It is well accepted that the personal

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[199] Human Rights Report Card 2013, page 167, citing Lawrie Moloneyetal, 'Allegations Of Family Violence and Child Abuse In Family Law Children's Proceedings: A Pre-Reform Exploratory Study' (Research Paper No15, Australian Institute of Family Studies, 2007) 7.

[200] Chief Magistrate Ian L Gray (Chief Magistrate of Victoria), *The People's Court – Into the Future* (June 2002).

situation of vulnerable witnesses has the potential to significantly affect access to the court and justice and performance of a witness or as a party in court proceedings.[201]

Further, as discussed in the 1994 Report, it remains the case that women need to know that when they enter court to testify as a victim or witness in a domestic violence or sexual assault case that their physical and psychological exposure to the accused will be minimised.[202] Currently, this is not the case with respect to a number of key court buildings in Western Australia that women domestic violence victims will need to attend.

Victims of domestic violence come into contact with all courts, but particularly the Magistrates Court (in relation to restraining orders discussed in Chapter 5) and the Family Court (for child custody and property matters). In the Magistrates Court at the Central Law Courts in Perth, whilst arrangements can be made (with notice to the Court) in particular cases, on the large part, facilities do not exist to accommodate domestic violence victims.[203] The Subcommittee acknowledges that there is restraining order protection in some Magistrates Court buildings for women victims. At the Perth Magistrates Court, there is a separate, restricted access area set aside for applicants of restraining orders who do not wish to wait in the general area outside the courtroom. In other Magistrates Court buildings, such as Joondalup and Albany, women victims have access to restricted access waiting rooms through VSS to minimise contact with the perpetrator. However, the protection of vulnerable witnesses is essential and accommodation for DV victims should be addressed immediately. These types of facilities are essential at all courts.

Protection for domestic violence victims is particularly heightened in RRR areas, where it is difficult for vulnerable witnesses and victims to get into and leave court without coming into contact with the accused or his family. This is a particular concern in Broome, Kalgoorlie and Kununurra. On the other hand, reports were positive regarding the facilities in Albany that allows separation of parties. It is also acknowledged that the outdoor area surrounding the Albany court-house provides an

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201 For example, the personal living circumstances of a witness, if unable to obtain a bed in a women's refuge, will usually have a bearing on her physical and psychological health and ability to participate in proceedings. There is a significant lack of beds in women's refuges, particularly problematic to house women with larger families or with adolescent boys – Consultation with The Hon. Linda Savage MLC.

202 1994 Report, page 47.

203 Consultation with the Magistrates Court.

informal environment in which Aboriginal people are most comfortable, and where lawyers can proof witnesses in an environment most suitable to them (particularly those who smoke).[204]

Security generally at courts is discussed below at page 97.

The Subcommittee refers to the recommendations in Chapter 5 regarding 'Victims of Crime' and makes the following recommendation:

1.21 The State Government makes available, as a matter of urgency, and in any event within 12 months from this Report, appropriate accommodation within all court buildings for victims of family and domestic violence.

Redefinition of Areas in Court Precincts

Attention should also be directed to redefining areas in courtroom precincts for witnesses/defendants and applicant/respondents. This includes providing separate entrances and waiting areas with respect to which there has been little progress since 1994. Whilst acknowledging the difficulty in retrofitting these requirements to existing court facilities, the Subcommittee nevertheless considers separate areas to be an important requirement to protect women (and the community more broadly) and for the administration of justice and continues to support this recommendation in the 1994 Report.

The Perth Magistrates Court tries to provide separate waiting areas where witnesses/defendants and applicants/respondents can sit, however this is still in the same larger area with no physical barrier between the spaces.[205] The Subcommittee was advised that Court 57 is best designed to accommodate opposing parties and witnesses, with a large waiting area immediately outside the courtroom and a separate, restricted access area for applicants of restraining orders who require protection.

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[204] Consultation with the DPP.
[205] Consultation with the Magistrates Court.

In addition to metropolitan courts, regional court facilities particularly need attention. Most are outdated and do not have separate areas and entries for witnesses, the accused and opposing parties, resulting in a lack of separation for victims and vulnerable persons from the person who harmed them. It is also an essential requirement for the administration of justice that witnesses do not discuss their evidence outside of the courtroom. In many cases, there is nowhere to wait outside courtrooms, and/or no shade outside the building (for example in Fitzroy and Newman),[206] with the result that everyone waits in the same place outside the courtroom waiting for their matter to be called. This only serves to compound the tension that already exists between the parties with nowhere to retreat to escape feuds. A shared facility serves as an example where this key problem has been addressed in that there are separate facilities allowing break out spaces for opposing parties.[207]

The Subcommittee was advised that the preferred court model for State DPP Prosecutors is Albany. The separate entrances, several interview rooms and waiting areas within the courthouse work particularly well in criminal matters. Furthermore the outdoor courtyard (where visitors to the court are able to smoke) is very well utilised. By comparison, it was reported that people generally do not like remaining in the air-conditioned rooms at the Kalgoorlie courts, as they are unable to smoke in them. Prosecutors also agree that it is difficult to manage situations such as in Broome where the custody area and CCTV area are in close proximity to each other.[208]

The Subcommittee makes the following recommendation:

1.22 The State Government gives urgent priority to redefining areas in court precincts to include separate entrances and separate areas for witnesses/accused and applicants/respondents.

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206 Consultation with the Magistrates Court.
207 Consultation with the Magistrates Court.
208 Written consultation with the DPP.

6) TOILET FACILITIES

Access to toilet and parenting facilities within court precincts has a direct and significant impact on women, including pregnant women and those with children, and was one of the key issues arising from the Subcommittee's investigations. The provision of adequate toilet and parenting facilities (affecting women considerably) in regional areas remains a significant issue. The Subcommittee was informed that in some RRR areas, there are either no toilets at the court, those available remain locked at times when they are required, or the only toilet facility available is at the police station and the use of the facility is ultimately granted at the discretion of police.

For example, Newman Police Station has the only toilet near the court. It was reported that women needing to use a toilet are often turned away from the police station, whether this be for police staff security reasons, police perceptions and attitudes (including overt biases against groups of court users). It was reported that public toilets in areas such as Halls Creek and Roebourne, which are used extensively, often block up due to the high use and are therefore locked by security. Situations were also reported to the Subcommittee where women have pleaded guilty because they had to get home as quickly as possible, had to be at court with their children and had no toilet or baby change facilities.

In other cases, where toilets are available they are extremely sub-standard in terms of hygiene, cleanliness and usability. This includes poor quality toilet facilities in the metropolitan area, such as at the Children's Court (where the toilets are extremely uninviting, painted black, with blue lights, with metal mirrors which do not serve their purpose); and Midland Magistrates Court with respect to which there were reports of a sewerage smell in the air conditioning.

Issues are further compounded for mothers who attend court with their children. In many metropolitan courts there is nowhere to change a child's nappy, or to tend to a baby's needs (such as breastfeeding) in privacy or comfort. It must be acknowledged that wherever you have women, you will have children and the courts need to cater for this common situation to ensure that women can participate fully in the justice system. The issue does not only affect mothers – it also affects extended family members and carers, such as aunts and grandmothers assisting with children.

The lack of clean, usable toilet and parenting facilities is extremely problematic on many levels, including the fact that:

- toilet facilities are a basic human need;
- the inability to use a toilet adds to the stress of attending court, particularly during peak court times in which court users may have to wait all day;
- the lack of toilets adversely affects the comfort of court users and consequently, the ability of applicants, respondents, witnesses and defendants to compose themselves, concentrate and perform well in court; and
- the availability and accessibility of basic court facilities have a critical effect on the proper administration of justice and work of the courts.

Whilst it is accepted that the need for adequate toilet and parenting facilities is being implemented in new courts built in accordance with the Courts Standard Design Brief[209], the Subcommittee is of the strong view that toilet facilities must be made available in all court precincts as a matter of urgency. This issue cannot wait until new courts are built or otherwise upgraded.

The Subcommittee makes the following recommendation:

1.23 The State Government immediately, but in any even within 12 months, provides access to toilet and parenting facilities at all court precincts, particularly in rural, regional and remote areas. Should these be at the police station or another shared facility, the State Government ensures that court users are allowed access to the facilities without prejudice and ensures any security concerns are addressed immediately so that they do not serve as an impediment to access.

[209] See pages 31, 45, 57 and 58.

7) REFRESHMENT FACILITIES

The Subcommittee was informed that currently, there are no court refreshment facilities in a number of metropolitan and many RRR areas. The Subcommittee was also advised that the Chief Justice, The Hon Wayne Martin AC, took up this issue after his appointment in 2006. Whilst the Supreme Court itself had a coffee cart for a period of one year, the owner lost money and it did not continue. It is considered that such a service is not economically viable unless subsidised by government.[210] The new District Court building at 500 Hay Street, opened in June 2008, has a café on the ground floor, and there is a coffee and drink vendor in the Central Law Courts used by the Magistrates Court. Refreshment facilities are included in the Courts Standard Design Brief[211] and it is planned that the new Supreme Court building, due for completion in May 2015, will have a café on the ground floor.[212]

In the course of consultation an issue was raised that court refreshment facilities could potentially result in the physical centralisation of opposing sides involved in court proceedings and promote unnecessary loitering in the court precinct before and after proceedings. However, the Subcommittee is of the view that access to refreshments is a non-negotiable basic need for court users, particularly those involved in or supporting those involved in a civil or criminal case or as a witness.

It is noted that making refreshment facilities available in all courts does not require manned facilities in all courts (such as a café or coffee cart) if self-service facilities are made available.

The Subcommittee makes the following recommendation:

1.24 The State Government immediately makes refreshment facilities available in all court complexes in Western Australia.

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210 Consultation with the Supreme Court.
211 See pages 45, 116.
212 http://www.cathedralandtreasury.com.au/

8) CHILD MINDING FACILITIES

The availability of child minding facilities[213] and services in court precincts remains an issue in 2014, and was one of the major issues raised in the course of consultations for this Anniversary Review. As noted above (at page 23), the only child minding facility in a court precinct is at the Family Court. There is no such onsite facility in any other jurisdiction in Western Australia. The District Court building, opened in June 2008, has a small children's play area with low fencing, aimed at younger children, along with a family friendly public café in the building, but does not have onsite child minding facilities. The District Court website advises "Court hearings are generally unsuitable environments for young children."[214]

It was reported to the Subcommittee that the lack of onsite child minding facilities is having an adverse and disproportionate effect on women's access to justice and the smooth operation of the courts. The problem of a lack of childcare is compounded for particular groups, for example, Aboriginal women who often have the care of a number of children of the extended family. Women appearing in court are concerned about their child, they are distracted, not able to fully participate in court proceedings (with a potentially adverse effect on the outcome) and they consequently have difficulty giving proper instructions to lawyers. There is of course the bigger issue of not wanting children to hear what is said, or litigants and witnesses not being full and frank when children are present. Obviously the courtroom is not an appropriate environment for children – both from a procedural point of view and with respect to the safety and protection of children themselves.

During consultations it was noted that it is not uncommon to see children in the back of the Magistrates Court, particularly in relation to criminal charges and restraining order matters. However it was strongly felt that the experience was both potentially damaging to children and served to de-sensitize them to the court and criminal law process, which may in turn make appearing in court seem to be more acceptable behaviour. Examples were provided of situations where women with small children consider it too difficult to pursue a restraining order when (for whatever reason) they feel they have no alternative other than to bring their children to court. It was

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213 Referred to as 'childcare facilities' in the 1994 Report. This Chapter uses the term 'child- minding facilities' to acknowledge the differences between approved childcare centres and crèche facilities, discussed below at page 78 -80.

214 http://www.districtcourt.wa.gov.au/V/visiting_the_court.aspx?uid=1455-1205-2323-9715

recognised that often those in court are people whose lives are so hectic that they cannot turn their minds to arranging someone to look after their children. The Subcommittee was informed of incidents in which children were left unsupervised in court precincts (on one occasion a child was found by an orderly in a lift in the District Court after their mother was remanded in custody) or had to be cared for by court staff who are not qualified or equipped to do so.

Further, it was reported to the Subcommittee that there is a tendency, particularly in RRR areas where there are inadequate facilities, for women to try to limit the length of time they spend at court by avoiding proceedings and in extreme cases, pleading guilty to avoid the length of time involved with a trial for a minor offence. An example was provided of a situation in Fitzroy Crossing where a woman charged with a minor criminal offence attended court with her baby in 40 degrees heat. It was reported that whilst the woman had a defence to the charge, she decided to plead guilty so that she could return home with her baby.[215] The lack of child minding facilities is considered to be a significant problem from a prosecution perspective in RRR areas, where there are problems bringing children to Perth from RRR courts for a trial to be held in Perth. This is especially the case for those women who do not have family support.[216]

Consultations with the heads of jurisdiction also confirmed the need for suitable child minding facilities at courts. It was reported that whilst child-minding facilities were previously considered for the Magistrates Court, ultimately the proposal was rejected due to money and perceived lack of space. Where children are in court, the Magistrates Court advised that Magistrates have no choice but to continue.[217]

At the Children's Court, some young offenders are parents themselves, and children who come to the court frequently have younger siblings under the age of ten years, who attend court with their parents. It is perceived that the Children's Court may deal with more people coming to the building who have young children than any other court.[218] When children are at the back of the courtroom in the Children's

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215 Consultation with Aboriginal Legal Service and Legal Aid WA.
216 Consultation with DPP.
217 Consultation with the Magistrates Court.
218 Consultation with the Children's Court.

Court, it is very difficult for both the parent and the judge to concentrate on the case at hand.[219]

It was reported that in the District Court, women who are the wives and partners of men being sentenced, want to know what is going on and often attend court with children. It was also reported that recently, a trial set down for a week in the District Court involving co-accused from a regional location several hours away from Perth had to be aborted and rescheduled because those co-accused had no one to look after their youngest primary school aged children and newborn breastfed baby whilst in court. The co-accused did not have the support of family or friends, who were either living interstate or were involved in the case as witnesses against the co-accused. The couple brought three of their children to court. It is certainly conceivable that other trial listings have been and will continue to be affected by children in court.

The presence of children in the hearing room is considered to be less of an issue in the SAT, likely because people attend the jurisdiction voluntarily. The SAT advised that due to the flexibility of the jurisdiction, the SAT can re-list matters to accommodate children.[220] This flexible approach was confirmed by consultations with lawyers appearing in the SAT, who have represented parties with responsibilities for minding children.

The Subcommittee was advised that, upon his appointment, the Hon Chief Justice Wayne Martin AC raised with the then Attorney General the issue of putting child minding facilities on Level 6 of the Central Law Courts in the space used for the practitioner's common room. That proposal did not proceed because of a lack of funds.[221]

The overwhelming view arising from the Subcommittee's investigations is that child minding facilities should be available for parties (including defendants and civil litigants), witnesses and jurors, along with those who need to attend court to support a family member or friend.[222] It is very disappointing that child-minding facilities have

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219 Consultation with the Children's Court.
220 Consultation with the SAT.
221 Consultation with the Supreme Court.
222 The Subcommittee notes that it is intended that child-minding facilities are for use by court users other than legal counsel – however the issue of child care and emergency care so that women can continue to appear in court and progress their careers is discussed in Chapter 2.

not been addressed in planning for the new court precinct in Perth.[223] This is particularly the case given the recommendation regarding childcare arising from the 1994 Report, and the broader recommendation that a child-protective focus be adopted in the delivery of court services.

Current Cost Assistance for Childcare

Currently, DOTAG will assist with the cost of offsite childcare for jurors, witnesses, defendants or litigants who need to attend court. DOTAG's Victims of Crime website states the following with respect to child minding:

> The Department of the Attorney General can help with the costs of child minding for jurors, witnesses, defendants or litigants who need to attend court.
>
> This service is free and uses approved local child-care centres. You can qualify for the free service by calling or visiting the courthouse and making an application two days prior to the day you are to attend court. You will be given an authorisation number and a list of local approved child-care centres. You can then make a booking at any of these centres and be confident that qualified professionals will care for your child during your time in court.[224]

Further information for jurors is available on DOTAG's website[225] as follows:

> The Department of the Attorney General will pay for childcare on the days that you are required to attend court only. The centre must be a licensed childcare facility as referred to in the Child Care Services Act 2007 Section 12 (2) (c).[226]
>
> You are responsible for making bookings, placing and collecting the child(ren) and knowing the business hours of the childcare provider.
>
> You must inform the child care provider on a daily basis of the date and times that you are required to attend court and the date and times that child care is required.
>
> It is recommended that you make arrangements for an alternative person to collect your child or children in the event that you are part of a jury panel that is deliberating, as you will not be able to leave during this time.

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223 http://www.cathedralandtreasury.com.au/

224 http://www.victimsofcrime.wa.gov.au/C/child_minding.aspx?uid=6294-6808-2415-1389

225 Sheriff's Office of Western Australia Jury Services, Childcare Information Sheet, available at DOTAG website: http://www.courts.dotag.wa.gov.au/_manifest/jury_services_childcare_info.jmf

226 The *Child Care Services Act 2007* (WA) has now been replaced by the *Education and Care Services National Law (WA) Act 2012*, however DOTAG's website has not yet been updated.

Payment can be arranged by forwarding either an unpaid invoice or a copy of a paid invoice and payment receipt (as appropriate) to the court the person attended.[227]

It became apparent during the Subcommittee's investigations that there are many reasons why having on-site child minding facilities (as opposed to reimbursement or payment for pre-arranged offsite childcare with certain approved external centres), are considered necessary to eliminate gender bias with respect to accessing the courts and to ensure that women (whether acting jurors, witnesses, defendants or litigants) are able to fully participate in the justice system. First, there are situations where placing a child in a childcare centre is not appropriate in the circumstances – including very young children, children who are exclusively breastfed, and children with special needs. Secondly, there is commonly a settling period for children who are new to childcare, or new to a particular childcare centre or environment. Thirdly, the current arrangement constitutes an added burden on court users and disadvantages those who have not made prior arrangements for a booking at one of the approved centres, and those who are simply unable to attend to the necessary pre-arrangements.

There also are several practical issues associated with an offsite childcare facility which the Subcommittee understands can impact on women's ability to access the justice system. Such issues include the location and availability of a place for a child of a particular age at an approved childcare centre. Finding a suitable centre can itself be difficult for ad-hoc/short term placements given the high demand for childcare and in some suburbs, not enough approved childcare places for the number of children who require them.[228] Given the legislative requirements on childcare centres[229], there are maximum numbers on age groups, and specific child to carer ratios based on age, which must be adhered to. In this context, it is often more difficult for those who require ad-hoc care to secure a place. The Subcommittee was advised that external care providers are not often used in the

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227 Ibid.

228 These and a number of other issues relating to childcare are being considered by the Australian Government Productivity Commission in its review into childcare and early childhood learning, which commenced in November 2013 – http://pc.gov.au/projects/inquiry/childcare

229 Currently the *Education and Care Services National Law (WA) Act 2012* and *Education and Care Services National Regulations 2012*.

Magistrates Court because the court user has to be organised enough to ask for care in advance, and to find a centre that has a place for their child.[230]

Family Court Crèche Facilities

On the other hand, the facilities offered at the Family Court of Western Australia are considered to provide an excellent example of how child minding can be arranged within court precincts to cater for court users with children. Details of the Family Court facility and photos of the facility are included at Attachment 2 to this Chapter. The Subcommittee considers that these facilities should be emulated in other court precincts in the metropolitan area, at least in Perth.

The Subcommittee was advised that the Family Court crèche facility cares for approximately 1,500 children per year, and rarely are there times where children are turned away from the facility. At the busiest times, the crèche has catered for up to 23 children, although the usual number of children at one time is much lower. A notice on the door explains to parents what is required of them, and all court staff and judicial officers are aware of how the crèche works and how to support court users who need to make use of it.[231]

It is important to recognise that the Family Court's facility is classed as a crèche, not a licensed childcare centre. This distinction affects the requirements for the facility, as a crèche is not subject to the licensing requirements of the *Education and Care Services National Law (WA) Act 2012* (National Act).[232] Rather, the crèche is excluded from the definition of 'education and care service' in section 5(1) of the National Act under regulation 5(2)(e) of the *Education and Care Services National Regulations 2012*. Regulation 5(2)(e) excludes services providing education and care to a child on an ad-hoc basis at premises where the parent or another person responsible for the child is a guest, visitor or patron, and is readily available at all times that the child is being cared for.[233]

Accordingly, the Subcommittee was advised that the Family Court crèche facility is:

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230 Consultation with the Magistrates Court.

231 Consultation with the Family Court.

232 The national law replaces the *Child Care Services Act 2007* (WA), under which crèche services were not required to be licenced if they met a number of exclusion criteria specified in regulation 4 (2) of the *Child Care Services Regulations 2007* (WA).

233 These requirements are reflected in the material provided to parents using the crèche facility at the Family Court. See Attachment 2 to this Chapter.

- permitted to care for children for 3 hours at a time;
- closed between 1pm - 2pm. Parents come and collect children during this time (which is also court recess time);
- staffed by one fully qualified childcare worker (although often a family member stays with their child also);
- able to call the parent back to the crèche if necessary;
- stocked with toys, games and activities for children, including a television and a WII/Nintendo console for older children; and
- designed with security in mind, so that the door is locked and must be opened by the staff member themselves, parents are made aware that there are strict rules about who can come to visit and pick up the children, and the staff member has emergency buttons to call security if necessary.

In the Subcommittee's view, the crèche is a surprisingly small but very good facility. Whilst the Subcommittee acknowledges that the service is provided on an ad-hoc basis, and the inherent difficulty in finding a replacement staff member should the permanent staff member be sick, the facility is well used and well regarded by those in the Family Court and the broader public who use it. Provided child minding facilities available at any court precinct are secure, with restricted access,[234] parents or carers are readily available (for example if contacted through the court) and there are guidelines as to eligibility for use (as is the case with the Family Court crèche), the Subcommittee cannot see any reason why such facilities cannot be emulated in other court jurisdictions.

Proposed Child Minding Facilities

The Subcommittee proposes that initially a crèche should be established in the newly created Cathedral Square Justice Precinct to serve the Supreme Court, State Administrative Tribunal (SAT), District Court and Perth Magistrates Court,[235] along with a facility to serve the Children's Court (given its separate location), and subsequently facilities as appropriate in major suburban and regional court precincts.

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[234] An issue raised during a number of consultations and in a written consultation with the DPP.

[235] If the Children's and Magistrates Courts are not able to be accommodated within this precinct, separate facilities will be required.

The Subcommittee also notes that at the time of establishing these facilities, there must be an immediate and wide dissemination of information on the facilities and how they operate to both the public and court and judicial officers, to ensure the smooth running of the facilities and court proceedings.

The Subcommittee makes the following recommendation:

1.25 The State Government:

a) within 12 months from this 2014 Review Report reviews how to best implement child-minding facilities in all court precincts, using the Family Court of Western Australia's crèche as a desired model, and reports on the results of that review;

b) within two years from this 2014 Review Report makes child-minding facilities available in major suburban and regional court locations, commencing in Perth with the newly created Cathedral Square Justice Precinct to ensure there is child-minding - available for users of the Magistrates Court, District Court, State Administrative Tribunal and Supreme Court of Western Australia, with a facility for the Children's Court to follow; and

c) thereafter, make child-minding facilities available in regional court precincts.

9) COURT PERSONNEL – Diversity and Education

Issues relating to the diversity of gender and experience of court personnel, and recruitment practices to achieve the desired diversity remain current in 2014. It is acknowledged that issues of diversity are not simple; diversity is often defined by a broader set of concerns that encompass areas such as ethnicity, gender, sexual orientation, religious beliefs and individual experiences.[236] Yet gender balance and diversity of background and experience is extremely important for all courts to ensure broad perspectives and balance in the public administration of justice and also to provide accessibility to diverse groups in the community and to enhance the public view of the courts and perceptions of justice being served.

[236] Courts Standard Design Brief, page 49 'CALD Brief'.

It was broadly raised in both consultations and the literature that there are few Aboriginal and CALD persons working in the court system at all.[237] This is particularly an issue for courts such as the Magistrates Court and Family Court, which deal with the vast majority of Aboriginal and NESB users. Such candidates have been referred to as 'bicultural personnel'.[238]

In the Magistrates Court, it was reported that there has been a significant change in culture from court staff being a 'boys-club' 20 or so years ago, with staff generally comprised of a majority of women at the lower levels, and women holding a number of key senior roles. For example, in the Magistrates Court two of the four Executive Managers (Level 8) are women, and there are a number of women in Level 6 and 7 roles.[239] It was felt that women would continue to benefit from opportunities to move into senior level roles.[240] Those consulted spoke highly of advancement programs for women, however noted that it is common to lose trained women to other departments or into private enterprise, perceived to be due to high salaries on offer. However, the reasons for staff leaving the courts are not fully understood.

At the Higher Courts directorate, currently two of the four Executive Managers (Level 8) are women, and there are eight women and five men in Level 6 roles.[241] In the District Court management team, there is an even gender split with the Executive Manager position held by a woman.[242]

In the Family Court, secretaries and associates are all women, all legal associates bar one are women, security officers are mostly women, and there is an even gender split amongst court officers resulting in a feminine-looking court.[243] Men employed at the court are generally employed in senior level positions.[244] The position of Director of the Counselling Directorate (Level 9) is held by a woman, as is the Director Strategic Development (Level 9), and there are a number of senior counsellors who are women.[245] The Subcommittee acknowledges the difficulties with respect to

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237 An issue raised by a number of persons consulted.
238 Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Feb 2012), page 31.
239 Information provided by DOTAG.
240 Consultation with the Magistrates Court.
241 Information provided by DOTAG.
242 Information provided by DOTAG.
243 Consultation with the Family Court.
244 Consultation with the Family Court.
245 Information provided by DOTAG.

recruitment for example, of customer service officers in the Family Court, who must be prepared to work in a dispute resolution front line – of course a challenging area.

At the Supreme Court, two out of four senior personnel are women.[246]

At the Children's Court, most senior managers are men, whereas staff at the front counter registry is predominantly young women, (under the age of 30). The need to have a mix of young and more mature court personnel was raised. Further, of the four full time Magistrates, two are women and two are men, with Registrars in Hedland and Karratha both women.[247]

With respect to recruitment, the Subcommittee supports the implementation of an affirmative action plan to increase diversity in all levels of court personnel. Further, it is noted that there remains an opportunity to increase the pool of potential applicants through targeted training and recruitment drives, and dissemination of information on jobs within the court and justice environment as potential career paths at high school and tertiary level. In this regard, the Subcommittee encourages DOTAG to consult with other government departments as to the lessons that can be learnt from their experiences with recruitment drives, such as for Aboriginal Police officers.[248]

With respect to retention, it is important to ensure ongoing training support is provided to court personnel, being particularly mindful of the stress and personal toll that some front line roles can have on staff. Cultural awareness education of court staff is discussed below at page 105. It is also important to ascertain the reason why court staff leaves, to determine if there are systemic issues arising with respect to retention. In this regard, the Subcommittee notes that exit interviews with staff who have tendered their resignation would assist in keeping abreast of current issues affecting the overall make-up of court personnel and more broadly, the perceived understanding and ability to deal with court users of diverse and complex cultural backgrounds.

The Subcommittee makes the following recommendations:

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246 Consultation with the Supreme Court.

247 Consultation with the Children's Court.

248 For example, WAPOL reported difficulties experienced with the number of eligible candidates being reduced by the requirements for a minimum educational standard and the need to have a clean criminal record.

1.26 The Department of the Attorney General, within 12 months from this 2014 Review Report, devises and publishes an action plan to increase overall diversity in the court environment, including in all positions held at the court.

1.27 The Department of the Attorney General, in consultation with the Heads of Jurisdiction of Courts and Tribunals, develops programs to support women into senior roles within the court environment and implements those programs within 18 months from this Report.

1.28 The Department of the Attorney General, within 12 months from this Report, prepares and disseminates information regarding careers within the court environment, including to high school and tertiary groups and culturally diverse groups within the community.

1.29 The Department of the Attorney General immediately focuses upon retention of court personnel, including by ensuring exit interviews are conducted to ascertain the reasons why staff leave, identifying common attrition factors and putting into place initiatives to alleviate these factors.

10) JUDICIAL EDUCATION

The 1994 Report discussed judicial education of issues affecting women in particular, including those issues specific to Aboriginal women, women from country and remote locations, of non-English speaking background, and of various ethnic and cultural groups. In 2014, the Subcommittee found there to be four key issues requiring attention with respect to judicial education, namely:

- Availability of relevant resources on NESB and CALD court users – discussed above at pages 54 -56;
- Provision of cultural awareness training; and
- Judicial education generally.

Judicial Education Generally

It was apparent from the Subcommittee's investigations that judicial education is not consistent across the various jurisdictions. For example, it was reported that training has been provided to Family Court judges on issues such as domestic violence, child protection, diversity and violence, and that this training usually encompasses the

needs of different migrant groups.[249] Further, SAT members have access to regular internal training, run in-house at the SAT, which consists of monthly compulsory sessions with topics identified by the members themselves. It was reported that SAT is well funded to support judicial education as part of a statutory obligation.[250] However, with respect to other State jurisdictions, the Subcommittee was advised that whilst in the past there had been occasional seminars for the judiciary federally funded through the National Judicial College, this funding was exhausted. As a result, there is now a serious gap in judicial education in Western Australia.

The Subcommittee is advised that judges, upon appointment, are supposed to attend the National Judicial College of Australia (NJCA) program, which includes a half-day session on interpreters and cultural issues. NJCA was established in May 2002 as an independent entity, incorporated as a company limited by guarantee, and funded by contributions from the Commonwealth and some State and Territory governments. The NJCA provides continuing education programs designed to help judges and Magistrates perform their judicial role. The sessions take place monthly and are held in a different State or Territory from month to month.

In 2007, the NJCA established the National Indigenous Justice Committee. Its members include judicial officers who chair State committees. The committee makes decisions on the allocation of funds for the conduct of professional development programs for judicial officers on indigenous justice issues. The Commonwealth Attorney-General's Department provides the funding over a four-year period. There have been 13 programs held all over the country between 2008 and 2011, four of which were held in Western Australia as follows:

- A twilight seminar on *Aboriginal English in the Legal System* held in November 2008;
- The *Wadjuk Nyungar* program ('Aboriginal Perth') for Western Australian judicial officers held in February 2009;
- The *Yelakitj Moort Judicial Cross - Cultural Training Package* held in September 2009; and
- The *Talking Law and Country Program* held in November 2010.

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249 Consultation with the Family Court.
250 Consultation with the SAT.

It was reported that there are logistical difficulties given that the majority of this training is run outside of Western Australia.[251] Further, the most recent Western Australian sessions were some time ago, and not all judges have attended.[252] In any event, training - particularly in relation to critical factors such as cultural awareness - should be provided on an ongoing basis and an ad-hoc program is not considered to be sufficient.[253]

Cultural Awareness Training

It was duly noted by the Subcommittee during consultation that the lack of cultural diversity on the bench presents difficulties in decision-making, and that there is an essential need for education and understanding of the issues faced by court users. The need for cultural awareness training has been long recognised, from as far back as prior to the 1994 Report.[254] Even the SAT, which benefits from individual training budgets, reported difficulty in identifying cultural awareness training programs. Currently, it is incumbent on the judicial officer themselves to identify a suitable course to attend within their training budget.[255]

A properly resourced cultural awareness program and education surrounding Aboriginal and NESB needs are required for the judiciary (as well as for court staff – discussed below at page 101 – and the police force).

The Subcommittee is of the view that to provide the highest standard of justice, judicial education is essential and it is important to ensure there is adequate and regular training. In this regard, training for all judicial officers should include comprehensive initial training when the officer is appointed and then appropriate ongoing training at least every few years thereafter. The general view held by those consulted both on the bench and otherwise, is that it is inappropriate to expect that judges innately know about cultural issues, and amongst the legal profession and community there is considerable risk that without proper education, judicial officers

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251 Consultation the SAT and District Court.

252 Various consultations with judicial officers.

253 Various consultations with judicial officers.

254 See e.g., The Royal Commission into Aboriginal Deaths in Custody: National Report (RCIADIC Report), released on 9 May 1991, which contained a recommendation regarding the provision of an appropriate training and development programme, designed to explain contemporary society, customs and traditions' with emphasis on historical and social factors contributing to disadvantage amongst Aboriginal people, and increase cross-cultural understanding – see Recommendation 96.

255 Consultation with the SAT.

may not recognise relevant issues that affect the administration of justice. It is also suggested that in Western Australia, cultural awareness training needs to be regionally specific.

Other potential topics include training surrounding domestic violence and sub-conscious bias. Domestic violence training is essential for Magistrates and Justices of the Peace (JP's) to ensure understanding of the issues surrounding domestic violence. It is also essential to remove any perception that the significance of these issues is minimised during the consideration of restraining order matters and that Magistrates and JP's are alive to potential problems such as those surrounding the issuing of mutual undertakings in violent relationships.

It has also been recognised that cultural and domestic violence awareness training is essential for all persons involved in domestic violence matters.[256] It was reported that the Family Court has previously arranged an education session by women's refuges on the issues surrounding clients in family and domestic violence situations and the work carried out by refuges, to overcome negative perceptions of refuges.[257] A number of not-for-profit organisations indicated that they would be happy to provide further sessions for the judiciary. These types of sessions are strongly encouraged, and the Subcommittee notes that the topics should extend to gender and cultural awareness issues with respect to different groups in the community.

Priority must be given to cultural awareness training, and funding is required for this purpose to ensure such training to the judiciary that is tailored and conducted on an ongoing basis.

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256 Human Rights Report Card, page 162 (Recommendation).Community Legal Centres Association (WA) Inc. and the King & Wood Mallesons Human Rights Law Group, Human Rights in Western Australia: A Report Card on Developments in 2013, http://www.mallesons.com/Documents/Human%20Rights%20Report%20Card%202013.PDF

257 Consultation with the Pat Giles Centre.

The Subcommittee makes the following recommendations:

1.30 The State Government increases funding for judicial education for all judicial officers in Western Australia, to address current and relevant issues including with respect to gender bias and cultural diversity.

1.31 Cultural awareness training is provided to all judicial officers, commencing with comprehensive initial training immediately upon appointment to the bench and then appropriate ongoing training at least every two years thereafter.

11) COMMUNITY LEGAL EDUCATION (CLE)

As an overarching principle, CLE should ideally start from a young age, and be included as a core subject in school curriculums. The Subcommittee notes the importance of legal education at school level being incorporated into the mainstream curriculum, as opposed to an elective to be done in the student's own time. CLE is also required in the broader community.

As identified earlier in this Chapter, there is a definite need for CLE regarding the legal system and process, especially for Aboriginal and NESB women whose cultural backgrounds are significantly different to the Anglo-Saxon concepts that underpin our legal and justice systems.

This CLE should be provided in an appropriate form and format to allow women to attend and to be comfortable in doing so. The Subcommittee acknowledges that the Equal Opportunity Commission of Western Australia (EOC) currently provides training on discrimination and rights matters, including indirect discrimination, and is well placed to extend these training sessions more broadly throughout the community.[258] The Subcommittee refers to the recommendation made in Chapter 7 with respect to funding the EOC so that it has adequate resources to, amongst other things, deliver its educational programmes.

In the Subcommittee's view, CLE also would provide a good platform for basic cultural awareness training on a community level.

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[258] EOC Strategic Plan, available at: http://www.eoc.wa.gov.au/AboutUs/StrategicPlan.aspx

The Subcommittee acknowledges the online information available from Legal Aid WA's website, and the new Train-N-Track platform currently available for lawyers but due to be extended to clients. When this platform is rolled out more broadly, it will disseminate standardised information (not advice) to the public and clients regarding common issues such as the steps to attain a restraining order. The Subcommittee supports this valuable initiative and encourages government funding with a view to overcoming the lack of basic understanding by community members, particularly women in RRR areas.

The Subcommittee refers to Chapter 7 of this report regarding gender issues in the school and law school curricula, and makes the following recommendations:

1.32 The Education Department, upon consultation with the Department of the Attorney General, ensures legal education is included as a core subject in school curricula and that schools welcome the opportunity to enhance learning objectives surrounding the legal system and cultural awareness.

1.33 The State Government funds the provision of community legal education for Aboriginal and NESB women, including but not limited to demonstrated support for and advertisement of Legal Aid WA's online Train-N-Track platform.

1.34 The State Government supports and funds more education to the community on discrimination and equal opportunity matters, such as that provided by the Equal Opportunity Commission of Western Australia.

ADDITIONAL RECOMMENDATIONS ARISING FROM 2014 REVIEW

In addition to seeking implementation of all of the above Recommendations 1.1 -1.34 the Subcommittee has identified 12 additional issues that also require attention in the following areas:

- Accessible information – specific to the needs of court user groups;
- Computers / Internet Access / Printers;
- Court websites;
- Court fees;

- Court facilities – including remote rooms, interview rooms, mediation spaces and holding cells;
- Security issues;
- Mandatory jury duty;
- Court listings – accommodating women with children; and
- Cultural awareness training.

These issues and the Subcommittee's related recommendations are discussed in detail immediately below.

1) INFORMATION SPECIFIC TO NEEDS OF COURT USER GROUPS

The Subcommittee's investigations reveal a need for information on the court environment and processes, and the legal system more broadly, specific to the needs of and in a format suitable for the particular user groups – namely Aboriginal and NESB women, including recently arrived migrants.[259] It is acknowledged that women are more disadvantaged as a gender group with respect to accessing information than men, so the lack of user-friendly information affects women at greater rates.

It is essential that information is available in a variety of formats and delivery methods to ensure equal access to justice, particularly across the NESB community. This involves consideration of what is meaningful and helpful to minority groups. It would of course be ideal if this information were provided in the court-house through information booths – as recommended in the 1994 Report[260] (and further if these booths were staffed by bi-cultural and multilingual staff). Information booths exist overseas in courts in places such as Singapore, to provide advice on the legal system; forms required and related processes (not on the merits of a case).[261] However, the Subcommittee acknowledges the existing assistance provided by court registry staff, the issues of resourcing and staffing information booths, along with the potential unnecessary duplication in relation to some information that can be provided through touch screen kiosks and computer facilities discussed below at page 93.

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259 Refer to discussion of issues facing Aboriginal and NESB women above at pages 49.
260 Recommendations 53 and 59 of the 1994 Report.
261 Consultation with the Supreme Court.

The Subcommittee considered the methods in which information is currently disseminated, including the information available on the Internet and the role of CLCs, Legal Aid WA and support services such as the Citizen's Advice Bureau in reaching those experiencing disadvantage particularly in NESB and Aboriginal communities. It is acknowledged that the development of Internet search options such as 'Google' have transformed how people access information, and there is a significant amount of information about the legal system online.[262] However, this information is not always accessible, particularly to Aboriginal and NESB women, nor obviously to illiterate or severely vision impaired women.

The Subcommittee acknowledges that information found online is largely written, and rarely presented in other accessible formats or a combination of formats. Generally information needs to be translated into different languages and different formats, particularly given literacy remains a major issue for many court users.[263] It must also be recognised that disadvantaged groups include the elderly (some without knowledge or experience with respect to computers) and people without access to the Internet at all. Improvement could be made, for example, regarding the availability and usefulness of information to assist women to prepare for formal courtroom procedures.

It was also raised during consultations that:

- many women do not have internet access or skills;
- a lot of women still prefer to sit and read a hard copy document;
- 1800-numbers, providing access to information over the telephone through a free call number, is extremely helpful;
- those in high stress situations are often not capable at the relevant time of looking for information they need online; and
- in future, there may be scope to provide certain basic information on a phone app.[264]

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262 See for example, State Government publications on the DOTAG and Victims of Crime websites - http://www.dotag.wa.gov.au/; and http://www.victimsofcrime.wa.gov.au/

263 Consultation with the Children's Court.

264 Consultation with Relationships Australia.

Use of the informal group setting to disseminate information can be particularly beneficial with certain groups, such as Aboriginal women.[265] Not all court users access brochures – experience has shown that some prefer to talk to staff at court registries.[266]

The Subcommittee makes the following recommendations:

1.35 The Department of the Attorney General, in consultation with relevant consumer groups, re-examines the content and form of current information available to court users on the court and legal system and the services available to court users, with a view to identifying and implementing improvements within 12 months of this Report to ensure that information is presented in an accessible and meaningful way, with a particular focus on women from Aboriginal and non-English speaking backgrounds.

1.36 The Department of the Attorney General considers the methods used to disseminate information on the court and legal system and the services available to court users, with a view to identifying and implementing improvements within 12 months of this Report to ensure the broadest possible dissemination of such information in the community, particularly to women from Aboriginal and non-English speaking backgrounds.

2) PROVISION OF COMPUTERS / PRINTERS / INTERNET ACCESS

The provision of computers, printers and internet access at court precincts will enable people to access key information they may otherwise not have access to. This will also assist in reducing the need for contact with court staff to answer simple queries and access basic information, leaving court staff free to allocate their time to those most in need of assistance. The Subcommittee was informed of situations where women had decided not to commence court proceedings, as they could not complete the relevant paperwork on their home computer for fear of their partner finding out. The provision of computers, printers and internet access will enable women to complete relevant court documents in a safe environment in order to access justice. The computer, printer and Internet service stations currently available at the Family Court are a desirable model.

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[265] Consultation with Relationships Australia.
[266] Consultation with the Children's Court.

The Subcommittee viewed the computer station facilities at the Family Court. The Family Court provides three computers along with a printer and two, coin-operated photo-copiers allocated on a first come first served basis, and situated near the registry and court security. These computer stations are also located near the voluntary Justice of the Peace (**JP**), providing a 'one-stop shop' where the public can print documents and have them witnessed by the JP. The only permitted computer access is to the Family Court website, and to court documents in Microsoft Word format (although these cannot be taken home in an electronic format if not completed). It was reported that the stations are widely embraced by the public, work extremely well, and although they are used by a large number of people, generally there is not a long wait to use the services.[267] In addition, registry staff, JPs and Legal Aid WA officers situated at the court work together as a coordinated team to assist litigants.[268]

It is recommended that information sought could largely be provided in electronic form via electronic touch-screen information kiosks. This would reduce the time and resources required by the courts to assist members of the public in accessing the court system. Whilst personnel would still be required to assist with the use of these booths, staff time would be significantly reduced and directed to those who really require assistance, including those with limited understanding and poor English literacy skills.

The Subcommittee makes the following recommendations:

1.37 The State Government, within two years of this Report, provides computer, internet and printing facilities for members of the public in all court precincts in metropolitan and regional areas, using the Family Court of Western Australia's self-service facilities as the desired model.

1.38 The State Government examines the use of standing touch screen information kiosks for public use at all court precincts, including in rural, regional and remote areas, to assist with access to essential information.

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267 Consultation with the Family Court.

268 Consultation with the Aboriginal Legal Service and Legal Aid WA.

3) COURT WEBSITES

Related to the accessibility of information and provision of computer stations and touch screen kiosks at court precincts is the need to improve all court websites to ensure the information is presented in a user friendly and culturally appropriate way. There is also a need to keep websites updated and relevant to users on a continuous basis. Whilst acknowledging that, as raised above, not all court users have access to the Internet, those who do must be able to locate what they need in a timely manner, and the information itself must be easily understood.

There is certainly room for improvement with respect to a number of court websites, which have been put together with very limited resources.[269] Whilst some information online is available in several languages, this is not universally the case for court information and fact sheets. For example, most information is not available in Aboriginal dialects.[270] Information is not commonly presented in a variety of formats, as opposed to only written text, and there is scope to better utilise other delivery methods including videos, power-point presentations and visual or pictorial presentations.

The Subcommittee refers to the Federal Court,[271] Family Court[272] and SAT[273] websites as providing examples of the type of information and potential delivery formats that should be available to court users. The effectiveness of website information is dependent on how easy it is to access and how the information is presented so that a court user can quickly identify what information is relevant for their matter. For example, providing a link to different pieces of legislation will not be very effective if the user does not know the name of the relevant legislation they require, or does not know the relevant section and has to trawl through a long Act in order to find the law relevant to their matter.[274] It must also be kept in mind that self-

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269 For example, the Magistrates Court and Children's Court websites.

270 Written consultation with the DPP.

271 The Federal Court website provides an example of the types of information that should be available to court users, including information on interpreting and translating services in 38 different languages: http://www.fedcourt.gov.au/

272 Examples of information presented in alternative formats such as audio and PowerPoint are available on the Family Court website: http://www.familycourt.wa.gov.au/

273 www.sat.justice.wa.gov.au

274 'Self-Represented Litigants: Tackling the Challenge,' Presentation by Deputy Chief Justice Faulks, Family Court of Australia, Managing People in Court Conference, National Judicial College of Australia and the Australian National University (February 2013), page 15.

represented litigants require more assistance than a website can provide them to run a case.[275]

It is beneficial for the courts to have 'ghost litigants' or 'mystery users' to test out the services and advise the courts if they are user-friendly.[276]

The Subcommittee makes the following recommendation:

1.39 The State Government improves all court websites to provide essential information about the court, court processes and the legal system in consumer appropriate formats (not limited to written text) in a range of different languages, with a particular focus on the needs of women from Aboriginal and non-English speaking backgrounds.

1.40 The State Government ensures that court websites are maintained on an ongoing basis and information on court websites is continually updated to reflect changes to law, procedure and consumer needs, including in particular the needs of women from Aboriginal and non-English speaking backgrounds.

4) COST OF ACCESS – Court Fees

The cost of access to the court system is an issue with the recent increase in fees for the Family Court. Fees changed on 1 February 2013, and the increase is perceived to be a further factor negatively impacting on women's' access to justice. It has been reported that prior to 1 January 2013, individuals suffering from financial hardship paid a $60 fee for filing a divorce application. From 1 January 2013, the fee is $265; which is a significant increase for a mother on a single parent benefit or a disability support pension. Other fees have also increased, including the filing fee for consent orders (from $80 to $145) which may see those suffering from financial hardship agreeing to informal parenting arrangements as opposed to those formalised by the court. There is a concern that such large increases will result in a system of divorce which is only accessible to middle and high income earners and more generally, a family law system which is not readily accessible and does not accord with the

[275] 'Self-Represented Litigants: Tackling the Challenge,' Presentation by Deputy Chief Justice Faulks, Family Court of Australia, Managing People in Court Conference, National Judicial College of Australia and the Australian National University (February 2013), page 15.

[276] Testing out the website is encouraged by the District Court, to identify any aspect that requires improvements – Consultation with the District Court.

National Plan to Reduce Violence Against Women and their Children (strategy 5.1) which seeks to enhance the family law system's response to family violence.[277]

It is notable however that the fees are kept by the particular court registry to which they are paid,[278] providing an incentive on a national basis for Family Courts to recover these fees to put towards their court system.

The Subcommittee was informed that the Family Court financial hardship guidelines are tough, and the imposition of fees is particularly resisted in matters concerning children.[279] The Subcommittee supports the review of court fees associated with family law proceedings for individuals suffering financial hardship and women as a user group.[280]

The Subcommittee makes the following recommendation:

1.41 The State Government reviews court fees in family law matters to determine if the current fees charged are proving a barrier to women accessing justice and the Family Court in Western Australia and make representations to the Commonwealth Government as appropriate.

5) COURT FACILITIES

Consultation revealed disappointment with the progress on court facilities due since the 1994 Report, and a number of areas in which improvement is required. Whilst improvements in all of these areas will benefit all members of the public who come into contact with the criminal justice or court system, regardless of gender, they are discussed here in the context of significant issues affecting *women* with respect to the environment of the courts and access to justice. Each issue has a significant bearing on the administration of justice.

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277 Community Legal Centres Association (WA) Inc. and the King & Wood Mallesons Human Rights Law Group, *Human Rights in Western Australia: A Report Card on Developments in 2013*, page 169 http://www.mallesons.com/Documents/Human%20Rights%20Report%20Card%202013.PDF. Information on the National Plan to Reduce Violence against Women and their Children is available at http://www.dss.gov.au/our-responsibilities/women/programs-services/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children

278 Consultation with the Family Court.

279 Consultation with the Family Court.

280 In line with the recommendation made in the Human Rights Report Card 2013, page 162.

At the time of writing this chapter, there are a number of court complexes either currently being built or recently completed[281]:

- New courthouses are under construction in Kalgoorlie, Kununurra and Carnarvon.
- The new Kalgoorlie Magistrates Court commenced operation from 2 December 2013.
- Carnarvon Justice Centre is due for completion in late 2014.
- Kununurra Magistrates Court is due for completion in late 2014.
- Restoration work is being carried out on the Kalgoorlie government offices and post office building, with a new Magistrates Court to be built at the rear.
- Budget submissions have been prepared on Armadale, Broome, Karratha and Midland court complexes.

The Subcommittee was informed that the courthouses feature state of the art facilities, and Kununurra and Kalgoorlie will offer considerably better facilities than the Albany courthouse for example, which was built in 2006.[282]

However, the dire state of some of our existing courts, both in metropolitan and RRR areas, must be addressed. Attention needs to be given to improving these facilities. The Subcommittee was referred to the courthouse in Broome (where the police station is new but the court remains sub-standard, including reports of extreme problems with spiders, mosquitos and lack of maintenance) and Karratha where the CCTV room is the Registrar's office, meaning that the Registrar must leave when a witness is giving evidence by CCTV.

The Subcommittee's consultations in relation to the Children's Court reveal that currently it does not divide the protection jurisdiction from the criminal jurisdiction, it does not separate individuals and families, nor adults from children and fails to separate males from females, where this is culturally appropriate. Lastly, it has no proper mediation facilities and therefore cannot run mediations.[283]

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281 DOTAG *Annual Report 2012/1*3, Available at: http://www.department.dotag.wa.gov.au/_files/DotAG_AR_2013.pdf (accessed 12 April 2014); Consultation with AG Department.

282 Consultation with DOTAG.

283 Consultation with the Children's Court.

The Subcommittee considers that Children's Court would benefit greatly from improved facilities such as:

- A separate complex for protection jurisdiction from criminal matters;
- Within each complex, the capacity to separate people by family or gender for example when separation is required;
- Separate detention facilities for adults and children, and males and females;
- CCTV facilities that do not bring female complainants into contact with the general population of people that come into the court complex, especially the accused and the accused's family;
- Refreshment and restroom facilities;
- A baby changing room (presently the same as the first aid room) and facilities for mothers and young children, given that commonly the offenders are in Court; and
- Judicial facilities so that judges can safely access conference rooms without walking across the general public area (as is currently the case).

The Courts Standard Design Brief now includes a number of these areas with respect to new buildings, and the Subcommittee encourages implementation of this Brief across both new and existing State courts.

In addition to the issues discussed above (toilets, refreshment and child minding facilities), the Subcommittee considers particular attention should now also be given to the following areas that were raised as significant issues during its investigation namely:

- Interview facilities;
- Remote rooms (CCTV facilities);
- Mediation space; and
- Holding cells.

Interview Rooms

The lack of interviewing rooms at a number of courts, particularly but not limited to RRR courts, is a significant problem.[284] Lawyers require dedicated spaces to advise and take instructions from their clients.

Interview rooms at the courts are particularly required given the difficulty in obtaining instructions at prisons such as Banksia, which means lawyers wait for clients to come to court and try to obtain instructions from the holding cells immediately prior to a hearing. Obviously this is not an appropriate time or place to obtain meaningful instructions from someone in custody, although it is necessary to clarify issues with an accused and get updates on relevant matters.

Remote Rooms

Remote rooms used for victims in sexual assault cases (recommendation 56 discussed above at page 27), in the country are particularly uncomfortable. To put a witness at ease such facilities should be friendly, relaxed, well configured, and ideally, child-friendly. There is also a need for remote rooms and CCTV facilities that are accessible without bringing women and children complainants into contact with other court users, particularly the accused and the family of an accused.

Court Mediation Space

Mediation spaces in the court precincts are considered critical to reaching negotiated and mediated outcomes for parties, as space provides flexibility and enables opportunities for the mediator to minimise the gender imbalance, along with addressing power and personality issues.[285] It was reported that the Children's Court is currently unable to run mediations, as it does not have the facilities to do so.[286]

Holding Cells

Conditions of holding cells in RRR areas were reported to the Subcommittee to be a particular problem, with no separate holding cells for individuals, and segregation of

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284 Consultation with Legal Aid WA and Aboriginal Legal Service. Examples of lack of facilities include Fitzroy Crossing, where there is only one room and it is often not open, and Armadale, where there is nowhere for lawyers to speak to their clients in private.

285 Consultation with the District Court, SAT and Children's Court.

286 Consultation with the Children's Court.

men and women only carried out on an ad-hoc basis, due to lack of facilities.[287] Detention facilities are dealt with in detail in Chapter 9.

In addition to the issues and recommendations set out above with respect to toilet, refreshment and child minding facilities, the Subcommittee makes the following recommendation in relation to court facilities:

1.42 The State Government addresses, as a matter of urgency, the serious deficiencies in court facilities in existing courts in both metropolitan and rural, regional and remote areas, and in particular:

a) A lack of interview rooms;
b) The state of remote/CCTV rooms;
c) The availability of appropriate mediation space; and
d) The conditions of holding cells.

6) SECURITY ISSUES

Whilst security issues affect all court jurisdictions, during the Subcommittee's consultations concerns were raised in particular regarding security at the Family Court and Children's Court, both of which deal with considerable tension amongst parties involving children, relationship breakdowns and in many cases, feuding groups of people. Violence and gang disputes are of particular concern at the Children's Court, with an altercation in the communal waiting areas taking place the week prior to consultation by the Subcommittee.[288] In both of these jurisdictions, to ensure the safety of court users, especially women and children, it is vital to ensure that there is a strong authoritative presence, that security will assist in separating feuding parties within the court environment and will step in quickly in the event that an altercation does erupt.

Of course, security at the courts is not just about security at the door, but also encompasses separating families and victims from the accused or perpetrators, such as in violence restraining order applications. As duly noted in the *DOTAG Handbook and Services Guide 2014*, court security encompasses "all risk and safety aspects of court security including the security and safety of judiciary, members of the public

[287] For example, in South Hedland.
[288] Consultation with the Children's Court.

attending court, protection of internal and external court areas and the secure movement and welfare of people in custody in all court locations…"[289]

It was reported that previously the Family Court had an onsite police officer, which had been of great assistance as the impact of the police uniform was significant. However, the Subcommittee was informed that funding has been withdrawn and there is currently no police presence at the court. Instead, there is a permanent security guard employed.[290] A comparison was raised with the Subcommittee, that, unlike a public police officer, the responsibility for security in court buildings stops at the front door for private security guards. Accordingly, for example escorting a client to their car is difficult from the perspective of ensuring the staff members' own safety outside the court building itself. Whilst the Family Court tries to accommodate vulnerable witnesses and victims, and it is better equipped to do so than other court buildings (with three ways of entering and exiting the Family and Federal Court building) the reintroduction of a police presence, at least at key times of the day when the court is mostly used, would assist in alleviating the current security concerns.

The Subcommittee makes the following recommendation:

1.43 The State Government, in consultation with the courts, within 18 months examines the issue of security and identifies and implements improvements to court security to ensure the safety of court staff and users, particularly women and children.

7) MANDATORY JURY DUTY

A new issue that arose during the Subcommittee's review is the effect that amendments to the *Juries Act 1902* (WA) are having on women with family care responsibilities. In 2011 the *Juries Act* was amended to increase the pool of potential jury candidates throughout the community. Members of the public are unable to be excused from serving on a jury due to child and family care responsibilities. Previously, having children to care for was seen as an exceptional circumstance with respect to which judges could excuse them from jury duty. As a result of the change to the *Juries Act*, it is now very difficult for women with

[289] DOTAG, Handbook and Services Guide 2014, page 33.
[290] Consultation with the Family Court.

responsibility for the care of children, the elderly or sick family members that remains a gender bias issue itself because of the fact it is predominantly women in the carer role.

An example was provided where a judge presiding over a lengthy trial of several weeks, was unable to excuse a woman selected as a juror who advised she could not sit for more than a week because she had two children with disabilities and had only been able to arrange care for them for a one week period. Under the *Juries Act*, the judge could not excuse her from service, and could only defer her service until another time. The problem was heightened in this case given the juror had been willing to do jury duty and had made arrangements to do so, but the length of the trial was outside of her control.

The issue of mandatory jury duty also raises a question regarding the provision of childcare services – is there an obligation on the State Government to provide childcare for jurors required to serve on a jury? The Subcommittee refers to the discussion and repeats the recommendations set out above in relation to child minding facilities at the courts.

The Subcommittee considers that the *Juries Act* should be reviewed to examine the unintended consequences and gender bias issues faced by women jurors with family care responsibilities.

The Subcommittee makes the following recommendation:

1.44	The Attorney General, within 12 months, undertakes a review of the effect of recent changes to the *Juries Act 1902* (WA) to identify gender bias against women with family care responsibilities (including childcare, elder care and care of sick or disabled family members) with a view to securing Cabinet approval for a bill to make any necessary amendments to address gender bias in the application of compulsory jury duty on women within the following 12 months.

8) COURT LISTINGS – Accommodating Women with Children

Related to the issue of childcare, along with the need for parents to drop off children at school (a role very often undertaken by women) is consideration of broader issues relating to accommodating women in the court system. The court listing system arose in the course of the Subcommittee's investigations as an area for potential improvement. It was suggested during consultations that staggering start times for court lists (particularly in busy courts such as the Magistrates Court) would make it easier for parents (both women and men) to attend to childcare and school drop off and also attend court, along with making child-minding facilities (discussed above at page XX) more viable by spreading demand across the day.

It was also suggested that the courts could implement a texting system or other innovative methods to notify people that their matter is due to start to reduce waiting times and eliminate waste of court resources. Such an innovation also potentially has the added benefit of assisting to spread demand and increase serviceability by Legal Aid WA duty lawyers, CLC lawyers and support service staff.

Not only could this be configured to all court users, but also legal practitioners and judges themselves, ultimately contributing to a more effective delivery of justice services. The Subcommittee is of the view that both of these suggestions – staggered listing times and an automated notification system – warrant further investigation to determine if such changes would have the desired effect.

The Subcommittee makes the following recommendation:

1.45	The State Government, in consultation with the courts and court user groups (in particular those servicing women with children), over the next 18 months examines the introduction of staggered court listings and an automated listing notification system by text message, with a view to implementing improvements to court listings within two years of this Report.

9) CULTURAL AWARENESS TRAINING FOR COURT PERSONNEL

Cultural awareness training for court personnel was not specifically addressed in the 1994 Report. The Subcommittee considers that training on cultural issues and other relevant matters would assist in educating court staff on matters essential to the proper running of the court that they may not be aware of. As discussed above with respect to judicial officers,[291] cultural awareness training is critical to ensure that those who work within the court environment:

- Understand the myriad of issues affecting court users of different cultural backgrounds, including issues of culture and gender combined; and
- Are equipped with the knowledge and skills to be culturally sensitive in all dealings with court users.

Training on other topics, such as dealing with victims and families of domestic violence and safety in the court environment would also be highly beneficial as part of a training program for all court staff.

As with the Subcommittee's recommendations regarding judicial education, training for court staff should occur upon the initial appointment (when commencing the role) and on an ongoing basis. Court personnel should have the opportunity to suggest potential topics of interest relevant to cultural awareness and to their daily work at the court. The Subcommittee considers such training to not only be a critical requirement for access to justice and the court environment, but also be an important component of the professional development of court personnel (thereby linked to advancement and retention of personnel).

The Subcommittee makes the following recommendation:

1.46 The State Government implements a regular training program for all court personnel (including registry staff, associates, ushers, security staff) to address topics including (but not limited to) cultural awareness and the issues relevant to the cultural background and gender of court users.

[291] Page 86 of this Chapter.

ATTACHMENT 1

Chapter 1 – Access to Justice and Environment of the Courts

Consultation List

The following organisations were consulted for Chapter 1:

1. Aboriginal Family Law Service (through Mary Clark, Subcommittee member)
2. Aboriginal Legal Service (ALS)
3. Australian Federal Police (AFP)
4. Community Legal Centres Association Inc. (through Karen Merrin, Subcommittee member)
5. Criminal Lawyers Association (CLA)
6. Department of the Attorney General (DOTAG)
7. Office of the Department of Public Prosecutions (DPP)
8. Domestic Violence Legal Workers Network
9. Heads of Jurisdiction of and representatives from the:
    a. Family Court of Western Australia
    b. District Court of Western Australia
    c. State Administrative Tribunal of Western Australia
    d. Magistrates Court of Western Australia
    e. Children's Court of Western Australia
    f. Chief Justice of the Supreme Court of Western Australia
10. Ishar Multicultural Women's Health Centre
11. Legal Aid WA
12. Patricia Giles Centre
13. Relationships Australia
14. South Coastal Women's Health Services
15. Western Australian Police (WAPOL)
16. Women's Information Service
17. Women's Law Centre of Western Australia

The following people were consulted for Chapter 1:

1. Craig Slater, President of the Law Society of Western Australia
2. Grant Donaldson SC, Solicitor General
3. The Honourable Linda Savage MLC, Member for East Metropolitan Region
4. Yvonne Henderson, Equal Opportunity Commissioner for Western Australia
5. Diana MacTiernan, Manager Community Education, Equal Opportunity Commission of Western Australia
6. Employees of the DPP and Legal Aid WA on a confidential basis

Several other confidential consultations also took place.

The Chapter 1 Subcommittee also consulted with the other subcommittees for this Review, including in particular Chapter 4 ‘Aboriginal Women and Girls and the Law’, Chapter 5 ‘Victims of Crime’, Chapter 6 ‘Restraining Orders’ and Chapter 7 ‘Education: Law Making; Civil Laws Which Discriminate’.

ATTACHMENT 2

Family Court of Western Australia

Child Minding Service

The Child minding Centre is a free service available to parties attending their Family Court case, the Family Court Counselling and Consultancy Service, support persons or the registry counter. The centre is open from **8.30am to 1pm** and **2pm to 4pm**. Care periods cannot extend beyond three hours and may resume after a one-hour break.

Staff at the centre are fully qualified childcare workers and in possession of senior first aid certificates. The centre has many toys, videos, puzzles, books, games and art activities to entertain your children while you attend to your court business.

Policy for Use of Child minding Service

The Child Care Worker will determine the safe number of children in care in the centre at any time, depending on the needs of the children signed in. Priority will be given to parties with their own case before the Court that day.

You should provide anything your child may need, such as bottles, nappies and lunches. Nappy change facilities, beds and cots are available, however it is recommended that prams be provided for infants. A microwave is available for heating food and bottles. Bottles of infant formula need to be prepared in advance.

Children are to be signed in (no more than half an hour before your appointment) and signed out by the same person. This person must remain at the Family Court while the child attends the centre. Only that person is permitted to enter the Child minding Centre, unless a support person is expressly permitted by the Child Care Worker so to enter. No third parties may enter the centre precincts.

You need to tell the staff about:

- Special diet
- Allergies
- Feeding times
- Sleep times

- Special needs or behaviours, and
- Medical conditions that may require attention - staff will not give medication

Please note that children with infectious illnesses such as scabies, chicken pox, head lice, impetigo, school sores or cold sores will not be accepted into the centre.

The centre is unable to care for children under the age of 8 weeks. The centre cannot assist with the facilitation of 'spend time with' court orders.

If at any time your child is distressed, your assistance will be sought and your child returned to you without delay.

* *Information taken from Family Court of Western Australia website page, 'Child minding Service' at* http://www.familycourt.wa.gov.au/C/child_minding_services.aspx?uid=9346-9236-1086-9827

Photographs of the Child minding Facility at the

Family Court of Western Australia


ANIMALS

ATTACHMENT 3

Community Legal Centres and Dedicated Women's Law Services

There are a number of Community Legal Centre services now operational in Western Australia, including in regional areas. Some of these services are dedicated to women or "family violence" situations. These services include:

METROPOLITAN	REGIONAL
Aboriginal Family Law Services (East Victoria Park)	Albany Community Legal Centre (Albany)
CASE for Refugees (Perth)	Albany Family Violence Prevention Legal Service (Albany)
Citizens Advice Bureau (Perth)	Bunbury Community Legal Centre (Bunbury)
Consumer Credit Legal Service (WA) Inc. (Perth)	Geraldton Resource Centre Inc. (Geraldton)
Djinda Services (Perth Aboriginal Family Violence Prevention Legal Service (PAFVPLS) (Perth)	Goldfields Community Legal Centre (Kalgoorlie)
Employment Law Centre (Leederville)	Kimberley Community Legal Services Inc. (Kununurra)
Environmental Defenders Office (WA) (Perth)	Marninwarnitikura Family Violence Prevention Legal Service (Fitzroy Crossing and surrounding communities)
Fremantle Community Legal Centre (Fremantle)	Peel Community Legal Services Inc. (Mandurah and Peel region)
Gosnells Community Legal Centre (Gosnells)	Pilbara Community Legal Service (South Hedland, Karratha, Roebourne, Newman)
Mental Health Law Centre WA (Perth)	Wheatbelt Community Legal Centre (Northam)
Midland Information, Debt and Legal Advocacy Service (MIDLAS) (Midland)	

Northern Suburbs Community Legal Centre Inc. (Mirrabooka and Joondalup)	
Southern Communities Advocacy Legal Centre (SCALES) (Rockingham)	
Street Law Centre (Perth)	
Sussex Street Community Law Service Inc. (East Victoria Park)	
Tenancy WA (Previously Tenants Advice Service) (Perth)	
Welfare Rights and Advocacy Service (Perth)	
Women's Law Centre Inc. (Perth)	
Youth Legal Service (Perth)	

* List compiled from the Community Legal Centres Association (WA) Inc. website listings of services, available at:

http://www.communitylaw.net/CLC-Directory/?phpMyAdmin=AIbkakzcU3W3EdE9ErqT2Oj%2C3H5

Chapter 1

Women's Access to Justice & Environment of the Courts

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20TH ANNIVERSARY REVIEW OF THE 1994 REPORT OF THE CHIEF JUSTICE'S TASKFORCE ON GENDER BIAS

CHAPTER 2

CAREER PATHS FOR WOMEN IN THE LEGAL PROFESSION IN WESTERN AUSTRALIA

THE CHAPTER 2 SUBCOMMITTEE, WITH THE ENDORSEMENT OF THE STEERING COMMITTEE, MAKES THE FOLLOWING RECOMMENDATIONS:

GENDER BIAS IN ACADEMIA – Women in Law Schools

2.1 University promotion committees in Western Australia do not refuse an application for promotion solely on the basis that a woman who is a primary caregiver of a family (including elderly parents) has not achieved the same amount of research and published works as her male counterpart, when all other requirements for promotion have been met.

2.2 Universities in Western Australia review the impact of promotional policies on female staff members with a view to implementing policies that support and encourage women's academic careers.

GENDER BIAS IN THE PROFESSION – Graduates (Articled Clerks)

2.3 The Law Society of Western Australia continues to conduct its Graduate and Academic Standards Committee to monitor and advise on the graduate recruitment process.

2.4 The Law Society of Western Australia recommends guidelines or minimum standards for graduates in relation to aspects such as working conditions, salary, mental health issues, equal opportunity etc.[1]

2.5 The College of Law surveys its students and alumni annually in an attempt to gather data on gender balance in graduate employment.

[1] The Australian Young Lawyers' Committee is currently looking at this issue with a view to implementing a process through the Law Council of Australia.

PRACTICE ISSUES FACING WOMEN

2.6 The Law Society of Western Australia publishes information on flexible work practices, including guidelines and best practice examples of firms utilising such practices, on its website to inform the profession and broader public about flexible work practices generally.

2.7 The Law Society provides Continuing Professional Development sessions for lawyers (including partners and directors) as well as human resources and non-legal management and support staff regarding flexible work practices in commercial practice, including the implementation of flexible arrangements for men and women, best practice examples and addressing common pitfalls for employers and employees.

2.8 Employers actively implement, promote and appropriately support those on flexible work practices, including co-working and job-sharing arrangements, to ensure that flexible arrangements are available to those who require them, and that flexible workers are not disadvantaged in terms of opportunity and advancement by working in such a manner.

MATERNITY LEAVE

2.9 Employers address the issues limiting women's careers, including by:

a) the adoption of more flexible conditions for promotion, including amending terms for promotion to remove criteria purely based on post qualification experience (PQE) or hours worked and to include criteria acknowledging work quality and output;

b) the provision of reintegration training for women to assist those on leave or returning from leave to maintain their skills and knowledge, particularly in relation to areas of law, practice and technology;

c) the determination of strategies to counter the view that flexible work equates to low career aspirations;[2]

[2] See Australian Human Rights Commission, Accelerating the Advance of Women in Leadership: 2013 https://www.humanrights.gov.au/publications/accelerating-advancement-women-leadership-listening-learning-leading.

d) the provision of networking and career-building opportunities for women, including those on maternity leave; and

e) the determination of strategies to ensure the needs of women returning from maternity leave are understood and appropriately accommodated, by engaging in honest and open dialogue with such women about the concerns they have and being prepared to implement change and improve office practices as a result of that dialogue.

2.10 The Law Society of Western Australia and Women Lawyers of Western Australia continue and actively promote their mentoring programs, particularly to women returning from leave.

2.11 The Law Society provides training for practitioners seeking to return to the profession after an extended period of time and such training to include issues relating to technology used in legal organisations, networking opportunities and professional and personal development skills.

LARGE COMMERCIAL LAW FIRMS[3]

2.12 The Law Society of Western Australia sets, publishes and promotes targets for the number of women in legal practice and ask law firms to report to the Law Society annually on achievement of these targets as a reporting requirement associated with the Law Society's Quality Practice Standard (QPS), or in the case of national and international firms utilising other quality assurance systems as part of the duties of a good corporate citizen.

2.13 Employers implement strategies to achieve these targets including:

a) targeted coaching;

b) sponsors and mentors including case managing those returning from parental leave; and

c) ensuring lawyers (generally senior associates and partners) who work flexibly continue to progress their careers.

[3] Consultations were undertaken with large commercial law firms with more than ten partners; the firms included those that may be larger in other parts of Australia but have a smaller local presence. The recommendations are directed to large firms who have the resources to collate the information and implement the recommendations; smaller firms may find the recommendations a burden on their resources.

2.14 Unconscious bias training be made mandatory and regular (at least every 3 years) as part of the Continuing Professional Development requirements of the Legal Practice Board of Western Australia for the renewal of practicing certificates.

2.15 Employers consider what steps they can take to implement cultural change to ensure that:

a) there is less focus on "face time";

b) there are good role models within the firm and support for women; and

c) formal flexible working arrangements are mainstreamed.

2.16 Employers more appropriately accommodate flexible work practice by:

a) providing remote access and Virtual Private Networks [4] and

b) the implementation of firm wide policies on expectations relating to completion of work outside business hours, to ensure hours of work are reasonable and not abused.

2.17 Employers consider what steps can be taken to assist with access to and the cost of childcare, including preferred supplier arrangements with childcare providers and salary packaging.

2.18 The Western Australian Bar Association appoints a diversity representative to support and promote career progression for women to the Independent Bar.

2.19 Large legal firms appoint a diversity representative to support and promote career progression for women.

[4] In using the term 'Virtual Private Networks' we refer to technology that enables people to work from locations remote from their workplaces but allows exactly the same data, with the same look and feel as if the person was accessing the computer in the physical workplace.

SEXUAL HARASSMENT

2.20 Employers implement, or work to improve, sexual harassment policies and educate staff (both legal and non-legal) about what constitutes sexual harassment and that sexual harassment will not be tolerated in any form, through induction training and ongoing training programs.

2.21 The Law Society of Western Australia:

a) promotes understanding and awareness of the sexual harassment clauses of the Professional Conduct Rules to members of the profession;

b) conducts Continuing Professional Development sessions (attracting CPD points in the areas required by the Legal Practice Board for the renewal of practicing certificates) relating to sexual harassment in workplaces; and

c) makes practitioners aware of the ability to speak to a senior practitioner and/or Senior Counsel in relation to ethical and professional misconduct issues (including in relation to sexual harassment by another practitioner).

2.22 The Law Society of Western Australia continues its Law Care (WA) counselling and information service and promotes the service and its ability to assist practitioners experiencing difficulties including dealing with instances of unprofessional conduct or professional misconduct.

WOMEN AT THE BAR

2.23 The Western Australian Bar Association:

a) reviews, assesses and effectively publicises its Model Briefing Policy;

b) collects feedback from instructing solicitors and barristers as to the nature and rate of engagement of female barristers and any perceived obstruction or incentive to such engagement; and

c) adopts a policy directed to practising barristers that seeks to achieve the objectives of its Model Briefing Policy, including those relating to working flexibly.

2.24 The Western Australian Bar Association implements a formal mentoring program open to all barristers, including junior barristers and those undertaking pupillage that matches barristers with experienced mentors from various chambers, to provide practical advice and support specific to the environment of the Independent Bar.

2.25 The Law Society of Western Australia and the Western Australian Bar Association lobby the Western Australian Government to adopt a policy similar in content and purpose to the Commonwealth's *Legal Services Directions*,[5] especially as it relates to the briefing of women by State agencies.

2.26 All barristers' chambers in Western Australia review or introduce parental leave and other policies, to facilitate members taking, and returning from parental leave and those working flexibly.

2.27 The Law Society of Western Australia and the Western Australian Bar Association support Women Lawyers of Western Australia in requesting that the courts avoid or minimise the listing of matters in a way that disadvantages those with family responsibilities, in particular, that matters should generally not be listed before 9.15am or after 4.30pm save for emergencies.

2.28 All private legal firms be encouraged to adopt legal reporting to the Law Society on their expenditure in the same manner as government departments which outline the number of women and men briefed by number of briefs and total fees paid, with the aim to highlight pay inequity where it occurs.[6]

2.29 The Law Society of Western Australia and the Western Australian Bar Association make submissions to the Supreme Court to adopt a policy (similar to the NSW Bar) explicitly stating in the Senior Counsel protocol that a flexible or part-time practice is not a barrier to being appointed Senior Counsel.[7]

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5 Australian Government Attorney General's Department, *Legal Services Directions 2005* http://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Pages/Legalservicesdirectionsandguidancenotes.aspx.

6 Law Council of Australia, Submission to the House of Representatives Standing Committee on Workplace Relations, *Inquiry into Pay Equity and Associated Issues Related to Increasing Female Participation in the Workforce*, 23 April 2009.

7 Leanne Mezrani, 'Breaking Old Habits', *Lawyers Weekly* (online), 11 September 2012 http://www.lawyersweekly.com.au/features/breaking-old-habits.

2.30 The Western Australian Bar Association implements a program to encourage more women to practice as barristers in all areas of practice, including commercial litigation.

GENDER BIAS IN THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS FOR WESTERN AUSTRALIA ('DPP') AND THE STATE SOLICITOR'S OFFICE ('SSO')

Director of Public Prosecutions ('DPP')

2.31 The DPP supports women with family responsibilities to progress their careers and:

a) adopts more flexible conditions for promotion to ensure that working flexibly does not limit career opportunities;

b) works with the courts to avoid or minimise the listing of matters in a way that disadvantages those with family responsibilities; and

c) adopts supportive practices to ensure that those working flexibly are afforded the opportunity to conduct complex and lengthy trials in high profile matters.

State Solicitor's Office ('SSO')

2.32 The SSO supports women with family responsibilities to progress their careers and:

a) adopts more flexible conditions for promotion (rather than just hours and years worked) to ensure that working flexibly does not limit career opportunities;

b) actively supports and accommodates flexible work arrangements, including providing access to appropriate technology platforms and addressing cultural barriers; and

c) works to ensure the existence of good role models (including those working flexibly), and to provide women on flexible arrangements with access to mentors who are supportive of their arrangement.

2.33 The SSO implements strategies to encourage women to apply for senior positions including through targeted coaching, and formal allocation of sponsors and mentors.

RECOMMENDATIONS RELATING TO NEW ISSUES IDENTIFIED IN THE 2014 REVIEW

CONDITIONS OF WORK INCLUDING SALARIES AND DRAWINGS

2.34 Employers focus on gender equity with respect to salaries and drawings by:

a) conducting annual equity pay audits to ensure that there is no disparity in salary based on gender;

b) ensuring performance reviews and promotions are based on outcomes and efficiency as opposed to billable hours achieved, and genuinely recognise non-billable contributions such as marketing, mentoring and pro-bono work;

c) ensuring promotion opportunities are not limited for those on flexible work arrangements; and

d) requiring those involved in determining employee performance and pay (including those conducting performance reviews and those setting pay reviews) to complete unconscious bias training to overcome ignorance and unconscious bias.

AVAILABILITY OF CAREER SUPPORT

2.35 All employers adopt a formal mentoring scheme for their junior employees. For small firms where an internal mentoring scheme is impractical, the Law Society provides mentors (through a formal scheme linking employees to mentors from other firms) for eligible employees of the small firm.

2.36 Employers and senior managers actively demonstrate organisational and individual support for an inclusive and diverse culture within their organisation.

THE CHANGED CULTURE OF THE PROFESSION

2.37 The Law Society of Western Australia within 12 months of the publication of this 2014 Review Report:

a) conducts research and profession-wide forums to discuss and document the steps required of the profession to change the culture away from the current 24/7 mentality (including but not limited to the impact of billing practices);

b) devises a plan by which the Law Society can assist to facilitate resolving the issue within five years; and

c) examines the status and publishes progress reports on the implementation of the changes on an annual basis.

2.38 The Law Society of Western Australia conducts research into alternative legal business models to time billing, in particular with respect to the impact of time billing as a charging method on the stress levels and health of legal practitioners.

2.39 The Legal Practice Board routinely seeks information from those who do not renew their practicing certificates, broken down by gender and post admission years of experience, as to the reasons for that non-renewal, and provide this information on a non-identifying basis annually to WLWA.

2.40 The Law Society of Western Australia continues to prioritise the development and delivery of educational and informational strategies aimed at addressing mental health and wellbeing issues in the profession, and make those strategies available to law students and graduates via University law schools and Practical Legal Training providers.

WOMEN LEADERS IN THE LAW

2.41 The Law Society of Western Australia:

a) sets, publishes and encourages employers to meet voluntary gender targets and goals for women in leadership positions in the legal profession, with the targets and goals to be first published within the next 12 months;

b) requests employers report to the Law Society on progress in relation to those targets and goals; and

c) collates the information received from employers, and from this information publishes profession-wide statistics and trends on gender equity in the profession.

2.42 Employers commit to:

a) reporting both internally to staff and externally to the Law Society on gender targets and goals; and

b) devising an implementation plan to set out how improvements with respect to meeting gender targets and goals will be made, and publicising this plan to staff.

MEMBERSHIP OF CHAPTER 2 SUBCOMMITTEE

Co-Convenors:

Associate Professor Jane Power – Director, Professional Legal Education, School of Law, The University of Notre Dame Australia (Co-convenor April 2013 onwards)

Anne Wood – Senior Associate, Kott Gunning (Co-convenor October 2013 onwards)

Cathryn Greville – President, WLWA; Assistant Director Customer Protection, Economic Regulation Authority of Western Australia (Convenor February 2012 – March 2013)

Tina McAulay – Barrister, Francis Burt Chambers (Co-convenor April 2013 – October 2013)

Subcommittee Members:

Megan Cramp – Lawyer, Sparke Helmore Lawyers

Cathryn Greville – President, WLWA; Assistant Director Customer Protection, Economic Regulation Authority of Western Australia

Kate Glancy – Senior Advisor, State Solicitor's Office

Pamela Hass – Principal Counsel Legal and Commercial Strategy, Department of State Development (Subcommittee Member until April 2013)

Jenni Hill – Partner, Norton Rose Fulbright Australia

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Tina McAulay – Barrister, Francis Burt Chambers

Robyn O'Byrne – PhD candidate, Curtin Business School

Shayla Strapps – former Chief Executive Officer, CASE for Refugees

Sian While – Principal, Sian While & Associates

Subcommittee Assistants:

The Subcommittee also acknowledges the contributions of:

Susan Diamond – formerly Legal Officer, Commonwealth Director of Public Prosecutions

Candice Campbell – Solicitor, Wilson & Atkinson

Caroline Teo – Associate, HHG Legal Group

Olivia Loxley – Student, University of Western Australia Law School; Volunteer, Employment Law Centre

Shelley Butler – LLB student, University of Notre Dame Law School

The views set out in this Chapter do not necessarily express the views of the individual members of the Subcommittee or the organisations with whom the individual members of the Subcommittee are associated.

FOCUS OF CHAPTER 2

The Chapter 2 Subcommittee of the 2014 Review (‘the Subcommittee') was formed to consider the topic of ‘Career Paths for Women in the Legal Profession of Western Australia’. As a result the Subcommittee makes a total of 42 Recommendations relating to 13 issues. Nine of these issues were previously raised in the 1994 Report and the balance of five, are new issues that have arisen following the Subcommittee’s consultations and deliberations.

The focus of the Subcommittee has been to investigate the current issues affecting women lawyers in all areas of practice in Western Australia, including private practice, government, corporations, at the Independent Bar, appointment of Senior Counsel, appointments to statutory boards, migrant women lawyers and women lawyers living in regional areas.

Relevant issues for consideration by the Subcommittee include:

- whether women are channelled into particular areas of work;
- the impact of maternity leave and the adoption of flexible work practices on progression, salaries and partnership drawings;

- the availability of flexible work practices including opportunities for part-time work;
- sexual harassment issues;
- the basis upon which performance is assessed and work allocated;
- promotion issues;
- conditions of work including salary and drawings;
- the effectiveness of any equal opportunity policies or practice;
- the availability of career support; and
- why women lawyers leave the legal profession (temporarily or permanently) and what needs to change in order to retain or attract women lawyers back to the profession.

Women now make up 47.96 per cent of the legal profession in Western Australia.[8] However, it is recognised Australia-wide that there is a wide gap between the number of women who enter the profession and those who remain in it.[9] Along with examining gender bias in the Western Australian legal profession and its effect on the advancement and success of women lawyers, the Subcommittee was interested in the local issues that contribute to the high attrition rate of women lawyers.

SUBCOMMITTEE'S INVESTIGATIONS – Rationale and Procedure Adopted

The Subcommittee examined the 1994 Report, investigated which of those recommendations had been implemented and evaluated whether further measures were needed in each of the areas of recommendations from the 1994 Report. The Subcommittee also considered whether any new areas had emerged where recommendations were desirable. In conducting its investigations the Subcommittee conducted a full literature review and consulted widely (including with members of the judiciary, practicing lawyers, heads of departments and academics). A full

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8 Legal Practice Board of Western Australia, *Annual Report 2012-13,* table 'Composition of the Legal Profession', 8 http://public.lpbwa.org.au/files/files/201_2012_-_2013_Annual_Report_LPB.pdf.

9 Law Council of Australia, '*National Attrition and Re-engagement Study (NARS) Report Q&A* (Fact Sheet, 14 March 2014) http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/Media-News/NARS_FactSheet_Complete_FINAL.pdf.

Bibliography listing the literature considered by the Subcommittee is included at the end of this chapter.

The Subcommittee undertook broad consultation with organisations and individuals to investigate these and any other issues relevant to the career paths of women in the legal profession. A list of those consulted is included as Attachment A to this Chapter.

Survey of the Legal Profession

The Subcommittee also commissioned a survey of legal practitioners to obtain current data and perspectives on issues such as any barriers or disincentives to staying in the profession, barriers to advancement, attitudes towards different workplaces and types of practice, attitudes towards aspirations for judicial appointment (see also Chapter 3 of the 2014 Review Report) and factors influencing movement within different legal roles or out of the law altogether. The Survey report, entitled *An Analysis of Work-Related Issues and Conditions of Lawyers in Western Australia* was released on 4 March 2014 and detailed the results of the survey, which had attracted 250 responses. No research regarding retention of lawyers had been conducted in Western Australia since 1999.[10] Accordingly, qualitative and quantitative data was required to determine the real state of the legal profession today. The survey, conducted by an independent consultancy Nexus Network, was designed to elicit information from both an employee and employer's perspective, and from both men and women, including women who have left legal practice (acknowledging the difficulty in identifying such women). The survey included Nexus Network conducting a number of targeted interviews with women including those who had left the profession.

[10] Law Society of Western Australia and Women Lawyers of Western Australia Inc., *Report on the Retention of Legal Practitioners; Final Report* (March 1999) http://www.lawsocietwa.asn.au.

Summary of Survey Findings

The Nexus Survey[11] found the following:

1. The practice of law, at least in many legal environments, has a personal cost and this is particularly the case for women;
2. More than a quarter of survey respondents reported experience of inappropriate workplace behaviour and a further 16 per cent had observed it, with private practice reporting proportionally higher levels of such behaviour;
3. There is a perception of gender bias with men appearing to advance more quickly in their careers and be paid more without significant performance differences;
4. Women who choose to have children felt their careers were put on the backburner if they returned to work part time. Promotion should be viewed through the employee's skills and abilities, not their time in the role;
5. Some respondents commented that they believed the practice of law was incompatible with family/personal life and there is a bias against working mothers. For other women, dealing with a lack of support in the workplace and at home after having children is too much. Comments about the discrimination faced by women were made by both women lawyers with children themselves and those women observing the experiences of other mothers;
6. A supportive work culture and a flexible workplace are integral to retaining women lawyers, with key factors for leaving work being high stress and a lack of flexibility followed by lack of a supportive workplace and long hours/poor pay; and
7. Issues of disadvantage and bias experienced by women lawyers must be addressed if the community is to address the high exit rates from the law, particularly given the disproportionately high exit rates for women notwithstanding that some 66 per cent of law students are now women (not reflected in the senior ranks).

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[11] Nexus Network, Report, *An Analysis of Work Related Issues and Conditions of Lawyers in Western Australia*, (October 2013) http://www.wlwa.asn.au/projects/survey-of-the-legal-profession.html.

SUMMARY OF RECOMMENDATIONS – 1994 Report and 1997 Progress Report

1994 Report

The recommendations in Chapter 2 of the 1994 Report of the Chief Justice's Taskforce on Gender Bias ('**1994 Report'**)[12] can be categorised as:

- Recommendations concerning women in law schools: (Recommendations 16 – 34.) Recommendation 1 relates to law school curriculum and is addressed in Chapter 7 of the 2014 Review Report.
- Recommendations concerning gender bias in the private profession including:
    - Articled law clerks ('graduates'): Recommendations 35 – 38;
    - Women's areas of law: Recommendations 41 – 42;
    - Large commercial law firms: Recommendations 43 – 49;
    - Sexual harassment: Recommendations 50 – 51; and
    - Women at the Independent Bar: Recommendations 52 – 55.
- Gender Bias in the Office of the Director of Public Prosecutions ('DPP') and Crown Solicitor's Offices[13] including:
    - Recruitment: Recommendation 58;
    - Training: Recommendation 59;
    - Type of work and promotion: Recommendations 60 – 69;
    - Conditions of work: Recommendations 70 – 75; and
    - Equal opportunity: Recommendation 76.

1997 Progress Report

The 1997 Gender Bias Taskforce Progress Report ('**1997 Progress Report**')[14] did not directly address issues arising from Chapter 2 other than to acknowledge the then newly formed Joint Committee of the Law Society of Western Australia ('Law

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12 Western Australia Chief Justice's Taskforce on Gender Bias, *Report of the Chief Justice's Taskforce on Gender Bias* (30 June 1994) 74-75 http://www.wlwa.asn.au/projects/2014-gender-bias-taskforce-review.html.

13 Now the State Solicitors Office ('SSO').

14 *Women's Policy Development Office in conjunction with the Ministry of Justice, Gender Bias Taskforce Report: Progress Report: A Report on Implementation by Government of Recommendations Contained in the Chief Justice's Taskforce Report on Gender Bias* (April 1997) http://www.wlwa.asn.au/projects/2014-gender-bias-taskforce-review.html

Society') with Women Lawyers of Western Australia set up 'to develop a policy and implementation plan' which was designed to implement and follow up the 1994 Report.

DISCUSSIONS AND RECOMMENDATIONS ARISING FROM 2014 REVIEW

GENDER BIAS IN ACADEMIA – Women in Law Schools

1994 Recommendations

No specific recommendations were made in the 1994 Report in relation to university Law Schools. A general recommendation was made concerning curriculum content (which is discussed in Chapter 7 of this 2014 Review Report). Comments were made in relation to gender imbalance in academic staff members employed, their seniority in academia and fractional (part time) employment. With more men than women employed on academic staff, there were no females in the senior positions of associate professor and professor. Most fractional appointments were men who held positions in other legal organisations.

In 2014 the promotion criteria in universities remains focused on research output and publications in which women are less likely to participate or be promoted as a result of family commitments and maternity leave.

1994 Report to 2014 Review

Since the 1994 Report three new Law Schools have commenced in Western Australia: The University of Notre Dame Australia Law School ('UNDA') (1997), Edith Cowan University Law School ('ECU') (2007) and Curtin University Law School ('Curtin') (2013). Accordingly, there are now five law schools in Western Australia, with The University of Western Australia ('UWA') and Murdoch University making up the remaining institutions.

The increase in Law Schools caused a corresponding increase in the need for academic staff including women. The flexibility afforded in both full time and fractional appointments allows women to pursue a career in academia or in academia and practice combined. This addresses the 1994 Report's concerns of vertical gender imbalance (where all senior positions were held by men). Gender

Employment Statistics for the Education Providers are attached as **Attachment B**. However, all Deans' positions have been filled as full time positions.

2014 Themes

In the last decade women have progressed into senior positions in Law Schools, including the positions of Dean (Mary McComish at UNDA in 2004-05; Jane Power at UNDA in 2008-11; Anne Wallace at ECU in 2012 - current; and Erika Techera at UWA in 2013 - current) and the position of Assistant Deans.

In the Law Schools, women hold many of the fractional appointments and they may also hold an additional fractional appointment in practice.

The Law Schools currently provide flexible working arrangements for women, particularly in relation to family responsibilities.

The sessional appointments of staff to teach electives that require expert knowledge are more often men who hold senior positions (often partners) in legal organisations and are experts in the relevant area of law. Elective units cover specialty areas of law (such as Mining law and Employment law) and universities seek experienced, senior members of the profession to teach them.

The research requirements of academic staff make it difficult for women to achieve a promotion in academic levels, which in turn dictate salary, due to their family commitments. As University promotion remains dependent on research out put this requirement provides a barrier to women's advancement in academia.

2.1	University promotion committees in Western Australia do not refuse an application for promotion solely on the basis that a woman who is a primary caregiver of a family (including elderly parents) has not achieved the same amount of research and published works as her male counterpart, when all other requirements for promotion have been met.
2.2	Universities in Western Australia review the impact of promotional policies on female staff members with a view to implementing policies that support and encourage women's academic careers.

GENDER BIAS IN THE PROFESSION[15] – Graduates ('Articled Clerks')

Articled Clerks are now referred to as 'graduates' (and will be within this Chapter). Graduates generally qualify for admission by completing the College of Law requirements but may still qualify for admission by completing Articles over a 12-month period and the Leo Cussen Centre for Law is approved to provide this form of Practical Legal Training (PLT).

1994 Report to 2014 Review

An area of concern in 1994 related to gender based questions in employment interviews. In 2014, as a result of the substantial increase of graduates in the last decade, the issues arising from graduate consultations have been largely related to obtaining employment and working conditions in the first few years. Although some consultation responses suggested these issues were gender based the majority considered them more an issue of the legal profession and the culture within the profession. This echoes the concerns raised elsewhere in this Chapter in relation to the present culture of the legal profession.

2014 Themes

- Female law graduates are still earning less than their male counterparts. On average, female graduates earn 3.8 per cent or 7.8 per cent less than male graduates depending on the report.[16]
- The Law Society's subcommittee the 'Graduate Academic Standards Committee' monitors the processes of graduate recruitment. In addition, the five Law Schools, through the Graduate Recruitment Advisory Group with representatives from legal organisations, graduates and students, sets dates for the graduate application process.

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[15] In the 1994 Report the discussion came under the heading 'Gender Bias in the Private Profession'. The 2014 discussion and comments do not restrict the discussion to private organisations. Further issues identified in 2014 are set out below at page 51 under the heading 'New Issues identified in the 2014 Review'.

[16] 3.8% was the finding of the Victorian Equal Opportunity and Human Rights Commission *Changing the Rules: The Experiences of Female Lawyers in Victoria*; 7.8% was the finding of the Australian Government Attorney General's Department, *Legal Services Directions 2005* http://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Pages/Legalservicesdirectionsandguidancenotes.aspx. (accessed 12 April 2014).

- Due to the increased competitive nature of graduate employment because of the number of graduates, working conditions in some legal organisations are not conducive to good mental health or professional well-being including inadequate salaries, stressful conditions of work, long working hours and difficulty in achieving a work/life balance. This often affects women more as they have additional responsibility as primary caregiver of a family.
- The College of Law is willing to survey its students and alumni in an attempt to gather and report on gender employment figures. However, they are dependent on good survey responses.
- There is general logistical difficulty across the profession and universities in collecting information on graduate employment statistics.

2.3	The Law Society of Western Australia ('Law Society') continues to conduct its Graduate and Academic Standards Committee to monitor and advise on the graduate recruitment process.
2.4	The Law Society of Western Australia recommends guidelines or minimum standards for graduates in relation to aspects such as working conditions, salary, mental health issues, equal opportunity etc.[17]
2.5	The College of Law surveys its students and alumni annually in an attempt to gather data on gender balance in graduate employment.

PRACTICE ISSUES FACING WOMEN[18]

1994 Report to 2014 Review

The 1994 Report recommended that law firms be encouraged to include flexible working hours, permanent part-time work, job sharing, flexible work location, a career break scheme and childcare leave. It further recommended the Law Society and the Western Australian Bar Association encourage women's participation on their councils and committees and establish Equal Opportunity Guidelines and mentoring schemes.

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17 The Australian Young Lawyers' Committee is currently looking at this issue with a view to implementing a process through the Law Council of Australia.

18 Formerly entitled "Women's Areas of Law" in the 1994 Report. Some of these issues are also discussed elsewhere in this Chapter.

On the whole, the Subcommittee's investigation found that larger law firms still have less flexible work practices than government departments and smaller practices. The concept of the Law Society undertaking to publish annual reviews on employers' conformity with a published set of gender bias criteria is yet to be adopted. Further, there remains a need to continue to encourage women to go to the Independent Bar to ensure equal representation in all areas and levels of practice and provide those women with other opportunities in the profession. 'Women at the Independent Bar' is discussed further from page 157 onwards of this Chapter.

(Issues relating to women's appointment to the judiciary, whilst relevant to 'Women's Career Paths in the Law' are dealt with in Chapter 3 of the 2014 Review Report.)

The areas considered important for investigation included the concerns raised in the 1994 Report regarding the availability of flexible work practices and ascertaining what mentoring schemes are now available.

2014 Themes

The ability to work flexibly as appropriate to the individual (whether this be part-time, on reduced hours, at particular times of the day, on a job-share arrangement or out of the office) to juggle work with family responsibilities is a key issue for many lawyers, particularly women. These responsibilities may be the care of children or the care of elderly parents or other family members. The availability of flexible working arrangements is particularly pertinent to those who, due to the nature of their work, cannot utilise childcare centres or have limited options with respect to elder care.

The Subcommittee's investigations revealed that:

- Whilst most large employers have flexible working policies, many women lawyers experience difficulty in translating those policies into appropriate workplace practices that suit both parties.
- Billable hours may in some circumstances operate as a barrier to women whose work hours and patterns may require flexibility based on their parental and carer responsibilities.[19]

[19] Victorian Equal Opportunity and Human Rights Commission, *Changing the Rules: The Experiences of Female Lawyers in Victoria* (December 2012) 41

- A major ongoing issue for women lawyers and the legal profession more broadly is the acceptance and attitude (of supervisors, colleagues and employers more broadly) towards flexible work arrangements, so that undertaking a flexible work arrangement is not viewed in a negative light or has a negative impact on opportunities and career progression.

Part of the problem with the lack of acceptance of flexible work practices and poor attitudes to those utilising such practices is that employers are generally unaware of the ways in which they can be very successful and actually increase efficiency and staff satisfaction (leading to numerous flow-on effects including retention of experienced lawyers).[20]

Employers and employees are also often unsure of how to implement flexible work practices in their workplace. The dissemination of relevant information would be useful to inform the profession and assist in alleviating this very real barrier to women.

- Those considering using or already on flexible work arrangements are concerned about losing the opportunity to work on complex and high profile or client-facing matters (including trials and high stake commercial and transactional work), and the effect that working flexibly will have on their career progression. Lawyers already working part-time, and those sharing a full-time workload with another lawyer through co-working or job-sharing arrangements reported this issue to the Chapter 2 Subcommittee.

It is noted that there is a finite time whilst a worker has small children and women need to be supported during this stage of their career. When children reach school age their needs and the needs of the family change.

It remains essential that women retain (and ideally build on) their skills and knowledge whilst on leave. They require assistance from their employers to stay

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http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&id=1811:changing-the-rules-the-experiences-of-female-lawyers-in-victoria&Itemid=690.

[20] See, e.g., Australian Women Lawyers,, 'Let's Get Flexible', Opinion Piece on Flexible Work Arrangements (26 October 2012) http://www.australianwomenlawyers.com.au/uploads/publications/Opinion_Piece_on_Flexible_Work_Arrangements_26_October_2012.pdf;;Cathryn Greville, 'Flexibility in Practice' (2012) 39(5) *Brief* 8, 8; Law Society of Western Australia Flexibility Protocol for Flexible Workplace Arrangements – adopted from Victorian Women Lawyers, *Do You Manage? A Guide to Managing Lawyers with Flexible Work Arrangements* (July 2010) http://www.lawsocietywa.asn.au/page.php?id=217.

connected to the profession during this time. Women who do not keep their skill set and legal knowledge up to date find this presents another barrier when they wish to return to work after taking time off. Most professional development is run in the CBD or at the workplace. Accordingly, it is important that organisations and venues support women both on leave and upon their return to work by providing appropriate breastfeeding and parenting facilities.

Since the 1994 Report the WABA and the WLWA have established mentoring or pupillage schemes. Only Francis Burt Chambers provides a formal pupillage scheme for junior lawyers less than five years of admission; John Toohey Chambers has an informal scheme. Whilst useful for women barristers, this scheme applies equally to men and women who wish to join the Independent Bar.

Some Law schools have also implemented several mentoring schemes involving alumni, by WLWA and the Law Society, for students and junior practitioners (some for both genders). Examples include the University of Western Australia Blackstone Society's Women in Law Mentoring Scheme, the University of Notre Dame's former Graduate Transition Program, the Law Society's mentoring programs conducted with ECU and UNDA and with junior practitioners of less than five years admission. WLWA itself now has two mentoring programs – an informal and confidential ad-hoc mentoring scheme open to members at any time (and as many times as they require it), and the Advocacy Mentoring Scheme, established in 2012 for commencement in February 2013, which matches advocates of all levels with retired judges or senior barristers for hands-on critique and guidance in relation to practical advocacy skills.[21]

Though consultations did not evidence any 'channelling' of women into particular areas of the law, women remain overrepresented (as a proportion) in academia, non-governmental organisations, such as community legal centres, and government. These choices may be due to the mode of practice or flexibility that is available in these sectors. The Subcommittee was unable to find any empirical evidence of this but it was difficult not to draw this as a possible conclusion.

Anecdotally, it appears that women may be overrepresented (as a proportion) in family law and criminal law although this also does not appear to be the result of channelling into these areas of law.

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[21] Devised with The Hon Christine Wheeler QC AO, this is the first programme of its kind in Western Australia.

Women represent at least half of all junior litigation practitioners. However, that proportion does not continue into the more senior ranks of the profession.

2.6 The Law Society of Western Australia publishes information on flexible work practices, including guidelines and best practice examples of firms utilising such practices, on its website to inform the profession and broader public about flexible work practices generally.

2.7 The Law Society provides Continuing Professional Development sessions for lawyers (including partners and directors) as well as human resources and non-legal management and support staff regarding flexible work practices in commercial practice, including the implementation of flexible arrangements for men and women, best practice examples and addressing common pitfalls for employers and employees.

2.8 Employers actively implement, promote and appropriately support those on flexible work practices, including co-working and job-sharing arrangements, to ensure that flexibility is available to those who require it, and that flexible workers are not disadvantaged in terms of opportunity and advancement by working in such a manner.

MATERNITY LEAVE

1994 Report to 2014 Review

The sole recommendation in the 1994 Report in relation to maternity leave encouraged law firms to include flexible working hours, permanent part time work, job sharing, flexible work location, career break schemes and childcare leave.

While many legal employers now have policies addressing flexible working, the implementation and availability of those policies remains an issue for women in private practice. In particular, women are reliant on managerial discretion with respect to both the acceptance of a proposal for flexible work practices, and the implementation of a flexible arrangement. Further, women report that the general firm or organisational attitude toward such practices is integral to their success.[22]

[22] Nexus Network, *An Analysis of Work Related Issues and Conditions of Lawyers in Western Australia: Final Report* (October 2013)

The issue is not whether organisations have a policy, rather *how* that policy is applied within organisations by employers.

Since the 1994 Report, there have been further legislative changes regarding parental leave and the right to request flexible working arrangements.

All of the organisations consulted as part of the review have policies which incorporate a right to take parental leave and, in many cases, paid parental leave of various lengths and most have policies for flexible working arrangements. These policies apply equally to men and women. However, it is primarily women who take parental leave and who work flexibly, particularly for childcare reasons.

These policies have allowed women to maintain employment in all areas of law. However, promotion criteria in all organisations focus on criteria that favour employees who work full-time and not fractionally throughout their career. As such, even though women constitute significantly higher numbers of lawyers within the profession than was the case in 1994, and make up 61% of all lawyers admitted to practice, women are still significantly under-represented in all organisations at senior levels.[23]

The impact of maternity leave and the stage at which women may take maternity leave are factors that play a large role in whether women succeed in the law, as career progression can differ depending on whether a woman has her family early in her career or later when she has established herself.[24]

Reintegration into the profession after time off from employment, and limited support for the transition, remain major issues for women lawyers.

Childcare remains a key issue for women lawyers, both at the time of returning to work after maternity leave, and on a more ongoing basis, as suitable childcare arrangements are critical to enabling women lawyers to juggle work and family responsibilities and be able to succeed in the profession.

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http://www.wlwa.asn.au/images/stories/dmdocuments/Nexus_Network-Ch2FinalReport7Oct13.pdf

[23] Law Council of Australia, *National Attrition and Re-engagement Study (NARS) Report* (14 March 2014) 9 http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/NARS%20Report_WEB.pdf.

[24] Nexus Network, *An Analysis of Work Related Issues and Conditions of Lawyers in Western Australia: Final Report* (October 2013) http://www.wlwa.asn.au/images/stories/dmdocuments/Nexus_Network-Ch2FinalReport7Oct13.pdf.

2014 Themes

- The model of a senior member of the profession is still primarily a working partner with a stay at home spouse (quite often the partner is a male and his female spouse is at home).
- Parental leave and flexibility of work practices are an issue for both women and men and not a gender issue. It ultimately becomes a gender issue because women are most often the primary care giver.
- The vast majority of people on flexible working arrangements due to childcare responsibilities are women; very few men avail themselves of this opportunity.[25]
- Parental leave and the use of flexible work practices can and do impact substantially on career opportunities. Both overt and unconscious bias exists against those who work flexibly, including general perceptions that those on flexible arrangements are less serious about their careers. Further, the availability of high quality work is an issue for those on flexible arrangements.
- The time and fee based nature of the profession and cultural issues surrounding this type of billing practice[26] creates and exacerbates the problem of impact on one's career of taking parental leave and using flexible work practices.
- The impact of parental leave is less of a problem in government practice than private practice (where billable hours, 'face time' and post qualification years of cumulative experience is critical to promotion) and in academia (where research output is critical to promotion).
- Generally, mothers on maternity leave and returning to work face a number of personal and professional challenges. These may include a reduction in income (if going on leave or returning on less hours or in a different position to that held prior to leave), transitioning back into the workforce, juggling carer and

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25 Nexus Network, *An Analysis of Work-Related Issues and Conditions of Lawyers in Western Australia, October 2013* http://www.wlwa.asn.au/images/stories/dmdocuments/Nexus_Network-Ch2FinalReport7Oct13.pdf.

26 See the data and examples discussed in the Nexus Network, *An Analysis of Work-Related Issues and Conditions of Lawyers in Western Australia: Final Report* (October 2013) http://www.wlwa.asn.au/images/stories/dmdocuments/Nexus_Network-Ch2FinalReport7Oct13.pdf; See also Adele J Bergin and Nerina Jimmieson, 'Australian Lawyer Well-being: Workplace Demands, Resources and the Impact of Time-billing Targets' (2014) 21(3) *Psychiatry, Psychology and Law 1* http://www.tandfonline.com.

work responsibilities, rebuilding professional confidence, maintaining skills, overcoming a loss of current knowledge, arranging childcare, breastfeeding and expressing breast-milk in the workplace, and too often, discrimination related to pregnancy, parental leave or return to work,[27] or a combination of these factors.

- Women lawyers on maternity leave, with children or with elder care responsibilities often face additional challenges due to the high-pressure environment and traditional culture of the legal profession and the area in which they work. For example, a woman lawyer on or returning from leave must deal with the impact upon her relationships with the firm, colleagues and clients, retaining her currency of legal knowledge and skill, and often practical issues such as a lack of facilities in court, workplaces and professional venues to tend to the needs of her child (such as baby changing or feeding facilities or a private space to express breast-milk).
- The availability and affordability of childcare is a major issue for women lawyers wishing to return to work, and remaining in the profession. The childcare issues facing women lawyers include:
    - After hours and emergency care, which are both necessary for many women given the long hours and unpredictable nature of work (particularly court work for example). Childcare centre opening hours are limited, and therefore childcare centres are not a viable option for many lawyers.
    - It is also important for women to have back-up care for emergencies, or when regular childcare arrangements break down. In this regard, the Subcommittee notes the lack of crèches or childcare available in the Perth CBD, which creates further logistical difficulties for women lawyers should an emergency situation arise. A scheme has been successfully run in

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[27] One in two women in Australia report experiencing discrimination in the workplace during their pregnancy, parental leave or on return to work - Australian Human Rights Commission, 'Pregnancy and Return to Work: High Prevalence of Discrimination' (Media Release, 7 April 2014) https://www.humanrights.gov.au/news/media-releases/pregnancy-and-return-work-high-prevalence-discrimination; In Western Australia, of the 738 unlawful discrimination complaints received by the Equal Opportunity Commission of Western Australia in the 2012-13 reporting year, 22 were on the ground of pregnancy, predominantly in the area of employment, and 17 on the ground of family responsibility - Equal Opportunity Commission of Western Australia, Submission No 32 to the Australian Human Rights Commission, *National Review on Supporting Working Parents: Pregnancy and Return to Work*,1 http://www.humanrights.gov.au/submissions-supporting-working-parents-pregnancy-and-return-work-national-review.

New South Wales[28] to provide back-up childcare in these situations; however nothing of this type exists in Western Australia. Whilst the Law Society has a preferred supplier arrangement (including a discount on the first booking) with a business able to provide in-home childcare and aged care services,[29] Law Society members have not widely used this arrangement. The Subcommittee believes this is largely because it is not widely known.

- For those who can use childcare centres, the places available at quality centres are extremely limited, particularly in locations close to the city or the family's home, and obtaining a place requires placing the child's name down on a waiting list well in advance of the planned return-to-work date. Due to higher carer ratios and various centre policies, the demand for places for babies and children up to 12 and in some cases 18 months is particularly heightened, meaning it is more difficult to return to work whilst a child is small should a woman lawyer wish to do so.
- For those who cannot use childcare centres due to their work hours or the inability to obtain a place at a suitable childcare centre, the cost of private nannies or other more flexible childcare options is too high for many women, particularly those in the early to mid stages of their legal career.
- In any event, the cost of childcare relative to net income remains a major issue for women lawyers, and often means that the woman does not return to work as she would like to from a career perspective, or in some cases, for many years after the birth of her child. After a number of children, it is often the case that it is not economic to work and pay for childcare. The cost of childcare has been the subject of a number of reviews and recommendations for childcare reform,[30] including a call for

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28 New South Wales Bar Association, *In Home Child Care Scheme* http://www.nswbar.asn.au/docs/professional/prof_assist/childcare.php.

29 Dial-an-Angel http://www.dialanangel.com/. This arrangement is available to members, who must log into the Law Society's website to learn of it or access information about it.

30 See, e.g., Women on Boards, Women's Voices Workforce Participation and Taxation Project: Child Care Reform (November 2011) http://www.womenonboards.org.au/pubs/submissions/child-care-reform.htm.
David Baker, 'Trouble with Childcare: Affordability, Availability and Quality', The Australia Institute, Policy Brief No. 49 (March 2013) http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCcQFjAA&url=http%3A%2F%2Fwww.womenonboards.org.au%2Fpubs%2Freports%2F2013-australia-institute-

tax deductibility of childcare to assist families and support women in returning to the workforce.

- Whilst this Chapter does not allow a detailed discussion of childcare issues across the Australian workforce, the Subcommittee notes that childcare reform, particularly with respect to reducing the financial cost, is necessary to remove the considerable impediments that currently exist for women lawyers returning to work and advancing in their career, and encourages the Federal Government to address the issue promptly.

- The lack of suitable breastfeeding and baby changing facilities in the workplace and at external venues at which professional events are run is critical to ensuring women are able to participate fully in the workforce. This is the case whether a woman is on maternity leave (and conscious to maintain or build on their professional skills during that time) or has already returned to work after the birth of her child. The lack of parenting facilities is of particular concern to women lawyers given the mandatory continuing professional development ('CPD') requirements placed on lawyers to maintain their legal practicing certificates. Women lawyers need to be able to attend CPD events after the birth of their children to obtain the required number of CPD points. To not be able to feed or express breast milk at external venues has a discriminatory effect on women lawyers and their careers, not to mention denying them basic rights to care for their children.[31]

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trouble-with-childcare.pdf&ei=c9NXU4GgPI7HlAXvoIGgCQ&usg=AFQjCNFXOiiCovb4URdo6IBD4sRsHrU7pg&bvm=bv.65177938,d.dGI

[31] Cathryn Greville, 'Supporting Breastfeeding and Working Mothers' (22 December 2013) http://www.wlwa.asn.au/publications/latest-news-from-wlwa/537-supporting-breastfeeding-and-working-mothers.html; Women Lawyers of Western Australia (Inc.), *Submission to the Australian Human Rights Commission, Supporting Working Parents: Pregnancy and Return to Work National Review* (30 January 2014).

2.9 Employers address the issues limiting women's careers, including by:

a) the adoption of more flexible conditions for promotion, including amending terms for promotion to remove criteria purely based on post qualification experience ('PQE') or hours worked and to include criteria acknowledging work quality and output;

b) the provision of reintegration training to assist those on leave or returning from leave to maintain their skills and knowledge, particularly in relation to areas of law, practice and technology;

c) the determination of strategies to counter the view that flexible work equates to low career aspirations;[32]

d) the provision of networking and career-building opportunities for women, including those on maternity leave; and

e) the determination of strategies to ensure the needs of women returning from maternity leave are understood and appropriately accommodated, by engaging in honest and open dialogue with such women about the concerns they have and being prepared to implement change and improve office practices as a result of that dialogue.

2.10 The Law Society of Western Australia and Women Lawyers of Western Australia continue and actively promote their mentoring programs, particularly to women returning from leave.

2.11 The Law Society of Western Australia provides training for practitioners seeking to return to the profession after an extended period of time and such training to include issues relating to technology used in legal organisations, networking opportunities and professional and personal development skills.

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[32] See Australian Human Rights Commission, Accelerating the Advance of Women in Leadership: Listening, Learning, Leading Male Champions of Change (November 2013) 9 https://www.humanrights.gov.au/publications/accelerating-advancement-women-leadership-listening-learning-leading.

LARGE COMMERCIAL LAW FIRMS[33]

1994 Report to 2014 Review

The adoption of a code of conduct addressing gender bias and establishing procedures for its elimination has not yet been adopted and there is no annual reporting or publication of any results against these criteria. As such, these aspects of the 1994 Report remain unaddressed.

Since the 1994 Report, the demographics of the partners in the large commercial law firms have changed significantly. Whereas at that time, women represented only five per cent of the partners in these firms (and of those only 2.3 per cent of the female partners had children), presently 19.1 per cent of partners at the large commercial law firms are women. Of these, 14.2 per cent are female partners with children and 8.8 per cent have formal flexible work arrangements in place (for childcare/family reasons). A number of the male partners at the large commercial firms have formal flexible work arrangements in place (four in total) but none for childcare/family reasons.[34]

Many of the recommendations under this heading of 'Large Commercial Law Firms', in 2014 apply to other legal practices. The recommendations relating to unconscious bias, promotion opportunities, flexible workplaces, childcare and Virtual Private Networks ('VPNs'),[35] apply to all other law workplaces.

2014 Themes

- The large commercial law firms have recognised the business case of gender diversity and the necessity to introduce flexible work practices. All have

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33 Consultations were undertaken with large commercial law firms with more than 10 partners; the firms included those that may be larger in other parts of Australia but have a smaller local presence. The recommendations are directed to large firms who have the resources to collate the information and implement the recommendations; smaller firms may find the recommendations a burden on their resources.

34 Nexus Network, *An Analysis of Work-Related Issues and Conditions of Lawyers in Western Australia: Final Report* (October 2013) http://www.wlwa.asn.au/images/stories/dmdocuments/Nexus_Network-Ch2FinalReport7Oct13.pdf.

35 In using the term 'Virtual Private Networks' the Subcommittee is referring to technology that enables people to work from locations remote from their workplaces but allows exactly the same data, with the same look and feel as if the person was accessing the computer in the physical workplace.

policies in place around flexible work practices. As a result, part-time or flexible work is reported to be widely available.[36]

- There remains an unconscious perception that those who work part-time or take leave to have children are less serious about their careers.
- There is a significant gender divide in the reasons for lawyers utilising flexible work arrangements. The Nexus Survey[37] found that amongst respondents, all female law firm partners working flexibly did so for family reasons (including both child and elder care responsibilities). On the other hand, none of the male law firm partners had formal flexible work arrangements in place for family responsibility reasons, although many responded that they do work more flexibly than was the case in 1994, for other reasons such as board positions and sessional academia.
- The nature of work in large commercial law firms often makes it difficult for women to work part-time or progress in their careers if they are the primary care giver. Many of the female partners are the primary income earner in their household with a partner at home playing a more supportive role.
- The average age and experience of the female partners is significantly lower than their male counterparts. This suggests that there still appears to be an issue with longevity in the profession for women, even at partner level as so few women remain in it long enough to achieve these positions.
- The entrenched culture of the legal profession exacerbates the challenges faced by those who are primary care givers to children or family members, and is a contributing factor to problems such as poor mental health and depression, high rates of attrition, and general dissatisfaction with legal practice.[38] The culture of the legal profession is discussed further below from page 174 onwards.

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36 However, refer to discussion above at pages 25-28 regarding the difficulties faced by women on flexible work arrangements.

37 Nexus Network, *An Analysis of Work Related Issues and Conditions of Lawyers in Western Australia: Final Report* (October 2013) http://www.wlwa.asn.au/images/stories/dmdocuments/Nexus_Network-Ch2FinalReport7Oct13.pdf.

38 See, e.g., Chris Bates, Views from the Bench: Addressing Critical Issues Facing Western Australia's Legal Profession (Interview with The Hon Chief Justice Wayne Martin) (2014) 41(2) *Brief*, 16; Law Society of Western Australia, *Report into Psychological Distress and Depression in the Legal Profession* (2011).

- The availability and affordability of childcare (discussed above at pages 74-78), and being able to effectively juggle work and family responsibilities (discussed above under 'Maternity Leave' commencing at page 142) remains central to a woman's decision to return to work after having a child, the role she takes on, and whether she remains in the legal profession in the longer term.
- The everyday reality of childcare centre drop off and pick up not only causes considerable stress for many families, but in many cases has negative implications for workers who are seen as not serious about their career, or not hard working, when they arrive at the office late or leave the office earlier than other colleagues. Such negative perceptions are heightened in the legal profession in which performance is measured by time-based billing and there is a culture of long hours at work.[39] The lack of understanding or support from employers and colleagues has led to some women feeling that they cannot juggle it all and ultimately exiting from the legal profession altogether.
- Ultimately, the attitude of and support provided by employers is critical to the careers of working mothers and there are things that firms can do to assist with this transition, including being understanding of carer responsibilities which may take her out of the office. Extremely supportive employers may be able to offer assistance to new parents or corporate incentives for employees in the way of vouchers for childcare or domestic support services such as cooking or cleaning.[40]

2.12 The Law Society of Western Australia sets, publishes and promotes targets for the number of women in legal practice and asks law firms to report to the Law Society annually on achievement of these targets as a reporting requirement associated with the Law Society's Quality Practice Standard ('QPS'), or in the case of national and international firms utilising other quality assurance systems as part of the duties of a good corporate citizen.

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39 The culture of the legal profession is discussed below at page 178

40 Dial-an-Angel, 'Case Study – Emergency Childcare' and 'Dial-an-Angel Executive Summary' documents (4 September 2013).

2.13 Employers implement strategies to achieve these targets including:

a) targeted coaching;

b) sponsors and mentors including case managing those returning from parental leave; and

c) ensuring lawyers (generally senior associates and partners) who work flexibly continue to progress their careers.

2.14 Unconscious bias training be made mandatory and regular (at least every 3 years) as part of the Continuing Professional Development requirements of the Legal Practice Board of Western Australia for the renewal of practicing certificates.

2.15 Employers consider what steps they can take to implement cultural change to ensure that:

a) there is less focus on 'face time';

b) there are good role models within the firm and support for women; and

c) formal flexible working arrangements are mainstreamed.

2.16 Employers more appropriately accommodate flexible work practice by:

a) providing remote access and Virtual Private Networks;[41] and

b) implementing firm wide policies on expectations relating to completion of work outside business hours, to ensure hours of work are reasonable and not abused.

2.17 Employers consider what steps can be taken to assist with access to and the cost of childcare, including preferred supplier arrangements with childcare providers and salary packaging.

2.18 The Western Australian Bar Association appoints a diversity representative to support and promote career progression for women to the Independent Bar.

2.19 Large commercial firms appoint a diversity representative to support and promote career progression for women.

[41] In using the term 'Virtual Private Networks' we refer to technology that enables people to work from locations remote from their workplaces but allows exactly the same data, with the same look and feel as if the person was accessing the computer in the physical workplace.

SEXUAL HARASSMENT

1994 Report to 2014 Review

Recommendation 2.7 of the 1994 Report was that sexual harassment be included as unprofessional conduct under the (then) Professional Conduct Rules. At the time of the 1994 Report, the Professional Conduct Rules were an instrument of the Law Society. This is no longer the case, due to the enactment of the *Legal Profession Act 2008* (WA). The rules relating to legal professional conduct are now set out in the *Legal Profession Conduct Rules 20*10 (WA), compliance with which is monitored by the Legal Practice Board of Western Australia ('Legal Practice Board').

The Law Society did not directly implement the 1994 recommendation.

Currently, rule 17(5) of the *Legal Profession Conduct Rules 2010* (WA) provides that:

> *a practitioner must not engage in conduct which constitutes:*
> *(a) unlawful discrimination; or*
> *(b) unlawful harassment; or*
> *(c) workplace bullying.*

A breach of the *Legal Profession Conduct Rules 2010* (WA) 'may constitute unsatisfactory professional conduct or professional misconduct'.[42] Whilst sexual harassment is still covered in the *Legal Profession Conduct Rules 2010* (WA), the wording differs from the 1994 Recommendation.

Sexual harassment was a major issue in the 1994 Report and 1997 Progress Report. The Subcommittee considered it important to ascertain the impact that raised awareness of sexual harassment, and its indirect inclusion as a breach of the *Legal Profession Conduct Rules 2010* (WA) and Rule 117 of the *Western Australian Barrister's Rules*, has had on workplaces in 2014.

Rule 117 of the Western *Australian Barristers' Rules* prohibits, amongst other things, sexual harassment and workplace bullying.

In June 2013, the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cwlth) extended the list of circumstances to

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[42] *Legal Profession Conduct Rules 2010* (WA) r 4(2).

be taken into account when assessing whether or not sexual harassment has occurred.[43]

The Subcommittee's investigation included a review of the relevant literature on the subject of sexual harassment, industry consultations, and the results of the Nexus Report commissioned for this chapter.

2014 Themes

- Across Australian workplaces, sexual harassment is a persistent workplace issue with high profile cases reported in the media,[44] and projects around Australia aimed at challenging sexual harassment in the workplace by encouraging public dialogue and informing of one's rights.[45]
- In 2012-13, sexual harassment was the third most common ground of complaint (behind impairment and race) to the Western Australian Equal Opportunity Commission, and all but one of the sexual harassment cases dealt with sexual harassment in the workplace.[46] It is noted however that many incidences of sexual harassment are not reported.

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43 Community Legal Centres Association (WA) Inc. and the King & Wood Mallesons Human Rights Law Group, Human Rights in Western Australia: A Report Card on Developments in 2013, 168-9 http://www.mallesons.com/Documents/Human%20Rights%20Report%20Card%202013.PDF Citing Australian Human Rights Commission, 'Sexual Orientation, Gender Identity And Intersex Amendments A Step Closer To Full Equality' (Media Release, 26 June 2013) https://www.humanrights.gov.au/news/media-releases/sexual-orientation-genderidentity-and-intersex-amendments-step-closer-full.

44 Community Legal Centres Association (WA) Inc. and the King & Wood Mallesons Human Rights Law Group, Human Rights in Western Australia: A Report Card on Developments in 2013, 168-9 http://www.mallesons.com/Documents/Human%20Rights%20Report%20Card%202013.PDF Citing Lucille Keen, 'Energy Exec Mcindoe Said He Feared 'Tattslotto' Sexual Harassment Case', *Australian Financial Review* (online) 2 September 2013 http://www.afr.com/p/national/energy_exec_mcindoe_said_he_feared_ic67lELzIy1sxuWkG4hRzK.

45 See, e.g., Jessie Street Trust, *See Hear Speak*, (2013) Jessie Street Trust http://jessiestreettrust.org.au/campaign-2012/

46 Of the 738 complaints received and 2332 enquiries handled in 2012-13 financial year, 83 complaints were about sexual harassment, Government of Western Australia, *Equal Opportunity Commission Annual Report 2012-13* http://www.eoc.wa.gov.au/Libraries/Annual_reports/Annual_Report_2012_-_2013_-final_web_version.sflb.ashx.

- During consultations for this Review, no significant sexual harassment issues were reported to the Subcommittee, either by employers or employees, as having been experienced in any of the consulted workplaces in Western Australia.
- However, the Nexus Survey identified some overt instances of sexual harassment in the workplace.
- The literature review also revealed that sexual harassment is still prevalent in the legal profession. In fact, one in four women in Australia experience sexual harassment in their workplace.[47]
- Many female lawyers who experience sexual harassment in the workplace may suffer mental health and physical health issues, as well as work and economic related consequences.
- It was noted that sexual harassment was likely to occur in the early stages of employment and in more than 75 per cent of cases the harasser held a more senior position within the workplace.[48]
- Accordingly, sexual harassment continues to be an issue for a large number of women in the legal profession despite the protection afforded by legislation.[49]

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47 Law Council of Australia, *National Attrition and Re-engagement Study (NARS) Report* (14 March 2014) 9 http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/NARS%20Report_WEB.pdf.

48 Victorian Equal Opportunity and Human Rights Commission, *Changing the Rules: The Experiences of Female Lawyers in Victoria* (December 2012) 32 http://www.humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/reports/item/487-changing-the-rules-%E2%80%93-the-experiences-of-female-lawyers-in-victoria.

49 Ibid; for example of the 400 female lawyers who responded to a survey by the Victorian Equal Opportunity and Human Rights Commission, 23.9 per cent had experienced sexual harassment while working as a lawyer or a legal trainee. One in four women respondents to the NARS survey reported having experienced sexual harassment in their workplace - Law Council of Australia, *National Attrition and Re-engagement Study (NARS) Report* (14 March 2014) 9 http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/NARS%20Report_WEB.pdf.

- There is merit in having independent and confidential information and counselling services available to legal practitioners experiencing, amongst other things, instances of unprofessional conduct or professional misconduct (including sexual harassment). The Subcommittee notes and commends the Law Society for its Law Care (WA) programme, which provides information services and up to three free counselling sessions to members who need to access it.[50] This program is also available to members who are in the 'on-leave' category of membership, such as those on parental leave.

2.20 Employers implement, or work to improve, sexual harassment policies and educate staff (both legal and non-legal) about what constitutes sexual harassment and that sexual harassment will not be tolerated in any form, through induction training and ongoing training programs.

2.21 The Law Society of Western Australia:

a) promotes understanding and awareness of the sexual harassment clauses of the Professional Conduct Rules to members of the profession;

b) conducts CPD sessions (attracting CPD points in the areas required by the Legal Practice Board for the renewal of practicing certificates) relating to sexual harassment in workplaces; and

c) makes practitioners aware of the ability to speak to a senior practitioner and/or Senior Counsel in relation to ethical and professional misconduct issues (including in relation to sexual harassment by another practitioner).

2.22 The Law Society of Western Australia continues its Law Care (WA) counselling and information service and promotes the service and its ability to assist practitioners experiencing difficulties including dealing with instances of unprofessional conduct or professional misconduct.

[50] Law Society of Western Australia, website: http://www.lawsocietywa.asn.au/lawcarewa.html.

WOMEN AT THE INDEPENDENT BAR

1994 Report to 2014 Review

Recommendation 10 in the 1994 Report that the Law Society undertake an annual, published review of 'the degree to which all employers of lawyers and the Independent Bar and all government bodies and agencies conform to a set of published criteria concerning gender bias' is still to be addressed. The WABA has adopted an equitable briefing policy entitled the 'Model Briefing Policy'.[51]

Apart from the introduction of WABA's Model Briefing Policy and the commencement of a WLWA mentoring scheme, most of the recommendations remain unaddressed.

In 1994 the small number of women practicing at the Independent Bar was of concern. The barriers women faced to establish themselves at the Independent Bar were high, particularly in commercial matters where male solicitors were generally not briefing women. Both the low numbers of women at the Independent Bar and the unique barriers facing women at or going to the Independent Bar remain of concern in 2014.

The improved gender diversity on courts and tribunals, with women judicial officers particularly drawn from the Independent Bar, has contributed to a lack of senior women at the Independent Bar. In 2014 there are now more women practising at the Independent Bar than in 1994, with women comprising approximately 20 per cent of members of the Independent Bar,[52] however the issues facing women barristers remain the same. The increase in women barristers has provided greater informal peer support opportunities, however there remains a lack of formal mentoring for women at the Independent Bar.

The Subcommittee consulted with various members of the two largest Bar Chambers.[53]

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51 Western Australian Bar Association *Model Briefing Policy* (June 2011) http://www.wabar.asn.au/images/Model_Briefing_Policy__June_2011_(1).pdf.

52 See Western Australian Bar Association website: www.wabar.asn.au.

53 Francis Burt Chambers and John Toohey Chambers. Both male and female members were consulted.

2014 Themes

- Women's experiences at the Independent Bar vary widely. Most women report that it is, to some degree, more difficult for a woman to practise at the Independent Bar and to receive briefs than it is for a man but no one reason is given for that difference. Some of the reasons given include family duties including elder care and breaks in continuous work due to maternity leave.
- Statistics available from the National 2009 Court Appearance Survey[54] (in which male and female barristers appeared in the survey population in the same proportion as they appeared in the population of the Independent Bar) indicate that male barristers appear in 86 per cent of appearances briefed by private law firms and in 70 per cent of all appearances briefed by other entities.[55] In addition the court appearance time (for matters resulting from private law firm briefings) with respect to male barristers was 3.8 hours whereas for female barristers it was 2.8 hours.[56]
- The results from the Court Appearance Survey were collated by each state and the Western Australian figures demonstrated that average male barrister court appearance times were 28 per cent higher than female barrister court appearance times.
- In August 2010, the WABA commissioned a research project to investigate the barriers and pathways towards creating a diverse bar and judiciary in WA.[57] The investigation suggested that a focus on broad cultural change in the profession, rather than a focus on making the profession more accepting of women and other minorities, may be the more appropriate and successful methodology for addressing the inequity. The research, in this regard, reported a clear perception of bias in the legal profession against women and racial

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54 Law Council of Australia, *Beyond the Statistical Gap: 2009 Court Appearance Survey Report* (2009) http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Beyond%20the%20statistic%20gap%20-ItemB_3-AttachmentA.PDF

55 Law Council of Australia, *Beyond the Statistical Gap: 2009 Court Appearance Survey Report* (2009) http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Beyond%20the%20statistic%20gap%20-ItemB_3-AttachmentA.PDF .

56 Law Council of Australia, *Beyond the Statistical Gap: 2009 Court Appearance Survey Report* (2009) http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Beyond%20the%20statistic%20gap%20-ItemB_3-AttachmentA.PDF .

57 Jill Howieson and Tomas W Fitzgerald 'A Cultural Challenge for the Western Australian Legal Profession: Lack of Diversity at the WA Bar?' (2012) 36(1*) University of Western Australia Law Review* 227.

minorities. It did not investigate the existence of such a bias in the profession but expressed the concern as to the mere existence of the perception.

- There is little data to determine the reasons why there are lower numbers of women at the Independent Bar.[58]
- The WABA adopted its Model Briefing Policy in 2005, updated in 2008 and 2011,[59] and advocated for it to be adopted by both clients and legal practitioners (including in-house counsel). The WABA has advised that the policy is currently under review. The Model Briefing policy advocates that when briefing counsel 'reasonable' endeavours should be made to identify and engage female barristers and regularly review the 'nature and rate' of that engagement. However, the Subcommittee's consultations revealed that the policy is not well known either within or outside of the Independent Bar, thereby restricting its effectiveness.
- Lawyers and the public are able to search separately for women barristers on both the WABA website[60] and the website of Francis Burt Chambers.[61]
- Since 2005, the Commonwealth has enacted the *Legal Services Directions 2005,* which is made under the *Judiciary Act 1903* (Cwlth) (the '*Legal Services Directions*'). The Legal Services Directions have as Appendix D a document entitled the 'Engagement of Counsel'. Clause 6 of the *Legal Services Directions 2005* requires Commonwealth agencies to brief in accordance with Appendix D, which in turn provides that the Commonwealth agencies (and their legal service providers) are particularly encouraged to brief women.[62] The Subcommittee understands that legal service providers tendering for Commonwealth agency work are required to report as to their briefing of counsel in accordance with Appendix D. The Subcommittee does not have data from which it can state conclusions as to the impact of the *Legal Services Directions* on the briefing of women by Commonwealth agencies. Anecdotally, however, it appears that the

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59 Western Australian Bar Association, Model Briefing Policy, (June 2011) http://www.wabar.asn.au/images/Model_Briefing_Policy__June_2011_(1).pdf.

60 http://www.wabar.asn.au/.

61 http://www.francisburt.com.au/.

62 By clause 11 of the *Legal Services Directions*, a Commonwealth agency is responsible for ensuring that both the agency and its legal service providers, amongst other things, brief in accordance with Appendix B.

Legal Services Directions, including Appendix D, have had a positive impact on increasing the number of briefs to women on behalf of Commonwealth agencies.

- The Bar Readers' Course[63] is now compulsory for all new barristers (unless an exemption is granted by Bar Council). This course covers four modules – 'Advocacy, Evidence, Ethics and Jurisdiction and Procedure'.[64]
- Presently, the WABA does not have a maternity or parental leave policy. Francis Burt Chambers has policies designed to accommodate maternity or parental leave and these are presently being reviewed.
- Court hours (court timing aspects) pose a significant problem for all practitioners (including barristers) involved in litigation that have parental or family responsibilities. Court hours are generally not conducive to women with young or school aged children or with elder care responsibilities, depending on the family member's requirements. There are at least three aspects to this:
    - The Supreme Court, Federal Circuit Court, the District Court and the State Administrative Tribunal have scheduled some of their work from as early as 9 – 9.15am;[65]
    - When matters run late, or into days which had not been previously allocated, serious difficulties are posed for practitioners with family responsibilities; and
    - The increasing tendency of some courts to regard evening or weekends as available working time when giving directions or setting timetables for litigation.
- These 'court timing aspects' disproportionately impact on women because they generally have the primary family responsibilities.
- WLWA has received support from most heads of jurisdiction about court starting times. For example, in respect of requests to be put at the end of a list

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63 Conducted once every year and only open to WABA members or practitioners who provide written confirmation of their intention to join the independent Bar within a reasonable period of time (e.g. 12-18 months) after undertaking the course.

64 WABA website:http://www.wabar.asn.au/?rt=article/38&m=50&p=22.

65 These changes have occurred largely as a result of the introduction of the Commercial and Managed Cases (CMC) List in the Supreme Court.

if the lawyer cannot be there before a certain time due to school drop off etc. These options appear to be increasingly used – however they are still not used extensively.

- With respect to the appointment of women Senior Counsel, prior to 2013 there were only two women Senior Counsel[66] out of 36 Senior Counsel (only 5.5 per cent) practising at the Independent Bar.[67] A breakdown of the number of women and men appointed Senior Counsel from 2002 to 2013 is included at Attachment C.

- In December 2013 an additional three women were appointed,[68] representing the first time in an Australian jurisdiction a majority appointment of women Senior Counsel and constituting a marked increase in total number of women Senior Counsel. Two of these new women Senior Counsel are practicing in State entities – one is at the DPP and one at the Legal Aid Commission of Western Australia. There are presently 31 Senior Counsel practicing at the Independent Bar, five of whom are women (12 per cent).[69]

- The Subcommittee is pleased to note the appointment of Senior Counsel who has used flexible work practices in the course of her career. Ms Karen Farley SC was appointed Senior Counsel in the most recent round of appointments in December 2013. The Subcommittee notes however that the Senior Counsel protocol[70] does not explicitly address flexible or part-time practice as a potential barrier to being appointed Senior Counsel. Accordingly, notwithstanding Ms Farley's appointment as Senior Counsel, the Subcommittee considers that (as adopted by the NSW Bar) the Senior Counsel protocol should be amended to

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66 The Office of Senior Counsel replaced the Office of Queens Counsel in 2001 – Supreme Court of Western Australia, 'Senior Counsel to Replace Queens Counsel in WA' (Media Alert, 24 September 2001) http://www.supremecourt.wa.gov.au/_files/Media_Alert_24_September_2001.pdf.

67 Both of these silk practise predominantly in commercial litigation.

68 One of whom practices in commercial law and two practice in criminal law.

69 Western Australian Bar Association website: http://www.wabar.asn.au/?rt=barrister/searchList&m=19&p=0.

70 Supreme Court of Western Australia, *Consolidated Practice Directions* (2009; last updated 21/3/2014), Practice Direction 10.3 - The Appointment of Senior Counsel in Western Australia, available at http://www.supremecourt.wa.gov.au/_files/SCPracticeDirections.pdf.

ensure that working flexibly or on a part-time basis is never seen as a barrier to Senior Counsel appointments in the future.[71]

- A lack of women Senior Counsel is important to the progression of women in the profession generally for at least two reasons:

  1) Judges in the superior courts tend to be appointed from the rank of Senior Counsel; and

  2) The appointment of women as Senior Counsel provides significant and encouraging role models for women in the profession generally, and provides female mentors and perspectives, including for those who call on Senior Counsel in relation to ethical and professional issues (part of the responsibility of accepting appointment as Senior Counsel).[72]

- The small number of practising women Senior Counsel clearly demonstrates a lack of progression of women at the Independent Bar and reflects poorly on the profession more broadly.

- The Western Australian Independent Bar has traditionally experienced difficulties attracting women to join, particularly junior women. Many young lawyers aspiring to become barristers go to the eastern states where it is more widely accepted to go to the Independent Bar as younger practitioners, and where there are split professions.[73]

- Pupillage and mentoring is currently the responsibility of individual Bar Chambers, and junior practitioners interested in joining the Independent Bar are required to approach senior members of the chambers to discuss pupillage.[74]

- The pupillage programme at Francis Burt Chambers[75], which has been in operation since around 2004, is generally open to practitioners who have been admitted for no longer than five years in any jurisdiction (although exceptions can be made) and provides guidance to younger practitioners joining the

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71 Leanne Mezrani, 'Breaking Old Habits', *Lawyers Weekly* (online), 11 September 2012.

72 Supreme Court of Western Australia, *Consolidated Practice Directions* (2009; last updated 21/3/2014), Practice Direction 10.3 - The Appointment of Senior Counsel in Western Australia http://www.supremecourt.wa.gov.au/_files/SCPracticeDirections.pdf.

73 Tom French, and Michael Robbins, 'Going to the Bar' (2010) 37(11) *Brief* 26, 29.

74 WABA website: http://www.wabar.asn.au/?rt=article/40&m=52&p=22

75 The Pupillage Scheme: Francis Burt Chambers http://www.francisburt.com.au/images/stories/policies/PuplillageScheme.pdf.

chambers. Because of the different structures of barristers' chambers in Perth, the Subcommittee was advised that it is not possible for WABA to formulate a programme for all chambers; rather it is the responsibility of each chamber. At this stage only Francis Burt Chambers has a published pupillage programme in place.

- Through the course of the consultations it became apparent that the Francis Burt Chambers pupillage programme would benefit from some improvements such as:
    - Having a person outside the cell oversee how the programme is working for each pupil.
    - Identifying the particular pupil's areas of need and ensuring the pupil is learning and building on practical skills essential for employment as a barrister. For example, a pupil may benefit from being taken to court more often, shown how to draft difficult pleadings and opinions, develop case strategy skills, be taken to client meetings and/or attend court hearings of the pupil's master.
    - More mentoring for the pupil from barristers outside of the cell (to broaden the perspective and practice experience for the pupil).
    - Training on the practicalities of running a business would also assist junior barristers, particularly in areas such as how to build a client base, run a practice at the bar, and manage clients and finances.
- There is an opportunity to build on informal mentoring currently available at chambers level with a more formal program, overseen by WABA that matches barristers with experienced mentors, drawn from either their chambers or another set of chambers, to provide practical advice and support at various stages of one's career at the Independent Bar. Such a program should focus on practice issues specific to the prospective junior barrister, and complement existing informal mentoring arrangements available at individual chambers. It should also complement the pupillage program available at Francis Burt Chambers.

2.23 The Western Australian Bar Association:

a) reviews, assesses and effectively publicises its Model Briefing Policy;

b) collects feedback from instructing solicitors and barristers as to the nature and rate of engagement of female barristers and any perceived obstruction or incentive to such engagement; and

c) adopts a policy directed to practising barristers that seeks to achieve the objectives of its Model Briefing Policy, including those relating to working flexibly.

2.24 The Western Australian Bar Association implements a formal mentoring program open to all barristers, including junior barristers and those undertaking pupillage, that matches barristers with experienced mentors from various chambers, to provide practical advice and support specific to the environment of the Independent Bar.

2.25 The Law Society of Western Australia and the Western Australian Bar Association lobby the State Government to adopt a policy similar in content and purpose to the Commonwealth's *Legal Services Directions*,[76] especially as it relates to the briefing of women by State agencies.

2.26 All Bar Chambers review or introduce parental leave and other policies, to facilitate members taking, and returning from parental leave and those working flexibly.

2.27 The Law Society of Western Australia and the Western Australian Bar Association support WLWA in requesting that the courts avoid or minimise the listing of matters in a way that disadvantages those with family responsibilities, in particular, that matters should generally not be listed before 9.15am or after 4.30pm save for emergencies.

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[76] Australian Government Attorney General's Department, *Legal Services Directions 2005* http://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Pages/Legalservicesdirectionsandguidancenotes.aspx.

2.28 Private firms be encouraged to adopt legal reporting to the Law Society on their expenditure in the same manner as government departments which outline the number of women and men briefed by number of briefs and total fees paid, with the aim to highlight pay inequity where it occurs.[77]

2.29 The Law Society of Western Australia and the Western Australian Bar Association make submissions to the Supreme Court to adopt a policy (similar to the NSW Bar) explicitly stating in the Senior Counsel protocol that a flexible or part-time practice is not a barrier to being appointed Senior Counsel.[78]

2.30 The Western Australian Bar Association implements a program to encourage more women to practice as barristers in all areas of practice, including commercial litigation.

GENDER BIAS IN THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS (DPP) AND STATE SOLICITOR'S OFFICE (SSO)

1994 to 2014 Review

No specific recommendations were made in the 1994 Report in relation to the DPP and SSO. However, there was commentary on the practices at those offices, which have been addressed by the 2014 Review.

Many of the issues raised in the 1994 Report in respect of each of the DPP and SSO have been addressed. Each of these offices has significantly grown since the 1994 Report, and more formalised structures exist for employment, promotional opportunities and allocation of work. For example, both offices are subject to the *Public Sector Management Act 1994* (WA) that requires a committee of three people to consider employment and promotion, at least one of whom must be a woman.

2014 Themes

- Over the last decade women have progressed into senior positions at both the DPP and the SSO, although it is to be noted that no female has yet been appointed to the role of Director or State Solicitor respectively.

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77 Law Council of Australia, Submission to House of Representatives Standing Committee on Employment and Workplace Relations, *Inquiry into Pay Equity and Associated Issues Related to Increasing Female Participation in the Workforce*, 23 April 2009.

78 Leanne Mezrani, 'Breaking Old Habits', *Lawyers Weekly* (online), 11 September 2012.

- Both offices employ more women than men, although the women are concentrated at the junior levels within each office. At the DPP, 69 of the 123 legal staff (56 per cent) are women, but men overtake women at Level 5 Legal Officers (which is the equivalent of a Senior Associate in a commercial law firm).[79] At the SSO, women outnumber men until the most senior levels within the office. Men only have greater representation at the Class 4 and SAT levels (equivalent to equity partner and senior management in a commercial law firm).[80]
- The DPP implemented an Equal Opportunity Management Plan, covering the period 2010-13, which includes specific targets and strategies to promote gender equity in the DPP.[81]
- Both offices have significant numbers of staff working flexibly, although a significant gender divide exists in the reasons for flexible work arrangements. All but one of the women working flexibly do so due to family responsibilities, whereas only some of the men do so because of family responsibilities. There are significant limitations at both offices for technology support for flexible workers, such as the lack of provision of iPads and/or iPhones. This is largely due to public sector requirements regarding confidentiality and inflexibility along with budgetary constraints.
- At the SSO, applicants for reclassification or promotion are assessed by reference to the quality of their work, their autonomy and their experience – taking into account their years of post qualification experience ('PQE'), the number and complexity of matters handled, and the hours worked. In particular, for reclassification, there is a requirement to have performed higher duties for a continuous period of not less than 12 months of full time work. Applicants for reclassification or promotion must put themselves forward for consideration; there is no formal process for people to be invited or asked to apply.[82]

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79 Office of the Department of Public Prosecutions, *Annual Report 2012-13*, 41 http://www.dpp.wa.gov.au/_files/ODPP_Annual_Report_2012_13.pdf.

80 Consultation with representative of the State Solicitor's Office on 10 December 2013.

81 Office of the Department of Public Prosecutions, *Annual Report 2012-13*, 5 http://www.dpp.wa.gov.au/_files/ODPP_Annual_Report_2012_13.pdf.

82 Consultation with representative of State Solicitor's Office on 10 December 2013.

- At the office of the DPP, promotion opportunities are largely based on having exposure to increasingly longer trials and more complex matters. These criteria very significantly reduce the opportunities for women working flexibly to be promoted, having the unintended impact of limiting the career path of flexible workers, particularly women.
- Such issues could easily be overcome through internal resourcing and the promotion of job sharing and co-working arrangements to assist those working flexibly to retain the opportunity to conduct complex and lengthy trials in high profile matters.
- Aspects of court listings and timing of appearances, in particular for criminal matters, pose a significant problem for employees at the DPP with parental or family responsibilities – particularly when matters run later or into days not previously allocated. It has been reported that a number of judicial officers have expressed their displeasure at the changeover of counsel for minor court appearances, despite it being made clear that the main counsel does not work on the particular day of that appearance.
- The DPP has recently introduced a mentoring programme comprising two components:

  1) a formal mentoring program for the DPP's articled clerks and restricted practitioners; and

  2) a voluntary mentoring program whereby any DPP staff member will be able to seek out a mentor from a list of approved DPP mentors.

  The first component was introduced in February 2014 and the second component is due to commence before June 2014.

Office of the Director of Public Prosecutions of Western Australia (DPP)

2.31 The DPP supports women with family responsibilities to progress their careers and:

a) adopts more flexible conditions for promotion to ensure that working flexibly does not limit career opportunities;

b) works with the courts to avoid or minimise the listing of matters in a way that disadvantages those with family responsibilities; and

c) adopts support practices to ensure that those working flexibly are afforded the opportunity to conduct complex and lengthy trials in high profile matters.

State Solicitors Office ('SSO')

2.32 The SSO supports women with family responsibilities to progress their careers and:

a) adopts more flexible conditions for promotion (rather than just hours and years worked) to ensure that working flexibly does not limit career opportunities;

b) actively supports and accommodates flexible work arrangements, including providing access to appropriate technology platforms and addressing cultural barriers; and

c) ensures the existence of good role models (including those working flexibly), and ensures that women on flexible arrangements have access to mentors who are supportive of their arrangement.

2.33 The SSO implements strategies to encourage women to apply for senior positions including through targeted coaching, and formal allocation of sponsors and mentors.

NEW ISSUES IDENTIFIED IN THE 2014 REVIEW

Three major issues were identified in the 2014 Review that were not directly addressed in either the 1994 Report or the 1997 Progress Report. These are:

- conditions of work including salaries and drawings;
- availability of career support; and
- the changed culture of the profession.

In addition, the terms of reference for the 2014 Review Report required the Chapter 2 Subcommittee to address:

- statutory boards and committees; and
- women leaders in the law.

These issues arose from the Subcommittee's consultations, literature review, the 2014 Review Report terms of reference and the Nexus Survey. However not all of these issues resulted in the Subcommittee making recommendations, for the reasons discussed below.

Conditions of Work Including Salaries and Drawings - 2014 Review

In 2014 women lawyers still face considerable gender bias with respect to conditions of work including salaries and drawings, limiting their opportunities for career advancement and success in the profession.

There remains a noticeable pay gap between men and women in Australia. In 2013 (across all sectors) there was a 17.5 per cent pay gap between men and women, with the gap having widened in favour of men.[83]

The Federal Government's Workplace Gender Equality Agency Report[84] revealed that the median starting salary for male graduate lawyers was 7.8 per cent more than for female graduate lawyers. The gap blew out by 4 per cent from the previous year.[85]

The Federal Government is considering the consolidation of Commonwealth anti-discrimination laws into one Act, and prepared a draft Bill (the *Human Rights and*

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83 Workplace Gender Equality Agency, 'The Cost Of Being Female: 64 Extra Days At Work' (Media Release, 2 September 2013) http://www.wgea.gov.au/news-and-media/cost-being-female-64-extra-days-work See also Australian Bureau of Statistics, 'Income Distribution: Female/male earnings' (online), 12 July 2005 http://www.abs.gov.au/AUSSTATS/abs@.nsf/2f762f95845417aeca25706c00834efa/bac94ebf241b1c9cca25703b0080ccc8!OpenDocument.

84 Australian Government, Workplace Gender Equality Agency, *Gender Pay Gap Statistics*, (August 2013) http://apo.org.au/research/gender-pay-gap-statistics-2013?utm_source=Australian+Policy+Online+Weekly+Briefing&utm_campaign=486713e6c8-APO_Weekly_Briefing_4_September_20138_28_2013&utm_medium=email&utm_term=0_1452ee3b6b-486713e6c8-84284249.

85 Australian Government, Workplace Gender Equality Agency, *Grad Stats – Starting Salaries* (January 2013) https://www.wgea.gov.au/sites/default/files/2013-01 07_GradStats_factsheet_tag.pdf.

Anti-Discrimination Bill 2012 (Cwlth)) in November 2012.[86] However, the Bill has been delayed due to drafting issues.[87]

2014 Themes

- There is anecdotal and empirical evidence that males are paid more in WA in some private firms.
- Many workplaces offer identical rates of pay but because promotion is harder to achieve for women, they effectively remain on lower rates of pay comparable to men.
- Men hold 80 per cent of partnership or principal positions in private law firms, and it is these partnerships that decide whether women advance.[88]
- Ten elite law firms revealed that despite the fact that women were outperforming men in interviews, firms admitted they were hiring less able men as a 'reverse discrimination policy' because of a concern that firms would have more women than men.[89]
- It is extremely difficult to achieve promotion whilst on a flexible work arrangement.
- A survey of individuals who left the legal profession in the last five years found that women leave the profession earlier than men and men enjoyed a much higher increase in their salary upon leaving the profession than women.[90]
- Private firms are more inclined to send their male lawyers to socialise with clients due to a perception that clients do not want to be entertained in corporate boxes at sporting events or in restaurants by women.[91]

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86 Community Legal Centres Association (WA) Inc. and the King & Wood Mallesons Human Rights Law Group, Human Rights in Western Australia: A Report Card on Developments in 2013, 78-9, http://www.mallesons.com/Documents/Human%20Rights%20Report%20Card%202013.PDF

87 For details of the drafting issues, see the Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2013).

88 Commentary – 'Women Aren't Broken, Law firms Are', The SheEO Blog (2 December 2011) http://www.sphinxx.org/_blog/The_SheEO_Blog/post/Women_aren%E2%80%99t_broken_Law_firms_are/.

89 ABC Radio National, 'Women in Corporate Law Firms', *Law Report*, 3 June 2008 (Damien Carrick) http://www.abc.net.au/radionational/programs/lawreport/women-in-corporate-law-firms/3259368.

90 Law Society of Western Australia and Women Lawyers of WA (Inc.), *Report on the Retention of Legal Practitioners* (March 1999).

- Often bias against women is not a conscious decision but rather comes in the form of unconscious bias, yet has an equally damaging effect on the advancement of women lawyers.

- It has been noted that whilst a decade ago the thinking was that the best way to support the advancement of women lawyers was to emphasise gendered differences, these stereotypes reinforced the unconscious biases at play.[92] The effect of unconscious bias on opportunities in advocacy and the law more generally (in this case speaking of women barristers) has been described as follows:

> …let us kill off for once and for all the notion that men and women are different when it comes to any relevant talent or tendency as legal advisors, strategists and advocates. Some people exhibit different personality traits. Those differences enrich us all. Painting women as having a set of gender specific characteristics relevant to their performance as advocates is potentially divisive and pushes younger women towards a need to conform to the advocate-warrior stereotype.
>
> It also reinforces the stereotype that leads inevitably to decisions about who gets hard cases and arduous briefs – not out of malice in 99% of cases, but well intended because we need to send her home to the kids so assume she doesn't want the long case, or because the client is pretty vulgar or likes to go out drinking and we'd rather protect her from that – or just that it's a man's job because it needs a fighter.[93]

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91 ABC Radio National, 'Women in Corporate Law Firms', *Law Report*, 3 June 2008 (Damien Carrick) http://www.abc.net.au/radionational/programs/lawreport/women-in-corporate-law-firms/3259368.

92 Fiona McLeod SC, 'Launch of Equity at the Victorian Bar – The Quantum Leap' (Speech delivered at the Essoign Club, 205 William Street, Melbourne, 12 November 2013 http://www.vicbar.com.au/GetFile.ashx?file=GeneralFiles/20131112%20Speech%20by%20Chair,%20Fiona%20McLeod%20SC%20at%20the%20Equality%20at%20the%20Victorian%20Bar%20Launch.pdf.

93 Fiona McLeod SC, 'Launch of Equity at the Victorian Bar – The Quantum Leap', (Speech delivered at the Essoign Club, 205 William Street, Melbourne, 12 November 2013 http://www.vicbar.com.au/GetFile.ashx?file=GeneralFiles/20131112%20Speech%20by%20Chair,%20Fiona%20McLeod%20SC%20at%20the%20Equality%20at%20the%20Victorian%20Bar%20Launch.pdf See also Victorian Bar Council, The Victorian Bar Equality Project, 'The Quantum Leap' http://www.vicbar.com.au/GetFile.ashx?file=pdf/The%20Quantum%20Leap%20-%20program%20outline.pdf; Unconscious bias training is part of the 7 point plan to address the balance at the Victorian Bar and reach a series of specified targets.

- Managers and supervisors are often not adequately trained to manage gender bias.[94]

2.34 Employers focus on gender equity with respect to salaries and drawings by:

a) conducting annual equity pay audits to ensure that there is no disparity in salary based on gender;

b) ensuring performance reviews and promotions are based on outcomes and efficiency as opposed to billable hours achieved, and genuinely recognise non-billable contributions such as marketing, mentoring and pro-bono work;

c) ensuring promotion opportunities are not limited for those on flexible work arrangements; and

d) requiring those involved in determining employee performance and pay (including those conducting performance reviews and those setting pay reviews) to complete unconscious bias training to overcome ignorance and unconscious bias.

Availability of Career Support-2014 Review

Women throughout the profession identified a wide range of experiences with respect to the availability of career support. Mentoring schemes already identified on page 145 of this chapter exist and can serve as models for other organisations.

Workplace bullying remains a significant issue with more than 25 per cent of respondents in the Nexus Survey directly experiencing inappropriate workplace behaviour, and 16 per cent of respondents having observed it at some stage of their career.[95]

Examples of behaviour described include bullying (reported equally by men and women), sexual harassment (only experienced by female respondents),

94 HR Pulse (Australian Human Resources Institute), Gender Equity in the Workplace: Research Report (March 2011).

95 Nexus Network, *An Analysis of Work Related Issues and Conditions of Lawyers in Western Australia: Final Report* (October 2013) http://www.wlwa.asn.au/images/stories/dmdocuments/Nexus_Network-Ch2FinalReport7Oct13.pdf.

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discrimination, verbal comments, verbal and physical abuse (more for women) and unethical conduct.[96]

2014 Themes

- The experiences of lawyers with respect to career support are varied, ranging from experiences of formal and beneficial career support to the complete lack of any support at all. The experience may depend on the workplace culture and whether there are any policies or mentoring schemes, and if so whether they are implemented effectively.
- Many, but certainly not all, firms and Law Schools have informal mentoring schemes for junior employees. These schemes can be enormously beneficial to participants, particularly those in the early stages of their legal careers; however, they must be implemented effectively and practitioners must feel comfortable accessing them.
- Mentoring and sponsorship is extremely important for lawyers at all levels to progress in their career. The Subcommittee refers to the discussion above at pages 141 and 163-164 regarding mentoring in the legal profession and at the Independent Bar respectively, and repeats recommendations 2.10 (continuation of existing Law Society and WLWA mentoring programs) and 2.24 (WABA mentoring program) above.
- The profession is still struggling with contemporary relevance – by clinging to past practices that favour men's career advancement over women's; many legal environments were perceived as being subtly hostile and discriminatory to women with families.

2.35 All employers adopt a formal mentoring scheme for their junior employees. For small firms where an internal mentoring scheme is impractical, the Law Society provides mentors (through a formal scheme linking employees to mentors from other firms) for eligible employees of the small firm.

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96 Nexus Network, An Analysis of Work Related Issues and Conditions of Lawyers in Western Australia: Final Report (October 2013) http://www.wlwa.asn.au/images/stories/dmdocuments/Nexus_Network-Ch2FinalReport7Oct13.pdf.

2.36 Employers and senior managers actively demonstrate organisational and individual support for an inclusive and diverse culture within their organisation.

The Changed Culture of the Profession - 2014 Review

In consultations for this chapter it became apparent that there has been a change in the culture of the profession over approximately the past decade. This changed culture impacts considerably on women, but also on men in the profession.

Two themes strongly emerged in consultations that related to the profession itself:

2014 Themes

- Many of the issues women face in the law are not as much a result of gender bias, as they are of the legal profession's culture. In the last decade, the profession has moved to 24/7 availability and work despite the number of lawyers increasing dramatically in that time period. This impacts negatively on mental health, family commitments and general well being; and
- An increased number of lawyers (both women and men) are leaving the profession in the earlier stages of their legal careers, impacting more on female lawyers due to the high number of female graduates.

In order to implement strategies to decrease the high attrition rate of lawyers in the first five to eight years of practice, it would be helpful to have more information regarding lawyers who leave the profession during this stage of their careers, including the total attrition rate broken down by gender and the reasons for leaving.

The Chapter 2 Subcommittee consulted with the Legal Practice Board regarding information on women who leave the profession in the first five years of practice. The Legal Practice Board advised that it did not routinely collect information from or prepare analyses of the legal profession more than to the extent necessary to perform its regulatory function under the *Legal Practice Act 2008* (WA).[97] However, the Legal Practice Board was willing to survey those who do not renew their practicing certificates seeking their consent to complete a questionnaire on the reasons surrounding that decision.

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[97] Written consultation with the Legal Practice Board between November 2012 and January 2013.

These themes were viewed as being interrelated to mental health and general health issues being experienced in the profession. The culture of the profession means that many lawyers work extremely long hours, often at the expense of personal relationships and health. Incidents of bullying behaviour and unprofessional conduct[98] are extremely concerning. Current research provides alarming statistics regarding the prevalence of depression amongst lawyers of both genders, requiring an immediate response from the profession.[99]

The expectation of working 24/7 together with associated mental health issues and high attrition rates are not necessarily focused on or caused by gender bias. However, they do impact considerably on women lawyers (who now make up the majority of entrants into the profession) and society as a whole. These issues impact women differently, and usually adversely, if women are the primary care givers to children and/or elderly parents, demonstrating that indirect gender bias can result from the effect of the culture of the legal profession itself. Both issues cannot be ignored if we are to see gender equality in representation at the top levels of the profession and advancement of women in the law.

The recommendations of the Kendall Report,[100] and the Law Society's Mental Health and Wellbeing Committee, should be embraced by the profession as a whole. The College of Law's *Resilience@law Project*[101] aims at 'raising awareness and understanding'[102] of mental health issues which can arise as a consequence of the profession's culture, including issues which women lawyers, students and graduates face. It has for some time been recognised that there are alternatives to the billable hours method of charging clients.[103] Whilst time billing is entrenched as the traditional method to charge for the work done by lawyers it has no doubt contributed

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98 Bullying constitutes a stated ground of unprofessional conduct – rule 17(5)(c) of the *Professional Conduct Rules 2010.*

99 Dr Chris Kendall, *Report into Psychological Distress and Depression in the Legal Profession* (16 May 2011) Prepared for the Law Council of the Law Society of Western Australia http://lawsocietywa.asn.au/visageimages/multimedia/News/Report%20of%20PDD%20Ad%20Hoc%20Cttee%20FINAL%20Public%20Release%2016%20May%202011.pdf.

100 Ibid.

101 Resilience law. http://www.collaw.edu.au/about-us/education-philosophy/resiliencelaw/

102 Ibid.

103 The Hon Chief Justice Wayne Martin QC, 'Billable Hours – Past their Use-By Date', (Speech delivered at the Perth Press Club, Frasers Function Centre Kings Park, Perth (7 May 2010) http://www.supremecourt.wa.gov.au/_files/Perth_Press_Club_Law_Week_20100517.pdf. Peter Godfrey, 'Younger and Smarter In-house Lawyers Pushing Change', *The Australasian Lawyer* (online), 11 April 2014, http://www.australasianlawyer.com.au/news/younger-and-smarter-inhouse-lawyers-pushing-change-186355.aspx.

significantly to the extreme stress, poor mental health and general health issues experienced by practitioners.

Whilst time billing has been reviewed, considered at forums and guidelines with respect to billing practices prepared in other Australian jurisdictions, Western Australia has not yet considered billing practices as a profession to this extent. Neither the Law Society nor the Legal Practice Board has a standard legal practice business model. Examples in other jurisdictions include the Queensland Law Society's draft guidelines on lump sum costs agreements,[104] and the Law Society of New South Wales' discussion paper on a review of billing practices.[105] Whilst this chapter is not the appropriate forum for a lengthy discussion of billing models, the Subcommittee considers that further consideration is warranted, of whether the implementation of alternative legal practice business model/s would benefit the profession generally. The issues of recognition for the many ways in which legal practitioners contribute to the profession and their workplace may not be adequately reflected in pure time billing models.

2.37 The Law Society over the next 12 months:

a) conducts research and profession-wide forums to discuss and document the steps required of the profession to change the culture away from the current 24/7 mentality (including but not limited to the impact of billing practices);

b) devises a plan by which the Law Society can assist to facilitate resolving the issue within five years; and

c) examines the status and publishes progress reports on the implementation of the changes on an annual basis.

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104 Queensland Law Society, *Guide to Costs, Billing and Profitability: Practice Support*, (March 2009).

105 Stuart Westgarth and Raja Balachandran, *Review of Billing Practices – The Way Forward* (circa 2011-12) http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/522591.pdf See also Law Society of New South Wales Media releases: 'Review of Billing Procedures: The Way Forward' (which details the stages of the project and symposium held) http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/522630.pdf; Law Society of New South Wales, 'Presidential Statement for the Law Society Website – Review of Billing Practices' (which sets out the Law Society Council's resolutions regarding billing practices) http://www.lawsociety.com.au/cs/groups/public/documents/internetpressreleases/576606.pdf.

2.38 The Law Society conducts research into alternative legal business models to time billing, in particular with respect to the impact of time billing as a charging method on the stress levels and health of legal practitioners.

2.39 The Legal Practice Board routinely seeks information from those who do not renew their practicing certificates, broken down by gender and post admission years of experience, as to the reasons for that non-renewal, and provides this information on a non-identifying basis annually to WLWA.

2.40 The Law Society continues to prioritise the development and delivery of educational and informational strategies aimed at addressing mental health and wellbeing issues in the profession, and makes those strategies available to law students and graduates via University law schools and Practical Legal Training providers.

Statutory Boards and Committees - 2014 Review

The gender balance of members of Statutory Boards and Committees[106] was not considered in the previous two studies. However, the Steering Committee of the 2014 Review considered that, given the important role of these bodies in shaping and administering the law, it was appropriate that they be considered as part of this 2014 Review.

2014 Themes

- Over the last three years the percentage of women on Statutory Boards and Committees within the portfolio of the Western Australian Department of the Attorney General has ranged between 48.6 per cent and 50 per cent.
- Membership statistics (provided by the Western Australian Department of the Attorney General) reflect the following composition:

[106] By statutory boards and committees, we refer to those approved by the Attorney-General and listed on the Department of the Attorney General's website – such as the Prisoner's Review Board, Mentally Impaired Accused Review Board and Supervised Release Review Board, Gender Reassignment Board http://www.courts.dotag.wa.gov.au/o/other_tribunals_and_boards.aspx.

BOARDS AND COMMITTEES

	2011	***2012***	***2013***
Number of Boards[107]	*7*	*7*	*7*
Total Board Members[108]	*39*	*38*	*37*
Female Board Members	*19*	*19*	*18*
% Board Members whom are Female	*48.7*	*50.0*	*48.6*

- The Subcommittee is pleased to see the gradual increase in the percentage of women serving on Statutory Boards and Committees, and considers that the range of 48.6 – 50 per cent is not only within statistical tolerance but demonstrates that women are currently achieving equal representation in this area.

Accordingly, the Subcommittee makes no recommendations in relation to Statutory Boards and Committees.

Women Leaders in the Law - 2014 Review[109]

The Western Australian legal profession and associated professions are fortunate to have many women leaders within their ranks. The Nexus Survey revealed that women leaders in the profession are not restricted to leaders at the Independent Bar or in firms (although senior lawyers were the group most highly rated by the survey); leaders are at every level and in every group of the profession.

However, as noted already in this chapter, in 2014 women still hold few leadership positions by comparison to men. This obviously has significant impacts on the profession and the wider community, flowing through to the pool of women available

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107 As contained in the Department of Premier and Cabinet's register of Boards and Committees linked to the portfolio of the Attorney General: Appeal Costs Board, Criminal Injuries Compensation, Gender Reassignment Board, Law Reform Commission of Western Australia, Legal Cost Committee, Mentally Impaired Accused Review Board and Prisoners Review Board.

108 This does not include judicial appointments or members of the Mentally Impaired Accused Review Board who are appointed to that Board by virtue of their membership of the Prisoners Review Board.

109 Whilst recognising that women lawyers undertake leadership roles in the wider corporate, industry and not-for-profit context, this discussion is confined to women leaders in the legal profession itself.

to act on significant matters and accept executive, judicial and corporate sector appointments.[110]

2014 Themes

- It is less common for women to hold positions of leadership or responsibility in private law firms; it is more common for women to be in leadership roles in corporate and government sectors.[111]
- The issue of women leaders in the law is important for this 2014 Review because of the extremely slow change witnessed over the past 20 years.
- The Subcommittee emphasises that it is not sufficient to rely on the idea that the high numbers of women law graduates will eventually flow on into leadership positions; women have been graduating from law schools in greater numbers for many years now, proving that it is not just a numbers issue. Simply admitting more women to the profession will not generate any substantive change as long as the culture of the profession and legal education, societal structures, preferences and biases remain the same.
- It is also not appropriate to rely on the out-dated idea that women must learn to be more assertive or even aggressive to succeed in a 'man's world'; educating and empowering women with the tools to succeed is essential, but only goes part of the way towards achieving gender equality.
- The characteristics of women leaders in the law in WA are as varied as the profession.
- In order to understand what the profession considered were the characteristics of its women leaders, the survey conducted by Nexus Network[112] asked

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110 Victorian Bar Council, The Victorian Bar Equality Project, 'The Quantum Leap', available at: http://www.vicbar.com.au/GetFile.ashx?file=pdf/The%20Quantum%20Leap%20-%20program%20outline.pdf.

111 Law Society of New South Wales, *Thought Leadership 2011: Advancement of Women in the Profession: Report and Recommendations* http://www.lawsociety.com.au/idc/groups/public/documents/internetcontent/579007.pdf.

112 Nexus Network, *An Analysis of Work Related Issues and Conditions of Lawyers in Western Australia: Final Report* (October 2013) http://www.wlwa.asn.au/images/stories/dmdocuments/Nexus_Network-Ch2FinalReport7Oct13.pdf.

members whether they agreed or disagreed with statements concerning women leaders in the law in Western Australia.

- The characteristics that were considered important in a leader were; being approachable, demonstrating skill and ability as a lawyer (advocacy, interpretation of the law, dealing with clients and other lawyers and being busy in their practice), being willing to share knowledge, being active in both the legal community and the general community, participating in mentoring schemes; being good at providing career advice and being innovative.
- There are now organisations such as Women on Boards,[113] dedicated to improving the gender balance on boards and across management and executive roles. Whilst the work of these organisations is not confined to the legal profession, they play an important role in raising awareness of, advocating for and supporting women in management and executive roles across the business community. This work benefits women in all fields including law, and such organisations should be encouraged. For example, Women on Boards has advocated for gender reporting requirements under the new *Workplace Gender Equality Act 2012* (Cwlth), and provided advocacy with respect to issues affecting senior women such as improving gender balance on boards, childcare and after school care, superannuation and income security.[114] Of course, joining and engaging with corporate organisations in addition to legal professional bodies can have a significantly positive effect on lawyers wishing to gain general leadership training and extend their networks.[115]
- Both men and women have an important role to play in encouraging and actively supporting and mentoring junior women lawyers and future leaders.

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113 Women on Boards began as an informal network in 2001 and was founded as a company in 2006 to improve the gender balance on Australian boards. It is funded through subscriber fees and earnings from services to organisations seeking to improve gender diversity, and has more than 18,000 women registered from all sectors and industries. http://www.womenonboards.org.au/about/.

114 See Women on Boards website, 'WOB Advocacy' http://www.womenonboards.org.au/news/advocacy/index.htm.

115 The Hon Justice Melissa Perry, 'Women at the Bar: Aspirations and Inspirations' (Speech delivered at the Women Barristers Forum, NSW Bar Association Common Room, Sydney 5 April 2014) http://www.womenonboards.org.au/pubs/articles/.

- In order to implement positive change and achieve gender equality in leadership in the profession, it is important to make public relevant statistics and information regarding what needs to change for women to advance into leadership roles. It has been recognised that it is difficult to drive change without knowing what is actually happening to women inside an organisation or industry, and that clear data is important for action to be taken seriously.[116] In this regard, the Subcommittee notes that guidelines have recently been published on gender balance performance and reporting.[117]
- The Law Council of Australia's recent NARS Report[118] identifies an opportunity for clear and transparent data and guidance to be provided on briefing practices, pay rates, expectations with respect to career progression and on leadership levels of women across the profession. One of the reported opportunities for change, (notably a priority area for further consultations with key stakeholders and analysis of NARS research and other literature), is to monitor, publicise and promote discussion of profession-wide statistics and trends on gender equity, to inform the measures to improve rates of attrition and leadership across the profession.[119]

The Subcommittee refers to the discussion above regarding women in leadership positions in large commercial law firms, at the Independent Bar, the SSO and the DPP, and refers to the recommendations specific to those areas of practice. Further, the Subcommittee makes the following additional recommendations regarding women leaders in the law generally.

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116 Alison Maitland, 'Strategies for Changing the Gender Imbalance', *International Women of Excellence* (June 2013) http://www.womenonboards.org.au/pubs/articles/.

117 Women on Boards, *Guidelines for Gender Balance Performance and Reporting* (May 2013) http://www.womenonboards.org.au/pubs/guidelines/.

118 Law Council of Australia, '*National Attrition and Re-engagement Study (NARS) Report* (14 March 2014) http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/NARS%20Report_WEB.pdf.

119 Law Council of Australia, '*National Attrition and Re-engagement Study (NARS) Report – Opportunities for Change'* (Fact Sheet, 14 March 2014) http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/Media-News/NARS_FactSheet_Complete_FINAL.pdf.

2.41 The Law Society:

a) sets, publishes and encourages employers to meet voluntary gender targets and goals for women in leadership positions in the legal profession, with the targets and goals to be first published within the next 12 months;

b) requests employers report to the Law Society on progress in relation to those targets and goals; and

c) collates the information received from employers, and from this information publishes profession-wide statistics and trends on gender equity in the profession.

2.42 Employers commit to:

a) reporting both internally to staff and externally to the Law Society on gender targets and goals; and

b) devising an implementation plan to set out how improvements with respect to meeting gender targets and goals will be made, and publicising this plan to staff.

ATTACHMENT A

Consultation List

Chapter 2

Career Paths for Women in the Legal Profession in Western Australia

The following people were consulted for Chapter 2:

1. The Deans of all five Law Schools
2. Student Presidents of all Law Schools other than Curtin (which does not yet have a Student Society)
3. College of Law WA
4. Beverley Hill – Associate Director Equity and Diversity Officer UWA
5. Ross Wheatley - Director of Parkes Recruitment
6. Adam Ebell- State Prosecutor, DPP
7. Hon Linda Savage MLC, Member for East Metropolitan Region
8. Lesley Kirkwood – Managing Solicitor, Women's Law Centre
9. Karen Merrin – Manager, Northern Suburbs Community Legal Centre
10. Gai Walker – Manager, SCALES (Southern Communities Advocacy and Legal and Education Service)
11. John Perrett - Executive Officer, Community Legal Centres Western Australia ('CLCWA')
12. CASE for Refugees staff
13. Department of the Attorney General
14. Migrant Women Lawyers - consulted with names suggested by WLWA committee but who wish not to be identified.
15. Verena Marshall – Principal of Skill Matters (HR, Employee Relations & Skilled Migration Consultancy)
16. John Prior and Paul Yovich –Criminal Lawyers Association (CLA)
17. Male lawyer member of Law Society of WA Council in private practice

18. Teresa Farmer and Rachel Oakeley – Family Law Practitioners Association ('FLPA')
19. Chris Bates – Interpeople (Recruitment firm)
20. Melvin Yeo – Australian Corporate Lawyers Association ('ACLA')
21. Heads of Chambers of Francis Burt Chambers and John Toohey Chambers
22. Western Australian Bar Association
23. The Hon Wayne Martin AC, Chief Justice of Western Australia
24. Joseph McGrath SC, Director of Public Prosecutions for Western Australia
25. Paul Evans, State Solicitor of Western Australia
26. Heads of office of the large commercial law firms
27. Female employees of the DPP on a confidential basis
28. Karen Farley SC, Legal Aid WA
29. Sally Dowling SC, Crown Prosecutors Chambers, Sydney.

Several other confidential consultations also took place.

ATTACHMENT B

Gender Employment Statistics for the Education Providers

at March 2014

Universities:

	Curtin*	ECU	Murdoch	UNDA	UWA
Full Time	5M / 0F	7M / 1F	3F	6M / 3F	17M / 22F
Part Time	2M / 1F	0M / 1F	2F	0M / 7F	8M / 3F
Sessionals / Casuals	14M / 25F	3M / 3F	2M / 6F	4M / 1F***	3M / 4F
Professor	5M / 0F	0M / 1F	1.5M / 0F**	1M / 0F	7M / 1F
Associate Professor	3M / 1F	0M / 0F	3M / 3F	0M / 2F	4M / 3F
Senior Lecturer	3M / 2F	2.3M / 0F	3M / 6F	3M / 5F	9M / 11F
Lecturer	3M / 9F	6M / 1F	5M / 5F	3M / 5F	5M / 8F
Associate Lecturer	2M / 4F	0M / 0F	0M / 2F	NONE	0M / 1F
Positions of Leadership	4M / 0F	1M / 1F	1M / 0F	2M / 1F	2M / 9F

M = Male

F = Female

* Curtin is only in its second year of existence and it statistics reflect a less than full compliment of staff.

** currently, a vacancy exists at this level.

*** first semester 2014 only. Semester two may have 1M / 1F.

College of Law WA* as at March 2014:

	Female
Full-time	60%
Part-time	92%
Casual / Adjuncts	60%
Sessional	50%

* College of Law does not have academic positions equivalent to the University Law Schools.

ATTACHMENT C

Senior Counsel Application and Appointment Statistics

2002 to 2013

YEAR	NO OF APPLICATIONS RECEIVED	NO OF SENIOR COUNSEL APPOINTED	FEMALE	MALE
2002	31	6	1	5
2003	34	2	0	2
2004	23	5	0	5
2005	31	2	1	1
2006	18	0	0	0
2007	22	5	1	4
2008	15	2	0	2
2009	22	4	1	3
2010	20	3	0	3
2011	19	3	0	3
2012	14	2	0	2
2013	15	5	3	2

* Statistics taken from publicly available information and consultation with The Hon. Chief Justice Wayne Martin AC.

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20TH ANNIVERSARY REVIEW OF THE 1994 REPORT OF THE CHIEF JUSTICE'S TASKFORCE ON GENDER BIAS

CHAPTER 3

APPOINTMENT TO THE JUDICIARY

2014 RECOMMENDATIONS

For the reasons outlined in this Chapter, the Steering Committee makes the recommendations set out below. Recommendations 3.2 and 3.3 are made with the unanimous support of the Steering Committee. Recommendations 3.1, 3.4, 3.5 and 3.6 are made by a majority of the Steering Committee.

3.1 In relation to the appointment of judges to the Supreme Court of Western Australia, the Family Court of Western Australia and the District Court of Western Australia

a) The Attorney General continue to invite expressions of interest from qualified persons willing to be appointed to a particular Court;

b) The Attorney General continue to invite the submission of nominations of persons qualified for appointment, provided that the nominee consents to being nominated for appointment;

c) Each invitation for expressions of interest and nominations for appointment to a particular Court be widely advertised so as to bring that invitation to the attention of all members of the legal profession;

d) In considering a recommendation for a judicial appointment, the Attorney General have regard to, but will not be not bound by, any expressions of interest from, or nominations of, suitably qualified candidates.

3.2 The Attorney General continue to undertake consultations with the Chief Justice and other Heads of Jurisdiction of Western Australian Courts and Tribunals, the Bar Association, the Law Society of Western Australia, and Women Lawyers of Western Australia (Inc.), in relation to the identification of suitably qualified candidates, including, specifically, suitably qualified female candidates, whenever a judicial appointment is made.

3.3 The recommendations made in Chapter 2 of this 2014 Review Report be implemented with a view to achieving a substantial increase in the pool of women suitably qualified for appointment to Western Australian Courts and Tribunals.

3.4 Part-time judicial service be made possible in all Western Australian courts. Part-time judicial service means judicial service which:

- is identical to full-time judicial service in all respects except for hours of work and, consequently, remuneration;
- is for a term which extends to a statutory age of retirement;
- excludes the possibility of any other paid work (this is not intended to exclude the conduct of other activities in which judges presently may ethically engage, such as charitable work, which activities do not distract from the performance of judicial duties and do not create a likelihood of significant conflicts of interest);
- is not an 'acting' appointment.

3.5 The Attorney General consult with the Chief Justice and other Heads of Jurisdiction, and any other relevant stakeholders, to determine what legislative changes are required to facilitate part-time judicial service, including:

a) legislation setting out principles designed to preserve the independence of the judiciary while facilitating part-time judicial service, including the core principle that the hours of work of a judicial officer cannot be altered without the consent of both the judicial officer concerned, and the head of jurisdiction; and

b) amendments to the *Judges' Salaries and Pensions Act 1950* (WA) to permit the calculation of the judicial pension by reference to full-time and part-time judicial service.

3.6 The Western Australian Parliament enacts such legislation, as is required to facilitate part-time judicial service, as soon as possible.

PREPARATION OF CHAPTER 3

Chapter 3 has an unusual drafting history. Like other chapters of the 20th Anniversary Review of the Gender Bias Taskforce Report ('the 2014 Review Report'), a Subcommittee was convened to consider Chapter 3 of the 1994 Report. The Chapter 3 Subcommittee ('the Subcommittee') comprised Ms Ros Fogliani (Convenor), Mr Chris Zelestis QC (until April 2014), Ms Cheryl Gwilliam and Ms Karen Lang (until June 2013).

Early in 2014, the Subcommittee (which by then comprised Ms Fogliani, Mr Zelestis QC and Ms Gwilliam) submitted a draft report to the Steering Committee. The members of the Steering Committee (other than Ms Fogliani and Ms Gwilliam) did not endorse some of the Subcommittee's views, namely those relating to part-time judicial service. However, the Subcommittee's view was that the issues addressed in its report were inter-related so that those parts of its draft report concerning part-time judicial service could not be severed from the balance of the draft report.

In those circumstances, the Steering Committee resolved that it would draft Chapter 3, and formulate its own recommendations arising from Chapter 3 (which in part would reflect the recommendations of the Subcommittee) but that it would include the Subcommittee's draft report as an attachment to the chapter. Chapter 3 of the 2014 Review Report has therefore been drafted by the Steering Committee. The Subcommittee's draft report is contained in Annexure A.

To the extent that the Steering Committee does not take issue with the Subcommittee's views, this chapter draws on the Subcommittee's draft report and proposed recommendations. The Subcommittee's draft report otherwise constitutes a dissenting view in respect of the Steering Committee's recommendations. Ms Fogliani and Ms Gwilliam dissent from recommendations 3.1, 3.4, 3.5 and 3.6 in so far as those recommendations differ from the views expressed in the Subcommittee's report.

In preparing Chapter 3, the Steering Committee relied upon the consultations undertaken by the Subcommittee in relation to the issues addressed in the chapter, other than part-time judicial service. Given the significant difference in view on whether part-time judicial service should be progressed, the Steering Committee

undertook further consultations on that issue. The details of those consultations are set out below where part-time judicial service is discussed.

FOCUS OF CHAPTER 3

The 1994 Report made 12 recommendations in relation to the appointment of the judiciary. These recommendations pertained to four themes, namely:

a) the process for judicial appointments (in Western Australia);

b) strategies to facilitate an expeditious increase in the number of women appointed to the judiciary and magistracy;

c) the availability of part-time judicial service; and

d) increasing the awareness of gender bias amongst members of the judiciary.

The Subcommittee focused on two of these themes, namely the process for judicial appointments, and on part-time judicial service. The Steering Committee agrees that that focus is appropriate for the following reasons.

In relation to the strategies for facilitating an increase in the number of women appointed to the judiciary, the Steering Committee agrees with the Subcommittee's view that a key factor in facilitating the appointment of more women to the judiciary in the future will be how successfully the legal profession is able to support and encourage female practitioners to remain in the profession for a sufficiently lengthy period to obtain the experience necessary for appointment to the judiciary. A variety of strategies to achieve that objective have been outlined in Chapter 2 of the 2014 Review Report. The Steering Committee endorses those strategies. It is therefore unnecessary to substantively address that issue for the purposes of this Chapter.

Judicial education regarding gender bias issues is addressed in Chapter 1 of the 2014 Review Report (Recommendation 1.30) at pages 81 – 84 and the Steering Committee endorses this recommendation. It is unnecessary to deal substantively with that issue for the purposes of this Chapter.

However, the manner in which suitable persons should be selected for appointment to the judiciary continues to be a matter of concern. It has been the subject of recent developments in Western Australia and at the Commonwealth level. The Steering

Committee agrees with the Subcommittee that a focus on the appointment process is warranted in these circumstances.

As for the question of part-time judicial service, the dissenting views of the Chapter 3 Subcommittee illustrate that there are strongly held differences of view in relation to this issue. The Steering Committee considers that this issue is sufficiently important to warrant a particular focus on it also.

THE STEERING COMMITTEE'S INVESTIGATIONS

In addition to the Subcommittee's report, the Steering Committee has relied upon the additional materials referred to in the bibliography at the conclusion of this chapter.

The matters taken into consideration in relation to part-time judicial service are set out in more detail later in this chapter.

SUMMARY OF RECOMMENDATIONS FROM 1994 REPORT

Chapter 3 of 1994 Report sets out 12 recommendations in relation to the appointment of the judiciary as follows:

- **The process for the appointment of the judiciary.**

  The 1994 Report recommended that a statutorily established Judicial Appointments Commission should consider nominations for appointment and recommend suitable candidates for appointment, and that legislation should be enacted to require that appointments be made by the Governor in Council from the pool of suitable candidates recommended by the Commission (Recommendations 26, 27 and 34).

- **Strategies to facilitate an expeditious increase in the number of women appointed to the judiciary and magistracy.**

  These strategies included:

  - the adoption of targets for the appointment of a set number of women to the judiciary within particular periods,

- the appointment of women to the judiciary and magistracy as an 'urgent priority',[1]
- the adoption of a policy requiring the appointment of a woman in any case where a man and woman were considered equally qualified until a 'significant representation'[2] of women in the judiciary was achieved,
- a requirement for the Judicial Appointments Commission to consult widely, including with Women Lawyers of Western Australia, to obtain comments on prospective judges and magistrates,
- extending the areas of practice from which suitable women candidates might be drawn to practitioners, academia, and women already appointed to tribunals or courts, and
- broadening the criteria for appointment of suitable candidates to include personal qualities and experience – whether within or outside the practice of law – which would be relevant to judicial appointment (Recommendations 28, 29, 30, 31, 32 and 33)

- **The availability of part-time judicial service.**

  Although the availability of part-time judicial service was clearly seen as another strategy to increase the number of women judges and magistrates, the significance of the issue of part time judicial service within the Steering Committee's consideration of Chapter 3 means that it is appropriate to deal with this recommendation separately. Recommendation 35 provided:

  'That part-time judicial and magisterial positions be available, together with a:

  a) flexible working hours or holidays; and

  b) flexible and appropriate pro-rata arrangements relating to the non-contributory pension.'

- **Increasing the awareness of gender bias amongst members of the judiciary.**

  The 1994 Report recommended that upon appointment, judges and magistrates should be provided with educational materials in relation to their

1 1994 Report, Recommendation 29.
2 1994 Report, Recommendation 33.

functions, including materials relating to the avoidance of gender bias, and that continuing judicial education programmes should encompass gender issues (Recommendations 36 and 37).

GOVERNMENT RESPONSE IN THE 1997 REVIEW

In the 1997 Progress Report, the Government's response to the 12 recommendations in Chapter 3 of the 1994 Report was as follows.

In relation to the process for the appointment of the judiciary and strategies to facilitate an expeditious increase in the number of women appointed to the judiciary and magistracy (Recommendations 26 – 34) the Government's response was that

> 'these matters require discussion between the Government and the Judiciary concerning strategies for implementation should the recommendations be considered appropriate. To this end the Attorney General will seek the advice of the Chief Justice'.[3]

In relation to the availability of part-time judicial service (Recommendation 35) the Government's response was in the following terms:

> 'With respect to part (a) [of Recommendation 35], part time appointments presently exist for Commissioners, Registrars and Magistrates. With respect to part (b), the Government has given effect to flexibility in appointments in a number of jurisdictions.'

And in relation to increasing the awareness of gender bias amongst members of the judiciary (Recommendations 36 and 37) the Government's response was that:

> 'These recommendations require endorsement by the Judiciary'.[4]

IMPLEMENTATION OF RECOMMENDATIONS ARISING FROM CHAPTER 3 IN THE 1994 REPORT

It is convenient to outline the extent of implementation of Recommendations 24 – 37 in the 1994 Report by reference to the four broad themes identified above.

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3 1997 Report p25.
4 1997 Report, p25.

a) Implementation of recommendations concerning the appointment of the judiciary

Selection and appointment of candidates

A Judicial Appointments Commission has not been established in Western Australia. Different appointment processes are followed in respect of the Supreme, District and Family Courts on the one hand, and for the Magistrates Court and Coroner's Court on the other hand.

Appointments to the Supreme Court, District Court and Family Court

The Steering Committee understands that the process, which, until recently, was ordinarily adopted to identify suitable candidates for judicial appointment was as follows. The Attorney General (either directly, or through the Solicitor General) consulted with the Chief Justice, the head of the relevant jurisdiction, and with other representatives of the profession, such as the Western Australian Bar Association (WABA), the Law Society and Women Lawyers of Western Australia (WLWA), to identify suitable candidates for appointment. The Attorney General then sought Cabinet approval for the appointment of a person whom he or she considered suitable for appointment to the relevant Court. The Governor, acting on advice, then formally appointed the person recommended by Cabinet, by granting a commission under the Public Seal of the State.[5]

There has recently been a change to that process. Earlier this year, the Attorney General advertised for expressions of interest from persons interested in appointment, and nominations of persons suitable for appointment, as judges of the District Court of Western Australia. It was made clear that the appointment would not necessarily be made from the pool of those persons who expressed interest in, or were nominated for, appointment. In all other respects it appears that the appointment process will remain the same.

The Steering Committee's understanding is that the Attorney General intends to use the same process (advertisement for expressions of interest or

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[5] See *Supreme Court Act 1935* (WA) s. 7A(1); *District Court of Western Australia Act 1969* (WA) s. 10(1); *Family Court Act 1997* (WA) s. 11(1).

nominations, plus consultation) in order to identify suitable candidates for future appointments to the Supreme Court, the District Court and the Family Court.

Appointments to the Magistrates Court and the Coroner's Court

The process for the appointment of Magistrates, and of the State Coroner and deputy State Coroners is slightly different. In recent years, the Steering Committee understands that that process has been as follows.

When a Magistrate is to be appointed, applications are invited for appointment to those positions. A selection panel interviews suitable candidates from the pool of applicants. A list of recommended candidates is then provided to the Attorney General. The Attorney General then seeks Cabinet approval for the appointment of a person drawn from the list of recommended candidates. The Governor, acting on advice, then appoints the person recommended by Cabinet.[6]

A similar process is followed for the appointment of the State Coroner or a deputy State Coroner. However, the Governor appoints the State Coroner upon the recommendation of the Attorney General, and the Attorney General appoints the deputy State Coroners upon the recommendation of the State Coroner.[7]

b) Implementation of recommendations concerning strategies to facilitate an expeditious increase in the number of women appointed to the judiciary and magistracy

The strategies proposed in the 1994 Report to facilitate an expeditious increase in the number of women appointed to the judiciary have not been implemented. There has never been a target fixed for the appointment of a particular number of women to the judiciary. Appointments to the judiciary are made solely on merit.

c) Implementation of recommendations concerning part-time judicial service

Since 1997, there has been no progress on implementation of Recommendation 35 from the 1994 Report. It remains the case that part-time

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6 *Magistrates Court Act 2004* (WA) cl. 3(1) of Schedule 1.
7 *Coroners Act 1996* (WA) s. 6(1) and s. 7(1).

judicial appointments have never been made in the Supreme Court, District Court and Family Court of Western Australia, although Commissioners of the Supreme and District Courts have been appointed for fixed periods on many occasions in the past.

Part-time appointments are not made for Magistrates in the Magistrates Court. However, Magistrates continue to work on a part-time basis in the Children's Court and the Family Court, as they have done for many years. In addition, sessional members, including legally qualified members, sit on the State Administrative Tribunal on a casual basis.

d) Implementation of recommendations directed to increasing the awareness of gender bias amongst members of the judiciary

Since 1994 there has been an increased recognition of the importance of judicial education. The Steering Committee agrees with the Subcommittee's view that there is information and literature available to Judges and Magistrates in relation to gender bias. However, there is no formal requirement, in Western Australia, for ongoing judicial education relating to gender bias issues. As we have noted above, Recommendation 30 in Chapter 1 of the 2014 Review Report deals with judicial education. The Steering Committee supports that recommendation.

THE STEERING COMMITTEE'S CONSIDERATION OF THE ISSUES ARISING FROM THE 1994 REPORT

The appointment of the judiciary

Although the Attorney General has recently signalled a change in the process for considering candidates for appointment to the judiciary by inviting expressions of interest, and the nomination of persons suitable for appointment, it is important that this new process continue to be followed in relation to future judicial appointments in this State. That is so for three reasons.

First, recent developments suggest that the federal government intends to depart from the process that had been observed (between 2008 and early 2014) in relation to judicial appointments to federal courts (other than the High Court).

That process was as follows. Prior to a judicial appointment, the position would be advertised - interested candidates were able to apply for appointment, an advisory panel considered those applications, suitable candidates were interviewed, and the advisory panel produced a list of recommended candidates from which the Commonwealth Attorney General identified a person for appointment.

There then followed the usual process of recommendation to Cabinet and appointment by the Governor-General. However, earlier this year, the Commonwealth Attorney General's Department website underwent a change which suggested that applications for judicial appointments to federal courts would no longer be sought[8] and that the process would revert to the former model of selection of a suitable candidate following consultation by the Attorney General. The Hon Justice Ruth McColl AO recently opined that

> 'This could be a worrying sign. The adoption of a more formal process of judicial appointment … has been hard won. Perhaps its adoption is part of the reason the percentage of women on the bench grew from 8.7 per cent in 1996 to 33.53 per cent last year. Perhaps that growth represents the increase in the pool of women lawyers suitable for appointment? Who knows? The possibility that it is partly attributable, at least, to a formal appointment process that enabled women (and others not in the traditional pool) to identify themselves as available for judicial selection cannot be excluded. Any move that strips away progress towards greater equality of judicial appointment is, at the very least, highly problematic.'[9]

Secondly, although there is presently a total of ten women judges on the Supreme, District and Family Courts of Western Australia, out of a total of 51 judges on those Courts (19.6% - representing a significant increase since 1994) there has recently been a worrying decline in the number of women appointed, primarily as a result of a decline in the number of women appointed to the District Court. There are presently 26 judges on that Court, of whom five are women (19%). However, since 2009, seven women judges have left the District Court, and in that period, only two new women judges have been appointed. These figures highlight the importance of ensuring that qualified women who are interested in appointment to the higher

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8 See Hon Justice Ruth McColl, 'Celebrating Women in the Judiciary', 68 *Law Society Journal* (April 2014) 68 at 70.

9 Hon Justice Ruth McColl, 'Celebrating Women in the Judiciary', 68 *Law Society Journal* (April 2014) 68 at 70.

Courts come to the attention of the executive government when appointments are being considered.

Thirdly, recognition of the need to appoint more women to the judiciary, and thus to increase the diversity of the judiciary in this State, is entirely consistent with the principle of appointment of the judiciary on merit. There is an argument that diversity cannot be easily divorced from the concept of merit (on the basis that different experiences, or additional qualities, may mean that one candidate is considered more meritorious than another). Assuming that merit can be distinguished from diversity, however, it is in any event now generally accepted that diversity in the judiciary is desirable. Uncontroversially, it is seen as helping to promote public confidence.[10] It is also argued that a range of diverse experiences amongst the judiciary enhances the management of the courts and the development of the law.

In the United Kingdom, although appointments are to be made 'solely' on merit, the Judicial Appointments Commission is required to have regard to the need to encourage diversity in the range of persons available for selection for appointments. It is useful to note the terms of sections 63 and 64 of the *Constitutional Reform Act 2005* (UK), which provide as follows:

63) Merit and good character

> *1) Subsections (2) to (4) apply to any selection under this Part by the Commission or a selection panel ('the selecting body').*
>
> *2) Selection must be solely on merit.*
>
> *3) A person must not be selected unless the selecting body is satisfied that he is of good character.*
>
> *4) Neither 'solely' in subsection (2), nor Part 5 of the Equality Act 2010 (public appointments etc) prevents the selecting body, where two persons are of equal merit, from preferring one of them over the other for the purpose of increasing diversity within –*
>
> > *a) the group of persons who hold offices for which there is a selection under this Part, or*

[10] For a discussion of the importance of diversity in the judiciary, see S.J. Kenney Gender and Justice, *Why Women in the Judiciary Really Matter*, 2013; and E. Rackley, *Women, Judging and the Judiciary – From difference to diversity*, 2013.

b) a sub-group of that group.

64) Encouragement of diversity

1) The Commission, in performing its functions under this Part, must have regard to the need to encourage diversity in the range of persons available for selection for appointments.

2) This section is subject to section 63.

Accordingly, the Steering Committee agrees with the tenor of the Subcommittee's recommendation that the Attorney General should continue to advertise for expressions of interest for appointment to the judiciary, whenever it is intended that a judicial appointment be made. However, the Steering Committee considers that the terms of the Subcommittee's recommendation in relation to this process should be amended in two respects.

First, the Steering Committee considers that it should continue to be possible to nominate a suitably qualified candidate for judicial appointment. Some suitably qualified candidates (especially some women) may be reticent about expressing an interest in a judicial appointment, for example because of modesty about their abilities. Inviting nominations, as well as expressions of interest, for judicial appointment would ensure that the names of all suitably qualified candidates, including all suitably qualified women, would come to the attention of the Executive government. Clearly, however, it should be necessary for the candidate to consent to the nomination. Accordingly, the Steering Committee considers that the Attorney General should advertise not only for expressions of interest by suitably qualified persons, but should also call for the nomination of suitably qualified persons, for appointment to the judiciary.

Secondly, because it does not endorse the Subcommittee's views in relation to part-time judicial service, the Steering Committee does not endorse the part of the Subcommittee's recommendation that proposes that expressions of interest be sought only for full-time judicial appointments.

Accordingly, the Steering Committee (by majority) makes the recommendations set out below. Ms Fogliani and Ms Gwilliam dissent from these recommendations in so far as they are not expressly confined to full-time judicial appointments, as proposed in the Subcommittee's report.

3.1 In relation to the appointment of judges to the Supreme Court of Western Australia, the Family Court of Western Australia and the District Court of Western Australia:

a) The Attorney General continue to invite expressions of interest from qualified persons willing to be appointed to a particular Court;

b) The Attorney General continue to invite the submission of nominations of persons qualified for appointment, provided that the nominee consents to being nominated for appointment;

c) Each invitation for expressions of interest and nominations for appointment to a particular Court be widely advertised so as to bring that invitation to the attention of all members of the legal profession;

d) In considering a recommendation for a judicial appointment, the Attorney General have regard to, but will not be bound by, any expressions of interest from, or nominations of, suitably qualified candidates.

3.2 The Attorney General continue to undertake consultations with the Chief Justice and other Heads of Jurisdiction of Western Australian Courts and Tribunals, the Bar Association, the Law Society of Western Australia, and Women Lawyers of Western Australia (Inc.), in relation to the identification of suitably qualified candidates, including, specifically, suitably qualified female candidates, whenever a judicial appointment is made.

As has been noted above, the Steering Committee's view is that a key factor in facilitating the appointment of more women to the judiciary in the future will be how successfully the legal profession is able to support and encourage female practitioners to remain in the profession for a sufficiently lengthy period to obtain the experience necessary for appointment to the judiciary. The Steering Committee endorses the pursuit of the strategies outlined in Chapter 2 of the 2014 Review Report with a view to increasing the number of women appointed to the judiciary in Western Australia.

Accordingly, the Steering Committee unanimously makes the following recommendation.

3.3 The recommendations made in Chapter 2 of this 2014 Review Report be implemented with a view to achieving a substantial increase in the pool of women suitably qualified for appointment to Western Australian Courts and Tribunals.

Part-time judicial service

In the analysis of part-time judicial service set out below, the following matters are considered:

i) Definition of part-time judicial service;

ii) Part-time judicial service in other jurisdictions;

iii) Part-time judicial service: a gender bias issue?

iv) Advantages of part-time judicial service;

v) Practical issues arising from part-time judicial service;

vi) Access to part-time judicial service and the maintenance of judicial independence;

vii) Consultation with stakeholders;

viii) Further steps required to facilitate part-time judicial service;

ix) Conclusion and recommendations in relation to part-time judicial service.

In conducting its analysis, the Steering Committee has drawn heavily on a submission made to the Subcommittee by the Hon Justice Janine Pritchard, and the Hon Christine Wheeler AO QC. A copy of that submission is Attachment 3 to the Subcommittee's Dissenting Report (Annexure A).[11]

i) Definition of part-time judicial service

There are many models for part-time work. These include working on fewer days of the week than a full-time basis, or working reduced hours each day, or working for particular blocks of time during the year. The Steering Committee does not see any justification for confining part-time judicial service to any particular model. However, for convenience, in the analysis which follows the

[11] The Subcommittee's report is Annexure A to this Chapter. The submission by the Hon Justice Pritchard and the Hon Christine Wheeler AO QC is attachment 3 to the Subcommittee's report.

model of part-time service contemplated is one which would involve the judicial officer completing a fixed proportion of a full-time work load either by being engaged in judicial work for less than five days per week (for example for 3 or 4 days per week throughout the year) or by engaging in full-time work but only for particular periods of time during the year. In all other respects, part-time judicial service should be identical to full-time service.

For the avoidance of any doubt, the Steering Committee defines part-time judicial service in the following way:

- identical to full-time judicial service in all respects except for hours of work and, consequently, remuneration;
- for a term which extends to a statutory age of retirement;
- excludes the possibility of any other paid work (this is not intended to exclude the conduct of other activities in which judges presently may ethically engage, such as charitable work, which activities do not distract from the performance of judicial duties and do not create a likelihood of significant conflicts of interest);
- not an 'acting' appointment.

ii) Part-time judicial service in other jurisdictions

There have been a number of recent developments in other jurisdictions where part-time judicial service has been supported for all levels of the judiciary.

In 2009 the Senate's Legal and Constitutional Affairs References Committee (the Senate Committee) considered part-time judicial service as part of its inquiry into the judiciary more broadly. In *Australia's Judicial System and the Role of Judges* in December 2009[12] (the Senate Committee Report), the Senate Committee supported part-time judicial service and recommended that a model protocol to guide arrangements for judicial officers to work part-time should be developed (Senate Committee Report, Recommendation 8).

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12 The report can be found at http://www.aph.gov.au/~/media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2008_10/judicial_system/report/report_pdf.ashx.

Part-time judicial work has been possible at all levels of the judiciary up to, but not including, the High Court, for some years. In 2012, the UK House of Lords Select Committee on the Constitution, in its report on *Judicial Appointments*[13] recommended the removal of the statutory limit on the number of individuals able to serve as High Court and Court of Appeal judges, to enable some appointments to be made on a part-time basis. The Committee (at [117]) regarded this as 'the minimum change necessary' and observed that in order 'for the number of women within the judiciary to increase significantly, there needs to be a commitment to flexible working and the taking of career breaks'.

Those amendments have since been made in the United Kingdom. The *Senior Courts Act 1981*(UK) now refers to a 'maximum full-time equivalent number' of judges on both the Court of Appeal,[14] and the High Court.[15] Furthermore, the *Constitutional Reform Act 2005* (UK) has also been amended to permit part-time judicial service by judges of the Supreme Court. That Act now provides that the Supreme Court of the United Kingdom consists of the persons appointed as its judges by the Queen by letters patent but goes on to provide that 'no appointment may cause the full-time equivalent number of judges to be more than 12'.[16] In both the *Constitutional Reform Act 2005* (UK) and the *Senior Courts Act 1981* (UK), the full-time equivalent number of judges is calculated 'by taking the number of full-time judges and adding, for each judge who is not a full-time judge, such fraction as is reasonable'.[17]

In 2013, the Victorian Parliament enacted the *Courts Legislation Amendment (Judicial Officers) Act 2013* (the Victorian Act). Part 3 of the Victorian Act contains amendments designed to permit part-time judicial service within the Victorian Supreme Court, County Court and Magistrates Court, including provisions enabling the entry, variation and suspension of part-time service arrangements and provisions dealing with the calculation of the pension for part-time judicial service. In the second reading speech for the *Courts Legislation Amendment (Judicial Officers) Bill 2013*, the Victorian Attorney General, the Hon Robert Clark MP, noted:

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13 http://www.publications.parliament.uk/pa/ld201012/ldselect/ldconst/272/272.pdf
14 *Senior Courts Act 1981* (UK) s. 2(1)(b).
15 *Senior Courts Act 1981* (UK) s. 4(1)(e).
16 *Constitutional Reform Act 2005* (UK) s. 23(2).
17 *Constitutional Reform Act 2005* (UK) s. 23(8), *Senior Courts Act 1981* (UK) s. 2(7) and s. 4(7).

> 'The bill's second initiative creates a uniform scheme for part-time judicial service in all Victorian courts. This reform is designed to facilitate the appointment and retention of judicial officers who have personal or family commitments, or might otherwise contemplate earlier retirement or resignation due to a lack of 'work/life balance'. All judges, associate judges and magistrates, except those in leadership positions, will be able to enter into an arrangement with the relevant head of jurisdiction to serve on a part-time basis for a specified period or on an ongoing basis.
>
> When considering whether to permit a judicial officer to serve part-time, the head of jurisdiction will have regard to the operational needs of the court, questions of parity, and other relevant matters. A part-time service arrangement must specify the proportion of full-time duties to be performed, which must be at least two-fifths of a full-time workload.
>
> However, the arrangement does not need to specify precise days or a pattern of work. This will enable flexibility so that precise working arrangements can be adapted to facilitate the smooth running of trials and other court processes. The bill provides that a judicial officer's salary and any pension entitlement are adjusted to appropriately address part-time service performed by the officer'.

iii) Part-time judicial service: a gender bias issue?

For the reasons set out below, the Steering Committee considers that the absence of any opportunity for part-time judicial service in the Supreme Court, District Court and Family Court of Western Australia, and in the Magistrates Court, is a gender bias issue. That is so because the absence of the option of part-time service may act as a barrier to women being appointed to the judiciary or magistracy, which in turn has implications for securing the appointment of meritorious candidates, and for diversity within the judiciary and magistracy.

The obvious candidates for part-time judicial service are women with family responsibilities (either for children, or for elderly parents), which prevent them from working on a full-time basis throughout the year. There is an increasing possibility that the pool of potential candidates for appointment will include women in this category, given rising maternal ages in the community.

At the same time, the Steering Committee acknowledges that candidates for part-time service would not be confined to women with family responsibilities.

Men with family responsibilities, or men and women whose partners also have demanding jobs, or who have significant interests outside of their work, who are unable or unwilling to work full-time, may also be overlooked for appointment to the judiciary. In addition, the largest group of potential part-timers may be judicial officers who have served for more than ten years and are currently faced with the choice between continuing in judicial service on a full-time basis or retiring altogether.

It is impossible to ascertain how many potential appointees to the judiciary or magistracy have been overlooked or excluded because part-time service is not an option, but it is safe to assume that there are some. Similarly, it is not possible to ascertain how many of the judges who have, in recent years, retired before reaching the statutory retirement age would have preferred to remain in judicial service, but not on a full-time basis. It is highly likely that there have been some.

iv) <u>Advantages of part-time judicial service</u>

Part-time judicial service has a number of advantages. From the perspective of eliminating gender bias in the law, the advantages of part-time service include implications for:

- Appointments on merit; and
- Diversity within the judiciary and magistracy

Part-time appointments also have practical advantages:

- Flexibility;
- Cost saving.

Appointments on merit

If the objective of a judicial appointment is to secure the services of the most meritorious candidate, it makes no sense to rule out potential appointees entirely on the basis that they would prefer different hours of work. This point was made in a number of submissions to the Senate Committee in its investigation of Australia's Judicial System and the Role of Judges in December 2009. The Senate Committee concluded that the possibility of part-

time arrangements would be 'of increasing importance in attracting and retaining many talented appointees'.[18]

The same principle underlies the selection process for salaried judicial officers which was described in a report prepared by the United Kingdom's Ministry of Justice entitled *Judicial Salaried Part-time Working: A Practical Guide.*[19] That report indicated that:

> 'all applicants in selection exercises for first time salaried judicial office will be subject to merit based selection procedures. Any preference for part-time sitting will be irrelevant in determining their ability or suitability for judicial office since an individual's reasons for seeking a salaried part-time appointment are not relevant to the appointment process'.[20]

Diversity within the judiciary and magistracy

The concepts of merit and diversity have been discussed earlier in this Chapter. To the extent that women are still under-represented in senior judicial positions, and to the extent that part-time work is more commonly a preferred model of work for women, part-time appointments are clearly desirable.

Flexibility

The flexibility in issue here is that of the court, rather than of the individual judicial officer. The Chief Justices of Victoria and of the Family Court each advised the Senate Committee that part-time arrangements had the potential to create an effective and flexible use of additional judicial resources.[21]The Senate Committee was also told that in NSW a part-time 'auxiliary' judge had made a useful contribution to the Court of Appeal and a system of part-time magistrates had worked well.[22]

Part-time appointments may be particularly useful where there would otherwise be gaps in a court's expertise, or where it was not clear whether an increase in

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18 Senate Committee Report at [4.69].
19 http://jac.judiciary.gov.uk/static/documents/0396-Guide_to_Judicial_Salaried_Part-Time_Working.pdf
20 *Judicial Salaried Part Time Working: A Practical Guide* at [11].
21 Senate Committee Report at [4.51], [4.58] - [4.59].
22 Senate Committee Report at [4.56] – [4.57].

workload would be sufficient to justify the appointment of a full-time judicial officer.

Cost savings

A number of cost savings may result from part-time judicial service. Assuming for present purposes that part-time judicial service would be remunerated on a pro rata basis, then clearly there would be a cost saving to the extent that a judicial officer worked on a part-time rather than a full-time basis.

There are, however, more significant cost-saving implications from part-time judicial work, for those officers who are eligible to retire, but who may be willing to work part-time instead. For example, if two retiring judges could be persuaded to work for six months per year each, instead of retiring, that would necessitate one replacement appointment rather than two, and avoid the need to pay the judicial pension to either of those part time judges. The saving to the community for each year the arrangement continued would be substantial. In addition, the court (and in turn the community) would retain the benefit of the experience of those two judges.

Part-time judicial service may also facilitate other savings. By way of example, in the Magistrates Court, it may be that there are regional courts that would be well served by a part-time magistrate (as either a sole appointment, or an additional appointment to a larger jurisdiction), saving travel and accommodation costs.

Cost saving and flexibility are of course related topics. If heads of jurisdiction have some freedom to use part-time arrangements, they are likely to be able to better manage increases in workload where those increases have not yet reached the point of requiring an additional full-time appointment.

v) <u>Practical issues arising from part-time judicial service</u>

Part-time judicial service raises a number of practical considerations, including:

- Listings;
- The volume of work able to be undertaken by part-time judicial officers; and

- Accommodation and staffing issues
- The Steering Committee's view is that none of these considerations precludes part-time judicial service, for the reasons set out below.

Listings

Part-time arrangements are likely to pose some listing challenges for courts, more for some than for others. These should not be exaggerated. The listings systems presently utilised in our courts are able to cope with the fact that judicial officers take leave, or are unable to sit on particular matters, or have expertise in particular areas, and so on. A listing system that can cope with these factors is likely to be able to cope with the fact that Judge X can only sit from Monday to Thursday, or between April and September.

The volume of work able to be conducted by part-time judicial officers

There are two issues: the volume of trial work of a duration which is able to dealt with by a part-time judicial officer, and the practical difficulties associated with allocating longer trials to part-time judicial officers. The issues arise only in relation to part-time judicial officers working fewer than five days per week. (The allocation of trials to a judicial officer working on a part-time basis by working full-time over, say, six months of a year is unlikely to present any difficulties in trial allocation.)

As to the first issue, many trials and substantive hearings (for example - appeals) are listed for fewer than four days. That suggests that there would be hearings that a judicial officer working part-time for three to four days per week could readily undertake. In the Magistrates Court, the greater volume of trials of shorter duration suggests that there would be ample trial work for part-time magistrates, particularly in the metropolitan area.

As far as longer trials are concerned, allocating a longer trial to a part-time judicial officer who works only on certain days per week would need to be dealt with in one of two possible ways. The first possibility is that the hearing days would need to be spread over a longer period of time. That may be a preferable model for many litigants. It is already the case that very long trials are frequently listed for only four sitting days per week so that lawyers can

attend to their other clients, litigants attend to their businesses, and jurors (if any) attend to their business and personal affairs. The alternative possibility is that the judicial officer may agree to sit full-time for the duration of the trial, but then account for those additional days of work by working fewer days in other weeks during the year.

This example illustrates that the success of any model of part-time judicial service would require some flexibility on the part both of court administrators and the judicial officer involved. That flexibility is required, as well, in order to accommodate unexpected contingencies: a trial may run over its listed hearing time, necessitating additional sitting days, or an urgent matter may require a hearing at short notice. Any part-time judicial officer would need to understand that she or he may on occasion, have to meet the needs of the court by working additional time.

Accommodation and staffing issues

A judicial officer working on a part-time basis would require office accommodation, and the assistance of support staff. Arrangements would need to be made on an individual basis to ensure the efficient and cost-effective utilisation of resources for this purpose. Arrangements of this kind are unlikely to pose significant practical difficulties.

vi) <u>Access to part-time judicial service and the maintenance of judicial independence</u>

An important issue which needs to be resolved if part-time judicial service is to progress concerns the need to marry the principle of judicial independence with the administrative arrangements necessary for a judicial officer to move from part-time to full-time work and vice versa. There are financial implications for government, so that a move from part-time to full-time work, in particular, has similarities with a fresh appointment. However, it would not be appropriate for government to be seen as able to influence the work of a serving judicial officer by having an effective veto over their working arrangements. Nor, of course, should a person seek appointment on one basis while intending to alter it in the near future.

In the view of the Steering Committee, the core principle must be that the hours of work of a judicial officer cannot be altered without the consent of both the judicial officer concerned, and the head of jurisdiction. That core principle should be set out in legislation.

vii) Consultation with stakeholders

The Subcommittee undertook a number of consultations in preparing its draft report.

In addition, the Steering Committee consulted with:

- Mr Craig Slater (then the President of the Law Society of WA);
- Mr Peter Quinlan SC, President, WA Bar Association;
- Ms Teresa Farmer, President, Family Law Practitioners Association; and
- Heads of Jurisdiction of the Western Australian Courts and the State Administrative Tribunal.

All of those consulted by the Steering Committee supported part-time judicial service, subject to proper resourcing of the courts and proper management of court listings.

The Western Australian Bar Association advised that it supports in principle part-time judicial appointment. The view of WABA is that the process of selection and appointment of judicial officers should provide access to the highest quality candidates. By making available part-time or flexible judicial appointments, judicial service would be available to candidates who, by reason of choice or necessity, do not wish to or are not able to work on a full-time basis. The Association considers that as in other professions and disciplines, the availability of flexible working arrangements can only enhance the available pool of quality candidates. However, the Association's support for part-time judicial appointment is subject to the arrangements for such appointment being such as to not compromise judicial independence or the standard of delivery of justice to the public.

The views of the Heads of Jurisdiction are set out in Annexure B to this Chapter.

viii) Further steps required in order to facilitate part-time judicial service

Once it is accepted that part-time judicial appointments should be possible, there will be a need for consultation between relevant stakeholders to distil a set of principles to guide decisions in relation to part-time service, and to consider which, if any, of those principles should be embodied in legislation.

Two additional practical issues need to be addressed. First, the level of remuneration would need to be determined. Clearly there would be a need for discussion and consultation between government, the judiciary and other stakeholders, in relation to the appropriate level of remuneration for part-time judicial officers.

Secondly, the calculation of the judicial pension (or of superannuation, in the case of magistrates) would need to take into account part-time service. The calculation of the entitlement to a judicial pension is presently premised on a minimum of ten years of full-time service (in addition to a minimum retirement age). An amendment to the pension provisions in the *Judges' Salaries and Pensions Act 1950* (WA) would be required to deal with the calculation of the judicial pension for judges who work part-time for some or all of their judicial careers.

For magistrates, the calculation of superannuation for part-time appointments should pose no difficulty under existing arrangements.

ix) Conclusion and recommendations in relation to part-time judicial service

The approach adopted towards part-time judicial service in other jurisdictions, and the utilisation of part-time judicial service in the Children's Court, Family Court of Western Australia, and the State Administrative Tribunal, suggests that part-time judicial service, within proper limits, poses no threat to the independence of the judiciary, poses no insurmountable practical difficulties, facilitates meritorious appointments and greater diversity within the judiciary and is a means to encourage longer judicial service. Part-time judicial service should be permitted in all Western Australian courts for precisely those reasons.

Accordingly, the Steering Committee, by majority, makes the following recommendations:

3.4 Part-time judicial service be made possible in all Western Australian courts. Part-time judicial service means judicial service which:

- Is identical to full-time judicial service in all respects except for hours of work and, consequently, remuneration;
- Is for a term which extends to a statutory age of retirement;
- excludes the possibility of any other paid work (this is not intended to exclude the conduct of other activities in which judges presently may ethically engage, such as charitable work, which activities do not distract from the performance of judicial duties and do not create a likelihood of significant conflicts of interest);
- is not an 'acting' appointment.

3.5 The Attorney General consult with the Chief Justice and other Heads of Jurisdiction, and any other relevant stakeholders, to determine what legislative changes are required to facilitate part-time judicial service, including:

a) legislation setting out principles designed to preserve the independence of the judiciary while facilitating part-time judicial service, including the core principle that the hours of work of a judicial officer cannot be altered without the consent of both the judicial officer concerned, and the head of jurisdiction; and

b) amendments to the *Judges' Salaries and Pensions Act 1950* (WA) to permit the calculation of the judicial pension by reference to full-time and part-time judicial service.

3.6 The Western Australian Parliament enacts such legislation, as is required to facilitate part-time judicial service, as soon as possible.

Chapter 3

Appointment to the Judiciary

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ANNEXURE A: DISSENTING VIEW OF THE 2014 REVIEW REPORT CHAPTER 3 SUBCOMMITTEE: THE APPOINTMENT OF THE JUDICIARY

10 March 2014

Membership of Subcommittee

In 1994 the Chapter 3 Subcommittee of the Chief Justice's Taskforce on Gender Bias in Western Australia Report published its recommendations on the appointment of the judiciary.

In 2014 a 20th Anniversary Review of the 1994 Report has been undertaken and a Chapter 3 Subcommittee (the Subcommittee) has been constituted to review the 1994 Report and recommendations and to make fresh recommendations on this topic.

The 2014 Subcommittee comprises:

Ros Fogliani, barrister, Francis Burt Chambers and as from 13.01.14, State Coroner (convenor)

Cheryl Gwilliam, Director-General, Department of the Attorney General, Western Australia

Chris Zelestis QC, barrister, Francis Burt Chambers

REVIEW OF 1994 RECOMMENDATIONS

The Subcommittee does not support the establishment of a Judicial Appointments Commission and prefers a different approach, as outlined in its report, below. The 1994 Report recommended the establishment of a Judicial Appointments Commission, which included recommendations concerning its membership and requirements to consult, (Recommendations 1 – 4).

The Subcommittee considers that the criteria for appointment to judicial office must be merit based and that merit will be addressed by the process for expressions of interest, referred to in its report, below. The 1994 Report made certain recommendations concerning priority to appointments of women to the Judiciary, which included a recommendation that a target be set. (Recommendations 5 – 8).

The Subcommittee considers that personal qualities and experience relevant to judicial appointment will be addressed by the process for expressions of interest, referred to in its Report, below. The 1994 Report had recommended a set of criteria for appointment that included personal qualities and experience (Recommendation 9).

The Subcommittee does not support the creation of part-time judicial appointments and has set out its reasons in its report, below. The 1994 Report recommended that part-time judicial and magisterial positions be

made available together with flexible working hours and consequential changes to the non-contributory pension. (Recommendation 10)

The Subcommittee considers that, given the passage of 20years since the 1994 Report, there is now adequate information and literature available for current and prospective Judges and Magistrates relating to the avoidance of gender bias. The 1994 Report recommended educational materials and a program for Judges and Magistrates, and the education of lawyers and prospective lawyers (Recommendations 11 – 13)

RESPONSE TO 1994 RECOMMENATIONS IN THE 1997 PROGRESS REPORT

In 1997 the Women's Policy Development Office in conjunction with the Ministry of Justice published its Progress Report, (1997 Progress Report) which included a report on the implementation of the 1994 Chapter 3 recommendations.

The 1997 Progress Report noted that the 1994 Chapter 3 recommendations require discussion between the Government and the Judiciary concerning strategies for implementation should the recommendations be considered appropriate[23].

[23]1997 Progress Report, page 25.

The response[24], in the 1997 Progress Report was as follows:

a) the Law Society advised of the recent establishment of a Joint Committee with the Women Lawyers of WA to develop a policy and implementation plan to deal with a number of matters, including the consideration of the appointment of women to the Judiciary and Tribunals;
b) that part-time appointments existed for Commissioners, Registrars and Magistrates;
c) that the Government gave effect to flexibility in appointments in a number of jurisdictions; and
d) that the recommendations concerning the education of the Judiciary in gender issues will require endorsement by the Judiciary.

RECOMMENDATIONS OF THE 2014 REVIEW REPORT CHAPTER 3 SUBCOMMITTEE

For the reasons set out below in this Report, the Subcommittee makes the following four recommendations:

1) That the Attorney General for Western Australia, seeks expressions of interest for the appointment of justices to the

[24] Op Cit, pages 25 to 26. The Ministry of Justice made some suggestions concerning an educational package for the Judiciary.

Supreme Court of Western Australia and the Family Court of Western Australia and for the appointment of judges to the District Court of Western Australia.

This recommendation comprises the following:

- That expressions of interest be sought for full-time permanent appointment to the relevant Court;

- That the seeking of expressions of interest be advertised to bring it to the attention of members of the legal profession;

- That expressions of interest be limited to a candidate's name and a brief biography; further information will be sought if required;

- That in considering a recommendation for a judicial appointment, the Attorney General has regard to, but is not bound by, candidates derived from the expressions of interest.

2) That measures be taken to encourage female legal practitioners to remain in the profession for at least 20 years post admission and that employers be encouraged to allocate high level and substantial legal work to those women, including work that entails appearances in Courts as counsel.

3) That measures be implemented with female law students and female legal practitioners to enhance their understanding of and their interest in a judicial career.

4) That subject to recommendation 1 above, the current process for judicial selection and appointment remains the same.

CHAPTER 3 SUBCOMMITTEE'S CONSULTATIONS

Members of the Subcommittee engaged in a range of consultations including with members of the Judiciary (current and former), the Solicitor General for Western Australia, members of the legal profession and University Academics. Further, following the Subcommittee's consultations with The Honourable Justice Pritchard and The Honourable Christine Wheeler AO, the Subcommittee received a written submission, which is Attachment 3 to this Dissenting Report. The Subcommittee has been assisted in its deliberations by all of the consultations that have been undertaken and is grateful for the consideration given to issues covered in this Report by all of those consulted.

DISCUSSION OF CHAPTER 3 SUBCOMMITTEE 2014 RECOMMENDATIONS

Enhancing the participation of female legal practitioners for consideration to judicial appointment

The current process for judicial selection involves discussions with invited persons as to who would be suitable for appointment (apart from Magistrates' positions, which are advertised). Taking into account the growth of the profession, the increasing proportion of female legal practitioners and the move towards specialisation in legal practice, the Subcommittee considers it is important to have a selection process that is enhanced by the seeking of expressions of interest. This would enable legal practitioners to express their interest and be considered for appointment. It will assist in bringing the names of female legal practitioners that are not otherwise well known or well publicised to the attention of those involved in the selection process. Evidence for the success of a selection process is partly provided by the process of judicial appointment to the Federal Court of Australia. However, the Subcommittee prefers a less bureaucratic process and for this reason recommends that expressions of interest be sought, as outlined in Subcommittee Recommendation 1.

The Subcommittee sourced figures for the total number of Judges and Magistrates broken down by gender, at 5-year intervals, from 1 June 2003 to 1 June 2013[25]. They are as follows:

2003 As at 1 June 2003		**2008 As at 1 June 2008**		**2013 As at 1 June 2013**	
F	**M**	**F**	**M**	**F**	**M**
26	**80**	**39**	**80**	**42**	**82**

The proportion of female judges and magistrates has increased from 24% (2003) to 32% (2008) to 33% (2013).

The Subcommittee considers that the lower proportion of female judges and magistrates arises from the level of attrition of female legal practitioners within the first 5 – 10 years of legal practice. This is a matter that is addressed below by reference to the outcome of the survey conducted by Nexus Network to canvass the views of lawyers in Western Australia. The Subcommittee has focused on two areas covered by that survey outcome, namely:

- What are the barriers and disincentives to staying in the profession?
- What are the attitudes to judicial appointments?

The survey notes the following:

[25] A detailed breakdown of these figures appears in the Table at Attachment 1.

- There are high rates of exit from the legal profession in the first 5 years and this is particularly the case with women in private law firms[26].

- The legal profession is feminising and young lawyers are most likely to leave[27].

- Key factors for leaving work were high stress and lack of flexibility followed by the lack of a supportive work place and long hours and/or poor pay[28].

- Judicial appointments were not particularly attractive to most respondents though for those who are interested the most powerful motivation is being involved in the administration of justice[29].

At pages 3 and 4, the survey notes that in 2011, 45% of legal practitioners were women. Further, some 66% of law students are now women. However, this demographic change has not resulted in the advancement of women to the extent that might have been expected having regard to the changing composition of the profession by the steady increase in the number of female practitioners over time.

[26]Nexus Report, Lawyers Reflect, page 4.
[27]Op cit, page 2.
[28]Op cit, page 40.
[29]Op cit, page 2.

The survey outcomes regarding aspirations to the judiciary are dealt with at pages 49 - 50 of the Nexus Report. Almost two thirds of the respondents to the survey did not respond to the question of whether they aspire to the judiciary and about three quarters of those who did respond answered in the negative or were ambivalent[30]. A selection of comments from respondents who were asked why they did not aspire for judicial appointment is set out at pages 49 – 50 of the Nexus Report.

Respondents who did aspire to judicial appointment were motivated by the opportunity to be involved in the administration of justice, followed equally by long term security and financial security and independence[31].

Given the relatively small proportion of respondents to the survey who actually answered the questions concerning aspirations to judicial appointment, the Subcommittee considers that no information of general application can be gleaned from the outcome of the survey on this particular point.

The high rates of exit from the profession as noted in the Nexus Survey has given rise to Recommendation 2, namely that measures be undertaken to encourage women to remain in the legal profession as practitioners, with high level legal work. This is addressed in more detail below.

[30]Op cit page 49.
[31]Op cit page 50.

The dearth of responses to the question regarding aspirations for judicial appointment in the Nexus Survey has given rise to Recommendation 3, namely that measures be implemented to encourage an interest in a judicial career at the earliest stages, with female law students, and also with female legal practitioners at all levels.

Encouraging female legal practitioners to remain in the legal profession, with higher-level legal work

A key factor in the increase of women able to be considered for judicial appointment is the retention of those women within the profession for long enough such that they are able to gain the extensive legal experience and depth of understanding of professional practice apposite to such an appointment.

The responses to the survey suggest that careful consideration regarding the retention of women needs to be given in the following circumstances:

- When women temporarily cease practicing in order to have children – their re-entry into the profession needs to be encouraged and facilitated, with the following matters borne in mind:
    - On their return, work ought to be allocated to them commensurate with their abilities and of a level and complexity at least equal to that allocated to them prior to their departure; and
    - For a period of time, to assist that re-entry, those women ought to be able to avail themselves of flexible work practices.
- Private legal firms in particular can assist in the retention of women by reviewing their requirements concerning billable hours and taking care not to foster a culture of "face time" leading to unnecessarily long hours at work. Assessing abilities primarily by reference to the achievement of milestones may ultimately be a preferable and, possibly, a more accurate method of gauging performance in the longer term.

Survey findings

There were 250 respondents to the survey. Over 80% of them were women[32]. Female respondents were skewed to the younger age groups with a majority with less that ten years experience[33]. Just over 50% of Respondents were in private practice and of these, the single largest group was in commercial or corporate litigation[34]. These are some of the

[32]Op cit, page 7.
[33]Op cit, page 18.
[34] Op cit, pages 62 - 63.

characteristics of the respondents that raised the issues concerning billable hours and flexible work practices.

Young lawyers are the ones most likely to leave and turnover is always costly[35]. Efforts at retention ought to focus on young lawyers.

Respondents to the survey were asked about their beliefs and feelings about the practice of law and the answers are addressed at page 28, as follows:

Almost 90% agreed or strongly agreed that it is intellectually challenging and provides opportunities to help people. Almost 75% found it personally satisfying and over 60% enjoy appearing in court. However, around 60% consider that billable hours encourage unethical practices and add to work stress. Almost 50% see the law as being more about money than justice. This was primarily the view of the younger respondents working in the private sector.

More than 70% of respondents were positive about their current working environments (that is, workplace culture)[36], which is to be welcomed.

Respondents to the survey were asked to articulate their beliefs and feelings about their *current employers' career pathways* and the answers are addressed at page 30, as follows:

About 70% agreed they had opportunities for high profile work and to use their full range of skills and abilities. Over 80% felt they had adequate training and 75% felt they had adequate court appearances. However, only 40% considered they had opportunities to advance (and most of these were in the younger age group and more were in the Government sector).

Respondents to the survey were asked to articulate their beliefs and feelings about their *current working conditions* and the answers are addressed at pages 31 - 32, as follows:

Most respondents felt their working hours were about right and 65% agreed they had good work flexibility. Over 50% considered their remuneration to be appropriate. However, over 40% reported too much stress and pressure. About 30% felt there was an expectation to be on call 24/7 and most of these were private practice employees in the higher salary bands. Predictably, of the 60% who agreed they had access to fractional employment, most were in the Government sector.

[35]Supra.
[36]Op cit, page 29. "Workplace culture" was noted as the organisation having a clear vision, good work being recognised and good role models being available.

When asked what makes it attractive to remain the legal profession, at the top of the list were items such as: Intellectual challenge; identifiable profession; good pay[37].

When asked what makes them consider leaving, responses included: Stress, heavy workloads and long hours, no work-life balance, not particularly friendly for mothers, lack of flexibility, commercialisation of the profession, part time work does not work well in practice.

The dual concerns regarding billable hours and flexible working conditions are encapsulated in the following comments, as responses to the survey:

Billable hours

> *"*Large private firms are driven by billing and billable hours. Your progress is determined by your level of billing. If you don't bill enough you don't get good work. If you don't get good work you can't bill and your advancement prospects are minimal"[38].

Flexible work practices

> " I do not want to come across as bitter, but that is the taste that has been left in my mouth after my experience in the legal profession after having a child. I loved being a lawyer and desperately wish I could be one again. However, I am yet to come across any firm that can offer real flexibility during this brief but important stage of my life/career…."[39].

The Subcommittee considers that the retention of female legal practitioners, with high level legal work, is a matter deserving of careful and sustained attention and that the focus ought to be on the more junior members of the profession employed in private firms, to seek to stem the flow of attrition within the first 5 – 10 years.

In a recent speech[40], Fiona McLeod SC, Chair, Victorian Bar Council, addressed the issue of unconscious bias:

> "Some people exhibit different personality traits. Those differences enrich us all. Painting women as having a set of gender specific characteristics relevant to their performance as advocates is potentially divisive and pushes younger women towards a need to conform to the advocate-warrior stereotype.
>
> It also reinforces the stereotype that leads inevitably to decisions about who get hard cases and arduous briefs – not out of malice in 99% of cases, but well intended because we need to send her home

[37]Op cit, page 43.
[38]Op cit, page 47.
[39]Op cit, page 51.
[40]"Launch of Equality at the Victorian Bar – The Quantum Leap" 12.11.13

to her kids so assume she doesn't want the long case, or because the client is pretty vulgar or likes to go out drinking and we'd rather protect her from that – or just that it's a man's job because it needs a fighter".

The Subcommittee considers that the key to stemming the flow of attrition of female practitioners in the first 5 – 10 years is the following; (a) the allocation of high level legal work, (b) the facilitation of re-entry into the profession after women depart to have children and (c) a change in the emphasis on billable hours as the primary assessment of the value of the employee's work. In this regard, the extent of the flexibility in work practices is one of the means for facilitating that re-entry. However, it is counter productive to characterise all female practitioners as being desirous of flexible work practices in the long term and/or not wanting the "long case" or the "arduous brief" as a consequence of that. It needs to be borne in mind (as noted above) that most respondents to the survey considered their working hours were about right.

The merits of appointing part time judicial officers

The Subcommittee has considered whether part time judicial appointments would increase the representation of females as judges and magistrates, but has concluded that it will not have that effect. For the reasons stated above, the long-term retention of female legal practitioners within the profession will have the effect of increasing that representation.

Further, the Subcommittee does not recommend part time judicial appointments for the reasons set out below.

The present position regarding part time judicial appointments in Western Australia is set out at Attachment 2.

There are important matters of principle, as well as practical issues, which require consideration in relation to the merits of appointing part-time judicial officers.

The Subcommittee received and considered a submission from The Honourable Justice Pritchard and The Honourable Christine Wheeler AO QC, which supports the appointment of part-time judicial officers, including to superior courts. A copy of the submission is at Attachment 3 of this Dissenting Report.

The Subcommittee acknowledges the contribution of The Honourable Justice Pritchard and The Honourable Christine Wheeler AO QC, however, with respect, the Subcommittee was not persuaded that such appointments, especially to superior courts, would be cost –efficient and practically effective in providing the high level of judicial service to the community required from such courts.

Equally, the Subcommittee had reservations as to whether the debate around part-time judicial appointments ought to be characterised as an

issue of gender bias. There is no evidence to support a contention that the lower proportion of female judges and magistrates arises from the lack of availability of part-time roles.

Judicial independence

It is a fundamental element of the Australian judicial system and our democracy that the judiciary is independent. The significance of this requirement needs no elaboration for present purposes.

In essence, what this requirement means is that judicial officers should not be exposed to any actual or perceived fear of having their on-going tenure prejudiced by their decisions. They should hold office until a specified age, resignation, or removal for cause.

Many submissions to the 2009 Senate Inquiry which included a consideration of the role of judges[41] opposed the use of acting judicial appointments on the ground that it weakened the independence of the judiciary: paras 4.29-4.40. The Senate Committee embraced those concerns, which have clear implications for part-time appointments (at paragraphs 4.41-4.46).

[41]Senate Standing Committee on Legal and Constitutional Affairs, Chapter 4, Report on Australia's Judicial System and the Role of Judges, 7 December 2009, Attachment 4.

The Senate Committee noted that there was limited support for part-time judicial appointments to superior courts, mainly related to using the services of experienced judges who would otherwise retire from all service (at paragraphs 4.47 – 4.71).

Appointment of judicial officers for fixed terms would inevitably impair the appearance and reality of their independence. There are no proper grounds for advocating such appointments. That is so regardless of whether appointment is on a full-time or a part-time basis.

Thus, given the importance of the maintenance of judicial independence, there is no proper foundation for advocating appointment of part-time judicial officers for fixed terms, as a means of facilitating part-time service.

Why have part-time judges?

As a matter of principle, the appointment of part-time judicial officers could only be countenanced if and to the extent, that such appointment served the interests of enhancing the standard of the judiciary in Western Australia.

The appointment of part-time judges cannot be justified by reference to the interests of particular categories of prospective candidates, who might find part-time service more convenient than permanent service.

The main argument usually advanced in support of part-time judicial appointments is that the opportunity to make such appointments may increase the pool of suitably qualified and experienced, available candidates, as well as increasing the diversity of the judiciary. The argument is also advanced on the premise that appointees to the judiciary ought to have choice as to whether they wish to work full-time or part-time.

The Subcommittee notes that in the main, suitable candidates will normally be in their late 40'sor 50'sand will usually be seeking full-time work.

Further, the identification of a suitable class of candidates for part-time appointments is complicated by the question as to whether such appointees would be permitted to engage in other paid work, whether of a legal kind or not.

The Senate committee received submissions to the effect that it would be inappropriate for part-time judicial officers to engage in other paid employment, a view that the committee itself adopted (at paragraphs 4.49-4.63). The obvious problem is that acceptance of other paid part-time employment will have a tendency to undermine the apparent, if not actual, independence of the judiciary. This is a problem that cannot be ignored.

If public confidence is to be maintained in the judiciary, part-time appointments could only be made on the basis that each appointee undertook no other paid work of any kind during the period of appointment. This would likely confine the pool of prospective candidates for such appointment, thereby undermining the supposed utility of the concept.

The function of the judicial branch of government is to administer the law. It is not a representative function.

Practical issues

There are two respects in which work may be carried out part-time. A person may be appointed to work full-time, but only for a specified period each year.

Alternatively, a person may be appointed to work for a number of days per week or weeks per month.

Because it would not be appropriate to countenance part-time appointments other than in the interests of enhancing the judiciary, the focus must be exclusively upon the interests of each court.

The workload of the Supreme Court and District Court is such that there would likely be significant practical difficulties with the appointment of judges who were to work for specified days each week or specified weeks each month.

There would need to be considerable flexibility in the periodical basis of appointment to enable the business of those courts to be conducted

efficiently. For example, the roster system contemplates judicial officers being available during and outside usual working hours for blocks of time. The docket judge may need to hear an urgent application on the matter allocated to him or her. The allocation of work to judicial officers contemplates a service to the community that goes beyond specified hours.

Appointments for a specified number of months per year may pose lesser practical difficulties than would other forms of part-time appointments, although there would still be a need for flexibility to ensure that proper use was made of judicial time and to avoid delay in the making of decisions. Experience with the appointment of commissioners, acting judges and auxiliary judges in WA over the past 20 years suggests that efficient use might be made of officers appointed to work for one or more designated months per year.

However, the practical issues of listing matters for trial or hearing before part-time judicial officers also involve a consideration of the effect upon complainants, accused persons and litigants generally. Complainants and accused persons will inevitably experience stress and anxiety during the course of a trial. For different reasons they will want the judicial process to be brought to its conclusion as expeditiously as is possible. Complainants in a sense often need to "re-live" their painful and disturbing experiences in the course of a trial. Accused persons are anxious as to the outcome and hopeful of clearing their names in the course of a trial. Witnesses, to varying degrees, experience stress at the prospect of giving evidence. The community, which as a whole is aggrieved by the commission of offences, wants to see a result. All of these factors combine to render it highly desirable for a trial to run its proper course as soon as is possible and with as little interruption and delay as is possible. In the area of civil litigation, the length of time that a trial takes to reach its conclusion may also operate as a burden on many litigants in terms of cost. There is an understandable expectation on the part of civil litigants that their matters will be dealt with as expeditiously as is possible.

The judicial officer is the person who is dedicated to ensuring that criminal and civil matters run their course in a proper fashion so that a just result is achieved for all of the members of the community that come before the courts. Accordingly, when considering the allocation of matters to part-time judicial officers, careful consideration would need to be given to issues of timing and availability. It would be undesirable to have matters take longer to be listed or longer to reach their conclusion if the timing problems arise due to the need to address the logistics of part-time work.

Having considered the arguments raised, the Subcommittee finds that the maintenance of the independence of the judiciary is the paramount consideration. It would not be satisfactory to diminish, or even risk the diminution of, this essential pillar of our democracy, by introducing fixed term judicial appointments, whether to facilitate part-time judicial work or otherwise.

Conclusion

The long-term retention of female legal practitioners within the profession, together with:

- an interest in and aspiration for judicial appointment amongst a significant number of those women at the senior level; and

- a selection process that enables those interested female legal practitioners to express their interest in a judicial appointment,

will increase the prospects of appointment of women to the judiciary and will improve the representation of women on the judiciary.

BIBLIOGRAPHY

- 1997 Progress Report;
- Nexus Report, "Lawyers Reflect";
- "Launch of Equality at the Victorian Bar – The Quantum Leap" 12.11.13, speech by Fiona McLeod SC, Chair, Victorian Bar Council;
- Senate Standing Committee on Legal and Constitutional Affairs, Chapter 4, Report on Australia's Judicial System and the Role of Judges, 7 December 2009;
- *Supreme Court Act* 1935;
- *Judges' Retirement Act* 1937;
- *Judge's Salaries and Pensions Act* 1950;
- *District Court of Western Australia Act* 1969;
- *Magistrates Court Act* 2004;
- *State Administrative Tribunal Act* 2004;
- Submission to the 20th Anniversary Review of the Gender Bias Taskforce in relation to Chapter 3: Appointment of the Judiciary - Part-time Judicial Service" by The Honourable Justice Pritchard and The Honourable Christine Wheeler AO (the version which appears as Attachment 3 to the Chapter 3 Dissenting Subcommittee Report as at 9 January 2014 (and all of the reference materials referred to in that submission).

ATTACHMENT 1 TO SUBCOMMITTEE'S DISSENTING REPORT

Total Number of Judges and Magistrates Broken Down by Gender[42]

JURISDICTION		2003 As at 1 June 2003		2008 As at 1 June 2008		2013 As at 1 June 2013	
		F	M	F	M	F	M
Children's Court	President (Judge)	1			1		1
	Magistrates	2	2	1	3	2	2
	Casual Magistrate	1	3	1	1		1
Coroner's Court	State Coroner		1		1		1
	Deputy State Coroner	1		1		1	
	Coroners (Acting)						2
Office of Criminal Injuries Compensation	Chief Assessor	1		1		1	
	Assessor	1	1	1	1	1	1
District Court	Chief Judge		1	1			1
	Judge	5	16	6	17	6	16
Family Court (figures as at June 2013)	Chief Judge		1		1		1
	Judges	2	2	3	1	2	2
	Magistrates[1]	3	5	4	4	5	2
	Magistrates (Acting)					1	2

[42] In 2003, the Family Court had a Principal Registrar and Registrars. In 2008 – present, these are magistrates, so these were included in the count for 2003. All other figures exclude Masters, Registrars, and Referees.

JURISDICTION		2003 As at 1 June 2003		2008 As at 1 June 2008		2013 As at 1 June 2013	
		F	M	F	M	F	M
Magistrates Court	Chief Magistrate		1		1		1
	Deputy Chief Magistrate	1		1		1	
	Magistrate	6	30	13	29	18	27
	Magistrates (Acting)				1		1
Prisoners Review Board (Parole Board in 2003) and Mentally Impaired Accused Review Board	Chairperson (Judge)		1	1			1
State Administrative Tribunal – SAT not created until 2005	President (Judge)	N/A	N/A		1		1
	Deputy Presidents (Judges)	N/A	N/A	1	1		2
Supervised Release Review Board	Chairperson (Judge)		1		1		1
Supreme Court	Chief Justice		1		1		1
	Judges	2	14	4	15	4	15
TOTAL:		**26**	**80**	**39**	**80**	**42**	**82**

ATTACHMENT 2 TO DISSENTING REPORT OF SUBCOMMITTEE

Present position regarding part-time judicial appointments in Western Australia

Supreme Court of Western Australia

Appointment of judges of the Supreme Court of Western Australia is governed by the *Supreme Court Act* 1935.

Judges of the Supreme Court hold office during good behaviour, subject to a power of removal by the Governor upon the address of both Houses of Parliament: s.9 (1).

A Superior Court judge must retire from office upon attaining the age of 70 years: s.3 *Judges' Retirement Act* 1937.

A master may be appointed to the Supreme Court: s.11A (1). A master may hold office as such in conjunction with any other office, appointment, duty or function which the Governor shall deem not incompatible: s.11B (b). Except in the performance of the functions or duties of his office or with the approval of the Governor, a master shall not engage in legal practice, or be directly or indirectly concerned in such practice, or engaged in any other paid employment: s.11B (1)(c). An acting master may be appointed for a period: s.11B (2). Such an appointment may be made "on other than a full-time basis": s.11 (3).

An acting judge may be appointed for a period: ss.11 (1), (2). A person may be appointed as an auxiliary judge for a period not exceeding 12 months: s.11AA (1).

There is no express provision to the effect that a judge may not engage in other paid employment. However, the provisions governing judges' pensions appear to assume that all judges will be appointed to full-time positions.

A pension entitlement depends upon the age of retirement and the length of service and no provision is made for differentiation in the case of service that is less than full-time: s.6 *Judge's Salaries and Pensions Act* 1950. Moreover, a person who may be entitled to, or be in receipt of, a judicial pension who shall practice as a barrister, solicitor or proctor in Western Australia or in any other part

of Her Majesty's Dominions, shall forfeit the right to pension: s.15 (1) Judge's *Salaries and Pensions Act* 1950. The Governor may grant exemption from that provision: s.15 (2).

The absence of any express provision enabling a judge to be appointed permanently on a part-time basis compels the conclusion that the *Supreme Court Act* does not contemplate any such appointment being made.

District Court of Western Australia.

Appointments of judges to the District Court are made pursuant to s.10 of the *District Court of Western Australia Act* 1969. Judges hold office during good behaviour and are subject to possible removal by Parliament: s.11. No express provision is made for part-time appointments.

A District Court judge must retire upon attaining the age of 70 years: s.16, which applies the *Judges' Retirement Act* to District Court judges.

A person may be appointed an acting District Court judge for a period, or an auxiliary judge for a period not exceeding 12 months: ss.18, 18A respectively.

A District Court judge shall not practise as a legal practitioner, or be directly or indirectly concerned in such practice: s.17 (1).

The observations above arising from the *Judge's Salaries and Pensions Act* 1950 apply equally to District Court judges. Similarly, the District Court of Western Australia Act does not empower permanent appointment of a judge on a part-time basis.

Magistrates Court

The Governor may appoint a qualified person as a magistrate of the Magistrates Court: cl.3 (1), Schedule 1, *Magistrates Court Act* 2004.

A person appointed as a magistrate ceases to be a magistrate when he or she reaches 65 years of age, resigns or is removed from office: cl.11, Schedule 1, *Magistrates Court Act*. A magistrate may be suspended from office in certain circumstances: cl.14, Schedule 1. A magistrate holds office during good behaviour and may be removed from office by Parliament: cl.15, Schedule 1.

A person may be appointed an acting magistrate for a period: cl.9 (3).

A magistrate must not work as a legal practitioner (whether for financial reward or not), or engage in other work for financial reward outside the functions of a magistrate referred to in or approved under s.6, unless permitted to do so by the Governor: cl.5 (6).

There is no express power to appoint a magistrate on a part-time basis.

State Administrative Tribunal

Judicial and non-judicial members of the State Administrative Tribunal may be appointed for terms not longer than 5 years and any member may be re-appointed for such a term: ss.109, 113, 118 *State Administrative Tribunal Act* 2004.

Judicial officers who are members of the Tribunal will be permanent members of the judiciary, by virtue of their appointment to the Supreme Court or the District Court.

ATTACHMENT 3 TO DISSENTING REPORT OF SUBCOMMITTEE

Copy of "Submission to the 20th Anniversary Review of the Gender Bias Taskforce in relation to Chapter 3: Appointment of the Judiciary - Part-time Judicial Service" by The Honourable Justice Pritchard and The Honourable Christine Wheeler AO QC.

SUBMISSION TO THE 20TH ANNIVERSARY REVIEW OF THE GENDER BIAS TASKFORCE

CHAPTER 3: APPOINTMENT OF THE JUDICIARY

PART-TIME JUDICIAL SERVICE

In this submission we deal solely with the question of part-time judicial service. In Part I of the submission we set out the reasons why the sub-committee should recommend that part-time judicial service should be possible for judicial officers in the Supreme, District and Magistrates Courts in Western Australia. In Part II of the submission we respond to the key points raised in the draft report of the sub-committee on Chapter 3, in so far as it deals with part-time judicial service.

The views set out in this submission are our personal views. In making this submission, we do not claim to represent the view of any Court.

PART I: WHY PART-TIME JUDICIAL SERVICE SHOULD BE SUPPORTED

In this part of our submission we deal with the following issues:

A. Definition of a part-time judicial appointment;
B. Who might want part-time judicial work?
C. Why is part-time judicial service desirable?
D. Practicalities: possible issues in relation to part-time judicial service;
E. Part-time judicial service in other jurisdictions.

A. Definition: a part-time judicial appointment

A part-time judicial appointment is one which is:

- identical to a full-time appointment in all respects except for hours of work and, consequently, remuneration;
- for a term which extends to a statutory age of retirement;

- excludes the possibility of any other paid work (although, as at present, judges may ethically carry out charitable work, or engage in hobby farms or similar activities, in a manner which does not distract from the performance of judicial duties and does not create a likelihood of significant conflicts of interest);
- not an 'acting' appointment.

B. Who might want part-time judicial work?

Most obviously, women with young children (who may well be at a career stage where appointment is a real possibility, given rising maternal ages in the community). Also men and women who have teenage children needing additional support, or who have the care of a disabled child, or who have or share responsibility for ailing parents. Or women and men whose partners also have demanding jobs, or who have significant other interests, such as sport or writing.

The largest group of potential part-timers however, may be judicial officers who have served for more than 10 years and are currently faced with the choice between carrying on as usual or retiring altogether. Judges in this category have been the subject of various initiatives informally within courts to retain them, and are a target of initiatives like the NJCA's Phoenix programme.

C. Why is part-time judicial service desirable?

The obvious advantages, both principled and practical, are these:

1. Merit;
2. Diversity;
3. Flexibility;
4. Cost saving.

1. Merit

If the objective of a judicial appointment is to secure the services of the most meritorious candidate, it makes no sense to rule out potential appointees entirely on the basis that they would prefer different hours of work. This point was made in a number of submissions to the Senate's Legal and Constitutional Affairs References Committee (the Senate Committee) which reported on *Australia's Judicial System and the Role of Judges* in December 2009 (the Senate Committee Report). The

Senate Committee concluded that the possibility of part-time arrangements would be 'of increasing importance in attracting and retaining many talented appointees' (Senate Committee Report at [4.69]).

The same principle underlies the selection process for salaried judicial officers which was described in the report prepared by the UK's Ministry of Justice entitled *Judicial Salaried Part-time Working: A Practical Guide.*[43] That report indicates (at [11]) that 'all applicants in selection exercises for first time salaried judicial office will be subject to merit based selection procedures. Any preference for part-time sitting will be irrelevant in determining their ability or suitability for judicial office since an individual's reasons for seeking a salaried part-time appointment are not relevant to the appointment process'.

We cannot know how many potential appointees have been overlooked or excluded but it is safe to assume that there are some. Similarly, we do not know how many of the judges who have, in recent years, retired before reaching the statutory retirement age would have preferred to remain in judicial service, but not on a full-time basis, but it is highly likely that there have been a number.

2. Diversity

There is an argument that diversity cannot be easily divorced from the concept of merit (on the basis that different experiences, or additional qualities, may mean that one candidate is considered more meritorious than another). Assuming that merit can be distinguished from diversity, however, it is in any event now generally accepted that diversity in the judiciary is desirable. Uncontroversially, it is seen as helping to promote public confidence. (For a discussion of the importance of diversity in the judiciary, see S.J. Kenney *Gender and Justice, Why Women in the Judiciary Really Matter*, 2013; and E. Rackley, *Women, Judging and the Judiciary – From difference to diversity,* 2013.) It is also argued that a range of diverse experiences amongst the judiciary enhances the management of the courts and the development of the law. We note that in the UK, although appointments are to be made solely on merit, the Judicial Appointments Commission is required to have regard to the need to encourage diversity in the range of persons available for selection for appointments: see s 63 and s 64 of the *Constitutional Reform Act 2005* (UK).

[43] http://jac.judiciary.gov.uk/static/documents/0396-Guide_to_Judicial_Salaried_Part-Time_Working.pdf

To the extent that women are still under-represented in senior judicial positions, and to the extent that part-time work is more commonly a preferred model of work for women, part-time appointments are clearly desirable.

3. Flexibility

The flexibility here is that of the court, rather than the individual judicial officer. The Chief Justices of Victoria and of the Family Court each advised the Senate Committee that part-time arrangements had the potential to create an effective and flexible use of additional judicial resources ([4.51], [4.58] - [4.59]). The Senate Committee was also told that in NSW a part-time 'auxiliary' judge had made a useful contribution to the Court of Appeal and a system of part-time magistrates had worked well ([4.56] - [4.57]).

Part-time appointments may be particularly useful where there would otherwise be gaps in a court's expertise, or where it was not clear whether an increase in workload would be sufficient to justify the appointment of a full time judicial officer.

4. Cost savings

A number of cost-savings may result from part-time judicial work. Assuming for present purposes that a part-time judicial appointment would be remunerated on a pro-rata basis, then clearly there would be a cost-saving to the extent that a judicial officer works on a part-time rather than a full-time basis.

There are, however, more significant cost-saving implications from part-time judicial work, for those officers who are eligible to retire, but may be willing to work part-time instead. For example, if two retiring judges could be persuaded to work for six months per year each, instead of retiring, that would necessitate one replacement appointment rather than two, and avoid the need to pay the judicial pension to either of those part time judges. The saving to the community for each year the arrangement continued would be substantial. In addition, the court (and in turn the community) would retain the benefit of the experience of those two judges.

Part-time judicial service may also facilitate other savings. By way of example, in the Magistrates Court, it may be that there are country courts which would be well served by a part-time magistrate (as either a sole appointment, or an

additional appointment to a larger jurisdiction), saving travel and accommodation costs.

Cost saving and flexibility are of course related topics. Governments are naturally reluctant to make fresh judicial appointments, particularly to the superior courts, because of the costs involved. If heads of jurisdiction have some freedom to use part-time arrangements, they are likely to be able to better manage increases in workload where those increases have not yet reached the point of requiring an additional full-time appointment.

D. Practicalities - possible issues in relation to part-time judicial service

Part-time judicial service raises a number of practical considerations, including:

(A) Listings;

(B) The availability of hearings able to be conducted by part-time officers;

(C) The calculation of remuneration;

(D) Access to part-time judicial service and the maintenance of judicial independence.

In our view, none of these considerations precludes part-time judicial service.

1. Listings

Part-time arrangements are likely to pose some listing challenges for courts - more for some than for others. These should not be exaggerated. Like other people, judicial officers have leave and long service leave, attend work-related education or other events interstate, have planned operations and unplanned accidents. They have conflicts of interest which preclude them from sitting on certain matters. Many are only available for, or are suited to, particular types of work. A listing system which can cope with these factors is likely to be able to cope with the fact that Judge X can only sit from Monday to Thursday, or between April and September.

2. The availability of hearings able to be conducted by part-time judicial officers

There are two issues: the volume of trial work of a duration which is able to dealt with by a part-time judicial officer, and the practical difficulties associated with

allocating longer trials to part-time judicial officers. The issues arise only in relation to part-time judicial officers working fewer than five days per week. (The allocation of trials to a judicial officer working on a part-time basis by working full time over, say, six months of a year is unlikely to present any difficulties in trial allocation.)

As to the first issue, the anecdotal information available for the Supreme and District Courts suggests that many trials and substantive hearings (eg appeals) are listed for fewer than four days. That suggests that there would be hearings which a judicial officer working part-time for three to four days per week could readily undertake. In the Magistrates Court, the greater volume of trials of shorter duration suggests that there would be ample trial work for part-time magistrates, particularly in the metropolitan area.

As to the second issue, allocating a longer trial to a part-time judicial officer who works only on certain days per week would need to be dealt with in one of two possible ways. The first possibility is that the hearing days would need to be spread over a longer period of time. On one view, that would be undesirable. However, even with current full-time judicial appointments it is recognised that spreading a long trial over a longer period, by not sitting every day of the week, may be convenient to all participants. Very long trials today frequently have only four sitting days per week so that lawyers can attend to their other clients, litigants attend to their businesses, and jurors (if any) attend to their business and personal affairs. That may be a preferable model for many litigants. The alternative possibility is that the trial judge may agree to sit full-time for the duration of the trial, but then account for those additional days of work by working fewer days in other weeks during the year.

This example illustrates the final observation we would make in relation to the practical implications of part-time judicial service, which is that it requires some flexibility on the part both of court administrators and the judicial officer involved. That flexibility is required, as well, in order to accommodate unexpected contingencies: a trial may run over its listed hearing time, necessitating additional sitting days, or an urgent matter may require a hearing at short notice. Any part-time judicial officer would need to understand that she or he may, on occasion, have to meet the needs of the court by working additional time.

3. The calculation of remuneration

Once it is accepted that part-time judicial appointments should be possible, there will be a need for discussion and consultation between government, the judiciary and other stakeholders, in relation to the appropriate level of remuneration for part-time judicial officers. For the purposes of this submission, it is not necessary to do more than refer to some of the alternative possibilities.

Other than in the case of judges approaching the end of their careers, a pro-rata calculation of salary and benefits is likely to be the most appropriate method of determining the remuneration of judicial officers. Most elements of judicial remuneration have, or can be given, a cash value, so that pro-rata payment can easily be calculated. Pro-rata calculation of leave and long service leave is not difficult.

In the case of a judge who had reached the minimum retirement age and had completed 10 years of service, there may be greater scope for debate about the appropriate level of remuneration for continuing part-time judicial service. It is not necessary to canvas the various alternatives for present purposes.

The rate of remuneration for part-time judicial officers could be fixed by legislation, or referred to the Salaries and Allowances Tribunal for determination.

For magistrates, calculation of superannuation for part-time appointments would pose no difficulty.

Calculation of the entitlement to a judicial pension is presently premised on a minimum of 10 years of full-time work (in addition to a minimum retirement age). An amendment to the pension provisions in the *Judges' Salaries and Pensions Act 1950* (WA) would be required to deal with the calculation of the judicial pension for judges who work part-time for some or all of their judicial careers.

We note that there would be no need to adjust the calculation of the pension for those judges who wish to work part-time only after reaching the minimum retirement age, provided that the judge had served for 10 years on a full time basis. By that stage, the judge will have qualified for the pension, and continued service after that time would not affect the entitlement to, or quantum of, the pension ultimately paid.

4. Access to part-time judicial service and the maintenance of judicial independence

There is only one issue of principle which arises in relation to part-time judicial appointment, as defined here. That arises from the need to marry the principle of judicial independence with the administrative arrangements necessary for a judicial officer to move from part-time to full-time work and vice versa. There are financial implications for government, so that a move from part-time to full-time work, in particular, has similarities with a fresh appointment. However, it would not be appropriate for government to be seen as able to influence the work of a serving judicial officer by having an effective veto over their working arrangements. Nor, of course, should a person seek appointment on one basis while intending to alter it in the near future.

In our view, the core principle must be that the hours of work of a judicial officer cannot be altered without the consent of both the judicial officer concerned, and the head of jurisdiction. That core principle should be set out in legislation.

Once it is accepted that part-time judicial appointments should be possible, there will be a need for consultation between relevant stakeholders to distil a set of principles to guide decisions in relation to part-time service, and to consider which, if any, of those principles should be embodied in legislation.

E. Part-time judicial service in other jurisdictions

The idea of part-time judicial work is neither novel nor radical.

In the UK at present, part-time work is possible at all levels of the judiciary up to, but not including, the High Court. The UK House of Lords Select Committee on the Constitution, in its report in March 2012 on *Judicial Appointments*[44] recommended the removal of the statutory limit on the number of individuals able to serve as High Court and Court of Appeal judges, to enable some appointments to be made on a part-time basis. The Committee regarded this as 'the minimum change necessary' ([117]).

Part-time judicial work was also supported by the Senate Committee in the Senate Committee Report in 2009. The Committee recommended that a model protocol to guide arrangements for judicial officers to work part-time should be developed (Recommendation 8).

[44] http://www.publications.parliament.uk/pa/ld201012/ldselect/ldconst/272/272.pdf

We note also that the *Courts Legislation Amendment (Judicial Officers) Bill 2013* (the Victorian bill) was introduced in the Victorian Parliament on 20 August 2013. Part 3 of the Victorian bill deals with amendments designed to permit part-time judicial service within the Victorian Supreme Court, County Court and Magistrates Court, including provisions enabling the entry, variation and suspension of part-time service arrangements and provisions dealing with the calculation of the pension for part-time judicial service. In the second reading speech for the Victorian bill, the Victorian Attorney General, the Hon Robert Clark MP, noted:

> The bill's second initiative creates a uniform scheme for part-time judicial service in all Victorian courts. This reform is designed to facilitate the appointment and retention of judicial officers who have personal or family commitments, or might otherwise contemplate earlier retirement or resignation due to a lack of 'work/life balance'. All judges, associate judges and magistrates, except those in leadership positions, will be able to enter into an arrangement with the relevant head of jurisdiction to serve on a part-time basis for a specified period or on an ongoing basis.
>
> When considering whether to permit a judicial officer to serve part-time, the head of jurisdiction will have regard to the operational needs of the court, questions of parity, and other relevant matters. A part-time service arrangement must specify the proportion of full-time duties to be performed, which must be at least two-fifths of a full-time workload.
>
> However, the arrangement does not need to specify precise days or a pattern of work. This will enable flexibility so that precise working arrangements can be adapted to facilitate the smooth running of trials and other court processes. The bill provides that a judicial officer's salary and any pension entitlement are adjusted to appropriately address part-time service performed by the officer.

Finally, we note for completeness that part-time (or casual) work has been possible for Magistrates in the Western Australian Children's Court for some time. Furthermore, sessional members (including legally qualified members) regularly sit on the Western Australian State Administrative Tribunal on a casual basis.

The approach adopted to part-time judicial service in other jurisdictions, suggests that part-time judicial service, within proper limits, poses no threat to the independence of the judiciary, poses no insurmountable practical difficulties, facilitates meritorious appointments and greater diversity within the judiciary and is a means to encourage longer judicial service. Part-time judicial service should be permitted in Western Australia for precisely those reasons.

PART II: RESPONSE TO THE DRAFT REPORT OF THE SUB-COMMITTEE FOR CHAPTER 3

In its draft report, the sub-committee expressly does not recommend part-time judicial appointments. Its decision not to make such a recommendation appears to be founded on the following conclusions:

1. That there is no foundation for expecting that part-time judicial appointments would be likely to increase the representation of women as judges and magistrates;
2. That part-time appointments could only be countenanced if they enhanced the 'standard' of the judiciary in Western Australia, and that part-time appointments would not do so;
3. That part-time appointments represent a threat to judicial independence;
4. That practical considerations would make part-time appointments too difficult.

In our respectful view, each of these conclusions does not withstand scrutiny for the following reasons.

1. The sub-committee's conclusion that there is no foundation for expecting that part-time judicial appointments would be likely to increase the representation of women as judges and magistrates

The sub-committee concluded that 'there is no firm foundation' for expecting that part-time judicial appointments would be likely to increase the representation of women within the judiciary. In addition to the observations we have already made in relation to this issue above, we need only add the following.

The sub-committee did not point to any evidence for this conclusion. It was clearly not based on the survey done by Nexus for the purposes of the Review, because the sub-committee concluded that no information of general application could be gleaned from the outcome of the survey on the question of judicial appointments.

Instead, there appear to have been two bases for the sub-committee's conclusion. First, it appears that the sub-committee considered that female practitioners do not have an interest in a judicial career (and hence the

sub-committee recommended that measures be implemented to encourage interest in a judicial career among law students and female legal practitioners). We are not aware of any evidence to support such a conclusion. It appears that the sub-committee may have extrapolated this conclusion from the fact that a high percentage of the respondents to the Nexus survey failed to respond to the question on judicial aspirations. With respect, that response rate provides no evidence whatsoever for the sub-committee's conclusion.

The second basis for the sub-committee's conclusion appears to have been that 'in the main, suitable candidates [for judicial appointments] will be in their late forties or fifties and will be able and prepared to undertake full-time work'. In other words, the sub-committee appears to have concluded that there is no present need for part-time judicial appointments. The 'evidence' for such a conclusion was presumably the fact that the persons appointed to the judiciary thus far, who have mostly been male, have fitted this description. That ignores the possibility that meritorious candidates may have been dissuaded from expressing interest in an appointment, or may have been overlooked for an appointment, as a result of the requirement for full-time judicial service.

Finally, we respectfully submit that the sub-committee's conclusion is out of step with modern thinking on part-time judicial service. As we have already observed, the Senate Committee recognised part-time judicial service as an issue of importance in attracting talented appointees. The UK House of Lords Committee observed that 'for the number of women within the judiciary to increase significantly, there needs to be a commitment to flexible working and the taking of career breaks' ([117]). And the express rationale for the Victorian Bill is to facilitate the appointment and retention of judicial officers with personal or family commitments which may make full-time service more difficult.

2. The sub-committee's conclusion that part-time appointments could only be countenanced if they enhanced the 'standard' of the judiciary in Western Australia, and that part-time appointments would not do so

The sub-committee's conclusion appears to have been premised on the view that judicial appointments must be made on merit, that merit is entirely unrelated to diversity, and that diversity has no place in discussions about judicial appointment, or in relation to the conditions of judicial service. The sub-committee's views are at

odds with contemporary recognition and acceptance of the importance of diversity within the judiciary.

There is no recognition within the draft report of the fact that flexibility in working arrangements for judicial officers would facilitate both the appointment of meritorious candidates with a range of different backgrounds and personal circumstances, and the retention of experienced judges.

3. The sub-committee's conclusion that part-time appointments represent a threat to judicial independence

The sub-committee's view appears to have been derived from its conception of what a part-time judicial appointment would involve. Although that concept is not defined by the sub-committee, it is apparent that it has in mind a fixed term appointment and/or a part-time appointment where the appointee would be permitted to undertake outside legal work. That model of part-time judicial service is not one which we advocate, not was it contemplated by the Senate Committee, nor is it contemplated in the Victorian bill. Consequently, much of the sub-committee's analysis does not engage with the model for part-time judicial service which has been the focus of recent discussions within Australia.

4. The sub-committee's conclusion that practical considerations would make part-time appointments too difficult

The sub-committee suggested that 'the workload of the Supreme Court and District Court is such that there would likely be significant practical difficulties with the appointment of judges who were to work for specified days each week or specified weeks each month', although the sub-committee noted that 'appointments for a specified number of months per year may pose lesser practical difficulties than would other forms of part-time appointments'. The sub-committee did not identify any evidence for its conclusion that part-time judicial service would involve 'significant' practical difficulties.

Although part-time judicial service would have some practical implications, the information available to us suggests that part-time judicial service would not give rise to 'significant' practical difficulties. In addition, there are likely to be substantial benefits from part time judicial service, including potential cost-savings and the retention of experienced judicial officers.

The Hon Justice Janine Pritchard
The Hon Christine Wheeler AO QC

ANNEXURE B

Heads of Jurisdiction Consideration of Part-Time Judicial Service

The Heads of Jurisdiction of the Western Australian courts and the State Administrative Tribunal recently met to discuss issues related to part-time judicial service, and in particular a number of issues arising from a submission to the *20th Anniversary Review of the Gender Bias Taskforce* prepared by the Hon Justice Janine Pritchard and the Hon Christine Wheeler AO. This document reflects the consensus which was reached at that meeting.

The Heads of Jurisdiction generally support the proposal to expand the possibility of part-time judicial service essentially for the reasons outlined in the submission, subject to the observations which follow. In short, part-time judicial service offers opportunities to expand the range of people willing and able to provide judicial service, thereby creating opportunities for meritorious candidates who might otherwise be discouraged from service, gender diversity and the possibility of increasing the flexibility of court operations. It was noted that magistrates have served on a part-time basis in both the Children's Court and the Family Court over a number of years, to the advantage of the Court and without disadvantage to the cost or efficiency of the Court's operations.

However, if the scope of part-time judicial service is to be increased, there are a number of practical issues which must be addressed.

First, if part-time service is to be provided on the basis of a part of a working week (as opposed to longer periods forming part of a working year, such as a month or a quarter), there are very real and probably insuperable listing difficulties in those courts in which a significant number of trials last more than a part of a week. This observation is consistent with the fact that part-time service has been successful in courts with high volume jurisdictions in which each case generally occupies a relatively short period, such as in the magistrates' jurisdictions of the Children's Court and the Family Court.

The general Magistrates Court is somewhat more problematic, as there are a not insignificant number of cases which occupy more than part of a week. However, it was generally thought that the volume of work in the Magistrates Court is such that

arrangements could perhaps be made to accommodate judicial service on the basis of a part of a week, perhaps on a job-share basis, for reasons of listing efficiency.

However, in the superior courts, cases occupying more than part of a week are commonplace. It was generally thought that in those courts part-time service would only be effective if the judicial officer was prepared to work for a minimum block of time - perhaps a month, perhaps longer.

It was also noted that whatever arrangements were made with respect to part-time judicial service would have to involve the efficient utilisation of judicial chambers and support staff. Although there are potential difficulties in these areas, it was generally thought that they might be overcome. However, they must be addressed.

In relation to the issues of prospective conflict of interest, the proposal suggested in the submission to the effect that part-time judicial officers work subject to the same constraints as full-time judicial officers was generally supported, although it was noted that in the case of part-time Children's Court's magistrates, judicial officers had continued to conduct legal practices, subject to an undertaking not to take any instructions relating to matters involving the Children's Court. It was observed that in courts of more general jurisdiction, such as the Magistrates Court and the superior courts, such arrangements would be problematic.

The Heads of Jurisdiction agree with the proposal in the submission to the effect that any arrangements for the greater utilisation of part-time work should embody the principle that the hours of work of a part-time judicial officer should not be altered without the consent of that judicial officer and the relevant Head of Jurisdiction. Consistently with that proposal, the Heads of Jurisdiction consider that any arrangement for the provision of part-time judicial service should be subject to the prior approval of the relevant Head of Jurisdiction.

The final observation made by the Heads of Jurisdiction was that the increased availability of part-time work should not be seen by executive government as an opportunity for reducing the judicial resources available to the courts generally, by, for example, reducing a full-time position into a part-time position.

20TH ANNIVERSARY REVIEW OF THE 1994 REPORT OF THE CHIEF JUSTICE'S TASKFORCE ON GENDER BIAS

CHAPTER 4

ABORIGINAL WOMEN AND GIRLS AND THE LAW

THE CHAPTER 4 SUBCOMMITTEE, WITH THE ENDORSEMENT OF THE STEERING COMMITTEE MAKES THE FOLLOWING RECOMMENDATIONS:

ABORIGINAL CROSS-CULTURAL AWARENESS

4.1 Aboriginal Cross-cultural Awareness courses should:

a) Provide a comprehensive overview of Aboriginal history and culture in order to give an historical perspective encompassing pre-colonial Aboriginal life and the effects of colonisation;

b) Consider the impact past government policies have had on Aboriginal culture, families and communities;

c) Include local Aboriginal women as lecturers in order to ensure Aboriginal women's culture and perspectives are incorporated into the courses so as to raise awareness of victims' needs and rights;

d) Allow sufficient time for participants to discuss issues with Aboriginal people so that the information provided during the course is understood;

e) Allow two days for the complete course but this could be delivered in multiple shorter modules.

4.2 The Department of the Attorney General, within 12 months of the publication of this 2014 Review Report, devises a plan to involve all court staff and employees in Aboriginal cross-cultural awareness courses that meet the recommended standards in Recommendation 4.1. Attendance will be compulsory. Within two years of this review the Department of the Attorney General implements the plan for cross-cultural awareness courses for all court staff and employees.

4.3 The State Government through the Department of the Attorney General works with the Commonwealth Attorney General's Department to reinstate funding for Aboriginal cross-cultural awareness courses for judicial officers and, in the meantime, the Attorney General of Western Australia within 12 months from the date of this 2014 Review Report funds such cultural awareness courses as the State's Indigenous Justice Committee determines are needed by the judicial officers of Western Australia.

4.4 The State Indigenous Justice Committee within 12 months of the date of this report submits a plan to the Department of the Attorney General for the delivery of Aboriginal cross-cultural courses to Justices of the Peace meeting the recommended standards in Recommendation 4.1. Within two years of the date of this 2014 Review Report, the Department of the Attorney General funds the delivery of this plan.

4.5 The Office of the Director of Public Prosecutions (ODPP) restructures its Aboriginal cross-cultural awareness courses in order to meet the recommended standards in Recommendation 4.1. These courses are to be required for promotion in the ODPP and will include local content depending on the locations where the prosecutor or staff member will be working.

4.6 As a matter of urgent priority, dedicated training resources are embedded in the Western Australia Police Academy and Professional Development portfolio to develop and maintain a contemporary and rigorous Aboriginal cross-cultural training program for both recruits and in service training. This program will have the capacity to be inclusive of outside presenters as well as community input. Courses must meet the standards in Recommendation 4.1.

4.7 Participation in all Aboriginal cross-cultural courses is to be mandatory for Western Australia Police recruits and an essential part of police professional development and a pre-requisite for promotion.

4.8 Within 12 months from the date of this review the Western Australia Police reports in its annual report on its progress in achieving these goals.

INDIGENOUS JUSTICE COMMITTEE

4.9 The Indigenous Justice Committee considers the number of meetings its members should attend annually in order to ensure the proper working of the committee. Committee members who fail to attend the required number of meetings should be replaced.

4.10 The Indigenous Justice Committee monitors the operation of the courts in so far as those operations affect Aboriginal people, particularly Aboriginal women and children.

ABORIGINAL COMMUNITY COURTS

4.11 The State Government continues to support and fund the operation of the Aboriginal Community Courts (as set out in Recommendation 9.3 of this 2014 Review Report) and the Barndimalgu Court.

4.12 The State Government supports and funds additional Aboriginal sentencing courts in locations where they are needed to meet the needs of local Aboriginal communities.

THE PROVISION OF LEGAL SERVICES FOR ABORIGINAL WOMEN

4.13 The State Government through the Department of the Attorney General and the Commonwealth government continues to fund and increases the funding for the Family Violence Prevention Legal Service, the Aboriginal Family Law Service, the Southern Aboriginal Corporation, the Marninwarntikura Family Violence Prevention Unit, the Women's Law Centre of Western Australia and Djinda with the goal of ensuring there is a statewide network of culturally secure services available to Aboriginal and Torres Strait Islander women whether in the Perth metropolitan area or in remote regions including funding for after-hours services.

4.14 Within 12 months the State Government, through the Department of the Attorney General determines the location and extent of any gaps in the services to Aboriginal women and reports to the Attorney General and within two years the State Government, with the Commonwealth Government ensures these gaps are filled by increasing the necessary funding.

ABORIGINAL LANGUAGES AND INTERPRETERS

4.15 The State Government supports the implementation of the National Indigenous Interpreters Framework, and uses it to strengthen service design and delivery to Aboriginal people for whom English is not their primary language.

COMMUNITY LEGAL EDUCATION

4.16 State and Commonwealth government funding for the statewide network of culturally secure services for Aboriginal women (recommendation 4.13 above) must emphasise the delivery of community legal education as a way of increasing community understanding of legal issues to enable Aboriginal women to recognise and address legal issues if and when they arise.

SAFE HOUSES

4.17 State and Commonwealth Governments commit to funding adequate safe houses for vulnerable people, especially Aboriginal women and children, escaping family and domestic violence. This funding must include resourcing for specialist staff to deal with family and domestic violence as well as co-existing issues such as substance misuse and mental health issues.

4.18 State and Commonwealth Governments commit to funding adequate, secure and affordable housing for those Aboriginal women and children left homeless by family and domestic violence.

SAFETY AT COURT

4.19 In small and/or remote locations Western Australia Police officers must be pro-active and intervene to ensure the safety of vulnerable witnesses.

MULTIFUNCTIONAL POLICE FACILITIES

4.20 Within 12 months of the date of this review, Aboriginal cross-cultural courses, meeting the recommended standards in Recommendation 4.1 be provided by Western Australia Police for all police officers assigned to work in Multifunctional Police Facilities to ensure cultural competence on the part of those police officers in the delivery of services.

4.21 Within 12 months of the date of this review all State government agencies whose services are needed in Multifunctional Police Facilities including child protection, education, health, mental health, local government, community development, corrective services and courts, review the assignment of workers to those facilities and ensure that services are provided on site where reasonably possible (not as fly-in, fly-out workers) so that workers are able to build trust and confidence with community members.

4.22 Within 12 months of the date of this report all State government agencies who provide services in Multifunctional Police Facilities, provide Aboriginal cross-cultural courses meeting the standards in Recommendation 4.1 to all workers assigned to work in Multifunctional Police Facilities to ensure cultural competence on the part of those workers in the delivery of services.

POLICE RECRUITMENT

4.23 Western Australia Police strengthens their efforts to recruit Aboriginal women and men as police officers so that they make up at least 3.0% of the police force.

4.24 Western Australia Police puts in place supports to retain Aboriginal recruits and encourage their advancement in the police service, particularly the advancement of Aboriginal women recruits.

NATIVE TITLE

4.25 The current legislative review of the National Native Title Tribunal shall consider the need for gender specific advocates for Native Title claimant groups so that, if culturally appropriate, women claimants may have access to women advocates to support them through the Native Title process.

4.26 The current legislative review of the National Native Title Tribunal shall consider requiring all practitioners conducting Native Title claims, including mediators, barristers, solicitors, anthropologists and other experts be culturally competent in the particular claimant group involved in the case by undertaking Aboriginal Cross-cultural courses meeting the standards in Recommendation 4.1 taught by Aboriginal women from the claim area.

4.27 The Department of Education and Department of Aboriginal Affairs provide scholarships for Aboriginal women anthropology students in Western Australia commencing in the 2015 academic year.

4.28 The State Library of Western Australia in conjunction with the Department of Aboriginal Affairs, the Department of Women's Affairs, the Native Title Representative Bodies and all Western Australian universities, commencing in the financial year 2015, establishes a databank of oral and written (where possible) documentation of Aboriginal historical information relating to genealogy and, where appropriate, connection to Country.[1]

4.29 The Office of the Registrar of Aboriginal Corporations, during the financial year 2015, amends its regulations to require specific reporting from Native Title Representative Bodies, Prescribed Bodies Corporate and Native Title Representative Corporation on gender inclusion for board memberships and executive councils.

4.30 The State Minister for Women's Interests develops and provides specific board readiness training for Aboriginal women to enable them to serve on boards, particularly Native Title Representative Bodies and Prescribed Bodies Corporate.

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[1] Where sacred information is kept, special protocols will need to be developed to ensure the confidentiality of material related to closed information on sights, traditions and customs.

MEMBERSHIP OF CHAPTER 4 SUBCOMMITTEE

The Chapter 4 Subcommittee comprises:

Convenors

- **Her Honour Mary Ann Yeats, AM** (Subcommittee member from 2012 and Convenor from April 2014) -Judge of the District Court of Western Australia, retired

- **Ros Fogliani** (former Convenor, 2012 to 9 January 2014) – State Coroner, Coroner's Court of Western Australia

- **Jenny Kiss** (former Co-convenor, 2012 to March 2014) – General Counsel Public Transport Authority

- **Amanda Thackray** (former Subcommittee member and Co-convenor) Lawyer, Legal Aid Western Australia

Subcommittee Members

- **Danille Abbott** (from 2012) – Lawyer, Indigenous Outreach Program, Australian Securities & Investments Commission (ASIC) (on maternity leave)

- **Mara Barone** (from 2012) – Director, Barone Criminal Lawyers Pty Ltd

- **Professor Harry Blagg** (from April 2014) - Winthrop Professor of Criminology, Associate Dean (Research) Faculty of Law, University of Western Australia

- **Amanda Burrows** (from 2012) – Senior State Prosecutor, Office of the Director of Public Prosecutions, WA

- **Mary Cowley** (from April 2014)- CEO, Aboriginal Family Law Service

- **Professor Colleen Hayward AM** (from 2012) – Pro-Vice-Chancellor (Equity and Indigenous); Head of Kurongkurl Katitjin Centre for Indigenous Education and Research, Edith Cowan University

- **Jocelyn Jones** (from April 2014)- Adjunct Research Fellow, National Drug Research Institute, Curtin University of Technology and PhD candidate at the Telethon Institute of Child Health Research.

- **Corina Martin** (from April 2014)- Principle Legal Officer, Aboriginal Family Law Service

- **Linda Shanks** (from 2012)- Senior Assistant Director, Commonwealth Director of Public Prosecutions

- **Gayann Walker** (from 2013) - Lawyer, Dwyer Durack Lawyers

- **Dr Mandy Wilson** (from April 2014)- Senior Research Fellow, National Drug Research Institute, Curtin University of Technology

Former members

- **Dr Hannah McGlade** (2012 to May 2014) (resigned), Migration Review Tribunal, former CEO Aboriginal Family Law Service

- **Madge Thomas nee Mukund** Director, Aboriginal Affairs Cabinet Subcommittee Office of the Director General, Government of Western Australia, Department of Aboriginal Affairs

PERSONS CONSULTED BY THE CHAPTER FOUR SUBCOMMITTEE

- Ruth Abdullah, Aboriginal elder
- Emeritus Professor Judy Atkinson, Southern Cross University, Aboriginal Health, Healing, Generational trauma
- Inspector Louise Ball, a/assistant Director: Academic Development and Executive Leadership Division WA Police
- Her Honour Judge Gillian Braddock, Judge of the District Court of WA
- Nicole Casley, Solicitor, Castledine Gregory
- Peter Collins, Principal Legal Officer, Aboriginal Legal Service WA
- Dennis Eggington, Chief Executive Officer, Aboriginal Legal Service WA
- Det Senior Sgt Stephen Foley, WA Police
- Kelsi Forrest, Aboriginal law student, 2013 NAIDOC Youth of the Year, founder of iAmtheOther a student run organisation bridging social divide between Aboriginal and non Aboriginal students; inaugural scholarship winner 2012, Aboriginal Women's Legal Education Trust (WLWA).
- Stephanie Fryer-Smith, Native Title Registrar, Native Title Tribunal
- Dr Sue Gordon AM, retired Aboriginal Children's Court Magistrate, inaugural commissioner of the Aboriginal and Torres Strait Islander Commission (ATSIC), head of 2002 inquiry into family violence and child abuse in WA Aboriginal communities, Chair of the Northern Territory Emergency Response Taskforce 2007-8.
- Chief Magistrate Stephen Heath, Magistrates Court of WA

- Jolleen Hicks, Aboriginal advocate for cultural awareness in native title claims
- Harriet Ketley, Lawyer, NSW Department of Justice
- Lesley Kirkwood, Women's Law Centre WA
- Helen Lawrence, Women's Law Centre WA
- Anna Liscia, Member Legal Practice Board WA, principal Liscia Tavelli Legal Consultants Pty Ltd
- Corina Martin, Principal Legal Officer Aboriginal Family Law Service WA
- The Hon Wayne Martin AC, Chief Justice of WA
- Dr Hannah McGlade, Aboriginal Human Rights lawyer
- The Hon Michael Mischin MLC, Attorney General of WA
- Kylie Moore, Co-ordinator, Barndimalgu Court, Geraldton
- Donella Ray, Bardi – Jabba Jabba women from Broome; Native Title Claimant
- Robert Skesteris, Executive Manager, Aboriginal and Multicultural Unit, WA Police
- Tammy Solonec, 2012 Young Lawyer of the Year, National Congress of Australia's First Peoples Board member, Vice Chairperson of NAIDOC Perth, Indigenous Rights Manager at Amnesty International Australia.
- Professor Erika Techera, Dean of Law University of Western Australia
- Dr Kathryn Trees, Senior Lecturer in Media, Communication and Culture at Murdoch University

- Victim Support Services, Kimberley
- Sgt Carol Vernon, WA Police, Family Protection Coordinator, West Metropolitan District
- Simon Walker, Victim Support Service WA
- Professor Anne Wallace, Head, School of Law and Justice, Edith Cowan University
- Ray Warnes, Executive Director Court and Tribunal Services, Department of the Attorney General
- Melissa Watts, Principal, M Watts Legal
- Owen Webley, Victim Support Service WA
- Chris White, Child Witness Service WA

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- Sue Clayton, Senior Reporting and Statistics Officer, The University of Notre Dame

- Raymond Li - Manager, Reporting and Analysis, Office of Strategy and Planning, Curtin University

- Francesca Robertson, Senior Research Officer, Kuongkurl Katitjin, Edith Cowan University

- Andrea Smith - Research Officer, Aboriginal Family Law Service WA

- Faye Strugnell - Law Clerk, Dwyer Durack

- Damon Wasserman - Acting Deputy University Registrar, University of Notre Dame Fremantle

- Amanda Willis– Director, Corporate Values and Equity / Ethics, Equity and Social Justice, Curtin University

The views set out in this chapter do not necessarily express the views of the individual members of the Subcommittee or the organisations with whom the individual members of the Subcommittee are associated.

FOCUS OF CHAPTER 4

The focus of the Chapter 4 Subcommittee has been the 51 recommendations made after extensive consultation with Aboriginal women as part of the1994 Gender Bias Taskforce Report. The 1994 Report provides a picture of the real concerns of Aboriginal women 20 years ago about gender bias they suffered in the law and the administration of justice. The Subcommittee investigated the changes made in the justice system since 1994 so that we are able to report what has been done as well as what remains to be done or done better. Key issues include:

a) Cultural awareness training for the judiciary including justices of the peace, for law students, for prosecutors, public servants and police officers;

b) The provision of legal services including representation as well as advice, counselling and referrals for Aboriginal women.

c) The employment of Aboriginal women as lawyers, prosecutors, police officers, court officers and court counsellors.

d) Concern for the safety of Aboriginal women and their children in the legal system.

The Subcommittee's focus has been on the gender bias Aboriginal women currently face in the justice system in 2014 by consulting widely with Aboriginal women not only in Perth but also in regional areas. The Subcommittee is committed to again ensure that the voices of Aboriginal women are heard in this 2014 Review as those voices were heard in 1994.

The Subcommittee enlisted the help of the Aboriginal Family Law Service who arranged to conduct a survey of Aboriginal women in regional areas in order to find out the real problems these women face with access to justice in 2014. A Questionnaire, Attachment 1 was circulated to AFLS Regional Coordinators who administered the questionnaire. The results of the survey, Attachment 2 were then used as part of the Subcommittee's review of the 1994 Recommendations. Those results are referred to in this chapter as the *Subcommittee Survey*.

The Subcommittee also enlisted the help of Dr Mandy Wilson, Senior Research Fellow at the National Drug Research Institute, Curtin University who had been involved in the *Social, Cultural Resilience and Emotional wellbeing of Aboriginal*

Mothers in Prison Project 2013 ('SCREAM'), a project of Curtin University and the University of New South Wales. In the course of the project 84 Aboriginal women incarcerated in WA prisons in 2013 were interviewed. Extracts from those interviews Attachment 3 were used by the Subcommittee in its review of a number of recommendations, particularly recommendations concerning lawyers and police. Those Aboriginal women's voices are referred to in this chapter as the *Subcommittee Interviews*.

The Subcommittee also consulted widely with Aboriginal women, judicial officers, government and non-government service providers, police, law schools, universities, specialist lawyers and legal bodies. A list of those consulted is set out at pages 267 - 269 of this chapter.

A number of the recommendations from chapter four of the 1994 Report have been dealt with in other chapters of the 2014 Review. Recommendations 26, 27, and 28 dealing with restraining orders are covered in Chapter 6: Restraining Orders. The system of fines and defaults; recommendations 32, 33, and 34 are covered in Chapter 9: Women and Punishment as are recommendations 46 and 47 concerning bail.

SUMMARY OF RECOMMENDATIONS FROM THE 1994 REPORT AND SUBCOMMITTEE'S DISCUSSIONS AND RECOMMENDATIONS ARISING FROM 2014 REPORT

Aboriginal Cross-cultural Awareness Courses

- **Recommendation 4 - 1994 Report:** *All court staff be given ongoing cultural awareness training.*

- **Recommendation 5 - 1994 Report:** *All Justices of the Peace and other judicial officers attend cross-cultural awareness courses, which include information as to the rights of Aboriginal women in Aboriginal society, otherwise the judicial officers not be allowed to sentence Aboriginal women defendants. Aboriginal women be consulted as to the content and conduct of these courses*.

- **Recommendation 9 - 1994 Report:** *All prosecutors (police and DPP) attend more extensive cross-cultural awareness courses and other training courses (e.g. as to the availability of support structures) to make them aware of victims' rights and needs. Aboriginal women be employed as lecturers.*

- **Recommendation 39 - 1994 Report:** *Better cross-cultural awareness education be instituted for all serving police officers to be assessed in the same way as other components of their courses.*

- **Recommendation 40 - 1994 Report***: More extensive police promotion and training programs be established to reflect Aboriginal issues in all their components and satisfactory completion of these programs be required before promotion is recommended.*

- **Recommendation 41 - 1994 Report:** *Police officers be given more training to deal with cases of violence toward, and sexual abuse of, Aboriginal women and girls. The training be directed at giving victims supportive, sympathetic and culturally appropriate treatment.*

In the 20years since the 1994 Gender Bias Report Aboriginal women have fared very badly in their contact with the criminal justice system. Between 1991 and 2007 the arrest rates of Aboriginal women increased significantly: from 1,381 per 100,000

in 1991 to 2,744 per 100,000 in 2005, which is an increase of 99 percent (Loh. N, S. Maller, Fernandez, Ferrante and Walsh. *Crime and Justice Statistics for Western Australia, 2005, pp 1-203, Perth 2007*). The dramatic increase in the arrest rates of Aboriginal women played out in shocking rates of imprisonment for Aboriginal women, particularly in Western Australia. Despite the USA having the highest rate of imprisonment in the world for African-American women (one in 203), in 2008 Aboriginal women in Western Australia surpassed that with a rate of about one in 160. (The Hon Wayne Martin AC, Chief Justice of Western Australia: "*Corrective Services for Indigenous Offenders – Stopping the Revolving Door*": 17 September 2009). Things have not improved. In 2014 almost 47% of women prisoners in Western Australia are Aboriginal (although Aboriginal women comprise only 3.8% of the adult female population in WA). (See: Chapter 9 of this 2014 Review Report).

The troubles Aboriginal women experience with alcohol abuse, partner abuse, police and lawyers who do not listen to them (*Subcommittee Interviews*) provide a window into Aboriginal women prisoners' views of the system that led to their incarceration. The statistics highlight the need for cultural competence on the part of everyone involved in the justice system - police, prosecutors, court staff, government workers and judicial officers. The statistics demonstrate that need may be even greater now than it was in 1994.

Aboriginal cross-cultural courses aim to move participants from cultural incompetence to cultural competence or cultural responsiveness so that when they come into contact with Aboriginal persons they are able to respond appropriately. "Cultural competence" refers to the ability to provide services in a way that respects the culture of Aboriginal people. The purpose and goals of Aboriginal cross-cultural courses is to enable positive changes in knowledge and attitude that can then facilitate culturally appropriate workplace environments and service provision. Courses should provide a comprehensive overview of Aboriginal history and culture in order to give an historical perspective encompassing pre-colonial Aboriginal life and the effects of colonisation. It is important that professionals understand the impact that past government policies have had on Aboriginal culture and the destruction caused to family and communities. Professionals working in the criminal justice system need a sound understanding about how the past has contributed to

the issues facing the Aboriginal community today. In order to achieve this, courses should where possible, be a minimum of two days.

In Western Australia we face significant challenges in the delivery of Aboriginal cross-cultural awareness courses because of the diversity of the Aboriginal communities across our State. Presenters should, where possible, be local to the area where attendees may be working. That could be achieved with some public servants, Justices of the Peace and local police assigned to work in regional Western Australia. So for example Kalgoorlie Magistrates, Justices of the Peace and local police officers might receive training with input from Kalgoorlie Aboriginal women. In the case of judicial officers, prosecutors, police prosecutors and senior police officers whose responsibilities are state-wide - this would not be possible and local community cultural knowledge should be sought by the nominated presenter to ensure appropriate training is received.

It is important that Aboriginal women participate as lecturers in cultural awareness courses. Aboriginal women's culture and perspectives are essential to cultural competence. In the case of DPP and Police prosecutors Aboriginal women lecturers are able to raise awareness of victims' needs and rights, particularly those of Aboriginal women, essential in the education of prosecutors. Cross-cultural awareness programs need to be accepted as a positive contribution to workers learning and dealing with clients, not just another department outcome that has to be met and ticked off.

The Subcommittee accepts that circumstances can dictate the use of online and DVD material in cultural awareness courses. But, where possible, face to face discussion sessions with Aboriginal people as teachers best provide the knowledge and are far more likely to lead to the understanding essential to cultural competence and responsiveness.

Accordingly, the Subcommittee recommends:

4.1 Aboriginal Cross-cultural Awareness Courses should:

a) provide a comprehensive overview of Aboriginal history and culture in order to give an historical perspective encompassing pre-colonial Aboriginal life and the effects of colonisation;

b) consider the impact past government policies have had on Aboriginal culture, families and communities;

c) include local Aboriginal women as lecturers in order to ensure Aboriginal women's culture and perspectives are incorporated into the courses so as to raise awareness of victims' needs and rights;

d) allow sufficient time for participants to discuss issues with Aboriginal people so that the information provided during the course is understood;

e) allow two days for the complete course but this could be delivered in multiple shorter modules.

Court Staff and Employees

Aboriginal cross-cultural awareness training for court staff and employees of the Department of the Attorney General (DOTAG) is provided through an on-line cultural awareness education course developed by the Public Sector Commission designed for public sector employees to "develop their awareness of Aboriginal and Torres Strait Islander history, culture and experiences". The course is listed on DOTAG's 2014 Corporate Workforce Development Program and court staff and employees are encouraged to complete the program.

Aboriginal cross-cultural awareness training for court staff and employees in regional areas was pursued of late by DOTAG but could not be implemented due to a lack of local service providers. Nevertheless, Magistrates Court staff recently received training in Perth, Kalgoorlie and the Midwest Gascoyne.

The Subcommittee believes cultural competence on the part of court staff and DOTAG employees is essential for Aboriginal people who are disproportionately represented in court appearances. The Subcommittee understands the problems of distance and the lack of availability of service providers; however, a heavy reliance

upon an on-line program when public sector employees of the courts do not require its completion is not acceptable. Therefore the Subcommittee recommends:

4.2 The Department of the Attorney General, within 12 months of the publication of this 2014 Review Report, devises a plan to involve all court staff and employees in Aboriginal cross-cultural awareness courses that meet the recommended standards in Recommendation 4.1. Attendance will be compulsory. Within two years of this review the Department of the Attorney General implements this plan for cross-cultural awareness courses for all court staff and employees.

Judicial Officers

In order to ensure judicial independence, the Judiciary must implement cultural awareness courses for judicial officers. That was the reason underlying the establishment of Western Australia's committee of Judicial Officers and Aboriginal women and men, the *Indigenous Justice Committee* (as discussed in Recommendation 1 of the 1994 Report.)

Until 2011, Recommendation 5 was implemented to the extent it coincides with Recommendation 96 of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) in 1992:

> *That judicial officers and persons who work in the court service and in the probation and Parole services and whose duties bring them into contact with Aboriginal people be encouraged to participate in an appropriate training and development program, designed to explain contemporary Aboriginal society, customs and traditions. Such programs should emphasise the historical and social factors which contribute to the disadvantaged position of many Aboriginal people today and to the nature of relations between Aboriginal and non-Aboriginal communities today. The Commission further recommends that such persons should wherever possible participate in discussion with members of the Aboriginal community in an informal way in order to improve cross-cultural understanding.*

The Commonwealth Attorney General's Department funded the implementation of Recommendation 96 insofar as it referred to judicial officers by providing funds to the Australasian Institute of Judicial Administration (AIJA) to design and deliver cultural awareness training courses for judicial officers. The AIJA established a national

committee consisting of judicial officers and Aboriginal women and men for this purpose and each State and Territory established a similar committee (now Western Australia's Indigenous Justice Committee). The first cultural awareness programs for judicial officers were held in WA in 1994 and 1995 where two-day courses were delivered to Judges and Magistrates. Commonwealth funding did not extend to Justices of the Peace so the State government funded two day courses for Justices of the Peace designed and implemented under the guidance of the Indigenous Justice Committee through the Centre for Aboriginal Studies at Curtin University headed by Dr Pat Dudgeon, an Aboriginal woman from the Kimberley.

Since that time further Aboriginal cross-cultural awareness programs and courses have been made available in Western Australia for new judicial officers and to update the early courses for serving judicial officers. When the National Judicial College (NJCA) was established, Commonwealth funding for cultural awareness courses for judicial officers moved from the AIJA to the NJCA. Unfortunately all funding for cross-cultural awareness courses ceased in 2011. Since that time no cultural awareness programs have been provided for new judicial officers or serving judicial officers in Western Australia. The Subcommittee considers that such courses need to continue if the cultural competence and responsiveness of judicial officers in Western Australia is to be maintained. For these reasons the Subcommittee recommends:

4.3 The State Government through the Department of the Attorney General works with the Commonwealth Attorney General's Department to reinstate funding for Aboriginal cross-cultural awareness courses for judicial officers and, in the meantime, the Western Australia Attorney General within 12 months from the date of this 2014 Review Report funds such cultural awareness courses as the State's Indigenous Justice Committee determines are needed by the judicial officers of Western Australia.

Justices of the Peace

Cross-cultural awareness courses for Justices of the Peace (JP's) have been the responsibility of the Department of the Attorney General. (DOTAG). In 2012 Courts and Tribunal Services (CTS) produced a DVD Kit on Aboriginal cross-cultural awareness circulated to all metropolitan and regional court locations. In the

metropolitan area, the JP Branch of CTS coordinates training sessions in relation to Aboriginal cross-cultural awareness for JP's at least once each year. The magistrates within regional areas coordinate JP training in those areas and a resource kit on Aboriginal cross-cultural awareness has been produced with a view to incorporating it into local training programs. Clerks of Court in the Pilbara region advise that JP's working in the mining and gas industry receive Aboriginal cultural awareness training in their workplace. The Deputy Chief Magistrate undertakes a road show providing training to JP's from time to time. Nonetheless the Chief Magistrate expressed a view to the Subcommittee that the Magistrate's Court is failing in terms of getting the necessary information to JP's.

The Subcommittee believes the work of JP's is an important part of the justice system in WA. JP's in remote regional communities are required on occasion to consider bail applications and are often called upon by police to be present during police interviews of juvenile suspects. Those are important and essential duties that require cultural competence where Aboriginal women, men and children are involved. For these reasons the Subcommittee recommends:

4.4 The State Indigenous Justice Committee within 12 months of the date of this review submits a plan to the Department of the Attorney General for the delivery of Aboriginal cross-cultural courses to Justices of the Peace meeting the standards in Recommendation 4.1. Within two years of the date of this 2014 Review Report the Department of the Attorney General funds the delivery of this plan.

Office of the Director of Public Prosecutions

From 2007 to 2012 the Office of the Director of Public Prosecutions in Western Australia (DPP) held a number of two-day cultural awareness training sessions as part of their workforce development. From 2013 there were difficulties sourcing presenters and an increase in workload made it impossible to set aside time for these longer sessions. The DPP currently runs a half-day cross-cultural awareness program every 12 months that is a requirement for all legal staff. Use is also made of online cultural competency training to be incorporated into the DPP induction program. Regular Continuing Legal Education sessions (CLEs) are held on a variety of topics such as Aboriginal English and working with Aboriginal client issues in

sexual assault cases. Aboriginal women are used as presenters of the majority of these programs. CLEs are also taped so that employees who are unavailable at the time of delivery have the opportunity to view the material.

In addition the DPP runs a three-day compulsory advocacy course on sexual assault prosecutions every two years. At the course the issue of prosecuting matters involving vulnerable witnesses and complainants, particularly focusing on Aboriginal women and children is dealt with in the form of a lecture from a senior prosecutor and a workshop.

The Subcommittee appreciates the time constraints and increased workload faced by the DPP but the half-day allotted for a cross-cultural awareness course would only superficially cover the topics that need to be covered. Face to face discussion with Aboriginal people would be limited if not impossible. Recommendation 9 in the 1994 Report focused on raising awareness of victims' rights and needs and this could not easily be done in a half-day session. While the Subcommittee applauds the continued commitment of the ODPP to cultural awareness training for its staff and the requirement that staff attend the half-day program, more is needed to meet the needs of Aboriginal women and children. Therefore the Subcommittee recommends:

4.3 The Office of the Director of Public Prosecutions (DPP) restructures its Aboriginal cross-cultural awareness courses in order to meet the standards in Recommendation 4.1. These courses will be required for promotion in the DPP and should include local content depending on the locations where the prosecutor or staff member will be working.

Western Australia Police

Western Australia Police recruits attend a two-day cultural diversity course. The purpose of this course is to give some background information to enable students to interact with all communities to achieve maximum co-operation and positive results. Only 120 minutes of the course are spent on Aboriginal culture. These include a five minute video *Australian Indigenous Culture*, a written paper handed to recruits entitled *'History of Aboriginals in WA'* that is read and discussed, a session on tribes, family and kinship systems, a ten minute PowerPoint discussing Western Australian

Aboriginal family structures and grouping with discussion, and a ten minute PowerPoint of Aboriginal words. Participants are then divided into groups and given 30 minutes to research a topic chosen from a list of topics for presentation to the larger group (70 minutes) with a five minute recap period. Police recruits are provided with a written paper relating to diversity including information on the Equal Opportunity Act and written material concerning Aboriginal Tribe/Family/Kinship as well as a mention of the five major groups they may meet in the course of their work as police officers – Noongar, Yamatji, Wankai, Kimberley Peoples and the Ngaanyatjarra peoples of the central desert region. The instructors at this course are police officers.

With regard to the serving members of Western Australia Police, cultural diversity training is not provided as a specialist course rather it is 'embedded' as a topic within other training themes and policy guidelines such as Western Australia Police:

- Code of Conduct
- Police Values
- Substantive Equality
- EEO training
- Mental Health First Aid Training

New guidelines are being developed for police in 'Community Engagement' referring to '*the benefits of working with communities to ensure effective policing services which are responsive to their needs and expectations. Police Officers are required to understand the impact of community perception on the role of policing, as well as how police conduct and response can influence engagement with the community.'*

The Western Australia Police *Aboriginal and Multicultural Unit* co-ordinates information, programs and advice on Aboriginal and multicultural issues that impact upon police officers. This unit provides some Aboriginal cross-cultural awareness training but it is only by request from police units requiring specialised training or information sessions.

The cultural diversity course provided for police recruits provides a very good overview of Aboriginal history and culture but it does not meet any of the recommended standards for effective Aboriginal cross-cultural courses

(Recommendation 4.1 above). There are significant shortcomings because 120 minutes is too short a time to cover the historical background and no Aboriginal women or men are involved as lecturers. There is no '*face to face'* discussion with Aboriginal people that would facilitate a deeper understanding on the part of police recruits of cultural issues. Beyond that the Subcommittee believes the lack of regular Aboriginal cross-cultural awareness courses for serving officers is totally inadequate. In the case of police prosecutors, they, like State prosecutors, need more extensive cultural awareness training so that they are aware of victims' rights and needs.

For these reasons the Subcommittee makes the following recommendations:

4.3 As a matter of urgent priority, dedicated training resources are embedded in the Western Australia Police Academy and Professional Development portfolio to develop and maintain a contemporary and rigorous Aboriginal cross-cultural training program for both recruits and in-service training. This program will have the capacity to be inclusive of outside presenters as well as community input. Courses must meet the standards in Recommendation 4.1.

4.4 Participation in all Aboriginal cross-cultural courses is to be mandatory for Western Australia Police recruits and an essential part of police professional development and a pre-requisite for promotion.

4.5 Within 12 months from the date of this review Western Australia Police reports in its annual report on its progress in achieving these goals.

INDIGENOUS JUSTICE COMMITTEE

Recommendation 1 – 1994 Report:

There be established a Permanent Committee with some members being judicial officers (one from the Supreme Court) to monitor the operation of the courts as they affect Aboriginal people and to work in with the proposed Aboriginal Justice Advisory Committee. On the committee should be an equal proportion of Aboriginal women and men.

A permanent committee, including judicial officers and Aboriginal men and women was established in the early 1990's pursuant to Recommendation 96 of the Royal

Commission Into Aboriginal Deaths in Custody (RCIADIC) and the Aboriginal Justice Advisory Committee was established to monitor the implementation of the 339 recommendations of the RCIADIC. That permanent committee remains in operation in Western Australia, now named the *Indigenous Justice Committee*. The chairperson has always been a Judge of the Supreme Court and, at present, is the Chief Justice. Judicial officers from all courts in Western Australia, both State and Federal, are members of the committee. At present there are two Aboriginal male members and two Aboriginal female members. Because of its membership the committee is able to monitor the operation of the courts as they affect Aboriginal people but its activities have focused primarily on cultural awareness training for the judiciary.

Aboriginal representation on the committee has proved difficult. The Chief Justice reported that Aboriginal committee members seldom attend meetings. In addition, it has been very difficult to attract and retain Aboriginal Liaison Officers in the Supreme Court. However, the Subcommittee notes that a Senior Aboriginal Liaison Officer was recently appointed at the Central Law Courts. Despite the intention to include Aboriginal men and women in bi-monthly meetings of the Indigenous Justice Committee, the Aboriginal members do not generally attend.

The Subcommittee believes the work of the Indigenous Justice Committee is essential to the proper working of the courts insofar as Aboriginal women and children are concerned. In interviews both the Chief Justice and Dr Sue Gordon AM found it difficult to think of any part of the criminal justice system that worked well for Aboriginal women and children. The Indigenous Justice Committee should regularly consider the operations of the courts as they affect Aboriginal women. To do this they need regular attendance by Aboriginal men and women who are members of the committee. If Aboriginal members fail to regularly attend, the Subcommittee considers other Aboriginal members who are able to do so, should replace them. Aboriginal organisations and community law centres are likely to be a good source of reliable Aboriginal committee members. Therefore the Subcommittee recommends:

4.9 The Indigenous Justice Committee considers the number of meetings its members are required to attend annually in order to ensure the proper working of the committee. Committee members who fail to attend the required number of meetings will be replaced.

4.10 The Indigenous Justice Committee monitors the operation of the courts in so far as those operations affect Aboriginal people, particularly Aboriginal women and children.

ABORIGINAL JUSTICES OF THE PEACE

Recommendation 2 - 1994 Report

More Aboriginal women Justices of the Peace be appointed to courts where there are a considerable number of Aboriginal women defendants, subject to the general limitation that only Magistrates and Judges should be able to impose imprisonment.

The *Court and Tribunal Services* division within DOTAG is not directly involved in the appointment of Justices of the Peace (JP's). Clerks of Courts are encouraged to identify suitable Aboriginal persons to apply to become JP's through their local Magistrate. This is particularly the case in regional areas where there are a high number of Aboriginal persons. Such submissions are almost always supported when forwarded to the Attorney General for approval. The JP database as of 13 May 2014 identified 65 Aboriginal JP's, 32 of whom are female. Of the 32 female JP's, 17 have been appointed after 1994 and 21 are located in regional and remote areas of WA. It should be noted however that not all Aboriginal JP's identify themselves as Aboriginal in their applications. The Subcommittee notes with reference to recommendation 2 above (1994 Report) that JP's are no longer able to impose imprisonment.

The Subcommittee considers that the concerns expressed in recommendation 2 of the 1994 Report have been met and no further recommendations are required.

UNIVERSITY TRAINING FOR ABORIGINAL AND NON-ABORIGINAL LAWYERS

Recommendations 3 and 23 -1994 Report

Recommendation 3:

Efforts be made to increase the numbers of Aboriginal lawyers and other persons to represent Aboriginal persons in courts and to increase legal positions and the number of women as paralegals (including at private firms), also the education and quality of service of legal representation for Aboriginal women by the provision of specific courses at Universities and at post-graduate level.

Recommendation 23:

The ability of non-Aboriginal persons to represent Aboriginal clients be improved so as to increase the trust and willingness of Aboriginal persons to access such services. This be done within law schools as well as via the provision of specific courses at post-graduate (continuing legal education) level.

There have been numerous efforts made to increase the numbers of Aboriginal lawyers. And those efforts seem to have been successful. In 1994 there were only two Aboriginal lawyers practicing in WA; now 52 lawyers who identify themselves as Aboriginal are currently practicing of whom 27 are female and 25 are male. A female Aboriginal lawyer is a partner and practice manager at a law firm in the Perth CBD. Aboriginal law graduates have been employed as Judge's Associates in the District Court following graduation. A number of Aboriginal lawyers are barristers and thus members of the Independent Bar.

In 1994 only 14 Aboriginal women were enrolled in WA law schools. The number of Aboriginal law students has markedly increased.

1. Of the 33 Aboriginal students studying at the University of Western Australia (UWA) Law School one is enrolled for a Master's degree, three for Advanced Diplomas, one in the JD, 12 in the LLB, 10 in the Bachelor of Arts, three in the Bachelor of Commerce and three studying a Bachelor of Science with Law as a second major. Recently an Aboriginal woman graduated with First Class Honours in Law at UWA.

2. At Murdoch University there are 24 students studying law who identify as Aboriginal, 13 females and 11 males. This compares with a total of 227 students who identify as Aboriginal currently studying at Murdoch, 157 female and 70 male.

3. At the University of Notre Dame, Fremantle campus one student (male) who identifies as Aboriginal is among the 404 students studying law. There is no law school at the Broome campus. Seven students who identify as Aboriginal (out of 65) are studying at Notre Dame's Broome campus while 35 students who identify as Aboriginal (out of 6222) are studying at the Fremantle campus.

4. At Edith Cowan University there are currently three persons who identify as Aboriginal enrolled as law students. The numbers of Aboriginal students enrolled in combined faculties including Law is much larger: Bachelor of Laws/Bachelor of Criminology and Justice – 37 students, Bachelor of Laws/ Bachelor of Business - five students, Bachelor of Laws/Bachelor of Psychological Science – 22 students, Bachelor of Law (LLB) Bachelor of Business – four students and Bachelor of Laws/Bachelor of Arts – three students, being a total of 71.

5. At Curtin University two female students who identify as Aboriginal are currently studying law. 415 students who identify as Aboriginal are currently studying at Curtin University as well as 207 students (not identified as Aboriginal) are enrolled at Curtin's Centre for Aboriginal Studies.

Although none of the law schools in Western Australia have specific courses in place to improve legal representation for Aboriginal women there have been important changes in the courses students study and in the cultural knowledge that is imbedded in courses. In 2010 the Council of Law Deans endorsed and published the 'Learning and Teaching Academic Standards for Law' including *Threshold Learning Outcomes* (TLOs).

TLO 1(b) provides: 'Graduates of the Bachelor of Laws will demonstrate an understanding of a coherent body of knowledge that includes: …(b) the broader contexts within which legal issues arise.' It is clear the 'context' extends to encompass 'Indigenous perspectives; cultural diversity and linguistic diversity'.

Professor Anne Wallace, Head of the School of Law and Justice at Edith Cowan University explains that ECU is moving beyond the concept of 'cultural competence', the usual goal of cultural awareness programs, to embedded 'cultural responsiveness' in its Criminology program. This concept reflects the views of Professor Colleen Hayward, ECU Pro-Vice-Chancellor who has recommended:

> "Education should move beyond cultural competence (in the sense of awareness of cultural issues) to cultural responsiveness or 'enacted cultural competence' in which individuals possess relevant cultural knowledge, are able to engage with people in a culturally sensitive way, value culture and respond to people from other cultures in a way which is fair and equitable" (Hayward, C. (2014) *Indigenous Students and Connection to University and Community with the theme "Transformative, Innovative and Engaging Pedagogy".* Paper presented at the WA Teaching and Learning Forum, Perth, Western Australia).

These ideas are mirrored in the approach of the UWA Law School where all law students must take at least one International Law unit and where cultural issues are imbedded and provide context within law courses. Although it is an elective, 'Indigenous Peoples and the Law', a course developed and taught by Professor Harry Blagg and Amberlin Kwamalina, is popular among the student body attracting 130 students this year.

UWA Dean of Law Erika Techera emphasises the specific pathways into the law school for Aboriginal students. The Pre-Law programme run through the Centre for Indigenous Studies offered pre-law training for prospective Aboriginal law students and provided tutoring and other support to students doing the course. UWA has now changed its law degree to a graduate JD degree another specific pathway has been opened to Aboriginal students to do a one year Advanced Diploma Course to enable entry to the JD course, acknowledging the social and financial situation of many Aboriginal students who would not be able to complete a six or seven year course. Professor Techera expects this initiative will increase the numbers of Indigenous lawyers.

UWA law students have the opportunity for an *Aurora Native Title Internship* with a Native Title Representative Body which internship is supported financially by the law faculty. UWA also offers its law students placements in social justice teams as part of the degree (placement with the Aboriginal Legal Service, the Legal Aid

Commission or a Community Legal Centre). Non-Adversarial Justice principles are also taught in a course on Alternative Dispute Resolution (ADR), compulsory at UWA.

At Murdoch University the School of Law has a dedicated support staff member who works with Murdoch's indigenous law students providing both academic and emotional support. As with all Aboriginal and Torres Strait Islander students, law students are eligible to receive one-on-one tutorial support through the federally funded Indigenous Tutorial Assistance Scheme. At Murdoch University, the Kulbardi Aboriginal Centre administers this scheme. Murdoch currently offers cultural awareness training to its incoming staff and although not yet mandatory for all staff, the training is well accessed by Murdoch's academic and professional staff. Cultural awareness training is not currently available to Murdoch students but this is planned for 2015.

University of Notre Dame, Fremantle, (Notre Dame) offers cultural awareness workshops for its staff in March and June. 23 Staff were in attendance for both workshops in 2014. The workshops cover five modules that address Aboriginal life: pre-colonisation, government policies, and the maintenance of culture through Native Title, contemporary Aboriginal societies as well as Reconciliation & Notre Dame. Other workshops are scheduled for September and December 2014. Aboriginal staff at Notre Dame's Broome campus, conduct cultural awareness workshops for new staff and also for the broader Kimberley community. These focus upon the same five modules as above but with relevance to the Kimberley region.

Notre Dame has developed a "Day in the Life" program as a tool for attracting Aboriginal and Torres Strait Islander high school students to its courses. The university has also initiated a mentoring program for Aboriginal and Torres Strait Islander students.

Curtin University has a strong history in the provision of indigenous education and research. In 1998 Curtin was the first Australian university to issue a Statement of Reconciliation and Commitment and in 2008, was the first Australian university to launch a Reconciliation Action Plan (RAP). The refreshed RAP 2014-2017 incorporates both the framework provided by Reconciliation Australia and Universities Australia's *National Best Practice Framework for Indigenous Cultural*

Competency in Australian Universities. It reflects national priorities, as expressed in the Behrendt Report, and Curtin University's goal of building indigenous cultural capability in all staff and students. Reconciliation initiatives are embedded into the core business of Curtin University. Aboriginal and Torres Strait Islander staff and students are engaged in reciprocal relationships with non-indigenous staff and students.

Under the leadership of the *Elder in Residence,* Curtin University supports a number of initiatives: the Centre for Aboriginal Studies course – *Ways of Working With Aboriginal People* for staff: *Indigenous Cultures and Health 130* for all undergraduate Health Sciences students: *Intercultural Indigenous Leadership Program* for staff and *Noongar Dandjoo,* an Aboriginal current affairs production through Department of Media, Culture and Creative Arts.

Curtin University holds programs aimed at encouraging Aboriginal and other secondary students to attend university, to encourage Aboriginal and other adult learning and community involvement. One such program prepares Aboriginal and other applicants to succeed at university and provides mentoring for those students at university. A number of projects provide pathways to university to assist Aboriginal students including UniReady, Indigenous Tertiary Enabling Course, Enabling Course for Science, Engineering and Health, English Language Enabling Course and StepUP.

At Edith Cowan University (ECU), Kurongkurl Katitjun, the Centre for Indigenous Education and Research, supports Aboriginal students in all faculties providing tutoring and other support. ECU law students have the option of taking an elective unit (currently titled 'Indigenous offenders and Victims') as part of their law program. Students also have the option of participating in the Aurora Native Title Internship Program.

Since 1994 there has been significant support provided to Aboriginal people to study law. The Aboriginal Women's Legal Education Trust established by Clare Thompson and Women Lawyers of Western Australia (WLWA) provides a scholarship annually to a female Aboriginal law student who has proved herself in her course of study. The Law Society of Western Australia provides mentoring programs for Aboriginal law students and WLWA provides mentoring programs for female practitioners.

Assistance is provided to Aboriginal law students through indigenous cadetships funded by the Commonwealth government aimed at providing students with financial assistance and work experience to be 'job ready' upon graduation.

The Commonwealth government also provides the John Koowarta Reconciliation Law Scholarship.

Notre Dame provides a comprehensive list of Indigenous scholarships on its website available for the study of law including:

- The Aurora Native Title Internship Program
- The Aurora Project undergraduate and postgraduate scholarships for ATSI students
- Commonwealth Indigenous Access Scholarship
- Indigenous Commonwealth Education Cost Scholarship
- Indigenous Enabling Commonwealth Education Cost Scholarship
- Indigenous Enabling Commonwealth Accommodation Cost Scholarship
- Mary MacKillop Foundation Scholarship
- The Kalyagool Kadadjiny Scholarship
- 2013 Roberta Sykes Harvard Club Scholarship for study at Harvard University
- The Charles Perkins Scholarships for study at Cambridge or Oxford Universities.

The Subcommittee considers that the concerns expressed by Aboriginal women in Recommendations 3 and 23 of the 1994 Report have been met and no further recommendations are made.

ABORIGINAL COURT STAFF

Recommendation 4 - 1994 Report

Aboriginal women be placed in court offices at all levels (including as support and resource persons) in particular where Aboriginal women are involved in court proceedings and processes. All court staff be given ongoing cultural awareness training.

The Court and Tribunal Services division in DOTAG have established several specific positions for Aboriginal persons (section 50D; positions that must be filled by an Aboriginal person under the *Equal Opportunity Act* 1984). In addition many Aboriginal persons are employed to provide support to Aboriginal and Torres Strait Islander people coming into contact with the courts. The Magistrates Courts presently employ 24 Aboriginal women in various positions and regions including the Regional Manager Goldfields, the Clerk of the Court at Moora, and the Supervising Court Officer at Perth. Aboriginal Liaison Officer (ALO) positions have been established in courthouses at Broome, Carnarvon, South Hedland, Perth Children's Court and Albany (four ALOs are currently Aboriginal women and the position in South Hedland is five in regional areas) filled by Aboriginal women and three Aboriginal trainee positions (two in metropolitan and one in regional areas). The role of Manager Aboriginal Advisory Services has been created in Perth but is currently vacant.

The Subcommittee recognises that the 1994 concerns of Aboriginal women have largely been met by DOTAG and Courts and Tribunal Services and commends them for their continuing work. The Subcommittee remains concerned that the role of Manager - Aboriginal Advisory Services is vacant and should be filled by a suitably qualified Aboriginal person as soon as possible.

The Subcommittee believes the 1994 concerns in Recommendation 4 have been met. No further recommendations are made.

ABORIGINAL COMMUNITY COURTS

Recommendation 6 – 1994 Report

Appropriate Aboriginal advisors be consulted by judicial officers on matters relating to culture where that is relevant – e.g. on questions of penalty.

In Western Australia there are three Aboriginal sentencing courts – two Community Courts in Kalgoorlie and Northam and the Family Domestic Violence Court, Barndimalgu in Geraldton. These courts allow respected Aboriginal community members to participate in the sentencing of Aboriginal offenders by; - attending the sentencing hearing held in a culturally appropriate setting, assisting the sentencing magistrate with cultural and family issues and speaking to the offender about his or

her behaviour from a community/family perspective. The Community Courts have six respected Aboriginal women out of a total of 12 panellists who participate with the magistrate. Barndimalgu has six Aboriginal females out of ten active panellists who participate with the magistrate.

These Aboriginal sentencing courts would meet the requirements of Recommendation 6 of the 1994 Report if they were generally available to Aboriginal persons charged with offences in Western Australia. However these three Aboriginal sentencing courts are provisionally funded, subject to evidence proving their effectiveness in reducing Aboriginal recidivism rates. So far they have not passed that test.

Sentencing of Aboriginal offenders is covered in Chapter 9 of this 2014 Review Report, Women and Punishment. The Subcommittee supports recommendation 9.3 of that chapter namely that: *The State Government continues to support and fund the operation of Aboriginal Community Courts*.

The Subcommittee also recommends the State Government continues to support and fund the operation of the Barndimalgu Court.

The Subcommittee therefore recommends:

4.11	The State Government continues to support and fund the operation of the Aboriginal Community Courts (as set out in Recommendation 9.3 of this 2014 Review Report) and the Barndimalgu Court.
4.12	The State Government supports and funds additional Aboriginal sentencing courts in locations where they are needed to meet the needs of local Aboriginal communities.

THE PROVISION OF LEGAL SERVICES FOR ABORIGINAL WOMEN

Recommendations 7, 16, 24 and 25 – 1994 Report

Recommendation 7

Aboriginal Persons (including counsellors) be available for Aboriginal women to discuss legal processes with, before they get to court. The Aboriginal Legal Service

be given more personnel, funds and organisation to assist with the problems of Aboriginal women.

Recommendation 16

Properly remunerated Aboriginal women counsellors be appointed, funded by the Ministry of Justice and Department of Community Development, Health Department and all other Government Departments relevant to Aboriginal people to counsel women who have been assaulted.

Recommendation 24

More resources be made available to the Aboriginal Legal Service for the creation of a separate women's issues unit within the Service to enable the ALS to better serve the needs of Aboriginal women; also for an "after hours" crisis service.

Recommendation 25

A separate Aboriginal Women's Legal Service be established in order to overcome the conflict of interest situations which prevent the ALS from acting for Aboriginal women and to fully serve the legal needs of Aboriginal women.

One of the problems faced by Aboriginal women is that the Aboriginal Legal Service (ALS) necessarily acts for alleged offenders, usually male. In the case of sexual assault or domestic violence offences Aboriginal women are reluctant to approach the lawyers who act for those charged with offences against them. Aboriginal women need advice, court support, counselling, and education as well as legal representation when seeking Domestic Violence Orders and Restraining Orders. They need help with family law Issues including children's issues, and care and protection proceedings. The Subcommittee in its investigations concluded that the range of services needed by Aboriginal women go well beyond the services available through the ALS. The Subcommittee notes that the priority is for safety refuge and culturally secure services based on Aboriginal women's needs. *Culturally secure services* are services specifically designed to meet the needs of Aboriginal women and delivered by Aboriginal persons or Aboriginal organisations.

The Chief Executive Officer of the ALS noted in consultation that efforts were made to create a separate women's issues unit in the ALS as recommended in

Recommendation 24 of the 1994 Report, an initiative he supported, but it was not successful. The Aboriginal Family Law Services (WA) (AFLS) unit originated from a separate women's legal unit within the ALS. More recently, the AFLS experienced problems because perpetrators of violence were accessing the same legal service as their victims. The need arose for a service assisting Aboriginal victims of family and sexual violence to access legal services in rural and remote areas. This lead to the emergence in2009 of the national Family Violence Prevention Legal Services program (FVPLS) funded by the Commonwealth; it provides alternatives to the ALS or mainstream services such as Legal Aid Commission (LAC) or community legal centres.

The Subcommittee's investigations show that the ALS has recently suffered severe cuts to its budget confirmed during consultation with the CEO. In this climate the Subcommittee were advised that it would be almost impossible to set up an entirely new and separate Aboriginal Women's Legal Service -a view that is shared by the Chief Justice. Even if such a service were to be established the concern of existing service providers such as ALS is that the funding would come from the same diminished pool of Commonwealth funding the ALS and LAC rely upon and lead to reductions for existing service providers.

Dr Sue Gordon AM supports the establishment of a dedicated service for Aboriginal women because she believes that this is the only way the needs of Aboriginal women be met. The respondents interviewed by the Subcommittee (Survey) overwhelmingly agreed with the introduction of an Aboriginal Women's Legal Service. The Subcommittee suggests that culturally secure legal services would have a large impact on access to justice by Aboriginal women.

The Subcommittee investigated legal service providers now available for Aboriginal women. The Subcommittee noted the ALS was the only legal service providing representation for Aboriginal people in WA in 1994 that undoubtedly had an impact upon the recommendations in the 1994 Report. In 2014 there are a number of agencies providing services to Aboriginal women including:

1. The Family Violence Prevention Legal Service (FVPLS) program provides legal and counselling services for victims of family violence and/or sexual assault who are Aboriginal or Torres Strait Islander people. Services include: legal

advice and information, community legal education, court representation on family violence and sexual assault matters, advocacy and assistance with completion and lodgement of legal documents, legal information, sexual abuse counselling, community awareness/development, and outreach to towns in their area. The FVPLS has 14 service providers nationally, with three operating in WA. These are the Aboriginal Family Law Service (WA) (AFLS) with offices in Perth, Broome, Carnarvon, Geraldton, Kalgoorlie, Kununurra and South Hedland; the Southern Aboriginal Corporation (SAC) in Albany and the Marninwarntikura Family Violence Prevention Unit in Fitzroy Crossing. The Commonwealth Department of Prime Minister and Cabinet funds all of these services. The AFLS receives no funding under the national FVPLS program to deliver a Perth service and the current service providers cover vast distances via outreach. For example AFLS Broome's outreach region includes Derby, Bidyadanga, One Arm Point, Djarindjin, Lombadina and Beagle Bay. But the 'tyranny of distance' limits the availability of services in many remote areas. For example Geraldton AFLS recently made an outreach trip to Wiluna where they were assisted by Kalgoorlie AFLS staff. It was the first AFLS visit to this remote area.

2. The Women's Law Centre of WA (WLCWA) is a not for profit community organisation operating for the past ten years through a human rights framework to improve access to justice for women in WA. WLCWA does this by helping women facing disadvantage with family law and children's issues, family and domestic violence issues, care and protection proceedings, criminal injuries compensation as well as sexual harassment and sexual assault. An important part of its work is in community legal education. Importantly for Aboriginal women the WLCWA has outreach projects assisting Aboriginal and Torres Strait Islander women in very remote communities through a partnership with the NPY Women's Council and providing services to women in prison in WA. The prison outreach program assists women in Bandyup Women's Prison and the Boronia Pre-Release Centre for Women providing legal advice and advocacy as well as community legal education. In partnership with the NPY Women's Council Domestic Violence Service, lawyers from WLCWA travel to the NPY Lands to provide legal services to women on the Lands. Unlike the

AFLS, the WLCWA is able to provide services to Aboriginal women in the Perth metropolitan region but like the AFLS its ability to fully service the needs of Aboriginal women is limited by the great distances involved as well as funding limitations.

3. Djinda is a new service in its first year of operation, entirely funded by the State government through DOTAG under the Western Australian Family Violence Prevention Legal Service (WAFVPLS) program. Djinda provides support for Aboriginal and Torres Strait Islander peoples in the Perth metropolitan area affected by family violence and sexual assault. (Similar to FVPLS in regional Australia.) Relationships Australia WA and the Women's Law Centre WA work together to deliver, through Djinda, services of advocacy, referrals and support for a range of services including legal, counselling, accommodation, medical, financial and employment. Djinda also provides lawyers to represent victims of family violence in court and legal advice in regard to restraining orders, child protection, victim compensation relating to family violence and family law including the payment of child support. Djinda provides community education in identifying and responding to family violence.

4. DOTAG reports there is currently two Aboriginal staff employed within Victim Support Services, the Child Witness Service and the Family Violence Service. One of these positions is a 50 D position. Contracts with non-government organisations have been established to provide these services in regional areas and contractors have policies in place to actively recruit Aboriginal workers. The Family Violence Court Program was expanded from Joondalup to five additional sites across metropolitan Perth from 2007. The FVC program offers risk assessment and safety planning and support to Aboriginal women who have been the victim of family violence. The perpetrator receives a court-monitored intervention specifically designed to address Aboriginal family violence.

During consultations the Subcommittee was advised of gaps in the existing network of services provided by these agencies and DOTAG. For example there is a gap in services from Mandurah south to Northcliffe as well as many other gaps resulting from remoteness.

After considering the concerns expressed by Aboriginal women in the 1994 Report recommendations for the range of legal services, referrals, support and community education required; and after considering the services for Aboriginal women provided by FVPLS, AFLS, SAC and Marninwarntikura Family Violence Prevention Unit, WLCWA, Djinda and DOTAG, the Subcommittee does not recommend that an entirely new Aboriginal Women's Legal Service be established at this time.

The Subcommittee recognises the support for an AWLS by Dr Sue Gordon AM and the overwhelming support for an AWLS by Aboriginal women respondents to the *Subcommittee Survey*. The Subcommittee considers that there already exists in Western Australia a network of culturally secure services for Aboriginal women whether in the metropolitan area or in regional areas that would, if gaps in those services were to be filled, meet the needs of Aboriginal women. The Subcommittee does not consider it is realistic to propose the establishment of an AWL that is entirely new. Any such proposal would meet the immediate objection that it duplicates the services already being provided. But it is accepted by the Subcommittee that the services for Aboriginal women through the FVPLS, AFLS, SAC, Marninwarntikura Family Violence Prevention Unit, WLCWA, Djinda and DOTAG should be provided, so far as is possible, by Aboriginal women to ensure cultural security. The *Subcommittee Survey* indicated that at times these services were limited as to time available to speak with women. Almost 90% of respondents to the *Subcommittee Survey* agreed that an after-hours legal service is required to assist Aboriginal women and the Subcommittee supports this.

For these reasons the Subcommittee makes the following recommendations:

4.13 The State Government through the Department of the Attorney General and the Commonwealth government continues to fund and increases the funding for the Family Violence Prevention Legal Service, the Aboriginal Family Law Service, the Southern Aboriginal Corporation, Marninwarntikura Family Violence Prevention Unit, the Women's Law Centre of Western Australia and Djinda with the goal of ensuring that there is a statewide network of culturally secure services available to Aboriginal and Torres Strait Islander women whether in the Perth metropolitan area or in remote regions including funding for after-hours services.

4.14 Within 12 months the State Government through the Department of the Attorney General, determines the location and extent of any gaps in the services to Aboriginal women and reports to the Attorney General; and within two years the State Government with the Commonwealth Government ensures those gaps are filled by increasing the necessary funding.

ABORIGINAL LANGUAGES AND INTERPRETERS

Recommendation 8 - 1994 Report

All service providers be required to provide information (including visual), which is meaningful to Aboriginal women in the appropriate Aboriginal language.

The issue of Aboriginal languages and the need for interpreters remains current. Increased engagement with Aboriginal people in regional and remote areas increases the need to communicate meaningfully with those who may not speak English fluently. In 2009 a cross-government *National Indigenous Languages Policy* was implemented. Forming part of the National Partnership Agreement on Remote Service Delivery, this required the Commonwealth to develop and implement a National Indigenous Interpreter Framework. The framework has not been completed.

In Western Australia the Office of Multicultural Issues released the updated Western Australian Language Services Policy (2014), which provides policy and guidelines related to indigenous interpreter and translation services but does not articulate its support for a national framework.

The majority of *Subcommittee Survey* participants stated that they were aware of services with written materials in a language they could read. But over 20% of the survey respondents said the services they accessed did not have language appropriate brochures or fact sheets. There was strong support for interpreters being available to people in contact with the police or when attending court but only 38% were aware of interpreters being available in their areas.

The Subcommittee endorses Recommendations 1.17, 1.18 and 1.35 in Chapter 1 of this 2014 Review Report; Women's Access to Justice and the Environment of the Court.

The Subcommittee further recommends:

4.15 The State Government supports the implementation of the National Indigenous Interpreters Framework, and uses it to strengthen service design and delivery to Aboriginal people for whom English is not their primary language.

PUNISHING CRIMES OF VIOLENCE

Recommendation 11 – 1994 Report

More appropriate penalties and/or remedies be imposed on Aboriginal men who have committed crimes of violence, particularly sex crimes against Aboriginal women; penalties that better reflect the seriousness of such offences.

The Subcommittee recognises the long standing concern on the part of Aboriginal women expressed in this recommendation - that Aboriginal men who commit serious crimes of violence against them did not seem to receive sentences reflecting the seriousness of the offences. Aboriginal women considered there was a gender bias against them as victims when Aboriginal men were sentenced for offences against them. Aboriginal women felt less valued in the justice system.

The Subcommittee is satisfied that the recent decision of the High Court of Australia in Munda v The State of Western Australia [2013] HCA 38 not only recognised those long standing concerns of Aboriginal women but has effectively dealt with them. In Munda the offender had been living with his *defacto* partner for many years. They had five children together. During the afternoon and evening of 12 July 2010 he brutally and repeatedly assaulted his partner while they were both intoxicated. The following morning he woke to find she had stopped breathing and sent for medical assistance. Munda pleaded guilty to manslaughter and was sentenced to a term of five years three months imprisonment. The State appealed against the sentence on the ground it was manifestly inadequate. The Court of Appeal of Western Australia upheld the appeal and re-sentenced Munda to seven years and nine months imprisonment. Munda appealed to the High Court. The appeal was dismissed and the High Court spoke clearly of the sentencing principles Aboriginal women should be able to expect in such cases. What the High Court stated is the law in Western Australia.

> *Mitigating factors must be given appropriate weight but they must not be allowed to lead to the imposition of a penalty, which is disproportionate to the gravity of the instant offence.*
>
> *To accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of human dignity.*
>
> *the appellant, by his violent conduct, took a human life… A just sentence must accord due recognition to the human dignity of the victim of domestic violence …*
>
> *A failure on the part of the state to mete out a just punishment of violent offending may be seen as a failure by the state to vindicate the human dignity of the victim;*
>
> *to impose a lesser punishment by reason of the identity of the victim is to create a group of second class citizens, a state of affairs entirely at odds with the fundamental idea of equality before the law.*

It is clear from the decision and commentary of the High Court that appropriate sentences must be imposed upon offenders of all ethnicities, including Aboriginal men, who inflict violence upon Aboriginal women.

The concerns expressed in recommendation 11 of the 1994 Report have been met. No further recommendations are made.

ABORIGINAL COMMUNITY BASED PANELS

Recommendation 15 - 1994 Report

Aboriginal community based panels of key women be appointed by the communities to be part of the Justice Ministry – but supervised by Aboriginal persons within the Ministry – to assist in the apprehension and control of offenders against women and children. The panels to have the responsibility of laying charges, whether or not there are complaints received from the victims, with the power to make recommendations to the courts concerning the disposition of the matters – for example, cautions and appropriate counselling.

This recommendation was never implemented and there is no record of it being considered. In 2006 the Law Reform Commission of Western Australia (LRCWA)

recommended (Recommendation 17 of its report on Aboriginal Customary Laws) the establishment of "Community Justice Groups" in remote Aboriginal communities to include equal representation of all families in the community and to include equal numbers of women and men. These Community Justice Groups were to have the authority to monitor behaviour in the community and to protect women and children. Again, this recommendation has not been implemented.

The Subcommittee found that the same reasoning underscored Recommendation 15 and LRCWA Recommendation 17 – the idea of regional and remote Aboriginal communities policing themselves and protecting their own women and children. The Subcommittee rejects the premise on which these recommendations are based. We agree with the Western Australia Police Aboriginal and Multicultural Unit that states "…it is the fundamental right of all Australians to live in a safe and secure environment. Upholding that right is a core function of the WA Police." The Aboriginal and Multicultural Unit concedes that historically there have been areas of inequity in services provided to Aboriginal people but, particularly since the Gordon Report (2002), there has been recognition of the need for a police presence even in the most remote Aboriginal communities in order to ensure that those communities live in a safe and secure environment. Leaving remote communities to police themselves independently opens the way for abuse of the vulnerable by more powerful community members. (Below, the Subcommittee considers multifunctional police facilities established in remote communities as a response to the Gordon Report.)

For these reasons the Subcommittee rejects recommendation 15 and the premise on which it is based. It was not implemented and should not be implemented.

COMMUNITY LEGAL EDUCATION

Recommendation 18 – 1994 Report

Aboriginal woman educators be appointed to go into the field and educate women through community-based programs concerning sexual abuse and family violence.

Many service providers who did not exist in 1994 now provide community legal education (CLE) and other educational services for Aboriginal women in regional and remote areas. AFLS has as part of its mission the commitment to provide

"community education and awareness on family and sexual violence legal processes". The education is provided by an Aboriginal Community Support Officer to mothers groups, young people in school, healing groups for women, community members in remote communities or during prison visits. AFLS has found that legal information is useful for young people and it is important to talk about healthy and respectful relationships, safety as a human right, and personal development such as identity and self-esteem. These are also relevant for adults and while the programs focus on women, boys and men may also benefit. AFLS also delivers educational programs to service providers who work with Aboriginal women and families experiencing family violence and sexual assault.

FVPLS provides community legal education on family violence and sexual assault in regional and remote areas while Djinda provides community education in the Perth Metropolitan area about identifying and responding to family violence. An important part of the work of the Women's Law Centre WA (WLCWA) is in community legal education in areas including the very remote areas of the NPY Lands and to women in prison.

There is some suggestion that CLE is not considered a priority for funding bodies. The Subcommittee believes CLE should be a priority. It is essential for Aboriginal women. For these reasons the Subcommittee recommends:

4.16 State and Commonwealth government funding for the statewide network of culturally secure services for Aboriginal women (recommendation 4.13 above) must emphasise the delivery of community legal education as a way of increasing community understanding of legal issues to enable Aboriginal women to recognise and address legal issues if and when they arise.

SAFE HOUSES

Recommendation 20 – 1994 Report

Safe places be established for the protection of women and children victims of assault to be funded by the Commonwealth.

Respondents to the *Subcommittee Survey* indicated the majority of regions have safe houses usually known as women's refuges and respondents knew how to

access these services. It was also interesting to note that most respondents indicated there would be no stigma attached to those accessing the services.

The current uncertainty as to the continued level of funding to homelessness services will potentially impact on current safe houses. Services are reporting having to refuse support to many people accessing their service which will lead to increased risk to the safety and wellbeing of vulnerable people, particularly those escaping family and domestic violence. Another factor is the Aboriginal population in the Perth Metropolitan area has increased by 18.7% between 2006 and 2011 with no commensurate growth in the number of women's refuges. The importance of safe houses cannot be underestimated. They save lives. Given these changing circumstances the Subcommittee recommends:

4.17 State and Commonwealth Governments commit to funding adequate safe houses for vulnerable people, especially Aboriginal women and children, escaping family and domestic violence. This funding is to include resourcing for specialist staff to deal with family and domestic violence as well as co-existing issues such as substance misuse and mental health issues.

4.18 State and Commonwealth Governments commit to funding adequate, secure and affordable housing for those Aboriginal women and children left homeless by family and domestic violence.

SAFETY AT COURT

Recommendation 29 – 1994 Report

Court services and the Police Department give more credence to expressed concerns by Aboriginal people concerning their personal safety when having to attend court.

In 2004 the Court Security Directorate was established to oversee security across all courts in Western Australia. The Directorate works closely with the community, security providers (Western Australia Police, G4S, Serco Australia and Wilson Security) and court staff from the Victim Support Service, Family Violence Service, and the Child Witness Service to obtain intelligence about potential security issues. Also, any person can inform a court official of a security or safety concern which will be referred to the Security Directorate. Identified risks are proactively managed and

liaison initiated with the parties including family members and friends. Once the nature of the risk is assessed and the level of response determined, security providers would be informed and engaged to make the necessary arrangements for future court appearances. The Directorate has established a good rapport with the Aboriginal community, which, together with other court users, can now participate in the court system with a greater sense of security and confidence.

The Subcommittee accepts that the Security Directorate is able to meet any security needs of Aboriginal witnesses in most courthouses. But the Subcommittee is aware that in more remote locations where there are no waiting rooms for witnesses and where the Magistrate's Court may sit in the local police station, Aboriginal witnesses can feel very unsafe and insecure; when they are forced to wait in public areas where they are exposed to the accused and the accused's family members. The Subcommittee believes police should recognise this problem and make appropriate arrangements for vulnerable witnesses without the witnesses having to notify a court official of their security or safety concern. In such small, remote locations police should be pro-active and take care of the safety of vulnerable witnesses without the need to involve the Security Directorate. For these reasons the Subcommittee recommends:

4.19 In small and/or remote locations Western Australia Police officers must be pro-active and intervene to ensure the safety of vulnerable witnesses.

1994 REPORT RECOMMENDATIONS CONCERNING POLICE

Recommendation 36

More Aboriginal women be appointed as police officers (not police-aides). There be a full police training facility established in the Kimberleys (sic).

Recommendation 37

An education unit be established to educate Aboriginal people as to why women are appointed as police officers.

Recommendation 38

When Aboriginal women are appointed to the police force efforts be made by the Department to support them in their positions as they are often subjected to extra pressures within and without the Department.

Recommendation 42

The Police Department develop mechanisms for ensuring that only police officers suited to work with Aboriginal people are posted to locations with substantial Aboriginal populations.

Recommendation 43

The Police Department more closely examine the needs of Aboriginal women in remote communities for police services and develop a strategy towards improving service delivery to such women and communities.

Recommendation 44

Victims of sexual abuse be referred as quickly as possible by police to an appropriate helping agency such as Aboriginal Women's Refuges or the Sexual Assault Referral Centres which agencies should have Aboriginal women on staff.

Recommendation 45

There be proper procedures instituted to ensure that the young children of women who are detained or arrested are properly cared for while their mothers are away. There be no night-time apprehension of women with young children unless it is absolutely necessary.

Recommendation 49

There be specific rules in police manuals and in courses concerning the above matters.

Recommendation 50

There be appropriate screening of offending police officers.

In the *Subcommittee Survey* of Aboriginal community members across Western Australia, participants were asked about their contact with police and how they were treated. 94% of respondents reported having had some contact with the police.

- When making a complaint to police, 35% said they felt their treatment by the police was positive. Comments included "with understanding and care" and "they really helped me through my ordeal and made me feel safe."

- For those who had a negative experience (32%) comments were mostly about being "disregarded", police having "no social skills" and "I didn't make it past the front desk." One respondent spoke about how because of her intoxicated state she "was not treated with any dignity". Another stated when she reported a serious assault preceded by stalking and intimidating behaviours that the police treated her complaint as if this behaviour was a "normal occurrence".

In instances where police contact related to their arrest 21% of respondents said their treatment was positive. Among the 26% who described their experience negatively, there was a connection between their negative treatment and being intoxicated - "Very unfair as I was not able to comprehend the situation as was under the influence. It was after hours and no lawyer present. I would not want this to happen to anyone."

In the *Subcommittee Interviews* Aboriginal women spoke at length about their negative experiences in their dealings with police. These were all Aboriginal women who were in prison in 2013.

- *"But sometimes I find it hard because how are police allowed to get away assaulting peoples and yet we do time over it? We've got to, you know, cop it in the shoulder. Yeah, it's just pretty – I reckon it's unfair."*
- *"at the time I got done I was drunk when they done interviews and that and because I was under the influence really badly they wanted to do more – what's that stuff – interviews. I refused to do any more…I was drunk. I was about 10 times over the limit apparently."*

- *"Because I was still a bit drunk anyhow. Mm. They still talked to me when I was still drunk, yeah, so I didn't know really what I was saying, yeah. I can't remember."*
- *"The police were driving past taking names. They're always taking names in Midland. Walking down the street or even when we walk in the shopping centre. They're supposed to be in there for lunch you know, their lunch break. They're still taking names. They're there at the train station. We can't even get on a train without giving our names. We can't get off a train without giving our names."*
- *"…someone had been racist to me…I got mad and smashed his house. The neighbour rang the police after we broke into his house. Then we got charged for it. We were telling the police that this man was being racist to me and they did nothing about it. … I told them what happened, this man kept calling me black c…and all and they didn't do anything about it so we did something about it."*
- *"…when I was in the relationship with my partner he was abusing me a lot. Even when I was pregnant I was getting a hiding a lot of time. I tried to ring the police but every time I rang the police they won't come…Every time I report to the police they're saying that I'm the one that's causing trouble because I keep in and out of jail. But I told them the reason why I'm keeping in and out of jail because I'm always abusive and getting bashed for no reason."*
- *"…they put the handcuffs on me too tight that night so I sort of kicked up a little and they wanted to do a breathalyser and I was like well take the handcuffs off and they wouldn't so I was swearing at them and that."*
- *"I got no help from the police, no mediation, no nothing … Even when there were witnesses there, people were too scared and intimidated by her, to step up and …"*

The Subcommittee accepts that *in isolation*, anecdotal experiences by Aboriginal women are not persuasive. However, Aboriginal women surprised the Subcommittee with the number of concerns raised by them regarding their treatment by police while intoxicated. That raises duty of care issues and, over all, reinforces the Subcommittee's earlier recommendations concerning the need for appropriate Aboriginal cross-cultural courses so that intoxication comes to be understood by individual police officers as one of the enduring problems brought about by colonisation and the gross mistreatment of Aboriginal people during the 19th and 20th

centuries. Cultural competence on the part of police in dealing with Aboriginal people would be an important first step to improving police/Aboriginal relationships.

The Subcommittee acknowledges the Western Australia Police in 2014 is very different from the police service in 1994. The Aboriginal and Multicultural Unit (AMU) was established to co-ordinates information, programs and advice on Aboriginal and multicultural issues impacting on police. It was this unit that responded positively to the recommendations of the Gordon Report in 2002 (discussed below). Besides supporting frontline police and communities to develop long-term strategies to mitigate complex community issues that impact crime, the AMU encourages Aboriginal people to seek employment with the Western Australia Police and manages the police Language Services Policy.

The current policy for recruiting Aboriginal officers includes active encouragement of applications from Aboriginal people, changes to the police entrance exam following the Auditor General's 20 June 2012 report resulting in changes to assessments to ensure that job related skills are being assessed as well as improvements made in the scoring methodology in order to take Aboriginal applicants into consideration. The 2012 Auditor General's report found:

> *"WAP is not meeting its diversity targets for recruiting from Indigenous backgrounds or women. Only 1.7 per cent of service officers identify themselves as coming from an indigenous background, significantly below the target of three per cent. The proportion of women officers has increased from 13 per cent in 2001 to almost 21 per cent in 2011, but remains below the target of 30 per cent."*

Current figures as of 31 December 2013 show 1.7 % of Aboriginal representation within Western Australia Police, below the public sector average of 3.0 %. Figures for women have improved; as of 31 December 2013 the proportion of women had increased to 32.6%.

The Subcommittee acknowledges that the recruitment of women, whether Aboriginal or not, poses problems for police. There are 72,000 Aboriginal people in WA and those who are skilled and literate are readily picked up in resource related industries or other employment. Western Australia Police also suggest the figures may be affected by police officers not wanting to identify as being Aboriginal. To illustrate their recruitment problems, it is reported that from 300 applicants only two police officers join the force.

Aboriginal Police Liaison Officers (APLOs) have gradually been phased out over the last 15 years with many moving into the mainstream police service and others leaving the force. Only about nine APLOs are left. This was the result of a clear policy directive that Aboriginal people should be mainstream police officers and not relegated to a lower position in the force. It also reflected the confusion experienced by Aboriginal people when the APLOs were called upon to exercise their police powers. It also reflected problems with family conflict experienced by APLOs.

Very recently in 2014 there has been a limited turn around in the Kimberley where five Aboriginal people (including two Aboriginal women) have been appointed in a pilot program as Indigenous Community Relations Officers (ICROs) charged with building a greater understanding between police and Indigenous communities in the Kimberley. They are not sworn police officers and have limited powers. Three will work out of Broome and two out of Kununurra working alongside two Aboriginal Police Liaison Officers stabilising relationships with the community, understanding local customs and laws, and being aware of the complexities and issues relating to different skin groups, language groups or cultural groups in the area. It is not yet known whether the same problems will emerge with ICROs that had earlier lead to the disbandment of most of the APLOs.

Police policy relating to the arrest of women has changed since 1994; police policy now is to summons (not arrest) women who have children in care, although in the case of very serious charges, there may be no alternative available to immediate arrest. Police express a very different attitude now – not aggressive policing. This is expressed in the Police Code of Conduct and in the value police place on respect; “Respect is based on human dignity, cultural awareness, respect for individual needs and differences, respect in our communications to individuals and groups in the community and to each other.”

The Subcommittee reviewed police procedures in dealing with victims of sexual abuse. Again police policy and procedures have changed since 1994. Now when police are advised of a sexual assault their main priority is the victim’s health and safety. Steps are taken to have the victim examined by an appropriate medical practitioner as soon as possible. The Department of Health is responsible for providing a service to persons who have been sexually assaulted. The Sexual Assault Referral Centre (SARC) is available in the metropolitan area; in regional

areas victims are taken to a medical doctor or trained forensic nurse. The Subcommittee accepts that these protocols are well established and answer the concerns raised in recommendation 44 of the 1994 Report except in very remote Aboriginal communities. That issue is discussed below concerning Multifunctional Police Facilities in remote areas.

The assignments of officers to work in remote areas with substantial Aboriginal populations are normally made from police officers with at least one year's experience, sometimes two years. If there has been any inappropriate behaviour during those initial years of service the assignments will not be made. Police are confident that officers who may be inappropriate for this work are readily exposed in what police describe as the "fishbowl" of police service.

MULTIFUNCTIONAL POLICE FACILITIES

In 1994 gender bias against Aboriginal women and girls was most obvious in remote Aboriginal communities where there were no police or other services readily available for victims of family violence and sexual assault. Not only were there no treatment programs available for themselves, but Aboriginal women and girls suffered further gender bias by the lack of any treatment programs such as anger management or alcohol treatment for the male perpetrators of violence so that violent partners and fathers returned to the family without treatment.

The 2002 Gordon Report addressed these issues and served as a catalyst for change. The Gordon Report, "Putting the Picture Together" resulted from an *Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities.* The Gordon Report provided powerful messages about the human cost of child abuse and family violence in Aboriginal communities and noted that the safety needs of children and women were not being met by existing Government services lacking a presence in Aboriginal communities. The Gordon Report recommended (Recommendation 170) the establishment of local community service centres, a "one stop shop" concept so that the range of factors and problems that are linked to, and result from, family violence and child abuse could be dealt with in one place in the community. The one stop shop would be supported by specialist teams who could use video and other links to support

workers at the one stop shop with specialist teams to visit when necessary (Recommendation 172).

The one stop shop model for dealing with domestic violence was developed in the United Kingdom and reported on in *Tackling Domestic Violence: Effective Interventions and Approaches*: Home Office Research Study 290 February 2005. The research evaluated 27 Violence Against Women Initiative projects. This evaluation found that increased numbers reported domestic violence to police when project workers were based within the Police Community safety unit or where police were based within the project. Women found it particularly useful when services were built around a one-stop shop model.

As part of the response to the Gordon Inquiry Western Australia Police in conjunction with other government agencies established Multifunctional Police Facilities (MFPFs) in 12 remote locations. The intent is that each one will cover a radius of 200 km. These facilities have been established by police at Balgo, Bidyadanga, Dampier Peninsula, Kalumburu, Looma, Warmum, Jigalong, Burringurah, Warakuna and Warburton in regional Western Australia, Kintore in the Northern Territory and Blackstone on The Lands.

Depending on the size of the Aboriginal population, police have stationed two or four police officers at each MFPF, one of whom is always a female officer. Officers are only given these assignments after one or two years of successful police service. It is intended that the presence of police in these communities will provide safety and security for community members and for service providers. The shared building provides a capacity for workers from different government agencies to be co-located so that stronger links can be forged between existing local health workers, educators, police and Department of Community Development workers to better strengthen child protection and violence prevention strategies.

As was recommended by the Gordon Report, the Aboriginal community must be fully engaged and have meaningful involvement in service development if the MFPF is to be effective. This necessarily requires cultural competence on the part of police officers sent to these remote locations. It is disappointing that even in this instance, where police are being stationed in very remote locations, there is no provision for Aboriginal cross-cultural courses with local community involvement. There is

support within the police service for officers who are being sent to work in the MFPFs to receive training with regards to the culture of the community and in particular matters relating to Aboriginal women. But that has not yet been funded and has not yet eventuated.

It is encouraging to find that the State Government and Western Australia Police registered support for Recommendation 19 of the 2013 Inquiry into Custodial Arrangements in Police Lockups. Recommendation 19 is in these terms:

> *"That Western Australia Police expands the diversity module for recruits which deals with Aboriginal culture, and ensures that Aboriginal people are involved in its delivery. Recruits should be able to demonstrate cultural competency – that is, a well-developed understanding of Aboriginal issues and the skills to deal effectively with Aboriginal communities."*

The Subcommittee believes local cultural knowledge and competence is particularly essential if police officers are to be sent to MFPFs.

Difficulties have been experienced for the MFPFs in becoming true one-stop shops. In order to achieve that status not only police but child protection, health, mental health, education, community development, local government, court services and corrective services need to have a presence in the MFPF. And that has not happened to the extent necessary to ensure the MFPFs really are one-stop shops. The importance of the MFPFs is the presence of the police and service workers in the community, not merely as fly-in, fly-out visitors. Obviously it would not be viable to mandate the presence of highly specialised services in every MFPF; but the highly specialised services should be available to the workers on site by the use of video conferencing. Access to services should be through workers on site who have developed the trust and confidence of community members.

Police are to be applauded for having appointed a clinical psychologist to annually visit and chat with all police officers assigned to the MFPFs to ensure no inappropriate behaviours or attitudes emerge during assignment. The Subcommittee was also pleased to note that experienced police officers were stationed at MFPFs. But Western Australia Police need to do more about the cultural competency of the police officers assigned to MFPFs. The State Government needs to review its commitment to meeting the challenges of the Gordon Report and to take seriously the needs of the Aboriginal women and children living in these remote communities.

The job has not been completed and it is important that it is completed in order to ensure there is no longer gender bias against women and children in remote communities. Therefore the Subcommittee recommends:

4.20 Within 12 months of the date of this review Aboriginal cross-cultural courses, meeting the standards in Recommendation 4.1 be provided by Western Australia Police for all police officers assigned to work in Multifunctional Police Facilities to ensure cultural competence on the part of those police officers in the delivery of services.

4.21 Within 12 months of the date of this review all State government agencies whose services are required in Multifunctional Police Facilities including Child Protection, Education, Health, Mental Health, Local Government, Community Development, Corrective Services and Courts review the assignment of workers to those facilities and ensure that services are provided on site where reasonably possible (not as fly-in, fly-out workers) so that workers are able to build trust and confidence with community members.

4.22 Within 12 months of the date of this report all State government agencies who provide services in Multifunctional Police Facilities provide Aboriginal cross-cultural courses meeting the standards in Recommendation 4.1 to all workers assigned to work in Multifunctional Police Facilities to ensure cultural competence on the part of those workers in the delivery of services.

POLICE RECRUITMENT

4.23 Western Australia Police strengthens their efforts to recruit Aboriginal women and men as police officers so that they make up at least 3.0% of the police force.

4.24 Western Australia Police puts in place supports to retain Aboriginal recruits and encourage their advancement in the police service, particularly the advancement of Aboriginal women recruits.

NEW AREA OF GENDER BIAS AGAINST WOMEN AND CHILDREN IN THE LAW IN 2014

NATIVE TITLE

The 1994 Report was released just after the Mabo decision and the enactment of the *Native Title Act* (Cwlth) 1993 (the "Act") which commenced on 1 January 1994. Given the timing, the Gender Bias Taskforce would not have contemplated this area of law. However the experience of 20 years of operation of the *Native Title Act*, together with the body of material which has been written and developed in that time, make it appropriate for the Chapter 4 Subcommittee to focus upon this area in the 2014 Review.

The impact of gender bias in achieving equitable and sound negotiated outcomes under native title processes has not previously been examined in Australia or Western Australia in any depth. In fact, the National Native Title Tribunal (NNTT) has recently closed submissions on its issue paper reviewing the Act. The scope of the review of this extremely complex legislation appears highly technical and is outside of the scope of the Subcommittee's review. However it does not directly address head on issues relating to gender bias that the Subcommittee found resulted from certain procedures required by the Act. Following consultations and literature review, the Subcommittee considers action in this area is warranted, together with review, monitoring and the collection of relevant information, both quantitative and qualitative.

The Native Title Process

The process for establishing native title requires the applicant group to prove connection with the land. The group must name a sub-group who end up being the named applicants. It is men within the community who, with the assistance of solicitors and barristers (who are generally men) make the decision about who is to be included in the sub-group. When women are involved, they tend to hold more junior positions. Very rarely is a female judge assigned to a native title case. There is a real risk of marginalisation for women in a claimant group when there is a lack of female leadership involved in the litigation process. Aboriginal women are at risk of

not being heard when the information they have to offer is as equally important to the claim as the information from their male counterparts.

> "*As one Aboriginal woman put it, Aboriginal men 'have been taught by non-Aboriginal men to consider themselves superior', while Aboriginal women have been told 'it is the men who own the land, know the only sacred sites and rituals and make the decisions*."[2]

The Subcommittee recommends:

4.25 The current legislative review of the National Native Title Tribunal shall consider the need for gender specific advocates for Native Title claimant groups so that, if culturally appropriate, women claimants may have access to women advocates to support them through the Native Title process.

Whilst the evidentiary requirements for proving *connection* have relaxed over time, connection evidence is still very important from a cultural and legal perspective. Aboriginal women are in a unique position in that they, generally, more so than men, have or maintain more cultural and spiritual information forming the evidentiary foundation for connection. In practical terms, women possess more cultural knowledge than men. In the majority of Aboriginal groups, women maintain information about bush medicines, bush foods and bush hunting because they are the ones performing these tasks. Furthermore, women have a higher degree of knowledge about genealogy as they tend to be more interested in who is married to whom and whose children are whose – in fact, some traditions require this knowledge.

Whilst women maintain a significant amount of cultural knowledge, they also face unique challenges. The Subcommittee identified statistics showing that 71% of the Indigenous children taken were female.[3] This creates an inherent gender bias issue in that this class of women may face difficulties in terms of retrospectively tracing heritage and familial contacts. However, the Subcommittee notes that being part of the *Stolen Generation* does not necessarily equate to a loss of cultural knowledge or

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2 Australian Human Rights Commission Submission No 122 to the Northern Territory Law Reform Committee, *Inquiry into Aboriginal Customary Law in the Northern Territory*, May 2003, 2.2

3 Australian Human Rights Commission *Bringing Them Home*, National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, (1997)

connection. Further, in some Aboriginal cultures, women are extremely reluctant to provide sacred information to individuals outside of their cultural group. There tends to be pressure to prove connection through the disclosure of sacred information when it is really unnecessary. This has historically caused women to choose between establishing a claim or not.[4]

The Subcommittee learned that as a matter of practice, however, there is a form of cultural cross contamination. Aboriginal men take cues from their western legal counterparts. The lawyers, primarily non-Aboriginal, feel special as a result of gaining knowledge of the sacred information about the Aboriginal customs and traditions. The Aboriginal men then take cues from the non-Aboriginal lawyers in terms of their unconscious bias towards women. Without women in visible leadership in the litigation process, Aboriginal women may be overlooked and their interests are not taken into account during the Native Title process.[5]

The Subcommittee recommends:

4.26 The current legislative review of the National Native Title Tribunal shall consider requiring all practitioners conducting Native Title claims, including mediators, barristers, solicitors, anthropologists and other experts be culturally competent in the particular claimant group involved in the case by undertaking Aboriginal cross-cultural courses meeting the standards in Recommendation 4.1 and taught by Aboriginal women from the claim area.

Another area identified where there is potential for the risk of gender bias in the native title process is in both the lack of qualified female anthropologists practising in native title litigation and the potential for cultural bias amongst non-Aboriginal anthropologists, both men and women. In 2004, the NNTT undertook a study of anthropologists who practice in the area of Native Title.[6] Given the controversy around gender specific evidence, the gender of the anthropologists is an important

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4 Rose, Deborah Bird 'Women and Land Claims' [1995] 6 *Land, Rights, Laws: Issues of Native Title* 1

5 We note that this is not necessarily the experience of all Aboriginal women in claimant groups. We understand that in certain Aboriginal cultures, women are the primary leaders in the claims and assert more influence over the process than men.

6 Martin, David F 'Capacity of Anthropologists in Native Title Practice' (Report, National Native Title Tribunal, April 2004)

topic. It appeared from the data gathered by the NNTT that female anthropologists engaged in litigation (as experts) in far less numbers than men. This could lead to the lack of availability of appropriate expert witnesses for female Aboriginal claimants.

The literature review revealed the dangers of relying on the opinion of anthropologists who approach their work with a western cultural bias. Especially in Aboriginal cultures where women are the dominant figures in their society, anthropologists without an Aboriginal background may struggle to accept Aboriginal convention. Additionally, we understand that there are currently only four Aboriginal female anthropologists in Western Australia, none of whom work specifically as experts in Native Title claims. There is a clear need not only for women, but specifically Aboriginal women to fill the role of expert anthropologist in Native Title litigation.

The Subcommittee recommends:

4.27 The Department of Education and Department of Aboriginal Affairs provide scholarships for Aboriginal women anthropology students in Western Australia commencing in the 2015 academic year.

Access to Genealogical Information

Given that connection to Country may be proven by genealogical evidence, the availability of heritage data remains culturally important to Aboriginal persons. In Western Australia, there are more Aboriginal people under the age of 30 than there are over the age of 60.[7] As a result, the number of those who may have been raised in a traditional way is potentially decreasing. Aboriginal groups are at risk in losing (with the passing of elders) much knowledge, tradition and history. Without this information, it may be more difficult for young people, especially women, to gather evidence of their ancestral history. Certain Aboriginal groups have matrilineal genealogical structures. If there is an inability to trace back far enough,[8] women will

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7 Stephanie Fryer-Smith, *Aboriginal Bench Book for Australian Courts* (Australian Institute of Judicial Administration Incorporated, 2002) 4

8 For example, an inability to trace matrilineal heritage due to the stolen generation.

struggle to produce genealogical evidence more so than men. This is an important issue, as individuals are required to prove that he or she belongs in a specific claimant group. If an individual is not accepted into the claimant group, that person's ability to pursue a claim for Native Title will dramatically decrease.

From the Subcommittee's literature review it does not appear that genealogical or customary information is available to a wide public audience, perhaps due to the sensitive nature of this cultural knowledge. The Subcommittee also considers that this information may be maintained on a more *ad hoc* basis rather than as a centralised, organised bank of data.

The Subcommittee recommends:

4.28 The State Library of Western Australia in conjunction with the Department of Aboriginal Affairs, the Department of Women's Affairs, the Native Title Representative Bodies and all Western Australian universities, commencing in the financial year 2015, establishes a databank of oral and written (where possible) documentation of Aboriginal historical information relating to genealogy and, where appropriate, connection to Country.[9]

[9] Where sacred information is kept, special protocols will need to be developed to ensure the confidentiality of material related to closed information on sights, traditions and customs.

NATIVE TITLE REPRESENTATIVE BODIES, PRESCRIBED BODIES CORPORATE AND ABORIGINAL CORPORATIONS AND TRUSTS

There are 5 Native Title Representative Bodies. (NTRBs) in Western Australia:

1. Goldfields Land and Sea Council Aboriginal Corp;
2. Kimberley Land Council (Aboriginal Corporation);
3. Central Desert Native Title Services (f/k/a Ngaanyatjarra Council);
4. South West Aboriginal Land and Sea Council; and
5. Yamatji Maripa Aboriginal Corporation (YMAC).

Based upon the Subcommittee's review of these organisations, there appears to be a similar representation amongst men and women on the boards. However, when one looks at the executive positions with the organisations generally, the gender proportions of high level employees are not as balanced.

Below is a table showing the distribution between men and women from information obtained on the websites for each organisation.

RB	Total # Board Members	Total # Female Board Members	% Female on Board	Total # Other Staff	Total # Female Other Staff	% Female Other Staff
Goldfields	13	6	46	3	0	0
Kimberley	15	7	47	Unknown	Unknown	Unknown
Central	4	2	50	5	1	20
South	12	4	33	Unknown	Unknown	Unknown
Yamatji	12	8	67	Unknown	Unknown	Unknown

Based on the figures, women appear to be participating in fairly equal numbers as men in the governing bodies, but perhaps not in terms of other high level staff. As recently as 2009 there have been calls for further participation by Indigenous

women, encouragement of engagement of younger Indigenous women in NRTBs and commitment of Indigenous communities and families to recognise the contributions made by involved Indigenous women.[10]

The Subcommittee recommends:

4.29 The Office of the Registrar of Aboriginal Corporations, during the financial year 2015, amends its regulations to require specific reporting from Native Title Representative Bodies, Prescribed Bodies Corporate and Native Title Representative Corporation on gender inclusion for board memberships and executive councils.

Once Aboriginal claimants establish that the claimant group is the traditional owner of a particular area of land, there are numerous benefits that flow from the result. The first and foremost (from a monetary view point) is the ability to negotiate land leases with mining and resource companies. "It is widely acknowledged that native title agreements have the capacity to generate significant positive social economic environmental and cultural benefits for Indigenous communities."[11] There is also a further layer in that "[d]ecision making based on the western democratic principles of one vote one value might not be culturally appropriate. Interrelated issues of kinship, gender, tribal politics, cultural custodianship and seniority may generate a more collective but nevertheless representative and consensual process". [12] The Subcommittee sought to determine how Aboriginal women fared in receiving benefits as traditional owners.

The Subcommittee reviewed the most recent general reports filed by the over 25 Prescribed Bodies Corporate (PCBs) in Western Australia.[13] Approximately 80% of the organisations have a roughly equal number of male and female directors. In the organisations where there was a lack of representation of women on the panel of directors, the discrepancy was more pronounced, between 25 – 30% female. There

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10 Ganesharajah, Cynthia, Pip McCourt 'Reflections on Women and Native Title' [2009] 4 Native Title Newsletter 4

11 Everard, Delwyn 'Scoping Process Issues in Negotiating Native Title Agreements' (Research Paper No 23, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2009) 8

12 Id

13 Data collected from the Office of the Registrar of Indigenous Corporations, www.oric.gov.au

was only one organisation that we looked at that had no female directors. From a Western perspective, having females taking ownership of the PBCs through directorships should assist in ensuring that women will benefit from the agreements negotiated as a result of being awarded Native Title. As indicated above, there are certain Aboriginal cultures in which women appear to be in a vulnerable position such that they may not be able to be effective leaders.

The Subcommittee recommends:

4.30 The State Minister for Women's Interests develops and provides specific board readiness training for Aboriginal women to enable them to serve on boards, particularly Native Title Representative Bodies and Prescribed Bodies Corporate.

Chapter 4

Aboriginal Women and Girls and the Law

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Chapter 4

Native Title

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ATTACHMENT 1

Chapter 4 Aboriginal Women and Girls and the Law

QUESTIONNAIRE
The purpose of this questionnaire is to get your feedback on whether Aboriginal women's access to justice has improved since the first Chief Justice's Taskforce on Gender Bias Report was released in 1994. We want to know if the original recommendations were implemented, explore the extent of gender bias in the law today, and make new recommendations for how we can eliminate this bias. We would like to thank you for agreeing to participate. Please also complete the attached consent form to allow us to list you as a contributor to this review. If you prefer to remain anonymous, please speak with the person conducting the interview.

1. What age group do you belong to?

Under 18 ☐ 18-30 ☐ 31-50 ☐ over 50 ☐

2. Are you:

☐ Female ☐ Male

3. Have you had any experience dealing with the police?

☐ Yes ☐ No

4. Have you made a complaint to police about an incident?

☐ Yes ☐ No

How did police, when making a complaint treat you?

_____

_____

_____

_____

_____

5. Have you been arrested by police?

☐ Yes ☐ No

How were you treated?

_____

_____

_____

_____

6. Have you experienced going to court for any matter?

☐ Yes ☐ No

How did you feel in court?

_____

_____

_____

_____

7. When attended court, was there anyone that explained the court process to you?

☐ Yes ☐ No

8. Did you understand what was going on in court?

☐ Yes ☐ No

9. Would you like the courts to know what is going on in your community?

☐ Yes ☐ No

What do you think is the best way of doing this?

_____

_____

_____

_____

10. Did you understand what your sentence was?

☐ Yes ☐ No

Do you think there was anything that could be improved for you in court?

_____

_____

_____

_____

11. Have you been to prison?

☐ Yes ☐ No

12. Did you understand why you went to prison?

☐ Yes ☐ No

13. Do you think it would be beneficial to have interpreters available for people in contact with the police or attending court?

☐ Yes ☐ No

Are there other times an interpreter might be useful?

_____

_____

_____

_____

14. Do you think it would be helpful for courts to have childcare while attending court?

☐ Yes ☐ No

15. Have you or someone you know ever felt unsafe or been threatened while attending court?

☐ Yes ☐ No

What could be done?

_____

_____

_____

16. Did you seek legal advice or speak to someone prior to going to court?

☐ Yes ☐ No

17. Is there pressure placed on a person who makes a complaint about family violence?

☐ Yes ☐ No

What should be done so this doesn't happen?

_____

_____

_____

18. Problems can arise when perpetrators return to the community where the victim lives. How can this be resolved?

_____

_____

_____

_____

_____

19. Have you ever had to pay a fine?

☐ Yes ☐ No

Do you think community work rather than a fine is a suitable option, and who should run it?

_____

_____

_____

_____

20. Do you believe that alternative dispute resolution such as mediation and negotiation should be available to Aboriginal people as an alternative to litigation (court) to resolve a dispute?

☐ Yes ☐ No

21. Do you think it would work in your community?

☐ Yes ☐ No

Why?

_____

_____

_____

_____

22. Are there any safe houses in your community?

☐ Yes ☐ No

Do you know who provides these services?

_____

_____

_____

_____

23. Do you think there should be an Aboriginal Women's Law Centre?

☐ Yes ☐ No

If yes, what services would you like to see them provide?

_____

_____

_____

_____

24. Do you think an after hours service is needed for legal advice?

☐ Yes ☐ No

25. Do you think a panel of selected Aboriginal community members should help the Department of Justice supervise female Aboriginal offenders?

☐ Yes ☐ No

If yes, how would this be helpful?

_____

_____

_____

_____

26. Do you work for an organisation that provides services to Aboriginal women?

☐ Yes ☐ No

Name of organisation:

_____

27. What services does your organization provide?

_____
_____
_____
_____

28. Are you aware of other services in your area that work with Aboriginal women?

☐ Yes ☐ No

Please list:

_____
_____
_____
_____
_____

29. Do the services you use/work at have brochures or fact sheets written in a local Aboriginal dialect/language?

☐ Yes ☐ No

30. Do you think this information would be helpful?

☐ Yes ☐ No

31. Are there any other comments you would like to make on improving Aboriginal Women's access to the law?

_____

_____

_____

_____

_____

_____

_____

_____

_____

Thank you for participating in this questionnaire.

ATTACHMENT 2

Survey and Methodology

Consultations occurred through interview and the questionnaire (Attachment 1) with a number of recommendations identified by the Subcommittee as requiring specific consultation. The purpose of the survey was to gather feedback on a range of justice related issues from Aboriginal women across Western Australia, inclusive of those living in remote locations. While the sample size of the survey was not large enough to extrapolate definitive evidence on these issues, there were a number of themes and trends that emerged.

The questionnaire was designed to gather information on a specific set of justice related issues. These included police treatment, courts, family violence, and legal services for Aboriginal women. The 1994 Report made recommendations regarding these issues and the present goal was to gain feedback from the community on the extent to which these have been implemented.

The following report provides a summary of the quantitative and qualitative data collected. Some of the participants' answers are documented as they give valuable weight and insight to the numerical findings. This report concludes with a summary of findings including a list of disaggregated items from the charts expressed as percentages.

1.1 Demographics

The following chart presents the age and gender of the survey participants.

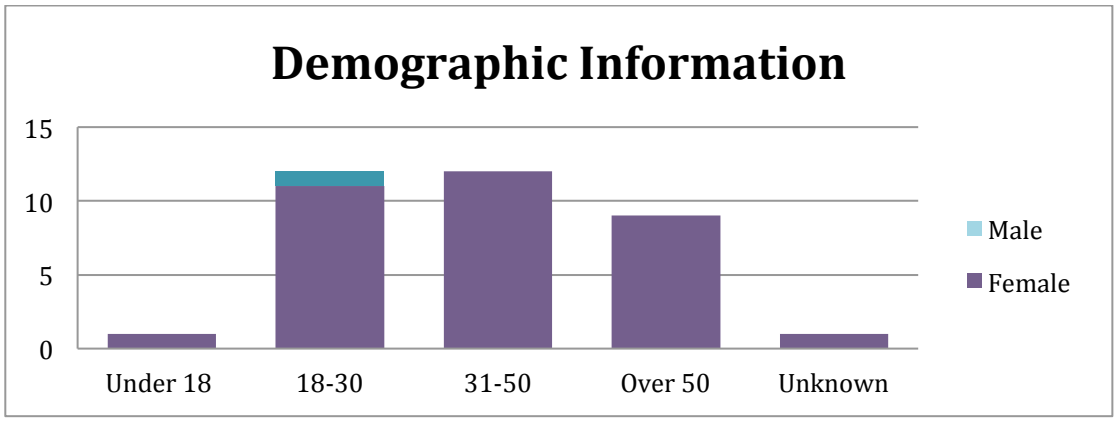

Chart 1: Number, age and gender of survey participants

1.2 Geographical Spread

In order to capture a broad range of responses, the surveys were issued to service users, service providers and community members known to the Aboriginal Family Law Services (WA) in a number of regional and metropolitan locations. The following chart demonstrates the geographical location of participants:

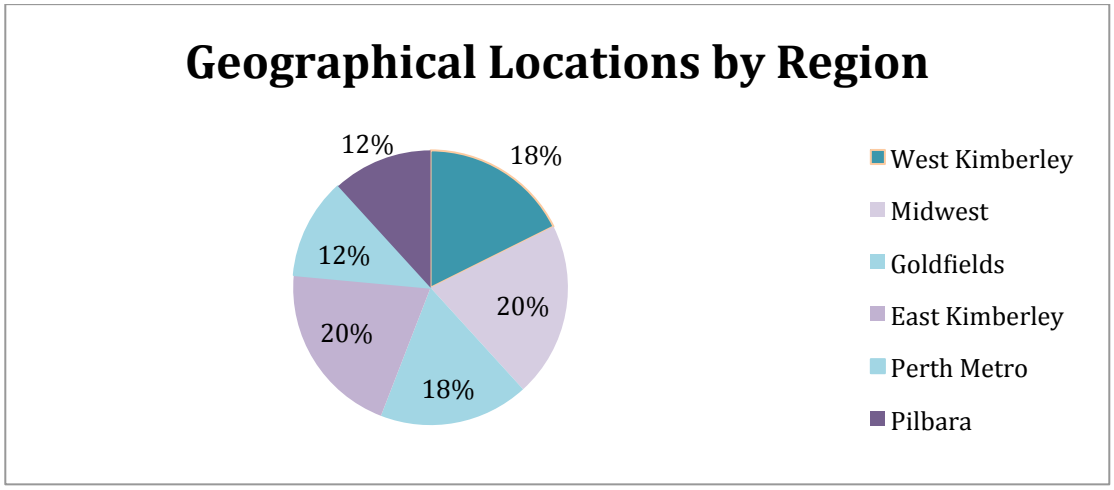

Chart 2: Geographical location of participants by WA region

1.3 Police Treatment

The survey asked for feedback on police treatment when making a complaint and when being arrested. The following table indicates whether the respondent's experience was positive or negative. The subsequent comments are examples of negative experiences reported by participants.

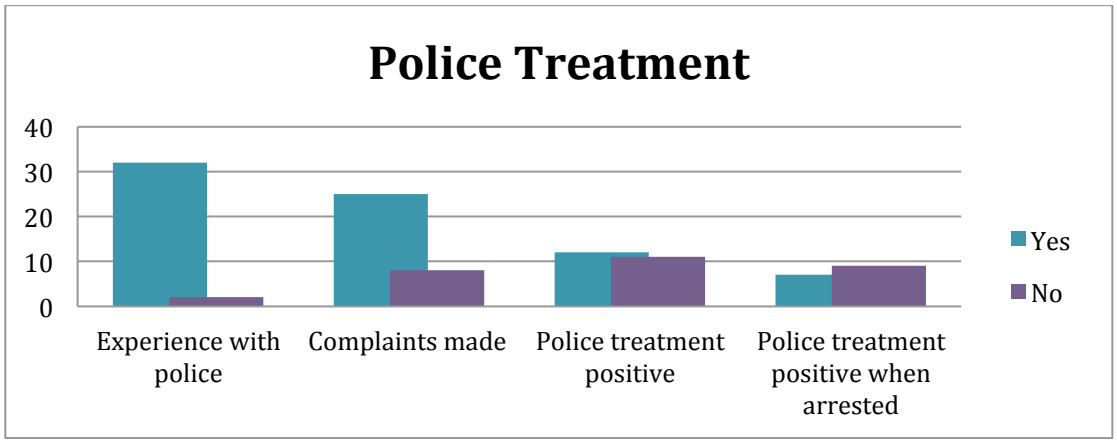

Chart 3: Police treatment when making complaints and being arrested

RESPONSE TO SURVEY QUESTION, "IF YOU HAVE BEEN ARRESTED, HOW WERE YOU TREATED BY POLICE?"

"Very unfair as I was not able to comprehend the situation as was under the influence. It was after hours and no lawyer present. I would not want this to happen to anyone. I was even questioned on a mater not related to the current matter" - Client

"Yes, about 5-6 years ago. Some were rough wanting to force me into the police van by grabbing my arms. I responded by telling them to let me go as I could put myself in the van

"Police were rough and cheek" - Client

"Too shame - but we would like a support officer present. They gave me attitude" - Client

"One time - couple of years ago I got locked up and my husband didn't know where I was. I was sick and police didn't do anything about it. I did not like how I was treated" – Client

"They treated me alright because I was sober - if I was drunk they would have been rough" - Client

"Quite roughly treated by the police I was actually assaulted by a high ranking male police officer when I was 20! No people skills! No respect" - Client

1.4 Courts

Participants were asked a range of questions about their interaction with the court and sentencing system. This started with whether they interacted with the court for any matter. The majority – 82% - had indeed prior contact with a court. Further questions were asked as to whether they thought courts should provide childcare, their comprehension of the court process and sentencing options.

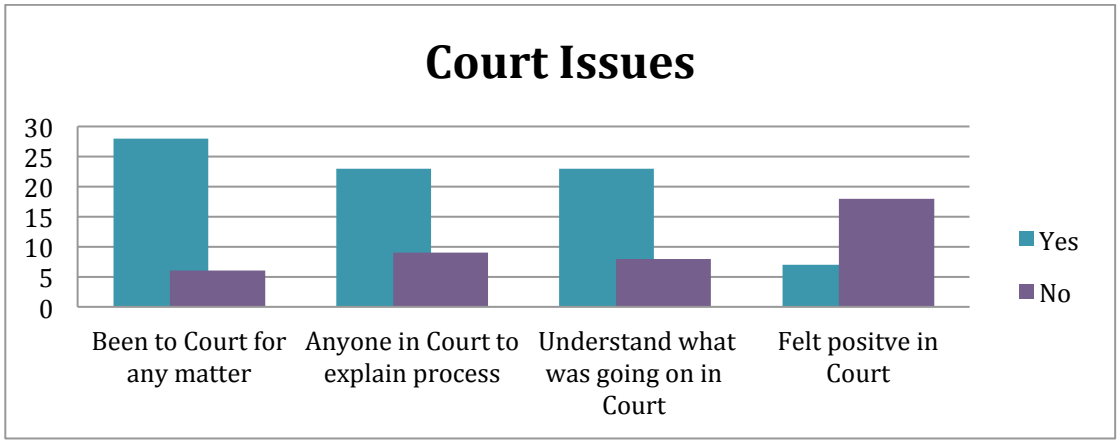

Chart 4: Experience of Court issues

Concerns were raised in the 1994 Report about women attending court not understanding the court processes and outcomes. Survey participants were asked to comment on whether in their experience of attending court they had someone available to them to explain the processes. The following responses were provided.

RESPONSES TO SURVEY QUESTION, "IF ATTENDING COURT IS THERE ANYONE THAT CAN EXPLAIN THE COURT PROCESS TO YOU?

"AFLS Lawyer" – Client

"Duty Lawyer"- Client

"Legal Aid Lawyer" – Client

"Private lawyer" – Client

"Victim Support Service" – Community Member

"DV Coordinator" – Client

"Department of Justice" – Community Member

"Court Officer" – Community Member

The 1994 Report recognised difficulties with women attending court due to their child rearing responsibilities and recommended that courts provide child care facilities. There was strong support for this recommendation in the survey. Similarly, there was strong support for the courts to develop a relationship with the community in order to develop and understanding of individual's situations as well as prevent reoffending.

RESPONSES TO SURVEY QUESTION, "WOULD YOU LIKE THE COURTS TO KNOW WHAT IS GOING ON IN YOUR COMMUNITY?"

"Be on the ground…talk to people" – Client

"This is very important as they will understand where the person has come from and your story behind you. Don't judge a book but read the story and understand the content. Understand a person's background makes them who they are" - Client

"Making time to talk to community member" - Client

"Lawyers are often open to knowing about your strengths and what is happening in the community. A good magistrate will want to hear and will ask these questions in court" – Community Member

"Have Elders/parents/guardian at the court" - Client

"Talk to community mob" - Client

"Liaising with the community more. Getting out in community and becoming more involved with community events" - Client

"Open up communication between the Courts and all service agencies" – Community Member

"Meet with leaders at least 4 times a year or ensure a report on key issues impacting on community issues is made available" – Community Member

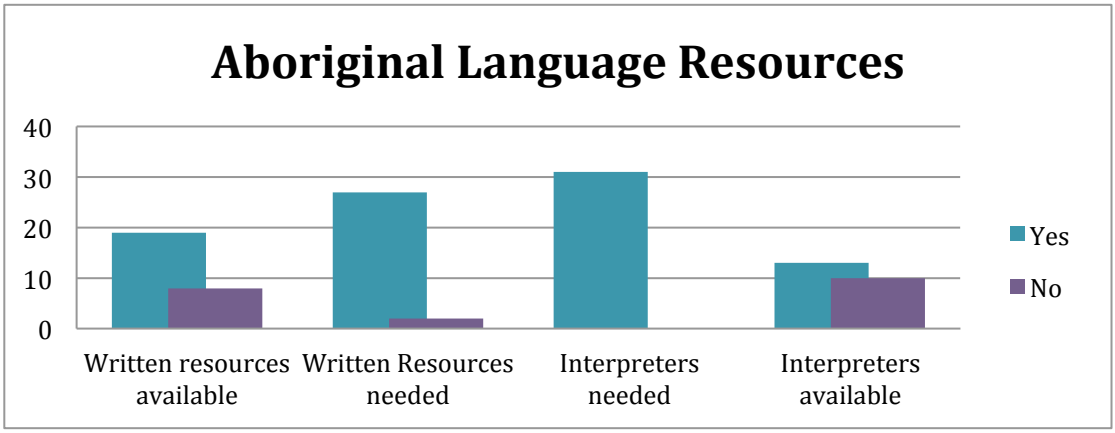

Chart 7: Language appropriate resources required and available

While most participants recognised the need for language appropriate resources to be provided in courts, there were also many comments expanding on the need for interpreters in other areas of daily life.

RESPONSES TO SURVEY QUESTION, "ARE THERE ANY OTHER TIMES AN INTERPRETER MIGHT BE USEFUL?"

"When talking to other services including Centrelink, Housing, other lawyers" - Client

"Whenever someone does not understand English well" - Client

"Before court proceedings. Perhaps there should be Police or Law staff with these language skills" – Community Member

"Yes, during and after trial. Have an interpreter there all the time explaining what is going on. They need to be aware of the consequences and severity and fully understand, this might help them not reoffend" - Client

"Not only at legal process but also day to day business such as Centrelink" – Client

"Should be assessed when needed" – Community Member

"Very important especially in criminal matters and child protection matters. Aboriginal people may just say yes or agree but not necessarily agreeing to proposed outcomes" – Community Member

"Hospital ER, Royal Flying Doctors, Airports, Conferences, Phone services, dial an interpreter. Justice system. Department of Transport. Banks" – Community Member

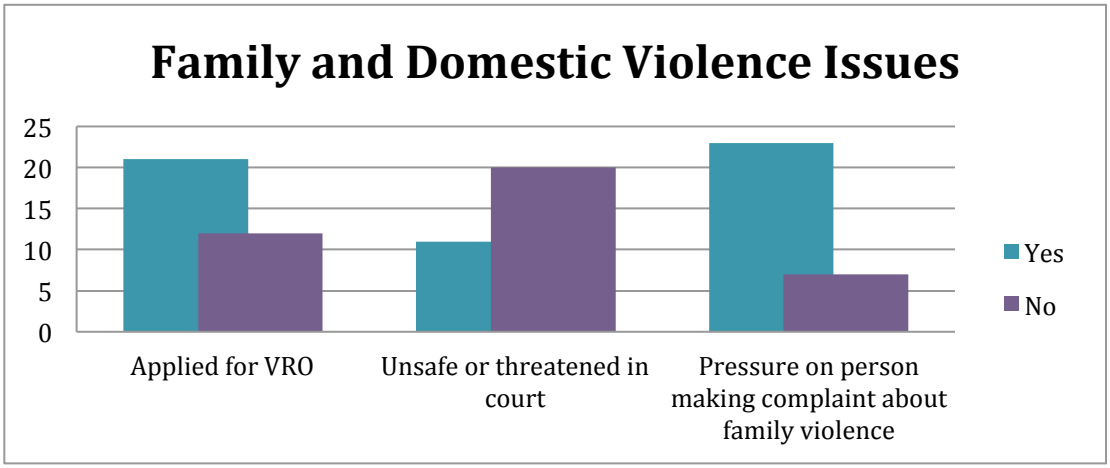

Chart 8: Family and domestic violence issues including VRO applications

Suggestions for resolving issues arising from perpetrators returning to the same community as the victim included VROs and reporting breaches,

ensuring the victim is notified, family mediation, support to both parties, refusing entry to offenders in some regions, and more education.

RESPONSES TO SURVEY QUESTION, "HAVE YOU OR SOMEONE YOU KNOW EVER FELT UNSAFE OR BEEN THREATENED WHILE ATTENDING COURT? HOW COULD THIS HAVE BEEN IMPROVED TO MAKE THEM FEEL SAFE?

"I was pregnant and applying for a VRO on my husband. He pushed me outside the courthouse and the judge did not grant me a VRO" - Client

"More security in waiting rooms" – Community Member

"More security guards" - Client

"More security present who are capable to protect clients" – Community Member

"By not having the court so open. Closed courts" – Community Member

"Separate entrances and exits. Close circuit TV" – Community Member

1.5 Women's Services

The establishment of safe houses was recommended in the 1994 Report, and in 2014 79% of survey respondents stated their community had a safe house. Just over half were aware of who operated these services. Almost two-thirds said there would be no stigma attached if they accessed one of these services.

Most respondents were able to name various service providers to Aboriginal women in their local community. Some were Aboriginal organisations, and some were mainstream non-government and government organisations. Half of the respondents currently or had previously worked in an organisation which provided services to Aboriginal women.

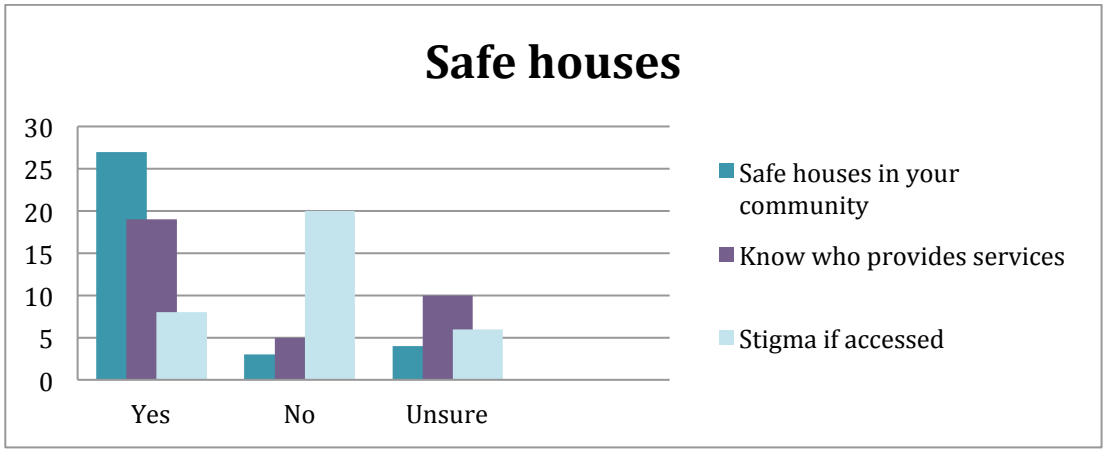

Chart 10: Awareness of safe houses in local community

Participants were asked for their opinion on whether an Aboriginal Women's Law Centre should be created. This was a recommendation in the 1994 Report to accommodate the particular legal needs of Aboriginal women. Eighty-eight percent of respondents supported this idea, with a similar level of support to an after-hours legal service and Aboriginal community member panel to help the Department of Justice supervise female Aboriginal offenders.

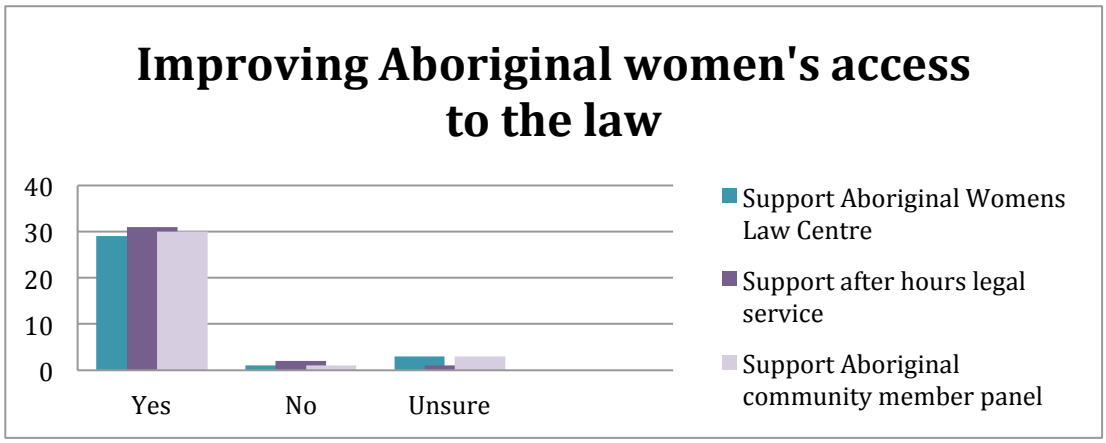

Chart 11: Support for improving Aboriginal women's access to the law

A common theme in the survey response was the need to underpin all treatment of Aboriginal people by justice system with culturally understanding and competence. This message was particularly strong when discussing an Aboriginal community member panel.

RESPONSES TO SURVEY QUESTION, "DO YOU THINK A PANEL OF SELECTED ABORIGINAL COMMUNITY MEMBERS SHOULD HELP THE DEPARTMENT OF JUSTIVE SUPERVISE FEMALE ABORIGINAL OFFENDERS"?

"Helpful in many ways. A resource centre for young females with no one to turn to. Have access to skills and knowledge to help them back into society and break the cycle. Show them the right way if they are willing"– Client

"This could be helpful e.g. interpreter, safer" - Client

"Talk to people who understand them as they are also Aboriginal and from same community; they can help offenders understand the legal stuff; they could help run programs" - Client

"Elders in the community should be involved. Women don't get support they need which results in them retaliating/lashing out and sometimes killing partner" – Community Member

"Cultural understanding" - Community Member

"Local knowledge and local support for women" - Community Member

"Do things cultural ways - this can help sometimes with women who have strong culture" - Community Member

"The majority of panel members should be female, Aboriginal women because they have a better understanding of Aboriginal women's issues and lifestyle" - Community Member

"The community members could influence the offenders - role models, understanding of culture, heaps of benefits in doing this" - Community Member

Responses to the question about improving Aboriginal women's access to the law were consistent across all geographical regions indicating on the face of it there is room for improvement across the state - in the metro, a rural and remote area. Suggestions were made on both individual and systemic levels with personal responsibility mentioned (i.e. awareness of services; skills to source the resources; feel more secure to ask questions etc.) as well as structural changes (i.e. more Aboriginal women to intervene, less people stereotyping our people; more cultural awareness; more training about perpetrator behaviour; taught...in school about their rights etc.).

RESPONSES TO SURVEY QUESTION, "ARE THERE ANY OTHER COMMENTS HAVE ON IMPROVING ABORIGINAL WOMENS ACCESS TO THE LAW"?

"Need to understand the legal side; research for yourself; awareness of what services can help and bring you closer to where you want to be; if you don't have the skills to source the resources you are stuck. Dealing with legal issues can be mentally draining and you can become very frustrated and stress" - Client

"Aboriginal women need to feel secure to ask questions to give them more understanding so they know their rights. Services need to give clients info on the places/services that can help them with their legal problem" - Client

"To be given the opportunity to be recognised and have a voice; to have a say and be acknowledged for their strength and be empowered and encouraged to determine their own futures; taking back their ownership" – Community Member

"Police use of excess force - man, woman, kid - treat us like dogs. They pick us up and throw against walls and I'll be saying Hey - they can walk. But them young police like to damage our walls 1st before they put people in wagon" - Client

"Men and women's" – Community Member

"More Aboriginal women to intervene, less white people stereotyping our people. More cultural awareness for the white people engaging with Aboriginal women Allow our services more friendly less family members within the workplace. Maintain confidentiality, more brochures and attending the refuge services" – Community Member

"Face to face contact, believe in confidentiality within an organisation" – Community Member

"Aboriginal women prefer face-to-face contacts rather than phone contacts. Police, court staff and community needs more training about perpetrator behaviour. Aboriginal women need more support and education in relation to the law and what their rights might be" – Community Member

"To be told and taught men and women in school about their rights and also respectful relationships. Women lawyers promoted as Aboriginal role models. More documentaries around real life situations with the legal system" – Community Member

FINDINGS SUMMARY

1. Cultural responsiveness remains a key consideration in the interaction between Aboriginal women and the justice system. Feedback ranged from communication issues to those of excessive force (police). Comments support the need for a stronger focus on cultural awareness training for the police and other professions within the justice system.
2. While some positive trends appeared concerning support around understanding court processes, further improvements are necessary and possible.
3. Court interaction with the community is vital to improve communication generally, service collaboration and individual sentencing outcomes.
4. Efforts should continue to make language appropriate resources including interpreters available wherever needed.
5. Efforts should continue to educate and support all parties in family violence situations.
6. Safe houses and other women's services are an essential and accepted community service.
7. Women's access to the law may be improved through expanded legal services, and an Aboriginal community member panel assisting supervision of female offenders.

The following is the breakdown of charts contained herein as percentages:

94% respondents had experience with the police;
76% had made a complaint to the police;
35% received positive treatment from police when making a complaint;
21% received positive treatment from police when being arrested;
82% had been to court for any matter;
72% reported someone in court to explain the process to them;
74% understood what was going on in court;
20% had a positive experience when they were in court;
84% agreed that childcare is needed in court;
94% would like the courts to know what is happening in the community;
73% agreed that community work is a suitable option;
32% agreed that sureties are relevant;
85% have paid a fine;
13% have been to prison;
56% stated language appropriate written resources are available in courts;
93% stated language appropriate written resources are needed in courts;

ATTACHMENT 3

Excerpts From Interviews With Aboriginal Women Prisoners:

Social, Cultural Resilience and Emotional Well-Being of Aboriginal Mothers in Prison Project:

National Drug Research Institute, Curtin University and The University of New South Wales 2013

PROCESS:

Well, when I come, I caught up this [for] this armed robbery, but armed robbery. But I just had walked into the house, in someone's house … but they tried to find a way to do for the armed robbery, but they can't find any evidence. Because I told the Magistrate that I didn't done anything. I just took the $55 and that's it … So, I told them the truth. So they - the judge just remanded me for that - they just wanted me to get a taste of prison. The lawyer said the Magistrate, they just want to give you a taste of it so, next time, [don't muck up], so, yeah

Yeah, I back my lawyers up in court for myself for the judge to try to give me a short sentence or to give me a chance out there in the real world. But sometimes I find it hard because how are police allowed to get away assaulting peoples and yet we do time over it? We've got to, you know, cop it in the shoulder. Yeah, it's just pretty - I reckon it's unfair

I was in custody, staying there at the police station [Port Hedland] and they stripped me … they – just wanted everything off. I had to walk like this [covering her breasts with her hands]. No, I was really cold and that thing has gone right through me. I had a blanket [but] I had to walk fully naked into a hospital. I got hit in the head from my Mother, because what happened [interviewee stabbed and killed her abusive partner] I was bleeding from here right down. I had clothes full of blood, yeah. When I heard my partner passed on, I was just shaking, crying

My lawyer is actually in Perth, but he speaks to my mum quite a bit and that's what he said. I shouldn't be in here and that - because I haven't been in trouble for over 30 years - and not that I've been in serious trouble or anything like that. He can't understand why I haven't been granted bail and stuff like that. So I go back to court tomorrow or Thursday, because mum wants me back up home there and he wants

me out, so that he and I can work on my case and stuff … He is going to try for bail and stuff like that. But we only get one shot at it and if that gets knocked back well … [remanded in custody for stabbing another woman]

No because at the time I got done I was still drunk when they done interviews and that and because I was under the influence really badly they wanted to do more - what's that stuff - interviews. I refused to do any more … I was drunk. I was about 10 times over the limit apparently. [On her lawyer] Yeah but he didn't - it took a while for him to get up and help me. I had a private lawyer legal aid. Because I was up on a murder charge from the start and I had to fight to live it down.

I don't think the - I think the ALS needs to shake-up their lawyers a little bit and start looking into their lawyers and getting them to start fighting seriously, because really, at the end of the day, I shouldn't have been sentenced. Yeah. So they need to really look into their lawyers. I think if I had a jury, I would have been found not guilty. [Sentenced for nine months for throwing a can of alcohol at a man in a bottle shop who was scruffing her niece']

[On being arrested and going to the police station] Because I was still a bit drunk anyhow, They still talked to me when I was still drunk, yeah, so I didn't know really what I was saying, yeah. I can't remember...

Oh, well like really, sort of - he [Lawyer] doesn't tell me much about it so I think it just - they support me as it is but they didn't even tell me much about it. They didn't speak to me properly, you know? I don't know what to go with here. I don't know much but to me I don't think he did his job properly. They just did it. They only just do their job - not the kind of person to support Aboriginal people

My licence was under suspension and I'm a repetitive offender, so I just don't take it seriously, but it is. Yeah, I got pulled over. It was back in - I don't know - Easter Sunday. I was taking my aunt back to Busselton. Got pulled over. It was the kids and me and they impounded the car and stuff. But I've, yeah, driven whilst under suspension numerous times. Yeah, I did try and ask my lawyer if I could get an adjournment, just so I could finish breast-feeding and sort my house out and stuff, but that didn't happen. [He didn't ask for an adjournment. Oh he said, that he didn't think I'd get imprisoned and said that there was no point getting an adjournment, we'll just get it dealt with today. However he wasn't a good lawyer. No because I'd

just applied for a legal aid grant and I'd known the lawyer in Perth, but because that was so far away, they just give me this other lawyer. That was just near Bunbury. Yeah, we just didn't - he wasn't supportive at all [sentenced to 98 days].

BAIL, ORDERS AND BREACHES:

No, this [has] been my - this is my first sentencing. Before I was on remand and I used to go home but this is my first sentencing of 10 months. It was hurting me, it's really hurting me because it was just like - I was only 48 hours late. The reason why I was 48 hours late was I was talking to the counsellor about - because the first day when I was meant to report but I'd seen my cousin [hanging] there and I went into depression and it really scared me, girl. I was like, whoa man I've never seen this in my life, I've never ever seen it. He took three times to get her off the thing, off the rope … then I just went into a real depression and I was breakdown and I was crying. Then after that my worker, she went on holiday and they thought I was telling lies. The people, the practice service never even what's the name, you fellows rang up to see where I was. They just put me in and it was the third compulsory strike, you're out. I was trying my best. I was really trying my best to get to my appointments. I know I've got to go to my appointments … coming back to my auntie's and saw there was four big police cars there. I was like, whoa, man, four. Then they left the car and they said we don't know why we're locking you are, you'll have to ask the corrective service officer. I rang corrective service officer, I said “why are you locking me up’. She said you've got to go to court tomorrow and you'll be remanded in custody because your third compliance was breached for 48 hours. I said but I was only 48 hours late, she said we don't care, [she hung up]. But I didn't think the compliance [while I've been] but I told her where I was. I was officially on an official business. It wasn't just roaming the streets, walking in that depression mode. I was doing my counselling. I mean I thought if you've seen somebody hang, hanging in front of you and then you hear about it, you'd go talk to your counsellor.

Well, I blew all my chances because they gave me a 12-month supervision order. I messed that up. Got a suspended sentence and went and messed that up. There was nothing they could really do at the end of it but to give me time and that was a bit of understanding about me, because I need it. What I did was wrong too, and I could have stopped it from happening but I continued to do it until I got goal.

No, I didn't know I had the fines until they picked me up on that warrant when I skipped court. Now, I'm going to write a letter to the magistrate - I've already started [writing] I'm pretty sure - where you do fear coming back. It's the fear of coming back to prison. It wasn't about me, I knew I was coming back here but I got too overwhelmed with leaving my kids. It was like I'm looking at my kids, I was thinking Mum's leaving you more than anything and I couldn't cope with that, I couldn't handle the reality of it. Instead of living in denial all your life that you've got it all together when you haven't, and that was my main thing, fear of coming. That's why I avoided going to court. I said well, if they catch me, they catch me. I was home. It was early in the morning, but that was all right. They picked me up for, this was all the bench warrant for not going to court, plus I had a warrant for fines

At the moment I'm just in for breaching my suspended sentence, which was initially a charge of armed robbery and aggravated robbery, but it was just really petty shoplifting. Because I had the weapon in my possession and things like that it got upgraded and that, but it was just breaching the order by leaving the rehab about a year or so ago. Yeah, but the rehab I was at, it was good but it was hard. It was a Christian rehab; A very tough program. I was there eight months, but I just got to the point, like I got to the phase of being in relationships and at that time I wasn't ready to deal with all the past issues and things. Growing up I never really got into trouble until about 18 and that was just petty shoplifting here and there. This order I am on at the moment would be the most major charges I've had. They came to my partner's home and picked me up from there. Then I came in, that was back in March, but then I got home detention bail because of my living arrangements and things because I never had my own place. There was a bit of friction between my in-laws and I couldn't stay there no longer. Then staying with my mum, she's kind of tough love and she thought I was doing drugs and things and just assuming things. So she didn't want me staying there either. So after that I had nowhere to actually do bail so I had to come in here.

I did get out. I had home detention, because they were coming in drugs, and I was like this is my nana's house. I just got out and pressuring me to have drugs, but I walked away from it, so I had to leave the house and that's when I hacked my band off and took off … I told them that I did that for a reason, because people coming in with drugs. I didn't want to have it, because like doing piss tests and that, so I just

avoided it by leaving the house … I thought it was good my leaving the house, but yeah, to them that's breaching. I just run away, but yeah I ended up getting caught and now I'm here till October.

But the only thing is, is that I completed the whole - I didn't mess up, didn't reoffend or anything throughout the whole six months or something like that. Then because I didn't comply with one program, it's not my fault that I didn't comply with the program. I rang the Correctional Facility and I said, I can't make it today, I've got my daughter and I've got no one to look after her. They said, no it's all fine, and that's all good, and whatever - that's what they said to me, and then, well they breached me anyway for it. So that kept going in and out of court.

EXPERIENCES WITH POLICE:

The police were driving past and taking names. They're always taking names in Midland. Walking down the street or even when we walk in the shopping centre. They're supposed to be in there for lunch you know, their lunch break. They're still taking names. They're there at the train station. We can't even get on a train without giving our names. We can't get off a train without giving our names.

It's all because I've been - someone had been racist to me … I got mad and smashed his house. The neighbour rang the police after we broke into his house. Then we got charged for it. We were telling the police that this man was being racist to me and they did nothing about it. It was reported that - I told them what happened, this man kept calling me black cunt and all of - blah and they didn't do anything about it. So we did something.

Like stabbing people and all that, you know. Fighting and hitting them. Since I got in the relationship I just felt like, I don't know, when I was I the relationship with my partner he was abusing me a lot. Even when I was pregnant I was getting a hiding a lot of time. I tried to ring the police but every time I rang the police they won't come … Every time I report to the police they're saying that I'm the one that's causing trouble because I keep in and out of jail. But I told them the reason why I'm keeping in and out of jail because I'm always abusive and getting bashed for no reason. You know, when it comes to me, when I do something, they're at my doorstep. But when he bashed me, he did it in front of everybody and no one didn't protect me. Of course I'm going to defend myself. I'm sick of getting hurt all the time.

[Treatment by police] Well, no, they put the handcuffs on me too tight that night so I sort of kicked up a little and they wanted to do a breathalyser and I was like well take the handcuffs off and they wouldn't so I was swearing at them and that. I was just drunk, over the limit, way over. I don't really like them anyway because when I was young, I think they were taking my uncle away and that's - I don't know, I don't really like the police. Because he was like a father figure to me too, so yeah.

The thing was, because I was always on my own, there were never witnesses and stuff and even when she would provoke me and stuff, I'd go to the police and then the police here is overpowering and just no, you've got a big mouth and stuff and she'd just twist things around. I got no help from the police, no mediation, no nothing … Even when there were witnesses there, people were too scared and intimidated by her, to step up and - you know.

My lawyer is actually in Perth, but he speaks to my mum quite a bit and that's what he said. I shouldn't be in here and that - because I haven't been in trouble for over 30 years - and not that I've been in serious trouble or anything like that. He can't understand why I haven't been granted bail and stuff like that. So I go back to court tomorrow or Thursday, because mum wants me back up home there and he wants me out, so that he and I can work on my case and stuff … He is going to try for bail and stuff like that. But we only get one shot at it and if that gets knocked back well.

POSITIVE EXPERIENCES:

This is my sixth offence now. My lawyer, she was pretty good. I told her everything and the truth, you know? You don't - my grandfather, he's a, you're not going to get anywhere lying. So it's like no matter how hard we choose to lie to him - it just - we get into trouble more. The truth does come out. So to me, I just see no point in lying. So by me telling Laura everything, it's like she told the magistrate. The magistrate understood everything, my situation and stuff that I'm not a very bad person, just can't be told not to drive. Which is why I got the light sentence so I'm happy with that.

Yeah I got a private lawyer. Yeah, he's great; he's a family friend of my partner. He's a barrister. He's a good bloke. The only thing was he got me moved to this courtroom - courtroom 42 because I was in 41 - and he thought there was a bad Magistrate there. But then the Magistrate that was in courtroom 42 fell sick and I got the bad magistrate anyway. He fought and fought to get me out of that - like get my

court date moved but the Magistrate would not let it happen. She told me that I was going to get three to four years, which really knocked me. But then when I went to court, he fought and he fought and he got me 12 months so I was happy with that.

LEGAL RIGHTS:

No, we've got no rights. We have no rights in their eyes, but we do. See, I don't listen to them, I just - they go by - the only positive thing, they always go like being a model prisoner at the last sentence. That's why I say to these young girls, they observe us and at the end of your day when you go towards the parole, everything is on paper, girl, everything about your conduct in here, your behaviour. Now, you think you're going to get parole and all that. Think again. Everything's changed, they make it harder now. Programs, don't just do the program because oh, yeah, do it when you can apply something because they've got to have programs to relate to the nature of the crime. Yeah, like cog skills. That's a three-month course. That's all - because they've got to assess you and yes, we recommend this program because of the crime or because of the nature of the crime. Some people 12 months with parole, you don't do parole, you don't do programs. Yeah, it's a system where you've got to really play the game, I guess, and your rights? Well, you've just got to blend because at the end of the day we have got rights but their rights overrule our rights, thinking we are silly people. We're not silly people, I'm not silly. I'm happy to go, but it's talking their language sometimes. You don't have to [screw them], no you can talk in a way that they do, and you can talk like that. Thinking we're not educated people.

20TH ANNIVERSARY REVIEW OF THE 1994 REPORT OF THE CHIEF JUSTICE'S TASKFORCE ON GENDER BIAS

CHAPTER 5

VICTIMS OF CRIME

THE CHAPTER 5 SUBCOMMITTEE, WITH THE ENDORSEMENT OF THE STEERING COMMITTEE, MAKES THE FOLLOWING RECOMMENDATIONS:

5.1 Separate and private waiting areas be provided in courts for victims and their families and supporters, with priority given to installing these waiting areas in courts dealing with sexual assault and domestic violence.

5.2 Sections 36B (concerning evidence of sexual reputation of complainant), 36C (concerning evidence of the sexual disposition of complainant) and 36BC (concerning evidence of the sexual experience of complainant) of the *Evidence Act 1906* (WA) be amended so that the prohibitions on adducing evidence of a complainant's sexual reputation, disposition or experience is not confined to proceedings for a sexual offence, within two years of this 2014 Review Report.

5.3 Where the victim of a crime gives evidence that is not pre-recorded, prosecutors and courts consider whether it is appropriate to and, if necessary:

a) interpose that evidence so that the victim of crime can arrive at court and commence giving evidence without waiting around court precincts; or

c) arrange for the victim to give evidence via CCTV from a different location.

5.4 The Victims of Crime Commissioner reviews the use and content of victim impact statements, including:

a) the nature of information that may be included;

b) who may make a victim impact statement;

c) the appropriate time that victim impact statements should be made and who they should be provided to;

d) the obtaining of informed consent from the victim about how the statement is to be used;

e) an identification of the number of complainants who submit a victim impact statement and factors that may prevent this from occurring;

f) a determination of when victim impact statements are to be disclosed;

within two years of this 2014 Review Report being published with a view to making recommendations for appropriate law reform.

5.5 The Victims of Crime Commissioner investigates whether victims of crime feel informed about their rights, the support services available to them, court processes and the progress of their complaints and what could help victims of crime feel better informed, within two years of this 2014 Review Report being published.

5.6 The operation of section 106G of the *Evidence Act 1906* (cross examination of a protected witness by unrepresented accused) be extended to special witnesses.

5.7 Where an accused appears in person, counsel and the Court actively consider whether orders should be made under sections 25A(c) of the *Evidence Act* (cross examination by accused in person) or 106G (cross examination of a protected witness by unrepresented accused) to provide protection for witnesses accepted by the Courts as being vulnerable.

5.8 The Victim Notification Register or other Court databases be used, at the request of a victim of crime, to inform that victim of relevant orders made and sentencing remarks, and victims of crime be informed that they can ask to be given this information.

5.9 Where a woman or girl has been the victim of a sexual assault which is reported to police, she is informed that:

a) she is not obliged to make a statement about the offence unless she wishes to do so but that if she does not, then the offence may not be prosecuted; and

b) if she does make a statement she is not obliged to answer all questions asked during that process. She may of course be told that her statement will be of less utility if she does not answer all questions, and that if the matter proceeds to court she will be required to answer questions if called.

5.10 Where a person has been charged with a sexual offence against a woman or girl and she indicates to Western Australia Police or to the Office of the Director of Public Prosecutions (DPP) that she does not wish the prosecution to proceed, the Western Australia Police or DPP are required to give weight to her views, and to the reasons (if any) given for them, in deciding whether it is in the public interest for the prosecution to proceed. If the Western Australia Police or the DPP decides that it is in the public interest for the prosecution to proceed, they will explain to the victim of the sexual offence the reasons why it is in the public interest to proceed.

5.11 Section 36C (names of complainants not to be published) to be more strictly observed and enforced.

MEMBERSHIP OF CHAPTER 5 SUBCOMMITTEE

The members of the Chapter 5 Subcommittee are:

Kimberlee Burrows, Deakin University

Elspeth Hensler (Convenor), Barrister, Francis Burt Chambers

Carole Macey, Coordinator Victim Support Service, Department of the Attorney General

Elizabeth Mooney, Prosecutor, Office of the Director of Public Prosecutions (Cwlth)

Yvonne Patterson, Director Court Counselling and Support Services at Department of the Attorney General WA

The Hon Christine Wheeler AO, QC, Retired Justice of the Supreme Court of WA

The Subcommittee would like to thank Ann O'Neill of *angelhands* community organisation for her assistance.

The views set out in this chapter do not necessarily express the views of the individual members of the Subcommittee or the organisations with whom the individual members of the Subcommittee are associated.

FOCUS OF CHAPTER 5

The focus of the Subcommittee in this chapter has been to build on the systems that have been put in place in the last 20 years to assist victims of crime and to keep them informed. From the Subcommittee's investigations, it appears that a number of tools available to assist and inform victims of crime are not being used to their maximum potential and could be used more effectively without detrimentally affecting court process or the interests of justice.

The other focus emerging from the Subcommittee's investigations concerns the need for some of the systems that have been in place for many years to be re-evaluated with a view to making changes. This focus applies particularly to victim impact statements.

The recommendations made as a result of the 2014 Review aim to reduce the stressors on victims of the crime, including child victims, whether that crime is sexual, violent, or otherwise, within the judicial system. The recommendations are also drafted with a view to balancing the victims' needs with the interests of justice and budgetary and other restraints on the availability of resources.

SUBCOMMITTEE'S INVESTIGATIONS – rationale and procedure adopted

As was the case in the 1994 Report, the recommendations made in the 2014 Review Report largely concern victims of domestic violence and sex crimes. As to these sorts of crimes:

> "*In Western Australia, as elsewhere in the world, women continue to be at greater risk of sexual assault and domestic violence than men. Women are more likely to feel unsafe in their homes and to be subjected to sexual objectification and harassment in their daily lives. Clearly this negatively affects the mental and physical health of women, and impacts women's ability to participate fully and freely in society.*"[1]

Further, about 70% of reported sexual assault cases do not result in criminal proceedings against the offender.[2]

While some of the recommendations have broader application than to victims of domestic and sex crimes, the genesis for those recommendations has been in the experience of those victims as they report the crime, as that crime progresses (or otherwise) through investigative and court processes, and as the victim seeks redress in relation to the crime, or protection from the recurrence of that crime. Chapters of the 2014 Review Report namely 1 (Access to Justice), 6 (Restraining orders) and 7 (Education; Laws which discriminate; Women as law makers) also address these issues.

An issue raised with the Subcommittee was whether public officers who do not treat victims of crime in accordance with the *Victims of Crime Act 1994* (WA) should be sanctioned in some way. The *Victims of Crime Act* authorises

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1 p 11 2012 "Women's Report Card", State Government of Western Australia Department for Communities: Women's Interests

2 pp. 12-13 2012 "Women's Report Card", State Government of Western Australia Department for Communities: Women's Interests. This information applies to all reported sexual assault cases, whether the victim was male or female.

public officers to have regard to and apply guidelines on how victims should be treated,[3] but

- Public officers should have regard to and apply the guidelines only to the extent that doing so is relevant to the public officer's functions and practicable[4], and
- The *Victims of Crime Act* creates no enforceable right for a victim of crime to be treated in accordance with the guidelines[5] and does not provide for sanctions if a public officer fails to have regard to or apply the guidelines.[6]

The *Victims of Crime Act* is due for review by 1 January 2015. While the Subcommittee doesn't make any recommendations in relation to this issue as part of its 2014 Review, it considers that the review of the *Victims of Crime Act* should address how:

- to improve systems available to public officers to help public officers apply the guidelines when dealing with victims of crime;
- to raise awareness of the guidelines on how victims should be treated; and
- clients and victims may give feedback or make a complaint,

This is not to say that the Subcommittee is of the view that there should be sanctions – but the Subcommittee does consider that the question of whether there should be sanctions and, if so, in what circumstances sanctions might be appropriate, should form part of the scheduled legislative review.

Another issue raised with the Subcommittee concerns child victims of crime. As with crimes against adult women, crimes against children are frequently offences against their physical person and matters that are reported and

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3 The guidelines on how victims should be treated are set out in the schedule to the Act and include things like treating victims with courtesy and respect for their dignity, providing/facilitating access to counselling, minimising inconvenience, keeping victims informed

4 section 3(1) of the *Victims of Crime Act*

5 section 3(3) of the *Victims of Crime Act*

6 The issue is also discussed at p 148 of the Law Reform Commission of Western Australia's discussion paper "Enhancing Laws Concerning Family and Domestic Violence" (Project No. 104, December 2013)

ultimately tried are most likely to involve child sexual abuse.[7] Further, the child might know the perpetrators of the crimes as part of a close circle of family members or acquaintances.[8]

The methods of minimising the trauma and confusion experienced by child victims giving evidence and otherwise participating in the prosecution of offenders are rightly the subject of continuing research and pilot studies. In this regard, the committee notes the current pilot by the Court and Tribunal Services of child communicators under s 106F of the *Evidence Act 1906* (WA). While it is too soon to make recommendations in this regard, the committee supports the investigation of the merits of this system.

The Subcommittee investigated the issue of gender bias in the law in relation to victims of crime by identifying people and organisations whose contact with victims of crime is closely tied to the legal system, and those whose contact with or support for victims of crime is more general, and meeting or corresponding with them. A list of the persons with whom the Subcommittee consulted (unless they have requested not to be identified), a bibliography of relevant materials and the literature review are attached.

SUMMARY OF RECOMMENDATIONS – 1994 and 1997

In summary, the recommendations in the 1994 Report concerned the following issues.

- Responsibility for policy in relation to violence against women and domestic violence and education about these issues – recommendations 7, 78, 81, 82, 83, 94, 95, 141, 145.
- Strategies to ensure that Western Australia Police, the Office of the Director of Public Prosecutions (DPP) and court personnel include appropriately trained officers, including women, to assist in taking

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7 Roylance R, Scanlon C. *The child victim: what should be done and who should do it?* Paper presented to Restoration for Victims of Crime: Contemporary Challenges; 1999 September 9 - 10; Melbourne, Australia. Available from http://www.aic.gov.au/conferences/rvc/index.html

8 Australian Institute of Criminology. Violent crime statistics: Assault retrieved 13 March 2012 from www.aic.gov.au/statistics/violent%20crime/assault.aspx

evidence from female victims of crime and to provide appropriate support those victims – recommendations 11, 23, 36, 74.

- Regular gender and cultural awareness training for members of the Western Australia Police, the DPP, the judiciary, court personnel and the legal profession with particular reference to sexual assault and domestic violence – recommendations 12, 18, 38, 44, 96, 97, 124, 125.
- Procedures for keeping victims informed of community resources available to help them (and to monitor the effectiveness of those resources), the progress of a complaint and to prepare them for the trial process – recommendations 14, 29, 84, 133, 137.
- Development and maintenance of a data collection programs to record incidents of sexual assault, domestic violence and of complaints regarding the administration of the law, and to monitor the outcomes of those reports –recommendations 17, 49, 85.
- The prosecution of sexual assaults and domestic violence and the evidence to be provided about the effects of sexual assault, including the psychological effects as well as the physical injuries – recommendations 25, 47, 90, 113.
- The use of victim statements – recommendations 27, 101.
- The experience of women victims, particularly sexual assault victims, victims of domestic violence, and the disabled, as they attend court to give evidence, including the compellability of their evidence, the use of vulnerable witness mechanisms, private waiting areas and the need of child care arrangements - recommendations 33, 34, 40, 42, 116, 130, 135.
- The use of mediation and alternative dispute resolution remedies – recommendations 46, 87, 99.
- The Bail Act and the safety needs of the victims of sexual assault – recommendation 51.
- Criminal injuries compensation – recommendations 54, 55, 118

- The Justices Act 1902 and restraining orders – recommendations 104, 107, 109, 110, 111.

According to the 1997 Progress Report[9] the majority of the recommendations made in 1994 have been addressed at least in part or in principle. Most notable has been the development and expansion of the Victim Support Service, proclamation of *The Victims of Crime Act 1994* (WA), and the strategic responses of the Domestic Violence Prevention Unit. The 1994 Report recommendations also resulted in amended legislation pertaining to, for example, restraining orders and stalking.

As to the coordination of a response to violence against women, this has been taken up at national, state and regional levels with initiatives such as White Ribbon Day, the National Council's *Plan for Australia to Reduce Violence against Women and their Children*, 2009-2021 and the National Rural Women's Network's practical toolkit for communities *Stopping Violence Against Women Before it Happens.*

The establishment of the Family and Domestic Violence Senior Officers Group has assisted the coordination of a response to violence against women. This Group is made up of senior representatives from all State and Commonwealth Government agencies that have a direct or indirect responsibility for victims and perpetrators of family and domestic violence. The Women's Council for Domestic and Family Violence Services (WA) represents the non-government sector on the Group. The purpose of the Group is to plan, manage and monitor a strategic across-government response to family and domestic violence in Western Australia.[10]

While issues remain about the recruitment of women into judicial roles (see Chapter 3 2014 Review Report - Appointment of Judiciary), women are very visible in the court system in roles where they can be easily contacted by a victim of crime. These roles include security, reception, registration staff, duty lawyers, Victim Support Services and clerks and associates. The

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9 pp. 11-12, 16-17, 25-36, 43-44, 50-53, 59 of the 1997 Progress Report

10 The Department for Child Protection and Family Support – State Planning http://www.dcp.wa.gov.au/CrisisAndEmergency/FDV/Pages/StateStrategicPlanning.aspx

Subcommittee welcomes women assuming visible roles in the court system where victims of crime may approach them for assistance.

The availability of resources (including funding and staff) was noted as a barrier to the full implementation of some recommendations. For example, according to the 1997 Progress Report, the Ministry of Justice proposed to give a high priority to providing separate waiting facilities for victims of crime and distressed witnesses[11] and a pilot program for child care at court was trialled in Rockingham in 1996.[12] However, except for the Family Court, the Courts do not provide childcare for witnesses or parties to legal proceedings and not all courts have separate waiting areas for victims of crime and their families and supporters. The issue of the provision of separate waiting areas is discussed below under the heading Recommendations Arising from the 1994 Report.

From its investigations, the Subcommittee understands that gender and cultural awareness and issues to do with domestic violence form part of the training for Western Australia Police, court personnel, the DPP and members of the judiciary. However, those issues compete with others that also properly form part of required training. Further it was reported to the Subcommittee that the involvement of agencies like Legal Aid WA, the Women's Council and the Department of Children and Family Services Family Violence Unit in providing training for Western Australia Police, court personnel, the DPP and members of the judiciary about gender, culture and domestic violence is being reduced.

The Subcommittee is of the opinion that Western Australia Police, court personnel, the DPP and members of the judiciary should regularly review their training in consultation with experts and stakeholders to identify gaps, so that organisations like Legal Aid WA, the Women's Council and the Department of Children and Family Services Family Violence Unit can provide input into the

11 pp. 10, 28, 36 of the 1997 Progress Report
12 pp. 10, 30 of the 1997 Progress Report

training curriculum in relation to gender and cultural awareness, sub-conscious bias training, and issues to do with domestic violence.[13]

The 1997 Progress Report indicated that some recommendations required further consideration. Further research would be beneficial, as the outcome of such consideration remains unclear, as does the success of initiatives taken in response to the 1994 Report recommendations (such as pilot projects). Recent evaluations of victims' experiences suggest that women continue to face considerable challenges as victims of crime.

RECOMMENDATIONS FROM THE 1994 REPORT

A recommendation made at paragraph 34 of Chapter 5 of the 1994 Report was that separate and private waiting areas should be provided for women victims and their family and supporters. The recommendation was made to recognise the dual role that a victim of crime plays – particularly in sexual assault cases where they are both victim and main witness for the prosecution.[14] It was also noted in the 1994 Report[15] that:

- the victim of a sexual assault may still be suffering from the crime when they are required to attend court to give evidence about the crime;
- the victim of a sexual assault may be worried or intimidated about having to face the accused and the accused's family in court, while arriving at and leaving court, and while waiting at court; and
- both of these factors may affect how well a woman gives her evidence and her ability to appear at court on more than one occasion.

Since 1994, the extent to which the above factors affect how well a victim of crime may give evidence has been addressed, at least in part by reforms to

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13 It is likely that such training may benefit men as well as women: for example: it was reported to the Subcommittee by SARC that gender bias poses greater barriers and difficulties for male victims reporting sexual assault than female. While training in the areas of gender and cultural awareness, and sub-conscious bias training will not make it easy for men to report sexual assault, it may make it easier.

14 paragraph 31 of Chapter 5 of the 1994 Report

15 paragraphs 31-32 of Chapter 5 of the 1994 Report

the way children and special witnesses[16] give evidence (as many need not attend the courtroom itself). But factors threatening how well a witness gives evidence can be an issue in all cases and not just for women, where there has been some prior relationship between the witness and the accused or where there have been some threats of violence.

The Subcommittee repeats this recommendation. Although as noted above under the heading Summary of Recommendations, 1994 and 1997, in 1997 the Ministry of Justice proposed a high priority be given to providing separate waiting facilities for victims of crime and distressed witnesses[17], in 2014 not all courts have separate waiting areas for victims of crime and their families and supporters.

While the Subcommittee recognises the budgetary issues concerned with providing these waiting areas, particularly in existing court buildings, it remains a recommendation that the Subcommittee supports. This is for risk and safety considerations as well as the very real experience of women and girls being intimidated within the court environment, leading to the potential for evidence to be retracted based on fear of future harm. The risk of causing further trauma or compounding the trauma is likely to be reduced with the use of private waiting areas.

5.1	Separate and private waiting areas be provided in courts for women victims and their families and supporters, with priority given to installing these waiting areas in courts dealing with sexual assault and domestic violence.

SUBCOMMITTEE'S DISCUSSIONS AND RECOMMENDATIONS ARISING FROM 2014 REVIEW

The Subcommittee commences this discussion by welcoming the creation of the new statutory role in Western Australia, the Victims of Crime

16 A witness may be declared to be a special witness under section 106R of the Evidence Act, if, for example, the witness would be likely to be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily, by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject matter of the evidence, or any other factor that the court considers relevant.

17 pp. 10, 28, 36 of the 1997 Progress Report

Commissioner. This is an excellent initiative. The Subcommittee expresses the hope that the role is, and continues to be, properly resourced and supported.

In February 2013, an accused was tried in the District Court on 5 counts of assault against his former partner. The accused's former partner gave evidence at the hearing and was cross-examined, apparently to her significant distress, about participating in group-sex, among other things.[18] The Subcommittee is of the opinion that the *Evidence Act* should make clear that it should be very rare for evidence to be allowed to be adduced about a complainant's sexual reputation, disposition or experience.

5.2 Sections 36B (concerning evidence of sexual reputation of complainant), 36C (concerning evidence of the sexual disposition of complainant) and 36BC (concerning evidence of the sexual experience of complainant) of the *Evidence Act* be amended so that the prohibitions on adducing evidence of a complainant's sexual reputation, disposition or experience is not confined to proceedings for a sexual offence, within two years of this 2014 Review Report being published.

Chapter 7 of the 1994 Report noted some factors peculiar to assaults experienced by women in that they are:

- more frequently in private, particularly in the home, rather than in public with witnesses;
- more frequently perpetrated by a family member or someone with whom the woman victim has a relationship;
- less likely to be reported to police; and
- more likely to be multiple assaults committed by one person over a period of time.

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18 T Clarke "Troy Mercanti's partner Tammy Kingdon suffered '15 years of abuse' court told" appearing in The Australian on 26 February 2013; A Raphael "Troy Mercanti trial hears of orgy, drugs, abuse of Tammy Kingdon" appearing in The Australian on 27 February 2013

As noted under the heading Subcommittee's Investigations – Rationale and procedure adopted above, about 70% of reported sexual assault cases do not result in criminal proceedings against the offender[19].

According to research:

> "*The fundamental causes of the high attrition rates and low conviction rates which distinguish this area of the law* [sexual offences] *lie primarily in the assumptions, images and values that shape the enforcement processes in general and the reception of evidence in particular*"[20]

For similar reasons to those concerning the need for victims of crime to have separate waiting areas, the Subcommittee recommends that where there is a reasonable likelihood that the accused or the accused's family and supporters will be waiting around a court building at the same time as a victim who is to give evidence, consideration be given to scheduling the victim's evidence. This may require their evidence to be interposed so that the victim can arrive at Court and go straight into the Court room, or arrange for the evidence to be given by CCTV, with a view to minimising the potential for unwelcome and potentially intimidating contact between the victim and the offender's family and supporters. The Subcommittee accepts that this may not always be possible.

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19 pp. 12-13 2012 "Women's Report Card", State Government of Western Australia Department for Communities: Women's Interests. This information applies to all reported sexual assault cases, whether the victim was male or female.

20 p 111 The National Council to Reduce Violence against Women and their Children "Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021" Commonwealth of Australia, Canberra, 2009 citing Lacey, N. (2001) 'Beset by boundaries: the Home Office Review of Sex Offences', Criminal Law Review, vol. 3 and other more recent research from Australia and internationally

5.3 Where the victim of a crime gives evidence that is not pre-recorded, prosecutors and courts consider whether it is appropriate to and, if necessary:

a) interpose that evidence so that the victim of crime can arrive at court and commence giving evidence without waiting around court precincts; or

b) arrange for the victim to give evidence via CCTV from a different location.

Apparently as a result of work already done by the Commissioner for Victims of Crime, the State Government now makes victim impact statements made to a court automatically available to the Prisoners Review Board and the Mentally Impaired Accused Review Board of Western Australia. The aim of this is to increase the ability of those boards to have greater regard to the direct impact upon victims of the criminal behaviour of the offender the board is considering for release on parole.[21]

Issues concerning the use and content of victim impact statements and the need for law reform in relation to victim impact statements, was also raised during the Subcommittee's investigations as follows:

As regards the content of victim impact statements and the persons who can make them – in the Subcommittee's investigations, contrasts were drawn between:

- the limited information that can be included in a victim impact statement and the broad amount of information that may be included in a character reference;
- the limit upon the persons who can make a victim impact statement and the larger number of people who may provide character references in support of the accused;

As regards the use made of victim impact statements disclosed prior to or during trial, such statements are usually not provided to Western Australia

[21] Statement by the Attorney General "Commissioner for Victims of Crime" delivered to the Legislative Council on Wednesday 11 December 2013, Hansard pp. 7597 - 7598

Police or to prosecutors until there has been a conviction and consideration is being given to sentencing and sentencing submissions.

However from its investigations, the Subcommittee is aware of instances where victim impact statements have been provided to the Western Australia Police or to prosecutors prior to or during trial. Consequently these statements are disclosed to the accused and the accused's lawyer prior to or during trial leading to situations where victims of crime are cross examined on topics that are not relevant to the charge but which cause the witness great distress.

The Victims of Crime Commissioner should comprehensively review these issues with a view to making recommendations for appropriate law reform.

5.4 The Victims of Crime Commissioner reviews the use and content of victim impact statements, including:

a) the nature of information may be included;

b) who may make a victim impact statement;

c) the appropriate time when victim impact statements should be made and who they should be provided to;

d) the obtaining of informed consent from the victim about how the statement is to be used;

e) an identification of the number of complainants who submit a victim impact statement and factors that may prevent this from occurring;

f) a determination of when victim impact statements are to be disclosed;

within two years of this 2014 Review Report being published, with a view to making recommendations for appropriate law reform.

There are a number of ways in which victims of crime may receive information about services that may be available to them and other relevant matters. For example:

- Western Australia Police has an automated referral system so that eligible victims of crime are automatically referred to the Victim Support Services so that an offer of service can be made to these victims;
- Victim Support Service can provide information about other relevant services, referrals to other support services, help to obtain information on the status of the police investigation, information about court proceedings and criminal injuries compensation, confidential counseling and a range of support services to assist with a victim of crime's interaction with the criminal justice system.
- a victim of an offence, on request, may be informed about the impending release of the offender from custody through the Victim Notification Register; and
- Victim Support Services can provide information to victims of crime through the Victim Notification Register as well as information about counselling and support services[22].

Even though there are ways for a victim of crime to receive relevant information, victims sometimes don't know how to access that information, or forget how to access that information. An example provided to the Subcommittee concerned a victim of stalking who felt she had to work out for herself how to arrange with Landgate, the Commonwealth, State and local electoral rolls and Telstra for her contact details to be kept confidential.

The Subcommittee is of the opinion that it would be useful for research to be conducted about whether victims of crime feel adequately informed and, if not, what could help victims of crime feel informed. The research should consider both the services provided but also the mechanisms available to inform

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[22] Services provided by Victims Support Services include:
- counselling and support;
- providing information and referrals to other support services;
- helping victims write a victim impact statement;
- preparing and supporting victims during a court case;
- helping victims obtain information on the status of police investigations;
- providing support when making an application for a restraining order;
- providing information about criminal injuries compensation; and
- helping victims understand their rights within the criminal justice system.

Those services are provided in regional and remote areas as well as in Perth.

victims of crime about existing services, the progress of Police investigations, whether charges have been laid, who has been charged, the progress of matter in the courts and court outcomes.

Research into whether victims of crime feel adequately informed and how to improve this process may help identify how a victim (such as the victim of stalking referred to above) could better receive information and other assistance that Victim Support Services[23] or other agencies such as Western Australia Police, the DPP, or the Courts are able to provide. The research may also identify how to provide information and support to women associated with the accused and whether support for these women (and their children) may help to break the chain of offending.

Such research may also identify ways of streamlining assistance (for example, in the case of the stalking victim, by creating one form that alerts all relevant agencies of the need for details to be kept confidential).

5.5 The Victims of Crime Commissioner investigates whether victims of crime feel informed about their rights, the support services available to them, court processes and the progress of their complaints and what could help victims of crime feel informed, within two years of this Report being published.

Sections 25A (cross examination by accused in person) or 106G (cross examination of a protected witness by unrepresented accused) of the *Evidence Act* provide protection for witnesses accepted by the Courts as being vulnerable from being cross-examined directly by the accused.

For the purposes of section 106G, a protected witness is defined by the legislation as a child or victim a serious sexual assault so, even where the legislation as a child or a victim of a witness has been accepted as a special

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[23] Victim Support Services informed the Subcommittee that there were approximately 33,000 offences against a person reported in the financial year to 30 June 2013 and Victim Support Services received and made an offer of service to approximately 11,000 people, most of who were victims of more serious offences against a person. Due to the need to target resources Victim Support Services is only proactive in ensuring that victims of more serious offences against a person are aware of the services available to them.

witness[24], section 106G will not protect that special witness from being cross examined directly by the accused, unless the special witness is a child or a victim of a serious sexual assault.

Under section 25A(c) of the *Evidence Act*, orders can be made protecting a witness[25] in criminal proceedings from being cross examined directly by the accused but information provided to the Sub-committee suggests that section 25A(c) is not used. An example given to the Subcommittee concerned witnesses who have been declared to be special witnesses under section 106R of the *Evidence Act* but were cross examined by the self-represented accused while giving evidence by CCTV as the offence was not a serious sexual assault.

In the circumstances, the Subcommittee recommends that: the protection given by section 106G be extended to anyone granted special witness status; and where an accused appears in person, counsel and the Court give active consideration to whether orders should be made under section 25A(c) of the *Evidence Act* to provide protection for witnesses accepted by the Courts as being vulnerable.

5.6	Where an accused appears in person, counsel and the Court actively consider whether orders should be made under sections 25A (cross examination by accused in person) or 106G (cross examination of a protected witness by unrepresented accused) of the *Evidence Act* to provide protection for witnesses accepted by the courts as being vulnerable.

Under the *Victims of Crime Act*, a victim of an offence, on request, may be informed about the impending release of the offender from custody and, where appropriate, about the proposed residential address of the offender

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24 A witness may be declared to be a special witness under section 106R of the *Evidence Act,* if for example, the witness would be likely to be so intimidated or distressed as to be unable to give evidence satisfactorily, by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or any other factor the court considers relevant.

25 whether or not the witness is a special witness or a protected witness

after release.[26] This information is made available to a victim of crime, if they request it, through the Victim Notification Register. According to information provided to the Subcommittee, the information is generally only provided where the victim is a victim of a crime that the offender is in custody for.[27]

Information kept electronically by courts also includes information such as orders made (including compensation or restitution orders), court mention dates in relation to a criminal matter, and sentencing remarks. At present there is not a comprehensive system in place to inform a complainant about these things. It would assist a greater number of victims of crime if enhancements to the courts' databases could be made to advise victims of crime of this type of information, particularly if the notification could be automated in some way.

In the Subcommittee's opinion, a victim ought to be able to request, and be given, the information about the impending release of the offender from custody and, where appropriate, about the proposed residential address of the offender even where the offender was imprisoned for an offence that was not an offence against the victim. This is particularly important for victims of domestic violence where there may be considerable potential risk to the victim, even though it was not the domestic violence by the offender that resulted in the offender being imprisoned. It is also the Subcommittee's opinion that a victim ought to be able to request, and be given, information about Court orders made (including compensation or restitution orders), Court mention dates in relation to a criminal matter and sentencing remarks.

Related to this, the Subcommittee is pleased to note that the Commissioner for Victims of Crime is already working with the Department of Corrective

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26 The Subcommittee was informed that, in practice, the offender's proposed residential address is not released via the Victim Notification Register even though it is permitted under item 11 of schedule 1 of the *Victims of Crime Act 1994* (WA) which sets out the Guidelines as to how Victims should be Treated

27 See also the discussion at p 151 of the Law Reform Commission of Western Australia's discussion paper "Enhancing Laws Concerning Family and Domestic Violence" (Project No. 104, December 2013)

Services to improve the currency of the Victim Notification Register's contact database, and to introduce enhanced notification measures.[28]

5.7 The Victim Notification Register or other court databases be used, at the request of a victim of crime, to inform that victim of relevant orders made and sentencing remarks, and victims of crime be informed that they can ask to be given this information.

As to the recommendations 5.8 and 5.9 below, concerning making statements to police or a victim of a crime not wishing to prosecute, although the Subcommittee was informed that, in effect, these recommendations reflect normal processes, members of the Subcommittee are aware of victims of sexual assaults not appreciating the consequences of making statements (or not) and prosecutions proceeding, apparently against the wishes of the victim. These have been in circumstances where the existence of sufficient public interest for the prosecution – either at that time, or at all, remained questionable. The effect of a prosecution proceeding can be more traumatic than the original offence, for some victims.

It is also important that when the relevant authorities talk to a child victim of sexual assault about giving a statement and prosecuting the offender, the authorities should not assume that the views and understandings of the parents of a child are necessarily the views of the child, but should consider whether the child has sufficient understanding to express their own views.

The Subcommittee accepts that some crimes are so serious that they should be prosecuted whether the victim of the crime wishes the prosecution to proceed or not. However, as making a statement to Western Australia Police and giving evidence about a sexual assault can be so traumatic for the victim, the Subcommittee is also of the opinion that what it understands to be current normal processes are diligently followed.

For these reasons, the Subcommittee makes the recommendations.

5.8 Where a woman or girl has been the victim of a sexual assault which is reported to police, she is informed that:

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[28] Statement by the Attorney General "Commissioner for Victims of Crime" delivered to the Legislative Council on Wednesday 11 December 2013, Hansard pp. 7597 - 7598

a) she is not obliged to make a statement about the offence unless she wishes to do so but that if she does not, then the offence may not be prosecuted; and

b) if she does make a statement she is not obliged to answer all of the questions asked during that process. She may of course be told that her statement will be of less utility if she does not answer all questions, and that if the matter proceeds to court she will be required to answer questions if called.

5.9 Where a person has been charged with a sexual offence against a woman or girl and she indicates to Western Australia Police or to the Office of the Director of Public Prosecutions (DPP) that she does not wish the prosecution to proceed, the Western Australia Police or DPP are required to give weight to her views, and to the reasons (if any) given for them, in deciding whether it is in the public interest for the prosecution to proceed. If the Western Australia Police or the DPP decides that it is in the public interest for the prosecution to proceed, they will explain to the victim of the sexual offence the reasons why it is in the public interest to proceed.

In relation to children, the committee notes that despite laws against the identification of child victims of crime, images of children leaving court are often broadcast in a way that is likely to lead members of the public to identify the child (because the broadcast images show the child walking, or show the child with close friends and family).

5.10 Section 36C (names of complainants not to be published) be more strictly observed and enforced.

Chapter 5

Victims of Crime

LIST OF PEOPLE AND ORGANISATIONS CONSULTED BY SUBCOMMITTEE AND BIBLIOGRAPHY

Consultations

The committee has met with:

- Tori Cooke, Anglicare WA
- Yvonne Henderson, Commissioner for Equal Opportunity WA
- Jennifer Hoffman, Victims of Crime Commissioner
- Linda Keane (DPP WA)
- Lesley Kirkwood & Heidi Guldbaek, Women's Law Centre
- Hannah McGlade & Gningala Yarran-Mark
- Ann O'Neill, *angel hands*

The committee has corresponded with:

- Aboriginal Family Law Service
- Commissioner for Children and Young People
- Country Women's Association,
- Criminal Lawyers Association
- Department of the Attorney General
- Multicultural Women's Advocacy Service,
- Salvation Army
- Sexual Assault Resource Centre
- Supreme, District and Magistrates' Courts
- Western Australia Police
- Women's Council for Family and Domestic Violence Services

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CHAPTER 6

RESTRAINING ORDERS

THE CHAPTER 6 SUBCOMMITTEE, WITH THE ENDORSEMENT OF THE STEERING COMMITTEE, MAKES THE FOLLOWING RECOMMENDATIONS:

The following recommendations, to be implemented within two years of the publication of this 2014 Review Report:

6.1 Responsibility for obtaining Restraining Orders lies primarily with Western Australia Police.

6.2 As part of standard procedure, Western Australia Police:

a) prepares a written report providing reasons, in circumstances where an officer asks a complainant, rather than the person complained about, to leave home where a domestic violence incident has been reported;

b) provides copies of that report to the complainant and to the person complained about;

c) provides copies of that report to the court if requested by the court; and

d) provides a copy of that report to the court if a person the subject of the report asks Western Australia Police to do so.

6.3 The Western Australian Parliament amends Section 62C(c) of the *Restraining Orders Act 1997* (WA) to provide that those reports be provided to:

a) the complainant *and* the person complained about;

b) the court if requested by the court; and

c) the court if the matter the subject of the written report is before the court and a person the subject of the report asks the Western Australia Police to do so.

6.4 The Western Australian Parliament amends the *Restraining Orders Act 1997* to provide that where an application for a restraining order is before the court, the court takes into account as evidence, written reports prepared by or for the Western Australia Police:

a) in relation to the complainant, rather than the person complained about, being asked to leave home; or

b) under section 62C(c) of the Act,

for the purpose of determining whether a restraining order is appropriate in the circumstances.

6.5 Front desk, switchboard and other ancillary staff at police stations are trained to treat and deal with persons reporting domestic violence or breach of a restraining order, with compassion and respect.

6.6 The Western Australian Parliament amends the *Restraining Orders Act 1997* to provide that where a Police Order is granted and the protected person registers the Police Order with a court while the Police Order remains in force, the registered Police Order is deemed to be an interim Restraining Order obtained by the Western Australia Police on behalf of the protected person.

6.7 The Western Australian Parliament repeals Section 35A of the *Restraining Orders Act 1997* (Misconduct Restraining Orders for persons other than those in a family and domestic relationship).

MEMBERSHIP OF CHAPTER 6 SUBCOMMITTEE

Elspeth Hensler (Co-convenor), Barrister, Francis Burt Chambers

Janette McCahon (Co-convenor from 1 January 2013), Senior Solicitor Civil Law Division, Legal Aid Western Australia

Amanda Thackray (Co-convenor until 31 December 2012), Legal Aid Western Australia

Professor Donna Chung, Head of Social Work, Curtin University

Doug Jones, former Magistrate

Nawdy Roussety, Coordinator Domestic Violence Legal Unit & Alternative Dispute Resolution Practitioner Family Law Division, Legal Aid Western Australia

The views set out in this chapter do not necessarily express the views of the individual members of the Sub-committee or the organisations with whom the individual members of the Sub-committee are associated.

FOCUS OF CHAPTER 6 SUBCOMMITTEE

The Chapter 6 Subcommittee (the Subcommittee) of the 20th Anniversary Review of the Gender Bias Taskforce Report (2014 Review) was convened to consider the issues arising from Chapter 6 of the 1994 Report of the Chief Justice's Taskforce on Gender Bias (the 1994 Report) and a subsequent review of that report in 1997 (the 1997 Progress Report). Chapter 6 of the 1994 Report addressed 'Restraining Orders'. There are a number of different orders that can be applied for to restrain people from committing acts of family and domestic or personal violence and the Subcommittee starts by setting out the types of orders discussed in this chapter.

A **Misconduct Restraining Order**[1] restrains the lawful activities and behaviour of the respondent, as the court considers appropriate to prevent the respondent from:

- behaving in a manner that could reasonably be expected to be intimidating or offensive to the person seeking to be protected and that would, in fact, intimidate or offend the person seeking to be protected;

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1 Section 36(1) of the *Restraining Orders Act 1997*

- causing damage to property owned by, or in the possession of, the person seeking to be protected; or
- behaving in a manner that is, or is likely to lead to, a breach of the peace.

A misconduct restraining order is not available where the person seeking to be protected by the order and the person bound by the order are in a family and domestic relationship with each other.[2]

A **Police Order**[3] restrains the lawful activities and behaviour of a person, as the officer considers appropriate to prevent a person from:

- committing an act of family and domestic violence; or
- behaving in a manner that could reasonably be expected to cause a person to fear that such an act will be committed.

A Police Order remains in force for 72 hours (or any shorter period specified in the order) after it has been served on the person to be bound by it but lapses if it is not served on the person to be bound by it within 24 hours of the order being made.[4]

A **Restraining Order**[5] means a violence restraining order or misconduct restraining order.

A **Telephone Order**[6] means a violence restraining order made on a telephone application.

A **Violence Restraining Order**[7] restrains the lawful activities and behaviour of the respondent, as the court considers appropriate to prevent the respondent from:

- committing an act of abuse against the person seeking to be protected;
- if the person seeking to be protected by the order is a child, exposing a child to an act of abuse committed by the respondent; or
- behaving in a manner that could reasonably be expected to cause fear that the respondent will commit such an act.

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2 Section 35A of the *Restraining Orders Act 1997*
3 Section 30C(1) of the *Restraining Orders Act 1997*
4 Section 30F(1) of the *Restraining Orders Act 1997*
5 Section 3 of the *Restraining Orders Act 1997*
6 Section 3 of the *Restraining Orders Act 1997*
7 Section 15 of the *Restraining Orders Act 1997*

Women remain at greater risk of domestic violence[8] and sexual assault than men[9]. Aboriginal[10] women are 45 times more likely than other Australian women to be victims of family and domestic violence, 35 times more likely to be hospitalised as a result and 9 times more likely to die as a result.[11]

Anecdotally, women reporting ongoing threatening behaviour are told that there is little that the Western Australia Police can do and to "get" a restraining order[12], with little guidance about how to apply for the order. This leads to many applications being made by unrepresented litigants and defended by unrepresented litigants, in a manner that wastes court resources. Consequently, applications for and opposition to, the grant of restraining orders are driven by the parties and this heightens the conflict and emotion in what is already a challenging situation for the parties.

A number of the recommendations made by the Chapter 6 Subcommittee seek to involve Western Australia Police or, where appropriate, the Office of the Director of Public Prosecutions (DPP) in making applications for restraining orders so that applications are properly presented by advocates who are experienced in the presentation of matters in court. The recommendations also seek to help persons who have the protection of a restraining order granted in a context *other* than a family or domestic violence context. It was reported to the Subcommittee that when

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8 Although family and domestic violence are discussed in this chapter, the focus of this chapter is on Restraining Orders, not preventing violence, as that is beyond the scope of the chapter. Having said that, the Sub-committee welcomes the work being done through such programmes as:

- Those programmes run through the Barndimalgu Court, Geraldton (providing offenders with the opportunity to complete programs to address their violent behaviour before the final sentence is delivered):
- Red Dust Healing (a program designed from an Indigenous perspective for Indigenous men and their families[8] which encourages participants to examine their own hurt and allows them to heal from within addressing family and personal relationships and what may have been lifelong patterns of violence, abuse and neglect); and
- the White Ribbon campaign (a male led movement to end men's violence against women).

9 Australian Bureau of Statistics data shows that one in three women have experienced physical violence since the age of 15 years and nearly one in 5 have experienced sexual violence. This data is referred to at pp. 13-14 and 190-192 of the Law Reform Commission of Western Australia's discussion paper "Enhancing Laws Concerning Family and Domestic Violence" (Project No. 104, December 2013). The Law Reform Commission goes on at p 14 to note that the consequences of experiencing family and domestic violence include homelessness, depression, anxiety, low self-esteem, social isolation and reduced parenting capacity, as well as physical injury and death.

10 In this chapter, "Aboriginal" is used to describe Aboriginals and Torres Strait Islanders

11 p 14 of the Law Reform Commission of Western Australia's discussion paper "Enhancing Laws Concerning Family and Domestic Violence"

12 See for example, p 47 of the Law Reform Commission of Western Australia's discussion paper "Enhancing Laws Concerning Family and Domestic Violence"

people report a breach of that restraining order, they are treated as though that breach is somehow less "real" or less threatening than if the breach was by a former spouse or partner.

Several issues were raised with the Subcommittee during its consultations but these are not addressed by the draft recommendations (for reasons explained below) as follows:

- accessibility of information about interstate restraining orders and criminal records;
- how to apply for an order where access to a Court or Police Station is impractical;
- procedures for Western Australia Police or DPP to apply for a restraining order at the time of any related criminal prosecution;
- the availability of interpreters and training for judiciary, court staff, Western Australia Police and others to be aware of cultural issues;
- whether the Victorian model *Men's Violence Behaviour Change Programme* should be offered to male respondents to VRO applications;
- the ability for people under the age of 18 years to apply for restraining orders.

The Subcommittee accepts the importance of these issues but does not make recommendations about these issues because, upon its investigations, it appears that mechanisms are in place to address each of these issues, to the extent that it is practically possible to do so. For example:

- access to computer records about interstate VROs and criminal records[13], the availability of training and access to court and police stations is addressed in some detail in the Law Reform Commission of Western Australia's discussion paper *"Enhancing Laws Concerning Family and Domestic Violence";*

[13] Although, as noted at pp. 83-84, 118 and 143-144 of Law Reform Commission of Western Australia's discussion paper "Enhancing Laws Concerning Family and Domestic Violence", it can take too long for information to be produced from computer records. The related issue of access to relevant computer records between Western Australian Courts, and between Western Australia Court and other Australian Courts is also addressed at these pages of the discussion paper. While those issues were not raised with the Sub-committee, the Sub-committee endorses those proposals made by the Law Reform Commission on these issues.

- there is legislation enabling applications by Western Australia Police or the DPP for restraining orders – see for example s 63 of the *Restraining Orders Act 1997*; and
- Parents, guardians, police officers or child welfare officers may apply for a restraining order on behalf of a person under 18 years old, thus arguably there is no need for people under 18 years old to be able to apply on their own behalf.

The difficulties obtaining interpreters who are independent of the parties to a restraining order are well known. That issue is beyond the scope of this chapter and is discussed in Chapter 1 of this 2014 Review Report (at pages 56 – 60).

SUBCOMMITTEES' INVESTIGATIONS – Rationale and Procedure adopted

In February 2013, the Subcommittee conducted a facilitated forum to consult with victims of domestic violence, their supporters, and providers of legal, counselling and other services to victims of domestic violence.

The Subcommittee also consulted with Western Australia Police, the DPP, the Court, representatives of Aboriginal (representative) organisations and victims of *stalking related* crimes - separately and confidentially - because it was considered likely that these people and organisations would want to raise different issues to those raised by the participants in the facilitated forum.

On 18 July 2013 the Attorney General referred a broad review of domestic violence laws to the Western Australian Law Reform Commission (LRCWA). Members of the Chapter 6 Subcommittee participated in that review by writing parts of, or being consulted in the preparation of, the LRCWA's discussion paper *Enhancing Laws Concerning Family and Domestic Violence* released in December 2013. The Subcommittee refers to parts of this discussion paper in relation to the recommendations that the Subcommittee makes.

A list of the people and organisations consulted with, and a bibliography, are attached.

SUMMARY OF RECOMMENDATIONS – 1994 and 1997

In the 1994 Report, 40 recommendations were made in the following categories that relate to the deliberations of the Chapter 6 Subcommittee as follows:

- Implementation of the recommendations made by Dr Alan Ralph in his paper *The Effectiveness of Restraining Orders for Protecting Women from Violence* (unpublished, March 1992, prepared for the Western Australian Office of the Family) – paragraph 21.
- Western Australia Police, judicial and court staff responses to violence against women, protecting women, applications for restraining orders and breaches of restraining orders – paragraphs 22, 25, 37, 38, 43, 46, 47, 48, 53, 54, 57, 59, 60, 62, 63, 65, 67, 68, 69, 71, 72, 73, 76, 77, 78, 79.
- Training, including cross-cultural training, for the Judiciary, court staff, lawyers and Western Australia Police in relation to violence against women, protecting women, applications for restraining orders and breaches of restraining orders – paragraphs 28, 31, 49, 56, 71, 72, 73, 74, 75.
- Procedures for women applying for restraining orders – paragraphs 29, 32, 40, 42, 44, 51, 60, 76, 78, 79.
- Harmonisation of the laws governing restraining orders – paragraphs 34, 35 and 36.
- Portability of restraining orders – paragraphs 35 and 36.

The 1997 Progress Report stated that, to the extent that the above recommendations could be addressed, they were addressed by enacting the *Restraining Orders Act 1997* and amendments to other relevant legislation. Legislation was also introduced to give effect to the portability of restraining orders between Western Australia and other Australian States and Territories.[14]Most importantly, the Domestic Violence Legal Unit (DVLU) was established as part of Legal Aid Western Australia (Legal Aid WA) to provide assistance to applicants for restraining orders.

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[14] pp. 12, 37 of the 1997 Report

In the 1997 Progress Report, the government noted that under Western Australian Police policy and procedures; family and domestic violence are to be treated as seriously as other forms of violence in the community, the law is to be applied where there is evidence that an offence has been committed and the Western Australia Police are required to provide every assistance to victims requiring restraining orders.[15] Although it was noted in the 1997 Progress Report that the assistance to be provided by Western Australia Police to victims of family or domestic violence *could include* making an application for a restraining order on behalf of the victim, anecdotal evidence suggests that this aspect of the above recommendations has not been actively followed.

It was also reported in the 1997 Progress Report that Western Australia Police launched a campaign to encourage female applicants and members from culturally and linguistically diverse backgrounds to apply for Western Australia Police positions. Training for members of Western Australia Police included compulsory cultural awareness training.[16]

The Western Australia Police also introduced computer systems for all Western Australia Police to record all reported incidents of family and domestic violence and began developing a *Family and Domestic Violence Data Collection Proposal* with the Domestic Violence Prevention Unit and other government agencies through a Family and Domestic Violence Implementation Advisory Committee.[17]

The 1997 Progress Report referred to developing training for staff in the courts to include the provision of appropriate responses and assistance to victims of domestic violence when applying for restraining orders.[18] While the 1997 Progress Report noted that training to address domestic violence and judicial responses to it was conducted in 1996[19], beyond that, such training was a matter requiring endorsement by the Judiciary.[20] According to the Subcommittee's investigations, the Judiciary, particularly Magistrates, continue to receive this training.[21]

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15 pp. 17, 33-34, 35 of the 1997 Report
16 pp. 13, 16, 50-51 of the 1997 Report
17 p 17 of the 1997 Report
18 pp. 8, 27, 36 of the 1997 Report
19 pp. 7-8, 59 of the 1997 Report
20 p 25 of the 1997 Report: judicial training is further addressed in chapter 1 at pages 85 - 88
21 At p 158, proposals 51 and 52 of the Law Reform Commission's discussion paper "Enhancing Laws Concerning Family and Domestic Violence", the Commission proposes regular training for

Recommendations in the 1994 Report to the effect that:

- women applying for restraining orders should have the right to be represented by a *McKenzie friend:*[22] paragraph 32;
- presumptions should be made in favour of the applicant for a Violence Restraining Order: paragraph 46, 59,

were not followed or otherwise addressed. The Subcommittee does not recommend that they should be.

THE SUBCOMMITTEES' DISCUSSIONS AND RECOMMENDATIONS ARISING FROM THE 1994 REPORT

A recommendation made at paragraph 25(4) of the 1994 Report was that Police Standing Orders be amended to express the clear direction that responsibility for obtaining restraining orders lies *primarily* with Western Australia Police.

The Subcommittee repeats this recommendation. According to the 1997 Report, part of the Western Australia Police response to the 1994 Report was that the Western Australia Police is required to provide 'every assistance' to victims requiring restraining orders and that that assistance could include making application for a restraining order on behalf of the victim.[23] The Subcommittee is of the view that this should remain the position and notes that such an approach is consistent with the Western Australia Police' reform program *Frontline 2020* which has been being trialled in Perth's south eastern suburbs since November 2013.

The Subcommittee acknowledges that making Western Australia Police primarily responsible for making applications for restraining orders, may increase the strain upon the Western Australia Police' resources. The Subcommittee also acknowledges that the police role is primarily one of response and investigation. But, it is the Subcommittee's view that applications for restraining orders should form part

(a)

court staff, judicial officers, and lawyers by agencies with expert knowledge of the contemporary nature and dynamics of family and domestic violence including specific issues in relation to Indigenous Communities, multicultural communities and people with disabilities. To this list, the Sub-committee would also add rural, remote and regional communities.

22 A *McKenzie friend* is a person who is assisting a self represented litigant. Typically, a McKenzie friend is not legally qualified

23 pp. 17, 33-34, 35 of the 1997 Report

of the police *response to the act*: just as issuing Police Orders and prosecuting a crime is part of a police responsive role.

It is anticipated that applying for a restraining order will be available in the course of prosecuting any crime connected to the act that forms the basis for the restraining order. For example, the prosecution can seek restraining orders during bail applications[24]. Having the application made by prosecutors reduces the need for separate proceedings and the delays often caused by self-represented litigants and thus the demands on court resources.

Further, provided that police receive appropriate gender and cultural awareness training and training in the causal factors of family and domestic violence[25], shifting the responsibility to the police for applications for restraining orders will help manage the conflict between the victim and perpetrator of the violence. Whilst it is not possible to remove the conflict and emotion from these applications, involving trained, independent police officers should assist in managing that conflict. This should also help overcome other potential barriers to applications being made, such as the person requiring protection being fearful of repercussions, a lack of understanding of the process, disability, language and cultural barriers.

6.1	Responsibility for obtaining Restraining Orders lies primarily with Western Australia Police.

SUBCOMMITTEE'S DISCUSSIONS AND RECOMMENDATIONS ARISING FROM 2014 REVIEW

The Western Australia Police established policy is that all reports of domestic or family violence should be recorded; however it was reported to the Subcommittee that, on occasion, domestic or family violence incidents or breaches of restraining orders are not recorded. Examples of Western Australia Police failure to record such

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[24] Under s 63(1) of the *Restraining Orders Act*, a court, including a judicial officer considering a case for bail, before which a person charged with an offence is appearing may make a Restraining Order against that person or any other person who gives evidence in relation to the charge

[25] The Sub-committee acknowledges that the training itself will increase the strains on the Police' resources, cultural and gender awareness training, and training concerning the causal factors of family and domestic violence, are important to the police' investigative role. However, as noted by the Law Reform Commission at proposal 5 of its discussion paper "Enhancing Laws Concerning Family and Domestic Violence", it is important that training remains regular and provided by a range of agencies as described in the footnote above concerning training for court staff, judicial officers and lawyers.

reports are referred to in the LRCWA discussion paper *Enhancing Laws Concerning Family and Domestic Violence*".[26]

Police records of reports of domestic or family violence incidents or breaches of restraining orders are important for subsequent legal proceedings, such as applications for or extensions or variations of restraining orders.

In this chapter, the Subcommittee makes a number of recommendations requiring Western Australia Police to make reports and the persons those reports should be made available to. The first of these recommendations concerns those reports made when Western Australia Police asks a complainant, rather than the person complained about, to leave home.

There are a number of valid reasons why a police officer may ask a complainant, rather than the person complained about, to leave a home that is the scene of domestic violence. They include that the complainant is behaving more rationally than the person complained about, that the complainant would be difficult to protect in the home, that the complainant has somewhere safe and supportive to go to, and that the complainant wants to leave.

The Subcommittee recommends that where a police officer asks the complainant and not the person complained about, to leave home, the police officer's request and the reasons for it should be recorded in a report. Without such a report, an inference might be drawn that the complainant was asked to leave home because, in some substantive way, the complainant instigated the incident complained of. Where the complainant instigated an incident, then that is relevant information for the Court. But, where the police officer has asked the complainant to leave, for example for the protection of the complainant's safety, or because of cultural issues[27] it is useful to have that information recorded to counter any inferences that might be drawn against the complainant.

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[26] See for example, pp. 47-49

[27] For example, cultural issues may arise where Aboriginal people are removed from the home

6.2 As part of standard procedure, Western Australia Police:

a) prepares a written report with reasons, if an officer asks the complainant, rather than the person complained about, to leave home where a domestic violence incident has been reported;

b) provides copies of that report to the complainant and to the person complained about;

c) provides a copy of that report to the court if requested by the court; and

d) provides a copy of that report to the court if a person the subject of the report asks Western Australia Police to do so.

Under s 62C of the *Restraining Orders Act 1997*, after investigating suspected family and domestic violence, a Western Australia Police officer must make:

- an application for a Restraining Order;
- a Police Order; or
- a written record of why they did not apply for a Restraining Order or make a Police Order.

The Subcommittee also believes that reports prepared under s 62C above should be made available to the complainant, the person complained about and the court, should there be subsequent legal proceedings and the report is requested by the Court. This is for similar reasons to those in circumstances where the complainant, rather than the person complained about, is asked to leave home. It was also reported to the Subcommittee that, while this is not always the case, there have been occasions when Magistrates have requested that a copy of a report prepared under s 62C be provided to the Court in relation to relevant proceedings before the Court and that request has been refused.

6.3 The Western Australian Parliament amends section 62C(c) of the *Restraining Orders Act 1997* (WA) to provide that those reports be provided to:

a) the complainant and the person complained about;

b) the court if requested by the court; and

c) the court if the matter the subject of the written report is before the court and a person the subject of the report asks the Western Australia Police to do so.

Where Western Australia Police responds to a report of domestic or family violence, they are required to complete a *Domestic Violence Incident Report.*[28] The Subcommittee has been informed that courts can and do issue summons for incident reports to be produced and take the information set out in these reports into account as evidence for restraining order applications.

6.4 The Western Australian Parliament amends the *Restraining Orders Act 1997* to provide that where an application for a restraining order is before the court, the court may take into account as evidence written reports prepared by or for the Western Australia Police:

a) in relation to the complainant, rather than the person complained about, being asked to leave home; or

b) under section 62C(c) of the Act,

for the purpose of determining whether making a restraining order is appropriate in the circumstances.

(Note: while generally supporting recommendation 6.4 above, Subcommittee member Mr Jones is of the view that these written reports prepared by or for the Western Australia Police should only be admitted as evidence of why the Western Australia Police asked the complainant to leave, or did not apply for a Restraining Order or make a Police Order, as the case may be.)

[28] See the Commissioner's Operations and Procedures Manual at DV 1.1.4.3

It was noted in the 1997 Progress Report that until 1991, the policy of Western Australia Police was to treat domestic or family violence as a "private" issue requiring mediation[29]. Anecdotally, this policy was reflected in a culture whereby victims of domestic or family violence could not persuade police officers to help them, unless it was apparent that the victim's death as a result of domestic or family violence was imminent.

During the Subcommittee's consultations, victims of domestic violence and organisations assisting or representing them generally reported that police responded promptly and helpfully to complaints of family or domestic violence, and complaints of breach of restraining orders. However, where employees who were not police officers manned police telephones reception areas, it was reported that those employees' responses were rude and dismissive. Victims perceived that, instead of helping the complainant to talk to a police officer, the response of these employees appeared designed to persuade the complainant to "get off the phone" or "get out of the waiting area", and to "stop wasting police time". This attitude is reported to be at its worst when a complainant is reporting a breach of a restraining order that is not related to family or domestic violence.

For these reasons, the Subcommittee recommends appropriate training for front desk, switchboard and other ancillary staff at police stations. By this, it is not intended that reception staff receive the same training as police officers or that they be expected to take a history from the complainant. What is intended is that ancillary staff be trained to treat complainants compassionately and with respect, refer them to a police officer as soon as is practical, and inform the complainant that they will be referred to a police officer as soon as possible.

6.5	Front desk, switchboard and other ancillary staff at police stations are trained to treat and deal with persons reporting domestic violence or breach of a restraining order, with compassion and respect.

[29] p 16 of the 1997 Report

It was reported to the Subcommittee that a common reason for people to contest the making of a Violence Restraining Order is that they mistakenly believe that a Violence Restraining Order is a criminal conviction and that it will prevent the respondent from having contact with their children indefinitely.[30] However, according to information provided to the Subcommittee, persons served with Police Orders do not respond in the same way: they do not appear to believe that a Police Order amounts to a criminal conviction or may indefinitely prevent child contact. Consequently, Police Orders are not contested to the same degree as applications for Violence Restraining Orders.

Whilst a Violence Restraining Order is being contested is a time of high risk for applicants, particularly those who have recently escaped a partner.[31]

In these circumstances, the Subcommittee considered alternatives to the current system of applying for Violence Restraining Orders with a view to:

- reducing the likelihood of applications for Violence Restraining Orders being contested where the reason for the contest is a mistaken belief about the nature of Violence Restraining Orders;
- continuing to provide for contests about the need for any restraints to protect an applicant, or the kind of restraints sought.

The Subcommittee proposes a system of registering Police Orders with a court that has jurisdiction under the *Restraining Orders Act 1997*. The proposal makes no changes to the need for the Police Order to be served – the difference is that once the Police Order is registered by or on behalf of the protected person at the court, it is treated as an Interim Restraining Order and the usual procedures then apply for that Interim Restraining Order lapsing, being confirmed or dismissed.

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30 This is consistent with information provided to the Law Reform Commission see p 97 of its discussion paper "Enhancing Laws Concerning Family and Domestic Violence". On a related issue, the Sub-committee welcomes the proposals made by the Law Reform Commission about making information available to respondents to Violence Restraining Order applications.

31 By way of recent example, in April 2014 a woman who had fled to a refuge was killed by her ex-partner in Sunshine, Melbourne.

6.6 The Western Australian Parliament amends the *Restraining Orders Act 1997* to provide that where a Police Order is granted and the protected person registers the Police Order with a court while the Police Order remains in force, the registered Police Order is deemed to be an Interim Restraining Order obtained by the Western Australia Police on behalf of the protected person.

Under s 35A of the *Restraining Orders Act 1997*, the court may not make a Misconduct Restraining Order where the person seeking to be protected and the person to be bound by the order are in a family or domestic relationship. This has caused problems where, for example:

- a person requires protection from intimidating or offensive conduct of a family member that falls short of being abusive,[32] or
- protection is sought against a violent family member but for cultural reasons, the person needing protection does not want to allege violence.

The Subcommittee recommends that Misconduct Restraining Orders be made available to people requiring protection from family members. This creates an option for protection to be sought in a way that doesn't raise the stigma of personal violence or criminal conviction given that the stigma of criminal conviction leads to an increased likelihood of contest, as discussed above.

6.7 The Western Australian Parliament repeals Section 35A of the *Restraining Orders Act 1997* (Misconduct Restraining Orders for persons other than those in a family and domestic relationship).

[32] An example given by the Law Reform Commission concerned a person seeking protection from an aunt who made constant harassing phone calls to the person's workplace about an old family issue

CONSULTATIONS

The Subcommittee has met with:

- a facilitated forum of representatives from angelhands, Anglicare WA, Centre Care, Family Violence Protection Legal Service, Fremantle Community Legal Centre, Geraldton Community Legal Centre, Legal Aid (WA) (Alternative Dispute Resolution Unit & the Domestic Violence Legal Unit), Koolkuna Women's Refuge, Lucy Saw Women's Refuge Centre, Men Alive Australia, Patricia Giles Centre, Women's Council for Domestic & Family Violence Services, Women's Health & Family Services (Domestic Violence Advocacy & Support), Women's Law Centre (Domestic Violence Legal Workers' Network)
- Hannah McGlade & Gningala Yarran-Mark
- Sgt Glenn Lloyd and S Con Carol Davenport, Western Australia Police
- Tori Cooke, Anglicare WA
- applicants for Restraining Orders

The committee has corresponded with:

- Western Australia Police
- Anglicare WA
- Aboriginal Family Law Services
- Domestic Violence Unit, Legal Aid WA

Attempts were also made to contact some stakeholders representing regional and multicultural interests but, those attempts, for various reasons, were not successful.

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The committee has also considered:

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Commissioner’s Operations and Procedures Manual

Domestic Violence Legal Workers Network “October to December 2012 Quarterly Update”

Gordon S, Hallahan K & Henry, D “Putting the picture together, Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities” prepared for Department of Premier and Cabinet, Western Australia 2002

Hickson, R. “2012 Amendments to Restraining Orders Act (WA) 2007” presented 16 & 17 April 2012

Law Reform Commission of Western Australia’s discussion paper “Enhancing Laws Concerning Family and Domestic Violence” December 2013

National Rural Women’s Network “Stopping Violence Against Women Before it Happens: a practical toolkit for communities” (2012)

WA Labor Discussion Paper “Violence in our Homes: protecting the vulnerable” 2012

Western Australia Department for Communities: Women’s Interests “Women’s Report Card”, 2012

Western Australia Department of the Attorney General “A report on the operation and effectiveness of Part 2 Division 3A of the *Restraining Orders Act 1997*” 2007

Western Australia Police training materials

Women’s Council for Domestic & Family Violence Services Strategic Plan 2012-2015

Women’s Policy Development Office in conjunction with the Ministry of Justice “Gender Bias Taskforce report: progress report” April 1997

20TH ANNIVERSARY REVIEW OF THE 1994 REPORT OF THE CHIEF JUSTICE'S TASKFORCE ON GENDER BIAS

CHAPTER 7

EDUCATION; LAWS WHICH DISCRIMINATE AGAINST WOMEN; WOMEN'S ROLE AS LAW MAKERS

THE CHAPTER 7 SUBCOMMITTEE, WITH THE ENDORSEMENT OF THE STEERING COMMITTEE, MAKES THE FOLLOWING RECOMMENDATIONS:

7.1 Political parties in Western Australia within two years of this 2014 Review Report:

a) examine their selection procedures to identify systemic discrimination;

b) implement strategies to increase the number of women candidates preselected for winnable seats; and

c) commit to reform of the culture and work practices in Parliament to encourage more women to seek pre-selection.

7.2 The Western Australian Parliament within two years of the publication of this 2014 Review Report establishes a standing committee on equal opportunity that monitors and reports on the status of women in Parliament and identifies ongoing barriers to equal participation by women as members of Parliament.

7.3 In preparing the Women's Report Card, the Department of Communities: Women's Interests liaises annually with the School Curriculum and Standards Authority for Western Australia to conduct an informal review of the inclusion of gender issues in the curriculum.

7.4 Western Australian Law Schools ensure that study of gender bias and the law (in particular the legal system's inadequacies in dealing with violence against women) is embedded in some compulsory and/or optional units within two years of the 2014 Review Report.

7.5 In preparing the Women's Report Card, the Department of Communities: Women's Interests liaises with the Deans of each Law School on an annual basis to:

a) ensure ongoing awareness within Law Schools of the recommendations made in the Chief Justice's Task Force on Gender Bias 1994 Report and in the 2014 Review;

b) discuss relevant research into areas of gender bias that require attention; and

c) conduct an informal review of the inclusion of relevant gender bias in tertiary legal education curricula.

7.6 The Equal Opportunity Commission, alternatively the Department of Communities: Women's Interests:

a) promotes the rights of parents returning from parental leave to request to return to work on a modified basis;

b) collects information on whether applications are being made to enforce s 38(4) of the *Minimum Conditions of Employment Act 1993*; and

c) considers what measures need to be taken, including amending the *Minimum Conditions of Employment Act 1993* to ensure that an employer's power to refuse a request for a return to work on a modified basis is only exercised on justifiable grounds.

7.7 The State Government provides the Law Reform Commission of Western Australia with a reference to examine and report on laws concerning sexual vilification and report on the adequacy of those laws and on any desirable changes to the existing law of Western Australia in relation to this issue within two years of the 2014 Review Report.

7.8 WorkCover WA conducts a review of laws relating to workers compensation and RiskCover conducts a review of laws relating to the workers compensation and personal injuries claims, in order to identify those parts of the law which discriminate against women, and to formulate recommendations which can lead to any necessary legislative change, within two years of the2014 Review Report.

7.9 The Western Australian Parliament amends laws concerning criminal injuries compensation with particular reference to:

a) the compensation payable where the victim of crime applying for compensation was engaged in criminal conduct; and

b) the payment of compensation subject to conditions, or made payable using trusts or some other mechanism, to quarantine compensation to the benefit of the victim of crime applying for compensation, and to make it unlikely that an offender will benefit from any compensation awarded,

within two years of the2014 Review Report

7.10 A new section 334(2)(a) is inserted in the *Health Act 1911* requiring that a person, hospital, health institution or service refers a pregnant woman without delay to a service provider who is known to provide abortion services, within two years of the 2014 Review Report.

7.11 The Western Australian Parliament amends section 334(7)(a) of the *Health Act 1911* to delete the words 'severe medical condition' and replace them with 'severe physical or mental health condition'.

7.12 The State Government permanently fills the position of Equal Opportunity Commissioner as soon as possible and provides the Commission with adequate resources to administer the legislation and deliver its educational programmes.

7.13 The Department of Housing reviews its application of the *Disruptive Behaviour Management Strategy*, particularly in relation to:

a) the proper investigation of complaints, including consideration of the tenant's version of events and whether, if substantiated, the conduct complained of amounts to a breach of the *Residential Tenancies Act 1987*;

b) then on penalisation of a tenant who is not the person responsible for the "strikes" and who has taken reasonable measures to prevent the "strikes";

c) those evictions for minor disturbances;

d) the encouragement of reconciliation and mediation conferences involving the complainant and the disruptive person, as well as the tenant; and

e) the opportunities for tenants and complainants to seek internal review of decisions by the Department of Housing,

within two years of the 2014 Review Report.

7.14 The State Government provides a reference to the Law Reform Commission of Western Australia to examine and report on laws concerning defences to child exploitation crimes (such as those found in section 221A of the *Criminal Code*) and report on:

a) the adequacy of those laws and on any desirable changes to the existing law of Western Australia in relation to this issue; and

b) whether the issue should be referred to the Law, Crime and Community Safety Council to consider the desirability of there being consistent defences across Australia,

within two years of the 2014 Review Report

MEMBERSHIP OF CHAPTER 7 SUBCOMMITTEE

Elspeth Hensler (Convenor), Barrister, Francis Burt Chambers

Associate Professor Jane Power, Director, Professional Legal Education, School of Law, University of Notre Dame

The Hon Linda Savage MLC, Member for the East Metropolitan Region

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The Subcommittee would like to thank Chelsea Quirk for the assistance she gave to the Subcommittee.

The views set out in this chapter do not necessarily express the views of the individual members of the Subcommittee or the organisations with whom the individual members of the Subcommittee are associated.

FOCUS OF CHAPTER 7

The Chapter 7 Subcommittee of the 20th Anniversary Review of the Gender Bias Taskforce Report (the 2014 Review) was convened to consider issues arising from Chapter 7 of the 1994 Report of the Chief Justice's Taskforce on Gender Bias (the 1994 Report) and a subsequent review of that report in 1997 (the 1997 Progress Report). As will be seen from the discussion below, chapter 7 of the 1994 Report was concerned with many disparate issues to do with education about women's rights, discrimination, abortion, encouraging women to enter Parliament and be promoted to cabinet (or shadow cabinet) positions, the participation and promotion of women in the workplace, access to legal services, and civil laws that discriminate against women.

The Subcommittee has addressed a large number of disparate issues in this chapter and multiple recommendations could have been made in relation to many of them. Further, a number of issues of concern in this chapter (such as legal services for women, prostitution and violence in family law cases) are addressed in other chapters of this 2014 Review Report.

Consequently the Chapter 7 Subcommittee concentrated on the issues of:

- women's role as law makers;
- legal studies at secondary and tertiary levels;
- abortion;
- equal opportunity and discrimination;
- access to public housing
- law reform in relation to sexual vilification;
- criminal injuries compensation; and
- child exploitation.

The Subcommittee considers these issues as being the more critical to women's interactions with the law and the legal system.

SUBCOMMITTEE'S INVESTIGATIONS – Rationale and procedure adopted

During consultations, the Subcommittee was asked to consider the legal position of transgender people who identify as women. This issue wasn't considered in the 1994 Report. The Subcommittee recognises that transgender people who identify as women face discrimination and very practical problems. However given that:

- The *Sex Discrimination Act 1984* (Cwlth) came into effect on 1 August 2013 making it against the law to treat a person unfairly because of their gender identity or intersex status;
- In the recent decision in *NSW Registrar of Births, Deaths & Marriages v Norrie* [2014] HCA 11 the High Court decided that a person's sex may be registered as "non-specific"; and
- The Gender Centre and the WA Gender Project, as lobby groups for transgender persons in Western Australia are not conducting any current campaigns seeking to change the law or inquire into the practice of the law as it affects transgender people (although they have in the past),

the Subcommittee does not propose to make any recommendations in this area.

Further, issues to do with violence in family law cases and prostitution which were the subject of recommendations in Chapter 7 of the 1994 Report are dealt with in chapters 5, 6 and 9 of the 2014 Review Report.

SUMMARY OF RECOMMENDATIONS – 1994 and 1997

In the 1994 Report, 22 recommendations were made in the following categories.

- Legal services for women – recommendation 1.
- Women's role as law makers – recommendation 2;
- Legal education at school and at tertiary level – recommendations 3 and 5(1) and (2) respectively.
- Gender neutrality in the language of the law - recommendation 4.
- Industrial and employment law – recommendation 6;
- Sexual vilification – recommendation 7.
- Women, worker's compensation and personal injury – recommendation 8.
- Criminal injuries – recommendation 9.
- Abortion – recommendation 10.
- Family law and de facto relationships – recommendation 11
- Ex-nuptial children – recommendation 12.
- Violence in family law cases – recommendation 13.
- Prostitution – recommendations 14(1) – (5).
- Women's unpaid work in the home – recommendation 15.
- Equal opportunity and discrimination laws – recommendation 16.

The recommendations from the 1994 Report concerning legal services for women, violence in family law cases and prostitution are addressed in Chapters 1 (Women's Access to Justice), 5 (Women as Victims of Crime), 6 (Restraining Orders) and 8 (Women and Criminal Laws) of this 2014 Review Report.

Not all of 1994 recommendations were implemented. Where there has been a response to the recommendations made in the 1994 Report, that response has been as set out immediately below.

Legal Services for Women

It was noted in the 1997 Progress Report that the Women's Legal Service of Western Australia had recently been established with funding from the Commonwealth Government. While that funding may have been adequate in 1997, funding for Women's Legal Services is now regarded as inadequate and this issue is addressed in Chapter 1 (Women's Access to Justice) of this 2014 Review Report.

Women's Role as Law Makers

In the 1997 Progress Report, the State Government's response was that the State was not the appropriate vehicle to address recommendations concerning political parties' selection procedures and whether those procedures systematically discriminated against women.

Political parties have since implemented different strategies concerning the pre-selection of women, including affirmative action and quotas (Western Australian Labor, and some divisions of Liberal Party), support networks (Emily's List which supports women who have been formally endorsed as candidates by the Australian Labor Party), the creation of women's councils at an executive level to actively promote women for elected office (the Federal Women's Committee in the Liberal Party), and the creation of designated organisational positions for women (Liberal Party).

Legal Studies in School

Recommendation 3 in the 1994 Report suggested that a compulsory part of secondary school curriculum deal with the development of human rights and citizenship and that students be encouraged as part of this education about citizenship, to have an understanding of the role which gender and the law has and has had in society.

The 1997 Progress Report identified specific parts of the school curriculum that were complying with the 1994 recommendation.

Gender Neutrality in the Language of the Law

Recommendation 4 from the 1994 Report was that judicial officers, legal practitioners, prosecutors and others appearing in the courts "be scrupulous in using language which refers to men and women expressly, when it is appropriate that a gender reference be made and that otherwise gender neutral language be used".

It was also recommended in the 1994 Report (paragraph 37) that legislation that contained male pronouns without reference to female pronouns be progressively amended to make such references. As is discussed in more detail below, Discussion of 2014 Recommendations, gender neutral language has become the official standard in Western Australian legal and parliamentary systems.

Legal Education at Tertiary Level

Recommendation 5 from the 1994 Report in this regard were:

5 (1) That feminist legal scholarship be included within all compulsory introductory subjects in law programs such as Legal Process (UWA), Australian Legal Systems (Murdoch), Legal Framework (Curtin University of Technology) and Introduction to Legal Studies (ECU – Legal Studies). The aim of such inclusion is to introduce all students to the history and basic principles of feminist legal scholarship. The legal system's tolerance of and failure to deal with violence against women, should be included.

5 (2) Where appropriate, feminist legal scholarship be integrated into all compulsory and elective subjects.

By the 1997 Progress Report, the University of Western Australia (UWA) was revising its Legal Process unit and had indicated it would consider these recommendations from the 1994 Report when doing so. A new elective unit – Feminist Analysis of the Law – was also taught for a number of years after 1996. In 2014 the University offered the unit "Gender and the Law" which examined critical theories of gender identity and their relationship with the law, including feminist theory. Law schools do not include gender issues in *all* elective and compulsory units and are unlikely to do so due to curriculum content constraints. See below - Discussion of 2014 Recommendations.

Women's Participation in the Workplace (Industrial and Employment Law)

Recommendation 6 from the 1994 Report required the government to conduct a review of the effects of industrial relations laws upon women's position in the workforce, including the right to parental leave and permanent part-time work.

In 1994 there had been significant legislative reform in relation to industrial and employment law at State[1] and Federal[2] levels. The effects of that reform were not yet clear but they were expected to be substantial. Of particular concern were how reforms aimed at replacing award regulation with enterprise and individual bargaining would affect women, given a tendency for women to suffer more than men from unequal bargaining power and the concentration of women in part time and casual work with low skill levels and limited promotional opportunities.

The 1994 Report also referred to the lack of women in senior management and women having significantly lower salaries than men as a result of the issues mentioned above and the disruption to career patterns caused by women leaving the workplace for extended periods to be primary carers of their children.

The 1997 Progress Report advised that the State Government was working with other States to monitor comparative data and relative progress of female and male employees in the workplace. It also noted that except for casual employees, all employees had a right to 52 weeks unpaid leave in respect of the birth or adoption of a child.

Women's participation in the workplace remains an issue. See below - Discussion of 2014 Recommendations.

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1 For example, the *Minimum Conditions of Work Act 1993* (WA)

2 For example, the *Industrial Relations Reform Act 1993* (Cwlth) introduced rights for unfairly dismissed employees a prohibition on dismissing employees on the basis of sex

Sexual Vilification

Recommendation 7 from the 1994 Report stated:

That legislation be drafted extending the prohibition against sexual harassment and sexual vilification to beyond the workplace, along similar lines to racial harassment laws recently enacted.

It was stated in the 1994 Report that women are subject to conduct in their homes, workplaces, and in going about their daily lives, that is offensive, intimidating and threatening but which, in 1994, was not dealt with adequately by any area of the law.

The 1997 Progress Report noted that under the *Equal Opportunity Act 1984* (WA), discrimination involving sexual harassment is unlawful in the areas of education and accommodation as well as employment but that sexual vilification was not an unlawful ground of discrimination. Sexual vilification is still not an unlawful ground of discrimination (except to the extent that it constitutes harassment in the areas of education, accommodation or employment). This issue is addressed further; see below - Discussion of 2014 Recommendations, Sexual Vilification.

Women, Workers' Compensation and Personal Injury – Recommendation 8

Recommendation 8 from the 1994 Report stated:

That a thorough review of laws relating to workers' compensation and damages for personal injury to be conducted in order to identify comprehensively those parts of the law which discriminated directly or indirectly against women, and to formulate recommendations which can lead to the necessary legislative changes.

The recommendations arose out of concerns that the then existing compensation systems in Western Australia were predicated on the male experience of work and were not adequate to cope with:

- how injuries affect women (particularly loss of a foetus, loss of a breast, soft tissue injuries and stress claims); and
- the kind of work that many women do. In particular, the high number of women in low paid work, or part-time work, having the result that many women would be deprived of the opportunity to sue for common law damages in relation to a

workplace injury as the women would not satisfy the statutory monetary thresholds.

Another concern was the restriction on damages for gratuitous provision of home care services, devaluing the support usually provided by women to injured family members.

The 1997 Progress Report referred this recommendation from the 1994 Report to Work Cover WA for advice.

Criminal Injuries Compensation

Recommendation 9 of the 1994 Report stated:

That a review be undertaken of gender bias in the criminal injuries' compensation system, with a particular emphasis on the kinds of assaults suffered by women in the home.

After a short summary of the statutory history of criminal injuries compensation in WA, the 1994 Report went on to identify as a central problem, that the system is predicated on male experiences of assault, this being most obvious in relation to violence in the home, sexual assault generally and in particular the sexual assault of children. The 1994 Report noted some factors that are peculiar to assaults experienced by women namely that they:

- occur more frequently in private, particularly in the home, rather than in public with witnesses;
- are perpetrated more frequently by a family member or someone with whom the woman victim has a relationship;
- are less likely to be reported to police; and
- are more likely to constitute multiple assaults committed by one person over a period of time.

The 1997 Progress Report indicated the State Government would take steps to appoint additional assessors and include the recommendations made in the 1994 Report as part of a general review of the criminal injuries' compensation system then being undertaken by the Ministry of Justice.

Abortion

Recommendation 10 of the 1994 Report sought that sections 199, 200 and 201 of the *Criminal Code,* concerning abortion, be repealed.

In the 1997 Progress Report, the State Government responded that the recommendation was not consistent with government policy.

In February 1998 Drs Victor Chan and Hoh Peng Lee were charged with attempting to procure an abortion. After Drs Victor Chan and Hoh Peng Lee were charged, and resultant campaigns for and against abortion reform, sections 199, 200 and 201 of the *Criminal Code* were repealed and amendments were made to the *Criminal Code* and the *Health Act 1911* making abortion lawful in certain circumstances.[3]

Family Law and de Facto Relationships

Recommendation 11 of the 1994 Report sought:

Legislation (be enacted) to provide for recognition of de facto relationships be implemented as soon as possible and that such legislation make provision for support or maintenance rights as well as property entitlements.

The response in the 1997 Progress Report was that 'This recommendation will be given effect to, in part, by legislation relating to de facto relationship property matters which is currently under consideration."

The 1994 recommendation has been implemented by the introduction of Part 5A of the *Family Court Act 1997*.

Ex-Nuptial Children

Recommendation 12 in the 1994 Report required:

Means to be found whereby the disadvantages of non-referral of power in relation to ex-nuptial children do not outweigh the perceived advantages of non-referral of power.

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[3] For news articles about the charges against Drs Victor Chan and Hoh Peng Lee and the subsequent public campaigns for and against changing the laws about abortion, see for example Stephen S, "Abortion Access Improves in WA" in Green Left Weekly on 23 October 2002 and Stephen K, "Changes to Western Australia's Abortion Laws in 1998" in Pro+Choice Forum at http://www.prochoiceforum.org.uk/al5.php

This recommendation intended that mothers of ex-nuptial children from Western Australia should not be disadvantaged on account of Western Australia retaining its power in relation to ex-nuptial children, instead of referring that power to the Commonwealth as other States did. By way of example, unlike their interstate sisters, mothers of ex nuptial children in Western Australia did not have the same rights to seek child support and to have payment reviewed through the Child Support Agency, as mothers of children of a marriage.

The 1997 Progress Report stated that "The *Family Court Bill 1997*, amongst other matters, provides that were previously the mother of an ex-nuptial child was given sole guardianship and custody rights to the exclusion of the father, the Bill proposes that the parents have equal responsibility." With parents having equal responsibility for their ex-nuptial children, obtaining child support and payment reviews became less arduous for mothers of ex-nuptial children in Western Australia.

Family law relating to ex-nuptial children under Western Australian law is now essentially the same as the laws that apply to children in other states and territories in Australia under Federal law.

Women's Unpaid Work in Home

Recommendation 15 in the 1994 Report was that the State and Federal Governments jointly:

- assess the real value of women's unpaid work;
- consider means to reward women who are currently denied pay and other minimum standard conditions designed to protect Australian workers; and
- identify those areas where women as unpaid workers are denied protection, or discriminated against, because of their status as unpaid workers.

The 1997 Report recorded that the State Government did *not* intend to review existing laws in regard to the real value of women's unpaid work and how to recognise and remunerate women for that work because under section 7(1) of the *Industrial Relations Act 1979* (WA) such a review fell outside the charter of the Department of Productivity and Labour Relations.[4]

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[4] p 47 of the 1997 Progress Report

Equal Opportunity and Discrimination Laws

Recommendation 16 in the 1994 Report, was that the *Equal Opportunity Act 1984* (WA) be maintained and that the Equal Opportunity Commission (EOC) be adequately funded. This recommendation was made against a background of the work of the EOC being under review, its jurisdiction expanding to address discrimination on the grounds of impairment, age and family responsibility, and the concern that the demands of the additional jurisdiction might cause delays in the EOC work of conciliating complaints unless extra resources were provided to support its additional work.

The 1997 Progress Report that the Commissions had sought funding to implement improvements to the investigation and conciliation processes under equal opportunity legislation but that the request for funding was not endorsed by the Cabinet Estimates Committee.[5]

(As referred to above, Recommendations 13 and 14 in the 1994 Report concerned with violence in family law cases and prostitution respectively are dealt with in other chapters in this 2014 Review).

SUBCOMMITTEES DISCUSSIONS AND RECOMMENDATIONS ARISING FROM 2014 REVIEW

Legal Services for Women

An inability to access legal services can present a particular barrier for a woman, which prevents or inhibits them from obtaining legal advice and taking steps to protect themselves and their legal rights. Women's economic inequality, which arises as a result of their over representation in low paid employment, less hours in paid employment due to child and other caring responsibilities, and particularly in older women a lack of savings and superannuation, exacerbates their lack of equality before the law.

A coalition of women and organisations led by the Women's Electoral Lobby established the Women's Legal Service of Western Australia in November 1993[6]. Following the release in May 1995 of the Federal Government's Justice Statement,

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5 p 15 of the 1997 Progress Report

6 p 20 of the 1994 Report

funding was received from the Commonwealth Attorney General's Department and the service moved into premises in Barrack Street, Perth. The service operated from these premises for some years. Following further changes in funding the Women's Law Centre was established in 2002. This is now funded by the Commonwealth Attorney General's Department, the Public Purpose Trust, Lottery West and donations.

Given the important work that is done by the Women's Law Centre, this Subcommittee supports the recommendations made in Chapter 1 of this 2014 Review Report, in relation to proper funding for the Women's Law Centre.

Women's Role as Law Makers

The review of recommendation 2 (discussed at paragraphs 7.29 to 7.31 of the 1994 Report) has been considered primarily in terms of women's participation as members of the Western Australian Parliament. "*A key measure of women's empowerment in society at large is their participation in politics.*"[7]

In the twenty first century *"…democracy can no longer be conceived of without women"*[8]. Despite the acceptance of women's participation in Western Australian (and Australian) politics, women do not, as yet, do so on an equal footing. "*The equal representation of women as elected members of government is one of the most widely accepted and recognised measures of the status of women in our community. At a state level, Western Australian women remain under represented in the Legislative Assembly but comprise almost half the membership of the Legislative Council in 2010.*[9] *At a federal level Western Australian women are under-represented in both the House of Representatives and Senate*."[10]

In the 38th Western Australian State Parliament (2009 - 2012), 93 years after women attained the right in 1920 in WA to stand for, and be elected to Parliament, women

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7 Allessandro Motter, *Statement before the Third Committee of the General Assembly*, Inter-Parliamentary Union, 11 October 2011, viewed 8 January 2012, http://www.un.org/womenwatch/daw/documents/ga66/IPU.PDF

8 Manon Tremblay (2007): *Democracy, Representation and Women: A Comparative Analysis, Democratization*, 14:4, 533-553

9 In WA's 38th Parliament (2009-2012), women comprised 47.2% of members of the Legislative Council.

10 Department for Communities (2012) "2012 Women's Report Card: Measuring Women's Progress". Perth *Difference – A Frontier of Firsts: Women in the Western Australian Parliament 1921-2012*, David Black and Harry Phillips, 2nd edition, 2012, Western Australia. www.communities.wa.gov.au/women/Documents

for the first time reached just over 30% representation,[11] with the number of women members of Parliament having increased significantly since 2001.[12] However, in 2012 the Western Australian Parliament ranked sixth out of all Australia's Parliaments[13] and in 2014 women members of Parliament remain minority participants in the formulation and implementation of public policy and law.

The review of this recommendation has coincided with unprecedented debate about what role gender played in the treatment of Australia's first woman Prime Minister Julia Gillard. Although this does not go directly to the issue of pre- selection, some people including the Sex Discrimination Commissioner Elizabeth Broderick have questioned whether the adverse treatment of Julia Gillard could lead young women to avoid seeking a role in public life.[14]

The barriers to women's participation in the political process in countries including Australia, the United Kingdom and the United States of America have been identified by the United Nations to include the following:

- the nature of the electoral systems;
- the nature and processes of political parties;
- the lower levels of education and socio-economic status for women;
- the traditions and beliefs about women's role in society;
- the burden of combining work and family responsibilities; and
- the culture of parliaments.[15]

In view of these circumstances, the Subcommittee makes the following recommendations.

7.1 Political parties within two years of this 2014 Review Report:

a) examine their selection procedures to identify systemic discrimination;

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11 2012 – Legislative Assembly 12 of 59 MPs; Legislative Council – 17 of 36 MPs: giving a total of 29 female MPs out of a total 95 seats.

12 David Black and Harry Phillips, *Making a difference: a frontier of firsts: women in the Western Australian Parliament 1921–2012* (Parliament of Western Australia, 2nd ed, 2012)pp 62-63

13 Ibid p.47

14 www.theaustralian.com.au/national-affairs/julia-gillard 11226663758211.

15 Dr Joy McCann and Janet Wilson, Representation of women in Australian parliaments, Department of Parliamentary Services, parliament of Australia, 7 March 2012, p.14

b) implement strategies to increase the number of women candidates preselected for winnable seats; and

c) commit to reform of the culture and work practices in Parliament to encourage more women to seek pre-selection.

7.2 The Western Australian Parliament within two years of the publication of this 2014 Review Report establishes a standing committee on equal opportunity that monitors and reports on the status of women in Parliament and identifies ongoing barriers to equal participation by women as members of Parliament.

Legal Studies in School

The Subcommittee recognises the area of importance identified in 2014 in relation to school curriculum is that the role of gender and the law in society remain a part of school curriculum. The School Curriculum and Standards Authority for Western Australia is responsible for the curriculum of all schools in the State and was the relevant body consulted. Key themes that emerged from consultations included:

- that a consideration of gender issues have always been and remain a part of the WA school curriculum;
- that human rights, citizenship and gender form an integral part of the *Civics and Citizenship* curriculum area;
- broadly speaking, the important recommendations made in the 1994 Report are reflected in the curriculum across years K-12 in Western Australia; and
- the School Curriculum and Standards Authority is developing a new outline for curriculum and assessment in schools that will replace the current Curriculum Framework but will continue to include issues and knowledge relating to gender.

Information about the statistical status of Western Australian women across a range of key indicators in areas including education is published by the Department of Communities: Women's Interests in Women's Report Cards. The Women's Report Cards provide an evidence base to inform government and private sector policies.[16] Given the information gathered for the Women's Report Card and its purpose, the

[16] http://www.communities.wa.gov.au/communities-in-focus/women/Pages/Women's-Report-Cards.aspx

Subcommittee considers that it would be useful to involve the Department of Communities: Women's Interests, in any assessment of how effectively the role of gender and the law in society is incorporated into the school curriculum.

The Subcommittee recommends as follows.

7.3	In preparing the Women's Report Card, the Department of Communities: Women's Interests liaises annually with the School Curriculum and Standards Authority for Western Australia to conduct an informal review of the inclusion of gender issues in the curriculum.

Gender Neutrality in the Language of the Law

The Subcommittee notes that gender-neutral language is the standard, officially at least, in Western Australian legal and parliamentary systems and in educational institutions. There are guidelines that provide for the use of gender-neutral language in parliamentary drafting. While there is no publicly available drafting guideline from the WA Parliamentary Counsel's Office, the Subcommittee had access to a draft Commonwealth Parliamentary Counsel Drafting Guideline which provides drafting directions for the appropriate use of gender-specific and gender-neutral language, amongst other things.[17]

Based on its research and discussions the Subcommittee is satisfied that gender-neutral language is used in drafting legislation in WA. There is a need for efforts to continue to ensure that the law is expressed in gender-neutral terms and that existing legislation that does not do so is updated. The use of gender-neutral language as a requirement in educational institutions is important to ensure that people commence law studies with this premise and use gender-neutral language in the language of the law.

Legal Education at Tertiary Level

Since the 1994 Report three new Law Schools have commenced in Western Australia: The University of Notre Dame Australia Law School (UNDA) (1997), Edith Cowan University Law School (ECU) (2007) and Curtin University Law School

[17] Parliamentary Counsel Drafting Direction No. 2.1 *English usage, gender-specific and gender-neutral language, grammar, punctuation and spelling* (29 Oct 2012).

(Curtin) (2013). All five Law Schools were consulted in relation to the 2014 Review though obviously Curtin has not yet implemented most of its curriculum.

The themes that emerged from the Subcommittee's research include:

- that both academic staff and students in the Law Schools were unaware of the 1994 Report (but it is important to note that at the time of the 1994 Report there were only two Law Schools – Murdoch and UWA, but there are now three additional Law Schools);
- that the focus on gender issues and feminist studies in law units that existed, particularly at Murdoch, in 1994, were no longer active issues in curriculum and are not currently perceived as focal points in curriculum by a majority of staff or students;
- that the State Government and the Law Admissions' Consultative Committee (**LACC**) requirements for curriculum content in higher education had made it more difficult to include gender issues to the extent recommended in the 1994 Report.

The Subcommittee considers it appropriate to involve the Department of Communities: Women's Interests and the Women's Report Card in assessing how effectively gender issues are incorporated into legal education at a tertiary level for the same reasons set out above in relation to legal studies in school. LACC also has a role here in making sure that its requirements are not to the exclusion of studying gender issues in tertiary legal education curricula.

7.4 Western Australian Law Schools ensure that study of gender bias and the law (in particular the legal system's inadequacies in dealing with violence against women) is embedded in some compulsory and/or optional units within two years of the 2014 Review Report.

7.5 In preparing the Women's Report Card, the Department of Communities: Women's Interests liaises with the Deans of each Law School on an annual basis and:

a) ensures ongoing awareness within Law Schools of the recommendations made in the Chief Justice's Taskforce on Gender Bias 1994 Report and in the 2014 Review;

b) discusses relevant research into areas of gender bias that require attention; and

c) conducts an informal review of the inclusion of relevant gender bias in tertiary legal education curricula.

Women's Participation in the Workplace (Industrial and Employment Law)

In 2014, women's participation in the workplace continues to be a matter of concern. Many studies and initiatives by business and government emphasise the social and economic benefits of increasing women's participation in the workplace and having women in executive and board roles.[18]

In relation to the gender salary gap[19] at a national level:

- as at May 1995, the gender salary gap was 16.5%;
- from the 1994 Report to November 2004, the gender salary gap fell to 14.9%;
- as at May 2013, the gender pay gap had increased to 17.5%; and
- the national gender pay gap is higher now than it was in May 1995.

WA women should be particularly concerned as the gender pay gap in WA is wider than it is anywhere else in Australia: 26.9% in May 2013 (compared to 25.6% in May 2012).[20]

The Subcommittee notes that Western Australia was the first state to establish a specialist pay equity unit in the Department of Commerce in 2006. The pay equity unit describes its role as providing 'Information, advice and tools to help employees

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18 See, for example, The Grattan Institute, Game Changers: Economic reform priorities for Australia, published on 15 June 2012; the COAG Reform Council, Tracking Equity: Comparing outcomes for women and girls across Australia, published in November 2013; the Productivity Commission's public inquiry into future options for childcare and early childhood learning, with a focus on developing a system that supports workforce participation and addresses children's learning and development needs, announced in November 2013; The Male Champions of Change, led by Elizabeth Broderick, report Accelerating the advancement of women in leadership also released in November 2013.

19 Gender Pay Gap, Australia, May 1995 – May 2013 which appears on page 1 of Workplace Gender Equality Agency, Gender Pay Gap Statistics, published August 2013 https://www.wgea.gov.au/sites/default/files/2013-08-28-Gender-Pay-Gap%20FINAL.pdf

20 Ibid

improve pay equity in their workplace.'[21] However, the unit currently only employs the equivalent of 1.2 full time employees.[22]

The Subcommittee welcomes the current emphasis on identifying strategies to close the gender pay gap, women's participation in the workplace and the recognition of the positive contribution made by women participating in the workplace, including at senior levels. The Subcommittee hopes that this work continues and that the initiatives identified to close the gender salary gap and promote women's participation in the workplace, particularly at senior levels, are implemented.

The Subcommittee also welcomes the State Government's work with industry and with the other States and Territories to promote initiatives to improve women's participation in the workplace and to monitor progress.[23] The State Government's priority areas are described in its Department for Communities' publication *Women's Interests Strategic Directions 2011 - 2014*.[24] According to this publication, the government's four priority areas are to be supported by practical, achievable initiatives and clearly identified outcomes, with annual work plans that will be updated online each year. However, the Subcommittee notes that this plan does not seem to have been updated past 2012. It is important that the plan continues to be updated, and implemented, so that the current momentum is not lost and Western Australian women have the best possible chance of closing the gender pay gap and participating fully in the workplace.

In relation to improving women's participation in the workplace, the 1994 Report recommended that the State Government undertake a review of the effect of industrial relations laws upon women's position in the workforce, including the right to parental leave and permanent part-time work.

The *Minimum Conditions of Employment Act 1993* (WA) was amended in 2006 to include a provision that:

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21 http://www.commerce.wa.gov.au/Labour Relations/Content/Pay *equity*/About_Equity.html

22 Hansard (Western Australian Parliament) pp.598b-610a (Thursday, 22 August 2013)

23 See, for example, 2012 "Women's Report Card", State Government of Western Australia Department for Communities: Women's Interests and Department for Communities "Women's Interests Strategic Directions 2011 – 2014"; Department of Local Government and Communities: Women's Interests, Being Board Ready: a guide for women, http://www.communities.wa.gov.au/communities-in-focus/women/Leadership/BeingBoardReady/Documents/WAC_Toolkit.pdf

24 http://www.communities.wa.gov.au/Documents/Women/WO24-2011%20Strategic%20Directions.pdf

- would allow a person returning from parental leave to request to return on a modified basis (s 38(4)); and that
- such a request must not be refused by an employer unless there are grounds to refuse the request relating to the adverse effect that agreeing to the request would have on the conduct of the operations or the business of the employer and those grounds would satisfy a reasonable person.

A further provision detailing how such a request is to be determined and the matters that could be taken into account are set out at s38B of the *Minimum Conditions of Employment Act*. Under s 38B(5), the employer has the onus of demonstrating that the grounds on which any request is refused are justified. However, if an employer refuses a request to return to work on a modified basis and the employee believes that the grounds for refusal are not justified, the employee must commence a proceeding to enforce the entitlement, even though there are a number of factors that would prevent a person returning to work after parental leave from challenging an employer's refusal of a request to return to work on a modified basis. These factors include cost (particularly at a time when the employee has been out of the paid work for a period of time), perceived reputation damage and the employee's resources.

As part of their roles in monitoring women's participation in the workforce, the Equal Opportunity Commissioner or the Department for Communities "Women's Interests Strategic Directions" should collect information on whether applications are being made to enforce s 38(4) of the *Minimum Conditions of Employment Act* and, if not consider what measures need to be taken to ensure that an employer's power to refuse a request for a return to work on a modified basis is only exercised on justifiable grounds. Such measures might include amending the *Minimum Conditions of Employment Act* such that it is the employer who must apply for a ruling that there are proper grounds to justify refusing the request, instead of the employee applying to enforce the Act.

7.6 The Equal Opportunity Commission, alternatively the Department of Communities: Women's Interests:

a) promotes the rights of parents returning from parental leave to request to return to work on a modified basis;

b) collects information on whether applications are being made to enforce s 38(4) of the *Minimum Conditions of Employment Act 1993*; and

c) considers, if few applications are being made, what measures need to be taken, including amending the *Minimum Conditions of Employment Act 1993* to ensure that an employer's power to refuse a request for a return to work on a modified basis is only exercised on justifiable grounds.

Sexual Vilification

Under racial vilification laws, such as section 18C of the *Racial Discrimination Act 1975* (Cwlth), it is unlawful for a person to do an act, otherwise than in private, if:

- the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
- the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

In this chapter, a corresponding meaning is used for sexual vilification – that is, the term sexual vilification is used to describe conduct, otherwise than in private, that is reasonably likely to offend, insult, humiliate or intimidate a person or group of people and the conduct is done because of the gender of the other person or members of the group of people.

Women are subject to sexist conduct in their daily life that is offensive, intimidating and threatening, but there does not seem to be the social impetus to give women the same protection from that conduct as is afforded to people who are the target of similar conduct, but on account of their race, colour or national or ethnic origin. In the Subcommittee's opinion, there remains a need for legislation in this area as part of the measures taken to combat the sexist treatment that women are subject to in their day-to-day lives. For this reason, the Subcommittee repeats the recommendation made in 1994 amended as follows for additional clarity.

7.7 The State Government provides the Law Reform Commission of Western Australia with a reference to examine and report on laws concerning sexual vilification and report on the adequacy of those laws and on any desirable changes to the existing law of Western Australia in relation to this issue within two years of the 2014 Review Report.

Women, Workers' Compensation and Personal Injury

The 1994 recommendation concerned a review of the law about compensating women for work related or other personal injury and the Subcommittee considered the publicly available information, including Court decisions, about how women in Western Australia are compensated for such injuries.

The 1997 Progress Report referred the recommendation from the 1994 Report to Work Cover WA for advice, however the Subcommittee was not able to locate any advice or response given by WorkCover in relation to the recommendation made in the 1994 Report.

WorkCover WA now publishes annual data about workers' compensation scheme statistics that include some analysis of the gender of claimants and their types of claims. But, that information does not include a breakdown by gender of the payment or cost statistics except in relation to long duration claims (namely those involving greater than 60 days or shifts off work). In relation to damages for personal injuries, RiskCover's website[25] indicates that it collects (or is in the position to collect) corresponding data about workers' compensation and other personal injuries claim statistics where government agencies are involved. Again, there is a lack of publicly available information in relation to gender.

In these circumstances, the Subcommittee is concerned about the lack of information that is publicly available about how appropriately women are being compensated for work related injuries and other personal injuries and how adequately compensation laws respond to the injuries that women suffer and women's work practises. The Subcommittee repeats the recommendation made in the 1994 Report and suggests that WorkCover WA and RiskCover are appropriate entities to conduct this review.

7.8	WorkCover WA conducts a review of laws relating to workers compensation, and RiskCover conducts a review of laws relating to the workers compensation and personal injuries claims managed by it, in order to identify those parts of the law which discriminate against women, and to formulate recommendations which can lead to any necessary legislative change within two years of this 2014 Review Report.

[25] https://www.riskcover.wa.gov.au

Criminal Injuries Compensation

Building on the observations made in the 1994 Report, the Subcommittee concentrated on how the *Criminal Injuries Compensation Act 2003* applies to women who have experienced sexual assault or domestic violence.

In the Subcommittee's opinion, two aspects of the *Criminal Injuries Compensation Act* prevent women being awarded compensation that they would otherwise be awarded. These are the prohibitions set out in:

- section 36 of the Act on compensation being awarded if that compensation may benefit the offender; and
- section 39 of the Act on compensation being awarded where the person seeking compensation was engaged in criminal conduct at the relevant time.

The Subcommittee accepts that:

- offenders should not benefit from compensation awarded to the victim of their offending; and
- a person's criminal conduct may be such as to disentitle them to an award of compensation under the Act.

However, there are situations where these prohibitions operate unfairly in relation to women who are the subject of a sexual assault or domestic violence.

For example, the prohibition on compensation being awarded if that compensation may benefit the offender, disproportionately affects victims of family and domestic violence as the essence of the crime is dependent on the existence of an interpersonal relationship between the victim and the offender.[26] The Domestic Violence Legal Workers' Network notes that financial dependence is one of the common barriers preventing women victims of domestic violence from leaving or seeking help. According to this Network, through being deprived of compensation, women who are victims of domestic violence do not receive money that they would otherwise have been able to use to escape from the violent situation such as, using

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26 p 9 Domestic Violence Legal Workers' Network "Report on the limitations of the *Criminal Injuries Compensation Act 2003* in relation to victims of sexual offences and domestic violence"

the money to move away from that domestic situation, pay for counselling or contribute towards learning a trade.[27]

Under s 30(2) of the *Criminal Injuries Compensation Act 2003*, where compensation is awarded, the award may include directions that all or a specified part of the compensation be held on trust for the victim on the terms specified in the award. While the Subcommittee recognises that this may not always be possible, the Subcommittee's opinion is that this trust mechanism should be considered and, if appropriate used, where there is a likelihood of compensation paid directly to the victim benefitting the offender.

For example, the award of compensation may be on terms requiring the victim to do certain things (such as undertake training or counselling) or specifying what the payment is to be used for (such as accommodation) or that the payment should be used to pay third parties who provide services to the benefit of the victim, so that the payments benefit the victim but not the offender. The terms of an award might also specify that the award will only be held for a certain amount of time before being forfeited to the State, thus giving the victim of crime an incentive to use the award to leave the violent domestic situation and establish independence from the offender.

In relation to the prohibition on compensation being awarded to victims of crime who were engaged in criminal conduct when they became the victim of a crime, *Attorney General for Western Australia v Her Honour Judge Schoombee* [2012] WASCA 29 concerns a victim of sexual assault who was denied compensation under the *Criminal Injuries Compensation Act 2003* because, at the time of the assault, she was using and in possession of prohibited drugs, among other things[28]. It is suggested that most people would accept that a woman who was sexually assaulted while drunk should be eligible for compensation under the Act and similarly so should a woman whose crime was to be under the influence of illicit drugs at the time of the assault. In the Subcommittee's opinion, while the victim's criminal conduct is a factor to be considered when assessing an application for criminal compensation, it should not automatically disentitle the victim to compensation.

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27 Ibid pp. 8 - 11

28 The Subcommittee notes that at the time of the sexual assault, the victim was also engaged in other criminal conduct but the decisions of the assessor, the District Court and the Court of Appeal squarely raise the prospect of a sexual assault victim being denied compensation under the Act because of being under the influence of illicit drugs at the time.

7.9 The Western Australian Parliament amends laws concerning criminal injuries compensation with particular reference to:

a) the compensation payable where the victim of crime applying for compensation was engaged in criminal conduct; and

b) payments of compensation made subject to conditions, or made payable using trusts or some other mechanism, to quarantine compensation to the benefit of the victim of crime applying for compensation, and to make it unlikely that an offender will benefit from any compensation awarded.

within two years of this 2014 Review Report.

Abortion

As a general statement of the law in Western Australia it has been unlawful to perform an abortion since 1998, unless:

- the abortion is performed by a medical practitioner in good faith and with reasonable care and skill; and
- the performance of the abortion is justified under section 334 of the *Health Act 1911*.[29]

Under sections 334(3) & (4) of the *Health Act 1911*, the performance of an abortion is justified if:

- the woman has given informed consent; or
- a serious danger to the physical or mental health of the woman concerned will result if the abortion is not performed and it is impractical for the woman to give informed consent; or
- the pregnancy of the woman concerned is causing serious danger to her physical or mental health and it is impractical for the woman to give informed consent.

There are further restrictions that apply if the woman has been pregnant for at least 20 weeks[30] or where the woman is less than 16 years old[31]. Relevantly, under section 334(7)(a) of the *Health Act 1911*, a restriction that applies where at least

[29] Section 199(1) of the *Criminal Code*
[30] Sections 334(8) – (11) of the *Health Act 1911*
[31] Section 334(7) of the *Health Act 1911*

20 weeks of the pregnancy have been completed is that 2 medical practitioners who are members of a panel appointed by the Western Australian Health Minister must agree that the mother, or the unborn child, has a severe medical condition that, in the clinical judgment of those 2 medical practitioners, justifies the procedure.

Thus abortion in Western Australia has not been decriminalised, however since 1998 has not been unlawful in certain circumstances. When the abortion laws were amended in 1998, the issue of decriminalisation was raised but ultimately the provisions concerning abortion were not removed from the Criminal Code. However, in submissions to this Subcommittee, the view was expressed ' *that uncertainty over the legality of abortion in Western Australia will continue to exist whilst laws relating to abortion are in the Criminal Code and that the precedent set by the Tasmanian Parliament to decriminalise abortion should be adopted in WA*.'[32] While most of the Subcommittee supports this view, the Subcommittee has limited the number of recommendations it makes to focus attention on recommendations that, in the Sub-committee's opinion, would have a more immediate impact on women's access to abortion services and be more likely to be implemented.

The number of induced abortions in WA has remained stable since the legislative changes despite the marked increase in the population in recent years. In 1999, the number of induced abortions was 8,216. From 1999 to 2012 the annual number of abortions in WA was 8,000 to 9,000, except for the period from 2003 to 2005 when it dropped below 8000.[33] The groups with the highest proportion of terminated pregnancies were teenagers and women 45 years of age and over. From 2006 to 2009, more than half of pregnancies in teenagers (15-19 years of age) ended in abortion[34]. The highest abortion rates were in the Pilbara (16.3 per 1000 women) and South West (15.7 per 1000 women)[35].

Women's access to abortion services in WA was raised in May 2010 when Mr Peter Abetz MLA, the member for Southern River, called for legislative change to require women to view a 3-D colour ultrasound image of their foetus, and enforce a 48-hour

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32 Submission 28 November 2013. Robyn Murphy and Margot Boetcher former Presidents of the Association for the Legal Right to Abortion WA.

33 INDUCED ABORTIONS IN WESTERN AUSTRALIA 2006 – 2009: Government of Western Australia, Department of Health May 2011.),Q3805 WAPD 24/5/11 p. 3827b, Q5129 WAPD 1/5/12 p. 1755c, Q30 WAPD 11/6/13 p. 1190c

34 INDUCED ABORTIONS IN WESTERN AUSTRALIA 2006 -2009 p.1

35 Australian Bureau of Statistics 2012, *Births, Australia, 2011*.cat.no.3301.0, p.1

'cooling off period' before they could consent to an abortion. To date no amendments to this effect have been introduced into Parliament.

Provision of abortion services was raised again in 2012 when St John of God Health Care (SJOG) was awarded the tender to run the new public hospital in Midland. SJOG had made it clear at all times that they would not provide reproductive services or advice including abortion, sterilisation or contraception. SJOG's stated position that it would not provide services including abortion has again led to calls for the *Health Act 1911* to be amended to require a person, hospital, health institution who will not perform an abortion to refer a pregnant woman to a service that will provide such a service. Robyn Murphy and Margot Boetcher, former Presidents of The Association for the Legal Right to Abortion WA (ALRA), who have for many years lobbied for the decriminalisation of abortion, provided written submissions to the Subcommittee that such an amendment would ensure women's access to abortion services are not delayed.[36]

In a meeting with the CEO and Medical Director of Family Planning Western Australia (FPWA)[37] on 27th March 2013 it was noted that some women who subsequently attended FPWA reported that medical practitioners either refused to provide a referral for an abortion or the name of a medical practitioner who would perform an abortion, and in some cases voiced disapproval that the woman was seeking an abortion. Reference was also made to anecdotal evidence that the need for a referral by a medical practitioner, other than the medical practitioner who performs or assists in the abortion (s. 334(6) *Health Act 1911*), was at times an obstacle to accessing abortion services. Murphy and Boetcher also raise this issue in their submissions.

ALRA continues to argue that the requirement that a woman must have a severe medical condition before an abortion is approved (in terms of section 334(7)(a)) is onerous. This is because, in the context of abortion, the delay and difficulty associated with obtaining the approval of two panel members can have serious consequences for the ability to procure a lawful abortion. The ALRA believes many

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36 Submission 28 November 2013. Robyn Murphy and Margot Boetcher former Presidents of the Association for the Legal Right to Abortion WA.

37 Family Planning WA Sexual Health Services. Steve Blackwell CEO and Maria Garefalakis Medical Director.

women and young girls in particular choose to access abortion services in other states of Australia for this reason.[38]

In addition the ALRA considers that given the significant developments in the understanding of mental illness in the last decade, section 334(7)(a) should also be amended to refer to mental illness specifically so that it is clear that 'a severe medical condition' includes a reference to 'a severe mental health condition.' References to mental health are used elsewhere in section 334 and, anecdotally, the lack of reference to mental health in section 334(7)(a) has caused confusion about whether a severe mental health condition can justify an abortion after 20 weeks. For these reasons, the Subcommittee by a majority makes the following recommendations.

7.10 A new section 334(2)(a) is inserted in the *Health Act 1911* that requires that a person, hospital, health institution or service to refer a pregnant woman without delay to a service provider who is known to provide abortion services, within two years of the 2014 Review Report.

7.11 The Western Australian Parliament amends section 334(7)(a) of the *Health Act 1911* to delete the words 'severe medical condition' and replace them with 'severe physical or mental health condition'.

It is noted that Subcommittee member Associate Professor Jane Power does not endorse the commentary or recommendations relating to abortion.

Family Law and de Facto Relationships

The risk posed to women from abusive relationships and family violence and the impact of violence and abuse on women and children involved in family law proceedings remains a pressing concern. Domestic violence and the need to protect women and children are dealt with in chapters 4, 5 and 6 of this 2014 Review Report.

The Subcommittee met with judicial members of the Family Court and members of the Family Law Practitioners Association (FLPA) Executive to discuss whether there are areas of gender bias against women in the family law system.

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[38] Submission 28 November 2013. Robyn Murphy and Margot Boetcher former Presidents of the Association for the Legal Right to Abortion WA.

These consultations were not confined to women in de facto relationships. The view formed by the Subcommittee is that Western Australian law applying to de facto couples is gender-neutral in its form and there are no areas where there is pressing need for legislative reform.

De facto relationships in family law have been recognised by legislation in WA since 2001. One aspect of the law that is different for parties to de facto relationships in WA compared to parties to a marriage and parties to de facto relationships in the rest of Australia is the power of the Family Court over certain superannuation matters arising out of the breakdown of the de facto relationship. As a consequence, the parties to a de facto relationship in WA do not have access to court orders to split superannuation benefits. Although this can impact on both men and women, the push to ensure access to superannuation benefits as part of a property settlement after the breakdown of a relationship is predominantly to improve the position of women upon a marriage breakdown[39].

The WA Parliament has enacted a law to refer power over superannuation of de facto couples upon breakdown of their relationship to the Commonwealth, but its referral has not been taken up. It is not within the of reference of this 2014 Review to recommend enactment of Commonwealth laws but the Subcommittee expresses the hope that the referral is taken up and acted on quickly.

Ex-Nuptial Children

The Subcommittee met with judicial members of the Family Court and members of the FLPA Executive to discuss whether there are areas of gender bias against women in the family law system.

The Recommendation in 1997 sought to ensure that children in Western Australia would not be disadvantaged by a non-referral of power in relation to children to the Commonwealth Parliament. (All other states have referred power with respect to children so that the same law applies to children of a de facto relationship as to children of a marriage.) Western Australia has continued to exercise state

[39] According to the Australian Human Rights Commission on the Gender Gap in retirement savings, the average superannuation payout for women is a third of the payout for men - $37,000 compared with $110, 000 and, as a result, many women are living their final years in poverty: see https://www.humanrights.gov.au/publications/gender-gap-retirement-savings

jurisdiction over ex-nuptial children on matters relating to children including parenting, welfare and maintenance and child support. Part 5 of the Western Australian *Family Court Act 1997* (WA) follows Part VII of the *Family Law Act 1975* (Cwlth) so the law for ex-nuptial children in Western Australia is essentially identical to the law that applies to other children in Australia. (The conferral on both parents of equal shared parental responsibility by the *Family Court Act 1997* referred to in the 1997 Progress Report is an example of a change to the law in Western Australia to bring it in line with Federal law). Since 1997 there have been significant amendments to Part VII of the *Family Law Act 1975* which subsequently have been adopted by amendment to the *Family Court Act 1997* (WA). Similarly, Western Australia has adopted Federal law on child support and legislated to adopt amendments to the *Child Support (Assessment) Act 1989* (Cwlth).

Following amendments to Federal law, there is inevitably a 'catch up' time for Western Australian State laws to be enacted to mirror the federal law. Accordingly, during this 'catch up' there is the potential to disadvantage an ex-nuptial child. During the Subcommittee's consultations, its attention was drawn to the frequent amendments to federal child support legislation and the fact that, Western Australia is frequently out of step. This may result in women who rely on child support not having the benefit of amendments in as timely a fashion as parties to a marriage or to de facto relationships elsewhere in Australia. There is no indication that WA intends to refer its power over ex-nuptial children. However, for most purposes (subject to this 'catch up' period) the present system maintains uniformity.

Women's Unpaid Work in the Home

There have been a number of significant changes since 1994 in relation to unpaid work in the home, in particular, with respect to the rate of participation by women in the paid workforce. The Australian Bureau of Statistics (ABS) summed up the changes in 2009[40], stating it was "*reflected in women playing an increasing role in the paid work force and in men becoming more involved in child care activities. While women still do the majority of household work even when they are in the paid work force, men continue to do the majority of paid work.*" This, together with the time that women spend unpaid out of the work force caring for children and other family

[40] ABS Australian Social Trends 4102.0 2009

members, results in women's earning power and ability to accumulate superannuation being compromised, and women having a more precarious financial situation than their male counterparts.[41] Women's unpaid work caring for children and family members has been identified as the most significant contributing factor to the gender gap in retirement savings and retirement income in Australia.[42]

The increasing number of women now in the paid work force has focused more attention on issues such the unpaid work they do, the concentration of women in lower paid employment and the gender pay gap. The impact of these factors include the substantially lower superannuation balances women have compared to their male contemporaries, and for some these factors form a disincentive to enter the paid workforce particularly if there are significant associated costs such as childcare.

In January 2012, the Australian Human Rights Commission, with the Social Policy Research Centre at the University of New South Wales and with the support of the Westpac Banking Corporation, commenced a project[43] with the aim of:

- identifying models for reforms that will properly recognise and compensate those who undertake unpaid caring work;
- inform evidence-based development of employment and retirement income strategies (e.g. workplace entitlements, flexible workplaces, superannuation reforms); and
- provide valuable information for policy and law-makers, academics and other opinion makers.

The project reported in January 2013[44]. The report, *Investing in care: recognising and valuing those who care (January 2013)*, proposed a combination of mechanisms for adoption in Australia, including:

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41 Department of Communities, Women's Report Card 2012

42 Australian Human Rights Commission, *Accumulating Poverty? Womens' experiences of inequality over the lifecycle* (2009) http://www.hreoc.gov.au/sex_discrimination/publication/gender_gap/index.html.

43 Australian Human Rights Commission, Valuing unpaid caring work in Australia: research project fact sheet, http://www.humanrights.gov.au/sites/default/files/content/sex_discrimination/VUCW_australiaResearchPrj/Fact%20Sheet%20170412.pdf

44 Australian Human Rights Commission, Investing in care: recognizing and valuing those who care (January 2013) https://www.humanrights.gov.au/sites/default/files/UnpaidCaringVolume1_2013.pdf

- Strengthening legislation to recognise discrimination based on family responsibilities including caring.
- Introducing mechanisms like carer assessments to determine a carer's support needs and carer cards for accessing services and entitlements which would allow unpaid carers to participate in society on a more equal footing.
- Ensuring that unpaid carers have the right to request flexible work arrangements and that their employers are obligated to reasonably accommodate their requests.
- Ensuring that income support reflects the variable costs of providing care and does not penalise unpaid carers for engaging in education and training or participating in the workforce.
- Expanding and strengthening leave provisions for all unpaid carers to ensure that they can maintain their attachment to the workforce while also undertaking their care responsibilities.
- Properly resourcing and coordinating services for unpaid carers across jurisdictions and care sectors to ensure that unpaid carers and those they care for receive the benefits of these services.
- Introducing workplace initiatives and changes to workplace culture to support unpaid carers to undertake their work and care responsibilities.
- Reforming the current system of retirement income and savings, including the age pension and superannuation that is tied to paid work, to account for the inequity of retirement incomes and savings that leaves many women in poverty in older age, especially women who are or have been unpaid carers.

The Subcommittee is concerned that the measures referred to in this report, did not appear in the Australian Human Rights Commission's agenda for 2013/2014 and expresses the hope that these measures remain on the agenda for further consideration (to the extent necessary) and implementation.

Equal Opportunity and Discrimination Laws

The Subcommittee remains concerned about the funding and proper resourcing for the Equal Opportunity Commission of Western Australia (EOC) and maintaining its

independence. The EOC's role investigating and seeking to conciliate complaints on all the various grounds of the Act, as well as delivering educational programmes - including programmes designed to address the underlying causes of discrimination - remain extremely important.

However, as at May 2014, the position of Commissioner, vacant since June 2013, remains unfilled (except as an acting role). Further, in March 2013, the State Government conducted a review into the ongoing role of the EOC. These matters cause considerable concern about proper resourcing and funding for the EOC and its continued independence.

At present, under Part VII of the *Equal Opportunity Act 1984*, the Governor appoints a Commissioner for up to seven years and the Governor has limited rights to terminate a Commissioner's appointment.[45] The Act also provides that staff may be appointed to assist the Commissioner.[46] Although the Commissioner's office is in the same building as other State Government Departments, it has its own reception and meeting areas. The Subcommittee was advised that for people wanting to report issues to the EOC, it was important that the EOC had its own office and staff so that:

- attending a meeting with representatives of the EOC can be done discretely – and an appointment is made through Commission staff, not through a general switchboard where any number of people may find out about the appointment; and
- the EOC can be seen to be independent of and able to criticise government, and government departments, as appropriate.

It is also important to have a Western Australian Commission, rather than having to rely on the Australian Human Rights Commission to address issues of equal opportunity. The AHRC doesn't have a presence in Western Australia. When preparing a submission to the State Government's review into the ongoing role of the EOC in March 2014, Women Lawyers of WA's Law Reform (Women's Rights) & Social Justice Working Group was advised that where complaints were made to the AHRC, delays and scheduling issues arose associated with waiting for officers from interstate to fly to Western Australia to deal with discrimination matters. Given the

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45 In contrast, an Acting Commissioner can only be appointed for up to 12 months by the Minister and that appointment may be terminated at any time: section 78 of the *Equal Opportunity Act*

46 Section 79 of the Act

nature of these types of complaints, it is not practical to wait for interstate members to visit Western Australia to investigate and act on equal opportunity complaints.

In the circumstances, the Subcommittee makes the following recommendation, which echoes the recommendation made in the 1994 Report.

7.12 The State Government permanently fills the position of Equal Opportunity Commissioner as soon as possible and provides the Commission with adequate resources to administer the legislation and deliver its educational programmes.

Housing

This issue was not addressed in the 1994 Report. The Subcommittee has included it in this 2014 Review Report because accommodation or shelter is such a basic need.

Interviews with tenancy advocates and the Equal Opportunity Commissioner[47] suggest that the Department of Housing's *Disruptive Behaviour and Management Strategy* has a disproportionately harsh effect on women, particularly Aboriginal women who have a greater cultural pressure to house and feed extended family members. Examples of the disproportionately harsh effect include women who have not been part of the disruptive behaviour and who have done everything in their power to stop the disruptive behaviour (including obtaining restraining orders to stop the disruptive person attending the tenanted premises, and calling the police) being issued with an eviction notice or a "strike" (an eviction warning) with no real opportunity to put their side of the story or say why a strike should not be given.

Members of the Tenant Advocates Network gave the Subcommittee examples of minor issues, such as children playing in outside common areas or the street, resulting in a strike being issued to the tenant because, under the *Disruptive Behaviour and Management Strategy*, this behaviour can be classified as "minor disruptive behaviour".

In circumstances where strikes are issued to women tenants this creates a major issue for the women concerned because it leads to no shelter for the women and their children. The need for a child to have a stable home with their family in a non-abusive, non-violent environment is a factor considered by the Department of

[47] Prior to her appointment ceasing in June 2013

Housing when allocating priority public housing assistance, however it is not determinative.[48]

Members of the Tenant Advocates Network also reported that, even though the *Disruptive Behaviour and Management Strategy* requires:

- complaints to be substantiated with independent verification from police, neighbours and witnesses, and
- the tenant to be given an opportunity to respond to the complaint and give their version of events,

the Department of Housing can take and does take legal action to terminate tenancies without having admissible evidence of the alleged disruptive behaviour, and without the tenant having a proper opportunity to give their version of what occurred. Anecdotally a tenant may be interviewed, but doesn't have access to an interpreter or appropriate cultural or legal support, or the tenant is distracted, trying to deal with the aftermath of the disruptive behaviour. Members of the Tenant Advocates Network also reported that a tenant is given no credit for steps she takes to stop any disruptive behaviour – even when it is the tenant that asked police to attend.

For these reasons, recommendations are made for a review of the Department of Housing's *Disruptive Behaviour and Management Strategy* and opportunities for reconciliation and mediation conferences for persons involved in or affected by disruptive behaviour.

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[48] Department of Housing, Government of Western Australia *Priority Public Housing Assistance* http://www.housing.wa.gov.au/housingoptions/rentaloptions/publichousing/priority/Pages/default.aspx

7.13 The Department of Housing reviews its application of the *Disruptive Behaviour Management Strategy*, particularly in relation to:

a) the proper investigation of complaints, including consideration of the tenant's version of events and whether, if substantiated, the conduct complained of amounts to a breach of the *Residential Tenancies Act 1987*;

b) the non penalisation of a tenant who is not the person responsible for the "strikes" and who has taken reasonable measures to prevent the "strikes";

c) those evictions for minor disturbances;

d) the encouragement of reconciliation and mediation conferences involving the complainant and the disruptive person, as well as the tenant; and

e) the opportunities for tenants and complainants to seek internal review of decisions by the Department of Housing,

within two years of the 2014 Review Report.

Initially the Subcommittee included a proposal to recommend funding for a tenants legal service but the Western Australian Department of Commerce has now commenced funding for Tenancy WA, an independent not-for-profit specialist community legal centre providing free, quality legal services to residential tenants across Western Australia and support for tenancy advocates. The Subcommittee welcomes the establishment of Tenancy WA.

Child Exploitation

This is also an issue that was not addressed in the 1994 Report. It was referred to this chapter's Subcommittee by the chapter 5 Subcommittee (who consider issues to do with victims of crime).

Under Chapter XXV of the *Criminal Code*, a person who produces, possesses or distributes material that, in a way likely to offend a reasonable person, describes, depicts or represents a person, or part of a person, who is, or appears to be a child in a demeaning, cruel or abusive context, commits a criminal offence. These laws are generally referred to as laws criminalising child exploitation.

Under section 221A of the *Criminal Code*, it is a defence to a charge under Chapter XXV if the material is of recognised literary, artistic or scientific merit and that the act to which the charge relates is justified as being for the public good.

After a controversial raid in 2008 on an art gallery containing nude photographs of children, New South Wales amended its laws to remove the "artistic works" defence: prior to this, as in Western Australia, there was a defence available to those producing, possessing or distributing material depicting naked children in New South Wales if the material was an "artistic work".

As a result of Western Australia retaining the broad defence to child exploitation laws if the material is of recognised literary, artistic or scientific merit, a photograph may hang in a boardroom in Western Australia and be regarded as "art" while hanging the same photograph in a boardroom in another in New South Wales may result in criminal liability for child exploitation. By way of example, during consultations about this issue, the Subcommittee was told of an oversized photograph of a weeping naked child hanging in a boardroom of a Western Australian law firm.

7.14 The State Government provides a reference to the Law Reform Commission of Western Australia to examine and report on laws concerning defences to child exploitation crimes (such as those found in section 221A of the *Criminal Code*) and report on:

a) the adequacy of those laws and on any desirable changes to the existing law of Western Australia in relation to this issue; and

b) whether the issue should be referred to the Law, Crime and Community Safety Council to consider the desirability of there being consistent defences across Australia,

within two years of the 2014 Review Report

Chapter 7

Education; Laws Which Discriminate Against Women; Women's Role As Law Makers

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- the Family Court of WA;
- the Family Law Practitioners Association of WA;
- the Commissioner for Equal Opportunity WA;
- the Women's Law Centre WA;
- the School Curriculum and Standards Authority for Western Australia;
- the Deans the Law Schools of Curtin, ECU, Murdoch, UNDA and UWA;
- the Presidents of Law School Student Societies of ECU, Murdoch, UNDA and UWA;
- the CEO and Medical Director of Family Planning Western Australia;
- the Tenant Advocates Network;
- the Aboriginal Family Law Service, Kununurra.

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CHAPTER 8

WOMEN AND CRIMINAL LAWS

THE CHAPTER 8 SUBCOMMITTEE, WITH THE ENDORSEMENT OF THE STEERING COMMITTEE, MAKES THE FOLLOWING RECOMMENDATIONS

STALKING

8.1 The Western Australian Parliament amends chapter XXXIIIB of the *Criminal Code* (WA) dealing with stalking to:

i) make clear that stalking can be a culmination of a number of different types of behaviour, as well as one type of behaviour being repeated;

ii) make clear that stalking occurs where there has been a 'course of conduct' (which may involve as few as two instances) of any of the behaviours that have been identified which could constitute stalking; and

iii) amend the definition of 'pursue' to provide for one protracted incident to fall within the definition (as provided for in s359B (b) of the Queensland *Criminal Code).*

FEMALE GENITAL MUTILATION

8.2 The Western Australian Parliament broadens section 306 (4) of the *Criminal Code* (WA) to make it an offence to remove any person from Western Australia with the intention of having female genital mutilation performed on that person.

8.3 The Western Australian Parliament broadens the extraterritorial application of s 306 of the *Criminal Code* (WA) to ensure that both of the following constitute an offence in Western Australia:

i) to perform female genital mutilation on a Western Australian resident, wherever the operation is performed; and

ii) to remove, or make arrangements to remove, a person from Western Australia for the purpose of subjecting them to female genital mutilation.

8.4 In order to improve the enforcement of s 306 of the *Criminal Code* (WA), the State Government financially supports efforts to:

i) establish liaisons with community groups in populations, which could be vulnerable to female genital mutilation;

ii) improve access to interpreters so that police can investigate suspected cases of female genital mutilation;

iii) provide targeted education about the negative impacts of female genital mutilation; and

iv) raise awareness amongst professionals and communities of the female genital mutilation laws.

8.5 The State Government in close consultation with relevant Commonwealth, State and Territory agencies, communities, experts and other stakeholders clarifies the legal and policy position in relation to female genital cosmetic procedures.

PROSTITUTION

8.6 The Western Australian Parliament conducts a review of the *Prostitution Act 2000 (WA)* to establish if the provisions relating to juvenile offending, search and seizure and reverse onus are justifiable and conform with human rights principles.

8.7 The Western Australian Parliament

i) considers whether the sex industry should be regulated; and if so

ii) considers what is the appropriate regulatory scheme (and when doing so consider alternative regulatory models such as exists in Sweden)[1];and

iii) considers how discrimination against those who work in the sex industry can be eliminated.

[1] The Swedish model, in which the focus is on the criminalisation of the activities of the clients of prostitution rather than the activities of the prostitutes, was the subject of discussion by US legal scholar Professor Catharine MacKinnon from the University of Michigan Law School in a keynote address on human trafficking, prostitution and inequality at the 2014 UWA Law Summer School.

HOMICIDE

8.8 The Western Australia Parliament enacts a new provision of the *Criminal Code* (WA) in terms that correspond to section 9AH of the *Crimes Act 1958* (Vic) whereby certain types of evidence are recognised as being possibly relevant to determining whether an accused person believed it was necessary to defend him or herself.

8.9 The Western Australian Parliament amends 248 of the *Criminal Code* (WA), in order to promote national consistency in the laws of self-defence, so that its terms correspond to the self-defence provisions in the *Criminal Code 1995* (Cwlth), the *Crimes Act 1900* (NSW), the *Criminal Code 2002* (ACT) and the *Criminal Code* (NT).

8.10 Sub-section 248(3) of the *Criminal Code* (WA), which creates a defence of excessive self-defence, be retained and its operation monitored by the State Government to determine its impact upon women.

8.11 The Office of the Director of Public Prosecutions for Western Australia (DPP) reports annually on the results of any prosecutions that concern spousal or intimate partner killings, such as the offence charged and the outcome of the prosecution and including whether a guilty plea was entered or the result of a jury verdict.

8.12 The DPP *Prosecution Guidelines* are amended to the effect that where there has been a history of domestic violence by the accused against the deceased a murder or manslaughter prosecution is preferred where appropriate, in preference to a prosecution under section 281 of the *Criminal Code*.

8.13 An aggravated form of the offence in section 281 of the *Criminal Code* is created which carries a maximum sentence of 20 years. The circumstance of aggravation is that the killing occurred in the context of family or domestic violence.

IDENTIFICATION

8.14 The Western Australian Parliament amends the face covering provision in section 16 of the *Criminal Identification (Identifying People) Act 2002* (WA) to require Western Australia Police to conduct the identification process in a way that provides reasonable privacy. This includes the option for a woman to request a female police officer to identify them so far as reasonably practicable. This provision must ensure the validity of the police identification process is not affected by a failure to comply with the privacy requirement.

8.15 The Western Australian Parliament amends the maximum penalty for the offence of refusing to remove a face covering in section 16(6) of the *Criminal Identification (Identifying People) Act 2002* (WA) so that the penalty of 12 months only applies if the person is suspected of committing an indictable offence and a monetary fine applies in all other instances.

MEMBERSHIP OF CHAPTER 8 SUB-COMMITTEE

The members of the Subcommittee involved in this review are:

Catherine Fletcher (Convenor), State Prosecutor, Director of Public Prosecutions (WA) and former UWA Law Lecturer

Genevieve Cleary, State Prosecutor, Director of Public Prosecutions (WA) and UWA Law Lecturer

Karen Farley SC, Criminal Appeals Consultant, Legal Aid of WA

Graham Pidco, Lawyer, WA Police Department and former UWA Law Lecturer

Hylton Quail, Barrister, Francis Burt Law Chambers

Stella Tarrant, Associate Professor, UWA Law School

Her Honour Magistrate Felicity Zempilas, Magistrates Courts of Western Australia

In addition the Subcommittee would like to thank Rachel Lee, UWA Law student, and Sinead Purvis, DPP State Prosecutor, for providing research and writing assistance to the Subcommittee; and also to thank Emma Tormey, UWA Law student for providing assistance with the literature review.

The views set out in this chapter do not necessarily express the views of the individual members of the Subcommittee or the organisations with whom the individual members of the sub-committee are associated.

FOCUS OF CHAPTER 8

Chapter 8 of the 1994 Report of the Chief Justice's Gender Bias Taskforce ('the 1994 Report') dealt with particular criminal laws concerned with stalking, female genital mutilation, homicide and evidence.

Chapter 7 of the 1994 Report dealt with various civil laws including the laws concerning prostitution. The Chapter 7 Subcommittee of the 2014 Review has considered all areas under chapter 7 with the exception of the prostitution laws.

In addition to reviewing the issues examined in Chapter 8 of the 1994 Report, this Subcommittee has considered the laws dealing with prostitution. This review examines the 1994 recommendations in the areas identified above and makes

further recommendations where needed. It also considers new laws concerning identification procedures for persons suspected of committing offences.

SUBCOMMITTEE'S INVESTIGATIONS – RATIONALE AND PROCEDURE

In order to identify whether gender bias exists in connection with particular criminal laws the Subcommittee met on several occasions to identify and explore the major themes and issues arising from chapter 8 of the 1994 Report. The Subcommittee reviewed the legislative and other reforms that resulted from the implementation of the recommendations of the 1994 Report by consulting the 1997 Progress Report, subsequent case law interpreting these legislative reforms and any relevant literature (including reports of Law Reform bodies) on such reforms. They also considered comparative case law where appropriate. The Subcommittee consulted with criminal lawyers, some judicial officers and interested groups[2] on the operation of various laws and considered their views. For some sections we considered data provided by Western Australia Police, the DPP or accessed from the database of the Australian Institute of Criminology (AIC) concerning the use of certain provisions.

A list of those consulted appears at Attachment 1 to this chapter.

To follow is a consideration of each area of law raised by the 1994 Report recommendations and 1997 Progress Report and whether such recommendations were implemented. This is followed by the Chapter 8 Subcommittee's discussions and recommendations following their comprehensive 2014 Review.

PROPENSITY LAWS - RECOMMENDATION 70 1994 REPORT

The 1994 Report recommended that:

> *"That the Evidence Act be amended to take account of multiple intra familial sexual abuse so that in an appropriate case it will be a matter for a jury to determine whether the evidence of a sibling assists in the determination of the credit of the complainant."*

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[2] For example the Women's Council for Domestic and Family Violence Services (WA) ('WCDFVS') in the context of the homicide laws.

There are no further recommendations arising as part of the 2014 Review because Recommendation 70 was implemented by the enactment in 2004 of s 31A of the *Evidence Act 1906* (WA).[3]

Following the 1994 Report, the State Government's 1997 Progress Report on the implementation of the 1994 Report recommendations ('the 1997 Progress Report')[4] indicated that the Ministry of Justice would co-ordinate the preparation of advice to the Attorney General on amending the *Evidence Act 1906* after consultation with relevant parties.

In 2004 the then Attorney General, the Hon. Jim McGinty, introduced the *Criminal Law Amendment (Sexual Assault and Other Matters) Bill 2004* to Parliament describing it as "unashamedly for victims".[5] The Bill included section 31A, which came into effect on 1 January 2005. That section allows propensity and relationship evidence to be admitted where it has significant probative value which a "fair minded person" would think outweighs the risk of an unfair trial and should be admitted because the public interest in adducing all relevant evidence of guilt takes priority over that risk. Propensity evidence is evidence of similar fact or conduct by an accused person or evidence of character, reputation or tendency. Relationship evidence is evidence of the attitude or conduct of an accused person to a person or class of people over time. The evidence is not admitted as going to the credit of the complainant, but rather to the propensity and tendencies of the accused.

Section 31A has wide application and has not been limited to intra familial sexual abuse cases. In all cases involving alleged sexual misconduct it is now common for courts to admit the evidence of other alleged victims as propensity evidence, even relating to uncharged acts.[6] In domestic violence cases the provision enables the admission of relationship evidence as well as of other allegations of violence involving the same victim and other victims.[7] The evidence of prior convictions that

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3 Inserted into the *Criminal Code* by s 13 of the *Criminal Law Amendment (Sexual Assault and other Matters) Act 2004* (WA).

4 *Gender Bias Taskforce Progress Report: A Report on the Implementation by Government Recommendations contained in the Chief Justice's Taskforce Report on Gender Bias*, compiled by the Women's Policy Development Office in conjunction with the Ministry of Justice, April 1997.

5 Parliament of Western Australia Hansard, 30 June 2004, p 4607.

6 For example see: *PIM v The State of Western Australia* [2009] WASCA 131, *The State of Western Australia v Osborne* [2007] WASCA 183, *Asplin v The State of Western Australia* [2013] WASCA 72.

7 For example see: *O'Driscoll v The State of Western Australia* [2011] 175*,MJS v The State of Western Australia* [2011] WASCA 112.

satisfy the requirements of the section can also be admitted at trial.[8] The section also has more general application and is often relied on to admit propensity evidence in drug cases.

The introduction of s 31A has more than adequately addressed Recommendation 70. Courts now commonly admit evidence of intra familial sexual abuse and other violence in determining charges brought against accused persons. DPP and defence lawyers reported their routine use of the section in appropriate cases, suggesting the amendment is being applied and not ignored. The view of the Subcommittee is that Recommendation 70 from the 1994 Report has been implemented and no further legislative amendment or other action is required.

STALKING LAWS

SUMMARY OF RECOMMENDATIONS AND IMPLEMENTATION – 1994 REPORT AND 1997 PROGRESS REPORT

The 1994 Report recommended that:

> *"Stalking legislation be introduced in Western Australia as a matter of urgency."*

The 1994 Report made its recommendation on the basis that there were cases around Australia resulting in the death of women who had been stalked, but where the law had been powerless to do anything until an actual physical assault took place.[9] The 1994 Report gave effect to the view that the legislature had: (i) failed to protect women who were the victims of 'dysfunctional intimate relationship' stalkers; and (ii) ignored the possibility such behaviour could escalate and ultimately lead to the death or serious harm of a victim.

Following the 1994 Report, the *Criminal Law Amendment Act 1994* (WA) ('the 1994 Act') amended the *Criminal Code* (WA) by adding Chapter XXXIIIB entitled "Intimidation" which contained sections 338D and 338E the effect of which was to:

- create the indictable offence of unlawful stalking;

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8 See *Bennett v Western Australia* [2012] WASC 70, *Colbung v Western Australia* [2010] WASCA 217.

9 Chapter 8.52 of the 1994 Report.

- include the "alternative mental element of causing physical or mental harm to a person or apprehension or fear in a person;"[10]
- create circumstances of aggravation, namely that the person was armed at the time of, or immediately before or after, the stalking or that the stalking breached either a restraining order (which at that time was provided for in the *Justices Act*) or bail; and
- substantially increase the maximum available penalty for stalking to eight years' imprisonment where the offence involved a circumstance of aggravation, and three years' imprisonment where no aggravating circumstance was involved.

The 1997 Progress Report noted that Recommendation 122 had been implemented by the 1994 Act however further amendments were pending to cover situations where there was no malicious intent but nevertheless the person's behaviour caused apprehension and fear, and to expand the methods of communication which constitute stalking.[11]

The *Criminal Law Amendment Act (No. 1) 1998* ('the 1998 Act') implemented the changes foreshadowed in the 1997 Progress Report. Accordingly Chapter XXXIIIB of the *Criminal Code* (WA) was repealed, with a new Chapter XXXIIIB entitled "Stalking" replacing it.

The current stalking provisions are as follows:

Chapter XXXIIIB — Stalking

Section 338D[12]

Terms used

(1) In this Chapter —

circumstances of aggravation, without limiting the definition of that expression in section 221, includes circumstances in which —

(a) immediately before or during or immediately after the commission of the offence, the offender is armed with any dangerous or offensive weapon or instrument or pretends to be so armed; or

(b) the conduct of the offender in committing the offence constituted a breach of a condition on which bail has been granted to the offender;

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10 The Hon Peter Foss, Attorney General, Hansard (LA) 27 October 1994, 6287.
11 The 1997 Report, p42.
12 Section 338D inserted by No. 38 of 1998 s. 4(1); amended by No. 38 of 2004 s. 71.

intimidate, in relation to a person, includes —

(a) to cause physical or mental harm to the person;

(b) to cause apprehension or fear in the person;

(c) to prevent the person from doing an act that the person is lawfully entitled to do, or to hinder the person in doing such an act;

(d) to compel the person to do an act that the person is lawfully entitled to abstain from doing;

pursue, in relation to a person, includes —

(a) to repeatedly communicate with the person, whether directly or indirectly and whether in words or otherwise;

(b) to repeatedly follow the person;

(c) to repeatedly cause the person to receive unsolicited items;

(d) to watch or beset the place where the person lives or works or happens to be, or the approaches to such a place;

(e) whether or not repeatedly, to do any of the foregoing in breach of a restraining order or bail condition.

(2) For the purpose of deciding whether an accused person has pursued another person —

(a) the accused is not to be regarded as having communicated with or followed that person on a particular occasion if it is proved by or on behalf of the accused that on that occasion the accused did not intend to communicate with or follow that person;

(b) an act by the accused on a particular occasion is not to be taken into account for the purpose of deciding whether the accused watched or beset a place where that person lived, worked or happened to be, or the approaches to such a place, if it is proved by or on behalf of the accused that on that occasion the accused did not know it was such a place.

Section 338E[13]

Stalking

(1) A person who pursues another person with intent to intimidate that person or a third person, is guilty of a crime and is liable —

(a) where the offence is committed in circumstances of aggravation, to imprisonment for 8 years; and

(b) in any other case, to imprisonment for 3 years.

Alternative offence: s. 338E(2).

Summary conviction penalty:

[13] Section 338E inserted by No. 38 of 1998 s. 4(1); amended by No. 70 of 2004 s. 35(7), 35(8) and 36(3); and No. 2 of 2008 s. 12.

(a) in a case to which subsection (1)(a) applies: imprisonment for 2 years and a fine of $24 000;

(b) in a case to which subsection (1)(b) applies: imprisonment for 18 months and a fine of $18 000.

(2) A person who pursues another person in a manner that could reasonably be expected to intimidate, and that does in fact intimidate, that person or a third person is guilty of a simple offence.
Penalty: imprisonment for 12 months and a fine of $12,000.

(3) It is a defence to a charge under this section to prove that the accused person acted with lawful authority.

Commentator Karen Whitney discusses the significant points of difference between the enactments that resulted from the 1994 and 1998 Acts.[14] However, in summary, they are:

- Rather than 'stalking,' the offence is now to 'pursue' another. 'Pursue' includes repeatedly (as opposed to 'persistently' in the old provision) communicating or following, repeatedly causing the person to receive unsolicited items, to watch or beset their residence or where they work, or where they happen to be and, whether or not repeatedly, to do so in breach of a restraining order or bail conditions.
- The 1994 Act required the prosecution to prove the accused had an intention to cause one of the harms listed. Therefore, a prosecution was difficult when the accused claimed that he or she was in love with the person, and meant them no harm or fear.[15] The 1998 provisions created the alternative offence of actual intimidation, without the need for the prosecution to prove intent to do so, provided that the conduct could reasonably be expected to intimidate. This is a summary offence and is an alternative verdict on an indictable charge.

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14 K Whitney, *Western Australia's New Stalking Legislation: Will it Fill the Gap?* (July 1999) 28 WALR 293.

15 See examples given by the Hon Peter Foss, Attorney General, Hansard (LC) 11 November 1997, p 7464 – 7465, and 8 September 1998, 807, where it was reported that a magistrate likened an accused stalker to a "harmless puppy dog."

DISCUSSIONS AND RECOMMENDATIONS ARISING FROM 2014 REVIEW

Has the legislation fulfilled the recommendation?

The Subcommittee considers that the introduction of Chapter XXXIIIB and subsequent amendments[16] have substantially addressed Recommendation 122 in the 1994 Report by ensuring that:

- The two offences created (the indictable and summary offences under sections 338E(1) and 338E(2) respectively), and the broad definitions of 'intimidate' and 'pursue', cover a wide range of conduct (particularly as there is no need to prove intent for the summary stalking offence under s 338E(2));
- The two offences are available and apply in relation to both the 'resilient victim' (who is not intimidated by the stalker's actions) and other victims who are in fact intimidated by the stalker's actions (in that they suffer physical or mental harm, apprehension or fear or otherwise experience interference in their lawful activities) despite the stalker's perception that their behaviour constitutes 'good intentions';
- The giving or sending of any unsolicited item (rather than just 'gifts') may qualify as stalking, whether or not the item is of some value or usefulness;
- The legislation reverses the onus of proof in relation to some defences, making it easier for a person to make a complaint of stalking and for a prosecution to be established (because, effectively, the prosecution does not have to negate the possibility that certain contact was accidental or establish that the offender acted with lawful authority.

Given the reforms described above the Subcommittee is of the view that current legislation significantly improves the available legal redress and protection for women experiencing dysfunctional intimate relationship stalking, given that there was sparse legislation criminalising the behaviour prior to 1994. The data below also suggests that the stalking provisions are being used, at least to some extent, to protect women in Western Australia.

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[16] Section 338D (as inserted by the 1998 Act) was amended by No. 38 of 2004 s. 71; Section 338E (as inserted by the 1998 Act was amended by No. 70 of 2004 s. 35(7), 35(8) and 36(3) and No. 2 of 2008 s. 12).

Data from the DPP shows that of the 23 indictable stalking offences[17] finalised since the 2010/2011 period, there were eight convictions (34.8%), seven remittals[18] (30.4%), six discontinuances (26.1%) and two acquittals (8.7%). Of all cases, each contained at least one female victim. It was not possible to obtain such data in the period prior to 2010/2011.

Data from Western Australia Police for the lower courts in Western Australia for the period 2002 to September 2013 shows that there have been as few as 43 summary stalking prosecutions in one year to as many as 98 summary prosecutions in another year. In total there have been almost 900 summary stalking prosecutions in that period.[19]

No further meaningful data is available to the Subcommittee from the police.

In Queensland, data collected from 2001 to 2004 shows that of the 1251 cases heard in both the lower and higher courts, a similar conviction rate of 37% was achieved.[20] Data taken from other states also shows similar outcomes, although Victorian data shows that between 1995 and 1999 approximately two thirds of charges of stalking were proven.[21] Data gathered from across Australia also shows that the majority of victims in stalking prosecutions are female, and the majority of the perpetrators are male.[22]

Furthermore, statistics gathered by the Australian Institute of Criminology[23] show that in 1998, 93 charges were laid in the category of 'threats and stalking' in Western Australia with 46 involving threats or stalking as the most serious of the offences charged. Although the conviction rate is unclear from the data produced, 46% of the 93 charges resulted in a prison sentence.

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17 The ODPP prosecutes indictable offences.

18 This refers to downgrading of indictable charges to summary charges, which can then be dealt within the Magistrates Courts.

19 Refer to Table 1 in Attachment 2.

20 Heather Douglas, '*Personal Protection and the Law: Stalking, Domestic Violence and peace and Good Behaviour*', 13.

21 Emma Ogilvie, '*Stalking: Policing and prosecuting practices in three Australian Jurisdictions'*, Australian Institute of Criminology, Trends and issues in Crime and Criminal Justice' No 176, November 2000, although the author notes that no "hard and fast" conclusions can be drawn from those statistics, given issues in data recording, the samples taken were small and policing and court practices are complex: p5.

22 Emma Ogilvie, '*Stalking: Legislative, Policing and prosecution Patterns in Australia'* Australian Institute of Criminology, Research and Public Policy Series no. 34, December 2000, 149.

23 Emma Ogilvie, '*Stalking: Legislative, Policing and prosecution Patterns in Australia'* Australian Institute of Criminology, Research and Public Policy Series no. 34, December 2000, 105.

Despite the apparent success of the stalking provisions here and elsewhere during some of the Subcommittee's consultations[24] the view was expressed by some practitioners that while the stalking provisions themselves were adequate, there was a perception that police were reluctant to investigate and prosecute such offences. The suggested reasons for this were a possible lack of understanding by police of the admissible forms of the evidence required to prove the elements as well as resourcing issues.

The Subcommittee also considered whether there are any further amendments required to improve the protection provided to women by the stalking provisions. The Subcommittee makes recommendations below which it considers could improve these provisions.

Is the word 'repeatedly' (used in the definition of 'pursue' in section 338D) clear enough?

The use of the word 'repeatedly' in the definition of 'pursue' in s.338D gives rise to the question of how many times contact is required, and over what period. If the legislative intention is to protect women who are physically intimidated by the stalker, so that intimidation does not escalate to physical harm, then the law must be clear that such victims do not have to endure days, weeks or months, with many instances of contact, before the stalker can be charged. The original definition of stalking incorporated the term 'persistent' in referring to the conduct of the accused (without a number attached). Parliament was of the view then that it was sufficient to prove a frequency, relentlessness or persistence of contact.[25] Similarly the amendment made by the 1998 Act, substituting the term 'persistent' with 'repeatedly', also purposefully does not refer to the number of contacts required to constitute repeated contact.[26] Although the provision seems to suggest that any behaviour repeated more than once will suffice,[27] it may not be clear to the victim that this is the case, especially where there are a number of different types of behaviour. This is addressed further in answer to the next issue.

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24 Subcommittee member Magistrate Felicity Zempilas held a discussion forum with a number of female legal practitioners in Kalgoorlie (from Legal Aid WA, ALS and from a private firm) in 2013 to discuss issues relevant to this chapter of the report.

25 The Hon C Edwards, Attorney General, Hansard, (LA) 30 November 1994, 8148.

26 Mr. Kevin Prince, Hansard, (LA) 25 June 1998, 4777.

27 K Whitney *"Western Australia's New Stalking Legislation: Will it Fill the Gap?"* July (1999) 28 WALR 293, 305.

Does the legislation require that similar acts be done repeatedly or can there be a combination of acts?

In Queensland the term 'unlawful stalking' includes doing one or more acts of a certain type on more than one occasion. In Victoria, the wording used is "a course of conduct which includes any of the following." This has been interpreted to mean that where there are two or more occasions of stalking conduct, that conduct can be the same or different.[28] Such an interpretation makes sense. It may be that a stalker repeats one type of act, over and over or, instead, a number of different acts.[29] The wording of the Queensland provision creates clarity and certainty as to when a person can complain of being stalked. Use of the words 'persistently' or 'repeatedly,' although they have well-known general meanings, provide no guidance to someone who needs to know when they can validly complain to police about another's behaviour.[30]

The Subcommittee understands the argument that any unrequited contact, such as if the person making the advances tries once, and then tries again using a different method, may be classed as stalking, however the prosecution would also have to prove the stalker intended to *intimidate* the person, or that the behaviour was objectively intimidating, and it did so intimidate. On this view, one incident may not amount to an offence of stalking (although it may amount to an offence under other criminal laws). This also potentially allows for misunderstandings and mistakes on the part of the victim. However, if the behaviour is intended to intimidate, or does in fact intimidate, being objectively likely to do so, and the behaviour occurs a second time, the victim is entitled to protection, and to understand that they will be protected at that point.

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28 *Gunes v Pearson & Tunc v Pearson* (1996) 89 A Crim R 297, 306.

29 Such as communication via email followed by watching the place of business followed by watching the residence then following the person.

30 Victorian legislation, rather than give a number value, provides that stalking occurs where there has been a "course of conduct" featuring any of the items listed in s 21A *Crimes Act 1958* (Vic).

8.1 The Western Australian Parliament amends chapter XXXIIIB of the *Criminal Code* dealing with stalking to:

i) make clear that stalking can be a culmination of a number of different types of behaviour, as well as one type of behaviour being repeated; and

ii) make clear that stalking occurs where there has been a 'course of conduct' (which may involve as few as two instances) of any of the behaviours that have been identified above which could constitute stalking.

Does the legislation need to include, within the meaning of 'intimidate', the depriving of a person's property?

The amendments made by the 1998 Act amended the meaning of 'intimidate' by omitting the words 'depriving or hindering a person in the possession or use of any property'. It has been argued that this omission will exclude behaviour such as deflating car tyres or unauthorised borrowings.[31] However, this Subcommittee is of the view that both examples would be covered by the definition of 'intimidate' at s.338D (1)(c) ("to prevent the person from doing an act that the person is lawfully entitled to do, or to hinder the person in doing such an act") and accordingly no changes need to be made in respect of that definition.

Is the legislation broad enough so that new technology such as 'spy-ware', GPS tracking devices, the Internet, 'sexting' and social media may be the subject of a stalking prosecution?

Despite the amendments which have improved upon the original stalking offence it has been argued[32] that the definition of 'pursue' may be too narrow to incorporate what might be thought of as 'cyber'[33] or 'internet' stalking (for example the posting of offensive messages and images on the internet). Under the current provisions some of these activities may not amount to "indirect communication" with the victim, or to

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31 K Whitney "*Western Australia's New Stalking Legislation: Will it Fill the Gap*?" July (1999) 28 WALR 293, 307.

32 Op cit, 4.

33 It has been observed that cyber stalking is analogous to traditional forms of stalking in that it incorporates persistent behaviours that instil apprehension and fear. However, with the advent of new technologies, traditional stalking has taken on entirely new forms through mediums such as email and the Internet; see Ogilvie E, 'Cyber stalking' (2000) 166 *Australian Institute of Criminology Trends & Issues* 1.

"the watching or besetting a place" where the victim is, or "following" that person. On the other hand the term 'mental harm', within the definition of "intimidate" in s.338D, may arguably encompass repeated posting of degrading and/or explicit messages or images on the internet provided such harm is either caused to the victim, or such postings were intended to have that effect on the victim.

It is also doubtful that the definitions of 'intimidate' or 'pursue' incorporate computer hacking. Spyware is now available to turn a camera on at a computer from a remote location, without another computer user knowing. Although such action may come under the description of watching or besetting the residence or place of work (assuming the definition includes the inside as well as the outside of the premises), if the camera is switched on permanently, or for a long time, with no data recorded as to when the stalker actually watches through the camera, it may be impossible to prove 'repeated' conduct. Yet, the watching of someone through a computer would appear to encapsulate the essence of stalking. This uncertainty could be addressed by inserting into the definition of 'pursue' a similar description found in section 359B of the Queensland provision that one single, but sustained, act, can be classified as stalking.

This also raises an issue where the victim does not actually know that she is being 'spied' on, or tracked. In Queensland, it has been suggested that a person cannot be intimidated unless they know they are being stalked, and neither can they be put in fear of violence unless they know the threat is there.[34] In Western Australia, however, the legislation appears to be drafted more widely.

Although the question of knowledge has not been dealt with specifically in Western Australia,[35] and in relation to the indictable offence, the victim need not actually feel

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[34] In *R v Davies* QDC, 279/2004, 2 August 2004, unreported, McGill DCJ, in a pre-trial argument found that a person needs to know they are being stalked before the stalker can be convicted of stalking: "It is not stalking unless the person concerned, the stalked person, is aware of what is going on and is reacting to that awareness so as to satisfy paragraph 359B (d). I think that is plainly the case in relation to the first limb of paragraph (d), and in the light of the definition of "detriment" in s 359A, the scope of the section generally, the explanatory notes, and bearing in mind as well, that where there is some reasonable ambiguity about the section, it should be given no wider an interpretation than the words used fairly require, it seems to me that it is not stalking to engage in conduct the stalked person is entirely unaware of merely because once the stalked person finds out about it later the stalked person is unhappy about it."

[35] Recently in *Musgrove v Millard* [2012] WASC 60, the offender pleaded guilty to stalking, and to a charge under the *Surveillance Devices Act* (WA). The magistrate included the placing of a tracking device on the victim's car as part of the stalking. Although that inclusion was in contention because he had been charged separately under the *Surveillance Devices Act.*

intimidated,[36] the Subcommittee is of the view that the wording of the indictable offence in s.338E (1) of the *Criminal Code*, is drafted in such a way that, as long as the prosecution proves that the stalker intended to cause harm, proof that the victim knew of the actions or those intentions is not required. However, if the stalker knows the victim is unaware, then the stalker knows that the victim will not suffer one of the required detriments, and the prosecution may not be able to prove the requisite intent.

The Subcommittee considered whether the unauthorised dissemination of private images or messages by an offender (such as sexual images or messages previously sent by the victim to the offender) could fall within the meaning of 'pursuing' the victim (because the definition of 'pursue' requires communication with the person *directly or indirectly)*. It may be arguable that the purpose of dissemination is to threaten the victim, or gain her attention, and therefore is indirect communication with her.

Furthermore, in both situations of spy-ware or tracking devices and posting images, there is other legislation that may adequately cover such factual scenarios. For example, in *Musgrove v Millard,*[37] a charge under the *Surveillance Devices Act* (WA) was preferred. Also a charge of 'using a carriage service to menace, harass or cause offence'[38] pursuant to s.474.17 *Criminal Code* (Cwlth) may be more effective than stalking legislation in protecting women against the unauthorised use of their sexual images and messages. Interestingly we note that Victorian stalking legislation has been amended to specifically include the use of spy-ware (refer s.21A (2)(ba) *Crimes Act 1958* (Vic) and messages on social media (s.21A (2) (bb) *Crimes Act 1958* (Vic)).

The Subcommittee considered whether the Western Australian legislation should be amended to include a provision similar to that of the Queensland provision s.359B (b)[39] providing for one protracted incident to fall within the definition of 'pursue' to ensure that, where alternative charges are not available for the offending conduct,

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36 *Hellings v The Queen* [2003] WASCA 208 [13].

37 [2012] WASC 60

38 Which requires the prosecution to prove that the person used the carriage service in a way that reasonable persons would regard as being menacing, harassing or offensive.

39 Section 359B of the *Criminal Code* (Qld) defines 'unlawful stalking' to include conduct that is intentionally directed at a person; engaged in on any one occasion if the conduct is protracted or on more than one occasion; and consists of 'contacting a person in any way, including, for example, by telephone, mail, fax, email or through the use of any technology'.

one incident of protracted following or other contact may be sufficient to constitute stalking.[40] In terms of non-computer based stalking, it is the view of a police prosecutor interviewed, who has prosecuted many stalking matters, that usually what may appear to be one course of conduct can be factually broken down into several different acts, which would then constitute repeated conduct, and, provided other elements are satisfied, would be sufficient for a charge of stalking. However, the Subcommittee agreed that for clarity the law should be amended to include one protracted act in the definition of stalking.

It is however the Subcommittee's view that no immediate amendment is required to cover the use of tracking or spy-ware itself,[41] or using social media to post sexual images, as both areas appear to be adequately covered by other State or Commonwealth legislation. The Subcommittee notes that the uncertainty of the operation of the stalking laws in the context of emerging technology highlights a need for a review of the stalking laws where the use of Internet, computers or social media might be employed in the ways described above. However it was beyond the scope of this report for this Subcommittee to further explore these issues. No specific recommendation of this sort has been made in this report.

8.1	iii)	The Western Australian Parliament amends chapter XXXIIIB of the Criminal Code dealing with stalking to amend the definition of 'pursue' to provide for one protracted incident to fall within the definition (as included in section 359B(b) of the Queensland *Criminal Code).*

Finally, because this Subcommittee finds there are numerous uncertainties about the application of the stalking laws, we refer to and endorse the views expressed in Chapter 5 of this 2014 Review Report[42] that the Victim's Commissioner should be looking into whether victims of crime feel informed.

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40 It is noted that there is no requirement in the legislation that 'watching' be repeated.

41 Despite the amendments to the Victorian legislation.

42 pp. chapter 5

FEMALE GENITAL MUTILATION LAWS

SUMMARY OF RECOMMENDATIONS AND IMPLEMENTATION – 1994 REPORT AND 1997 PROGRESS REPORT

Recommendation 139 of the 1994 Report provided

> *"The State Government request the Commonwealth Government to pass legislation to make female genital mutilation a crime."*

Recommendation 139 was based upon a discussion paper dealing with female genital mutilation ('FGM') released on 31 January 1994 by the Family Law Council of Australia (FLC). The views and concerns of the Chapter 8 Subcommittee of the 1994 Taskforce examining this issue are set out at paragraphs 59 to 67 of the 1994 Report.

In summary that Subcommittee endorsed the FLC views that:

- FGM was a traditional cultural practise performed mainly in - but not confined to - a number of African countries;
- FGM can involve all types of circumcision involving an incision in a girl's genital area;
- FGM is a practice that has no basis in Islam and is not a requirement for Islamic women to undergo;[43]
- The incidence of FGM in Australia at that time was unknown although anecdotally it was understood to be practised among some African communities that have migrated to Australia;
- FGM can have devastating physical, psychological and sexual effects on females whilst having no known benefits and is not required on religious grounds;
- FGM is a practise aimed at undermining the autonomy of women and girls among some migrant communities and accordingly should not be acceptable in Australia; and

[43] It was noted that some Muslim leaders in Australia have condemned the practise.

- FGM ought to be criminalised and recognised as child abuse (when perpetrated on a child).

The 1994 Chapter 8 Subcommittee therefore recommended that the State Government request the Commonwealth to pass legislation in relation to this matter and, where it should fail to do so, that the State Government should pass such legislation.

The 1997 Progress Report recorded that the Standing Committee of Attorneys General supported the enactment of legislation to address the issue of FGM and indicated that State legislation was under consideration.

However it was not until 2004 that the then Attorney General, Hon. Jim McGinty, introduced the *Criminal Code Amendment Bill 2004* to Parliament containing numerous and diverse amendments to the *Criminal Code* (WA) which included a new section 306 to criminalise the practice of FGM.[44] In introducing s.306 the Attorney General noted FGM breaches numerous international human rights, referred to the model FGM provisions[45] and accordingly proposed the new s.306 to send a strong statement to the community that the Parliament condemned the practice of FGM.

Section 306[46] prohibits the performance of FGM on another person (punishable by 20 years)[47] and prohibits taking a child or arranging to take a child from Western Australia with the intention of subjecting them to FGM (punishable by ten years).[48] The section also provides that it is not a defence to a charge of performing FGM that the person on whom the procedure was performed, or a parent or guardian of that person, consented to that act.[49] Section 306 is modeled on similar legislation in the ACT, Queensland, NT and the Commonwealth provisions. Like those Acts, it also

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44 Section 306 was inserted by s.22 of the *Criminal Code Amendment Act* 2004 which commenced on 21 May 2004.

45 Prepared by the Model Criminal Code Officers Committee, which had been endorsed by the Standing Committee of Attorneys General on 14 July 1995. In September 1998, the Committee published its model laws on female genital mutilation after extensive consultation with interested stakeholders and a thorough examination of existing national and international laws criminalising female genital mutilation.

46 Which has not been amended since its introduction in 2004.

47 Section 306(2) Code.

48 Section 306(4) Code.

49 Section 306(3) *Criminal Code*.

contains certain exclusions for a gender reassignment procedure or a medical procedure carried out for a proper medical purpose.[50]

Section 306 is in the following terms:

306. Female genital mutilation

(1) In this section —

child means a person under the age of 18 years;

female genital mutilation means —

(a) the excision or mutilation of the whole or a part of the clitoris, the labia minora, the labia majora, or any other part of the female genital organs; or

(b) infibulation or any procedure that involves the sealing or suturing together of the labia minora or the labia majora; or

(c) any procedure to narrow or close the vaginal opening,

but does not include —

(d) a reassignment procedure within the meaning of the *Gender Reassignment Act 2000* carried out on a person's genitals by a medical practitioner within the meaning of the *Health Act 1911*; or

(e) a medical procedure carried out for proper medical purposes.

(2) A person who performs female genital mutilation on another person is guilty of a crime and is liable to imprisonment for 20 years.

(3) It is not a defence to a charge under subsection (2) that the other person, or a parent or guardian of the other person, consented to the mutilation.

(4) A person who takes a child from Western Australia, or arranges for a child to be taken from Western Australia, with the intention of having the child subjected to female genital mutilation is guilty of a crime and is liable to imprisonment for 10 years.

(5) In proceedings for an offence under subsection (4), proof that —

(a) the accused person took a child, or arranged for a child to be taken from Western Australia; and

(b) the child, while out of Western Australia, was subjected to female genital mutilation,

is proof, in the absence of evidence to the contrary, that the accused person took the child, or arranged for the child to be taken, from Western Australia, as the case may be, with the intention of having the child subjected to female genital mutilation.

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[50] Section 306(1) *Criminal Code*.

DISCUSSIONS AND RECOMMENDATIONS ARISING FROM 2014 REVIEW

Whether section 306 is effective in criminalising FGM?

The effectiveness of the current provision (and like provisions in other jurisdictions) was investigated by seeking information about the current prosecution of such provisions and also exploring current literature as exists concerning the effectiveness of such provisions.

The World Health Organisation estimates that between 100 to 140 million women and girls around the world have been subjected to genital mutilation, with 92 million in Africa. In Western Australia we have seen increasing numbers of immigrants from those African countries where FGM takes place.

Although there are no official figures for the number of women in WA who may have been subjected to FGM, anecdotally there is evidence of it having been committed upon women now resident in WA (who have presented for treatment for the health and emotional complications it can cause).[51]

Despite these reports, to date there have been no successful prosecutions in WA for the offence of FGM[52] and very few prosecutions under FGM laws in other jurisdictions.[53] One must then ask what value (deterrence or otherwise) do these laws have if in fact they are not being utilised despite the very high probability these practices are taking place?

In a recent report of the Commonwealth Attorney General's Department reviewing FGM laws in Australia ('the Commonwealth Report') it was suggested that opportunities exist to improve the detection and enforcement of the existing FGM laws, which include:

i) improved information sharing between the health and legal systems;

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51 See Pollock, Stephen "*Mutilated women deserve medical respect*", Perth Voice Newspaper, 22/9/12 in which ECU medical sciences school chief Moira Sim says she's met around 30 women of from Sudan and Eritrea who had been subjected to "female circumcision", which involves the partial or total removal of external female genitalia.

52 There has only been one case in WA in which a prosecution for an FGM offence was commenced in 2012 but it was discontinued by the DPP in July 2013.

53 Overseas experience - particularly in Africa, England, Wales and France – is that the practice of FGM continues despite the enactment of anti-FGM laws: see *Review of Australia's Female Genital Mutilation Legal Framework*, Final Report, Commonwealth Attorney General's Department, March 2013 at 1.3 (accessed at www.ag.gov.au).

ii) establishing liaisons with community groups in populations which could be vulnerable to female genital mutilation;

iii) improving access to and willingness of interpreters to assist police to investigate suspected cases of female genital mutilation;

iv) the provision of targeted education programs; and

v) improving awareness of Australia's laws overseas.

The Commonwealth Report proposed broad co-operative government efforts to end the practice of FGM in Australia which included a national summit in 2013 of community, health, legal and policing experts to discuss ways of increasing awareness and reducing the incidence of female genital mutilation in Australia; new research and data collection; and substantial grants to fund organisations to run education and awareness activities and support change within communities. The Commonwealth Report also noted that although the current FGM laws are comprehensive, three areas have been identified that could strengthen the current legal framework. These relate to consistent penalties, consistent age range (i.e. what age range the offences apply to) and consistency in the extraterritorial application of the provisions.

In relation to the penalties it should be noted that the penalties available under s.306 of the Criminal Code are heavier than the penalties set out in the Model Laws. There is therefore no need for any specific recommendation to change the penalties available under s.306.

Regarding the age range the Commonwealth Report notes that most jurisdictions make it an offence to remove, or make arrangements to remove, a child under 18 years from the relevant jurisdiction with the intention of having FGM performed on that child. However in most jurisdictions the criminalisation of the 'performance' offence applies to women of any age. This report therefore recommends that the States and Territories consider broadening the scope of their legislation to make it an offence to remove any person from the relevant jurisdiction with the intention of having female genital mutilation performed on that person. It is noted that this would provide more comprehensive protection to all Australian women and girls in line with the purpose of the report.

8.2 The Western Australian Parliament broadens section 306 (4) of the *Criminal Code* (WA) to make it an offence to remove any person from Western Australia with the intention of having female genital mutilation performed on that person.

Regarding the issue of consistent extra territorial application the Commonwealth Report notes two differing approaches to the basis of the extra territorial reach of the provisions of the various laws across Australia. It notes most jurisdictions (including WA) adopt a 'removal' approach whereby it is an offence to remove a child from that jurisdiction, or make arrangements for their removal, with the intention of having FGM performed on them. This contrasts with the 'wherever performed' approach (as in NSW and NT) which criminalises the actual performance of female genital mutilation outside the relevant jurisdiction, ensuring that those who carry out female genital mutilation cannot escape criminal liability by performing female genital mutilation outside the relevant jurisdiction.

The Commonwealth Report points out that while the 'removal' approach does not criminalise the actual performance of FGM outside the jurisdiction, it does criminalise early planning conduct, potentially allowing law enforcement to intervene at an early stage before female genital mutilation has even occurred. It suggests this is not possible under the 'wherever performed' approach, unless there is enough evidence available to proceed with a charge of 'attempt'. It also suggests that there may be difficulties with the enforcement of the 'wherever performed' approach where the offences are taking place outside of Australia in countries who may be unwilling or uninterested to co-operate with the prosecution of such cases. Despite the difficulties this report recommends adopting both approaches to the extraterritorial application of FGM offences to achieve a more extensive coverage of criminal conduct under current legal framework. This Subcommittee endorses that recommendation as follows.

8.3 That the Western Australian Parliament broadens the extraterritorial application of s.306 of the *Criminal Code* (WA) to ensure that both of the following constitute an offence in Western Australia:

i) to perform female genital mutilation on a Western Australian resident, wherever the operation is performed; and

ii) to remove, or make arrangements to remove, a person from Western Australia for the purpose of subjecting them to female genital mutilation.

The low incidence of enforcement of FGM offences

The Commonwealth Report noted an apparent disconnect between the number of FGM prosecutions across all Australian jurisdictions and the reports of health workers who treat women and children who have undergone FGM. In order to address this, this report recommended that all Australian governments work together to identify potential opportunities for cooperation and improved information sharing between the health and legal systems. It also noted other opportunities that could assist with the enforcement of FGM laws, and which could be developed with further cross-jurisdictional and cross-agency cooperation. These include liaisons with community groups, improving access to and the willingness of interpreters, targeted education and raising awareness amongst professionals and communities referred to above at page 23 of this chapter.

This Subcommittee has not had the resources to consult with multicultural groups in respect of whom FGM laws might have a significant impact. It recognises that FGM is a culturally sensitive issue and concerns matters of a highly intimate and private nature. Furthermore women who may have suffered FGM are possibly among the most marginalised women in our community.[54] The Subcommittee recommends consultations should be held with the representatives of such groups so they have a role in determining any legal and policy approaches to this issue.[55] Any such consultations should be approached with considerable care, caution and sensitivity.

Accordingly the following recommendations are endorsed in order to improve the enforcement of the current FGM provision in Western Australia and like provisions elsewhere.

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54 'Listen To Us! Female Genital Mutilation, Feminism & The Law In Australia', (1995) 20 Melbourne University Law Review 562 at 581.

55 'Listen To Us! Female Genital Mutilation, Feminism & The Law In Australia', (1995) 20 Melbourne University Law Review 562.

8.4 In order to improve the enforcement of section 306 of the *Criminal Code* (WA), the State Government financially supports efforts to:

i) establish liaisons with community groups in populations which could be vulnerable to female genital mutilation;

ii) improve access to interpreters so that police can investigate suspected cases of female genital mutilation;

iii) provide targeted education about the negative impacts of FGM; and

iv) raise awareness amongst professionals and communities of the female genital mutilation laws.

It is noted that the Commonwealth Report also refers to efforts by the Commonwealth[56] to raise awareness of Australia's FGM laws overseas. Finally the report discusses the possibility of enacting Commonwealth legislation to deal with FGM offences but concludes that it is not supported by any jurisdiction for various reasons. Accordingly this Subcommittee makes no recommendation in relation to this issue.

The issue of consent for female genital cosmetic procedures

The Commonwealth Report noted that the broad definition of FGM and explicit removal of consent as a defence has raised some issues in relation to female genital cosmetic procedures. It indicated that anecdotal evidence exists that suggests female genital cosmetic surgery has increased significantly since 1998, when the model legislation (and the majority of State and Territory offences) was drafted. It points out that there are many examples of surgeons advertising procedures for Australian clients. The report states:

> "*While most public discourse distinguishes between female genital cosmetic surgery and female genital mutilation, female genital cosmetic surgery may involve procedures that are technically very similar to those defined in the legislation. The status of these procedures under existing laws is untested. This is a complex issue, which this Report has been unable to fully consider. Further work should be done in close consultation with relevant Commonwealth, State and Territory agencies, communities, experts and other stakeholders to clarify the legal and policy position on female genital cosmetic procedures*."

[56] Via the Department of Foreign Affairs and Trade ('DFAT').

This Subcommittee also endorses the suggestion for further work concerning this issue.

8.5 The State Government, in close consultation with relevant Commonwealth, State and Territory agencies, communities, experts and other stakeholders, clarifies the legal and policy position in relation to female genital cosmetic procedures.

PROSTITUTION LAWS

SUMMARY AND IMPLEMENTATION OF RECOMMENDATIONS - 1994 REPORT AND 1997 PROGRESS REPORT

Chapter 7 of the 1994 Report made specific recommendations, 146 to 150, regarding prostitution. These are set out in detail below but included the repeal of all provisions in legislation referring to prostitutes and related activities[57]; that a new offence of procuring for prostitution by coercion, force or violence be legislated; the repeal of provisions in the *Local Government Act* (WA) granting Local Councils power to prohibit prostitution; that zoning regulations be developed by the Department of Land Administration for the establishment or continued operation of premises used for prostitution; and that sex industry workers come within the provisions of the (formerly named) *Occupational Health, Safety and Welfare Act 1984* (WA).

The 1997 Progress Report said very little about implementation of these recommendations. It only noted that the Police Service were investigating and developing proposals for the regulation of this industry.[58]

Recommendation 146: All provisions in the *Criminal Code* (WA) and *Police Act 1892* referring to prostitutes and related activities be repealed.[59]

This recommendation has been partially implemented in that the *Police Act* provisions relating to prostitution have been repealed in full. However, the provisions in the *Criminal Code* (WA) relating to keeping brothels, living off the earnings of

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57 Recommendation146 of the 1994 Report.
58 Progress Report, p. 16.
59 Refer to paragraph 121 of chapter 7 of the 1994 Report.

prostitution and procuring women to become involved in prostitution remain. Following a repeal of the *Police Act* provisions relating to prostitution (these being relatively limited in scope), the Western Australian Parliament enacted the *Prostitution Act* 2000.

The *Prostitution Act* 2000 is a comprehensive piece of legislation in terms of prostitution enforcement. In contrast to the repealed *Police Act* provisions it actually extends the reach of the criminal law in terms of who may commit an offence. It is now the case that in certain circumstances simply being a prostitute can constitute an offence. In the past prostitution legislation focused on the conduct "surrounding" or "ancillary" to the act of prostitution and not the act itself. Further, the *Prostitution Act 2000* contains search and seizure powers directed specifically at those who engage in prostitution related activities. Previously, police relied on general common law and statutory powers when enforcing prostitution laws.

The Subcommittee's concerns with respect to the *Prostitution Act 2000* are outlined below.

Recommendation 147: A new offence of procuring for prostitution by coercion, force or violence be legislated (with an aggravating circumstance where the offence involves procuration of a minor).[60]

This recommendation has been implemented. In respect of adults, section 7 of the *Prostitution Act 2000* makes it an offence to assault a person in order to induce that person to act or continue to act as a prostitute. The offence is a crime and carries a penalty of imprisonment for 10 years. In respect to children, section 16 of the *Prostitution Act 2000* makes it an offence to cause or permit a child to act as a prostitute. This is an indictable offence and carries a penalty of imprisonment for 14 years.

Recommendation 148: The provisions of the *Local Government Act* granting councils power to prohibit prostitution be repealed.[61]

This recommendation has been implemented. Section 206 of the *Local Government Act* was repealed in 1995. However, it should be noted that local governments still

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60 Refer to paragraph 122 of chapter 7 of the 1994 Report.
61 Refer to paragraph 123 of chapter 7 of the 1994 Report.

have some jurisdiction over brothel location by virtue of their responsibilities for town planning.

Recommendation 149: That premises having more than three sex workers (including massage parlours and escort agencies) be categorised and zoning regulations for such premises be developed by the Department of Land Administration for the establishment or continued operation of such premises.[62]

This recommendation has not been implemented.

Recommendation 150: The sex industry come within the provisions of the Occupational Health Safety and Welfare Act and Regulations, or a Code of Practice should be enacted based on recommendations from a tri-partite Committee involving sex workers, managers of premises and the Department of Occupational Health, Safety and Welfare.[63]

This recommendation has been implemented. A code of practice for health and safety in the sex industry has been developed and is available for dissemination to those in the industry.

[62] Refer to paragraph 124 of chapter 7 of the 1994 Report.
[63] Refer to paragraph 125 of chapter 7 of the 1994 Report.

DISCUSSION AND RECOMMENDATIONS ARISING FROM 2014 REVIEW

Background

Notwithstanding that there is some degree of overlap between the *Criminal Code* (WA) and *Prostitution Act 2000* offences, the former are essentially directed at brothel activity whilst the latter relate more to street prostitution. A comparison between the two types of activity illustrates how, in practical terms, very little has changed since 1994. The Subcommittee considered the effect of provisions in the *Prostitution Act 2000* as well as other legislation relevant to this issue and the history of police attitudes to enforcement over the years.

Brothel based Prostitution

Prior to 2000, approximately 16 brothels were permitted to operate in the Perth area under what was termed the "containment and control policy". Although this policy had no legal standing or basis, it had been endorsed as an appropriate law enforcement measure in the findings of the *1976 Royal Commission into Prostitution.*[64]

Containment ceased in 2000 when the then WA Police Commissioner, Bob Falconer, expressed disquiet about it, particularly in the context of the potential for police corruption. In 2004 Falconer's successor, Commissioner Barry Matthews, "determined that WA Police would not continue to police brothels under the provisions of either the *Criminal Code* or the *Police Act 1892*. The operation of brothels is not regulated unless the possible involvement of organised crime networks, juveniles, drugs, illegal immigrants or sexual servitude is established".[65]

In terms of law reform, little has been achieved. The stance taken by successive state governments has been essentially, to a lesser or greater degree, one of regulation. However, none of the Bills put forward in Parliament became law.

The *Prostitution Control Bill 2003* was both regulatory and punitive in nature (punitive in the sense that a stated aim was to discourage participation in prostitution). This

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64 Norris, JG (1976) "*Report of the Royal Commission into Matters Surrounding the Administration of the Law Relating to Prostitution*" (1976) Government of Western Australia, Perth.

65 The Hon Peter Collier Minister Representing the Minister for Police, Hansard (LC) 30 August 2011.p6292b-6293a.

Bill failed. In 2007, a further attempt to legislate (*Prostitution Amendment Bill 2007*) also failed. The most recent attempt to regulate the "prostitution, or sex industry" in terms of brothel activity, the *Prostitution Bill 2011,* has not been enacted.[66]

Thus, in terms of brothel based prostitution very little has changed, at least with respect to enforcement, since 1994.

Street based prostitution

The *Prostitution Act 2000* widens the net in terms of who, and in what circumstances, can be criminally responsible for a prostitution related offence.

Historically, prostitution laws were directed at conduct that was analogous to actually engaging in prostitution activity. This is no longer the case.

Section 14(a) of the *Prostitution Act* 2000 provides that a child who acts a prostitute commits an offence, whilst section 14(b) prohibits a person who has been declared a drug trafficker, from acting as a prostitute. Finally, section 14 (c) prohibits a person who has been convicted of one of a list of prescribed offences (e.g. grievous bodily harm) from acting as a prostitute. Breach of these provisions carries a penalty of two years imprisonment.

Section 14 raises several issues. First, it is questionable whether it is appropriate to have an offence that penalises a child who was, or is, acting as a prostitute. Arguably such a situation is best addressed by a welfare approach and, while it might be said prosecutorial discretion can be exercised to ensure that only "appropriate" cases are put before the courts, there is always the potential for a charge to be laid in circumstances where diversion away from the criminal justice system is more desirable.

The same issues arise in terms of sub-sections (b) and (c) of s.14. The circumstances surrounding "triggering" offences are irrelevant to whether or not a person commits an offence under the section. Further, it is unclear as to why conviction for the prescribed offences should automatically result in a further penalty simply on the basis that the person has engaged in prostitution activity. This

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66 For a comprehensive discussion of all three failed Bills see: Crofts, T., and Summerfield, T., "*Red Light on Sex Work in Western Australia*" (2008) 33 Alt LJ 209-213; Larson, A. "*Disembodied Knowledge: Law's Incapacity to Provide Justice for Prostitute in Western Australia*" (2012) Outskirts: Feminisms Along the Edge.

Subcommittee has been unable to find any empirical research establishing a nexus between previous offending and potential, or actual, risk to clients.

Search and Seizure provisions

Notwithstanding the extensive general powers of search and seizure available at common law, and, since 2006, in the *Criminal Investigation Act*, the legislature saw fit to include in the *Prostitution Act 2000* extensive and intrusive powers of search and seizure. Of particular concern is the power contained in section 29 to detain a person, and have him or her subjected to a body cavity search by a medical practitioner or registered nurse. It is not clear to the Subcommittee why such a provision, directed only at those engaged in prostitution, is required when the ability to conduct intimate body searches is already contained in the *Misuse of Drugs Act 1981* and *Criminal Investigation Act 2006*. Further, it is difficult to understand how such an intrusive and invasive procedure can be justified when offences of soliciting or loitering for the purposes of seeking a client are simple offences and, in most cases, carry a maximum penalty of one year of imprisonment.

Arguably, the power to carry out a cavity search is disproportionate to the nature of at least some of the offending behaviour prescribed in the Act. Rather than singling out those engaging in prostitution for "special treatment", equality before the law is, perhaps, better achieved by reliance upon more general powers of search and seizure.

Reverse Onus provisions

Part 6 of the *Prostitution Act* 2000 contains a number of sections that effectively place an evidential and persuasive onus on an accused.

In respect of offences under sections 5(4) (b) and 6(3) (b)(seeking a prostitute; prostitute loitering to find a client), Section 52(1) provides that a person is presumed to engage in the relevant conduct unless she or he establishes the contrary.

Similarly, section 49 requires a person accused of an offence under section 16 (permitting a child to act as a prostitute) to prove that she or he took reasonable steps to ascertain the age of the complainant.[67]

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[67] For a discussion of the statutory scheme in the context of Sections 16 and 49 of the *Prostitution Act 2000* see *R v Hutchinson* [2003] WASCA 323.

It is not clear to the Subcommittee why such provisions, which are contrary to general principles in respect to the burden of proof, are included in the Act.

Liquor Control Act 1988

The Subcommittee has concerns about an amendment to the *Liquor Control Act 1988*, which indirectly discriminates against those who work as prostitutes.

Prior to 2006 a licensee of licensed premises committed an offence if she or he permitted "any reputed thief, prostitute or supplier of unlawful drugs to remain, other than for so long as is necessary to obtain reasonable refreshment… on licensed premises".[68]

In 2005, a review of the then titled *Liquor Licensing Act*[69]recommended an amendment of s.115 to the effect that the ability of a licensee to provide reasonable refreshment be removed. The rationale behind this was that (a) there is an established nexus between licensed premises and illegal or unsavoury activities; (b) reputed prostitutes are undesirable persons; and (c) licensees should not be under an obligation to serve undesirable persons.

It is significant that the prohibition is not based on any form of conduct (e.g. soliciting for prostitution within the premises). Rather, it is that working as a prostitute is sufficient to classify a person as being undesirable and therefore warrants total exclusion from licensed premises.

The recommendation of the Liquor Licensing Independent Review committee was accepted and the relevant section amended to make it an offence to permit a reputed prostitute in licensed premises. Therefore s.115 (4) of the *Liquor Control Act* 1988 empowers a licensee to remove a person from licensed premises purely on the basis he or she is a reputed prostitute.

Conclusion

In terms of prostitution and the sex industry, a summary of the years 1994 to 2014 can be characterised by an emphasis on punitive legislation, increased police powers and procedural reforms designed to enhance the probability of convictions

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68 Section 115(1) (b) *Liquor Licensing Act 1988.*

69 *Report of the Independent Review Committee into the Liquor Licensing Act 1988*, (2005) Government of Western Australia, Perth.

being obtained. At the same time the response of successive governments in terms of more wide ranging law reform has been to establish ad hoc groups, sometimes described as “Community Panels”, to consider sex industry reform and make recommendations. Significantly, the government has not implemented any of the recommendations of these groups, insofar as they relate to regulation of the industry. Further, there seems to have been little, if any, attention paid to discrimination issues.

The fact that a government appointed committee would, in 2005, see fit to make a recommendation that was potentially discriminatory against sex workers and government then saw fit to adopt such a recommendation, leads this Subcommittee, in light of the lack of progress since 1994, to make the following recommendations. These recommendations seek to address specifically some of the more pressing problems that arise under the *Prostitution Act 2000* and, more broadly a consideration of whether, and if so how, the sex industry should be regulated (which should include considering alternative regulatory models such as exists in Sweden)[70] and how to eliminate discrimination against sex workers.

[70] The Swedish model, in which the focus is on the criminalization of the activities of the clients of prostitution rather than the activities of the prostitutes, was the subject of discussion by US legal scholar Professor Catharine MacKinnon from the University of Michigan Law School in a keynote address on human trafficking, prostitution and inequality at the 2014 UWA Law Summer School.

8.6 The Western Australian Parliament conducts a review of the *Prostitution Act 2000 (WA)* to establish if the provisions relating to juvenile offending, search and seizure and reverse onus are justifiable and conform with human rights principles.

8.7 The Western Australian Parliament

i) considers whether the sex industry should be regulated; and if so

ii) considers what is the appropriate regulatory scheme (and when doing so consider alternative regulatory models such as exists in Sweden); and

iii) considers how discrimination against those who work in the sex industry can be eliminated.

HOMICIDE LAWS

SUMMARY AND IMPLEMENTATION OF RECOMMENDATIONS – THE 1994 REPORT AND 1997 PROGRESS REPORT

The issue of gender bias in homicide laws has been a long-standing issue in many jurisdictions. The focus has been on the available defences to murder (and manslaughter), in that women are often seen to be unfairly excluded from the defences and men are often seen to have an unjust advantage in accessing the defences (particularly provocation). Where homicides are committed in the context of domestic violence, the specific nature and experience of that form of violence is sometimes unrecognised in the form or application of the law. Calls for reform have therefore focused on the wording of the laws or the application of provocation as a defence. The issue of gender bias is considered to arise primarily from conscious and unconscious perceptions of the kinds of violence that occur in families.

Recommendations 125 and 153 to 157 from the 1994 Report dealt with reforms to the laws of homicide, in particular the defences of self-defence and provocation, and reforms to the law of evidence in cases of domestic violence, in order to address gender bias in such laws. These recommendations are set out further below.

The 1997 Progress Report[71] dealt only briefly with these recommendations as outlined below. A more extensive consideration of the themes and issues explored in the 1994 recommendations was undertaken by the Law Reform Commission of WA

[71] Gender Bias Taskforce Progress Report 1997, p43.

('LRCWA') in its 2007 final report of the *Review of the Law of Homicide ('Homicide Report'*).[72]

Recommendation 125: That there be judicial recognition of the need for expert evidence to inform juries of the realities of domestic violence**.**[73]

In the 1997 Progress Report it was noted that this recommendation requires the endorsement of the Judiciary. Judicial recognition of 'battered woman syndrome' under the common law dates from the early 1990s in Australia.[74] However this particular recommendation called for further judicial recognition of other kinds of expert evidence concerning domestic violence, for example, from those who have worked for a considerable time in women's refuges.[75] However recommendation 125 was never implemented. The LRCWA also considered this issue in the *Homicide Report.*[76]

For reasons set out below in the discussion of the 2014 recommendations this sub-committee endorses the above 1994 recommendation in that it recommends statutory recognition of this type of evidence.

Recommendations 153 – 157:

In connection with Recommendations 153 – 156 of the 1994 Report, the 1997 Progress Report indicated that the *Criminal Law Officers' Committee of the Standing Committee of Attorneys General* had proposed amendments to the law of self-defence found in the "Model Criminal Code, Chapter 2, General Principles of Criminal Responsibility". It noted that the 1994 Report recommended that the *Criminal Code* be amended as envisaged by the Model Criminal Code but with the addition of a new defence to take account of the realities of 'battered women' who kill their abusers. The 1997 Progress Report indicated that, consistent with this view, the *Criminal Code* was being examined with a view to the clarification of provisions in

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72 Law Reform Commission of Western Australia, *Review of the Law of Homicide, Final Report, Project No 97* (Government of Western Australia, 2007), See generally, Chapters 4 and 6.
73 Refer to paragraph 49 of Chapter 8 of the 1994 Report.
74 *Runjanjic and Kontinnen* (1991) 56 SASR 114; *Osland v R* (1998) 197 CLR 316.
75 1994 Report, pp. 217-218.
76 LRCWA Report pp. 291 – 294.

relation to subjective and objective elements regarding defence of property and person.[77]

The 1997 Progress Report also specifically noted, in connection with Recommendations 153 – 156, that a Bill which amended the *Criminal Code* provisions relating to defence of person and property, was then currently before the Parliament and, in connection with Recommendation 157, that Government policy had endorsed the life sentence by increasing the period prior to review in the *Criminal Law Amendment Act* 1994.[78]

The LRCWA also considered many of these issues in the *Homicide Report* (as noted further below in the Discussion of the 2014 Recommendations).

Recommendation 153: That the Criminal Code be amended with respect to self-defence as envisaged by the Model Criminal Code of the Standing Committee of the Attorney General.[79]

This recommendation has not been implemented. For reasons set out below in the Discussion of the 2014 Review this Subcommittee endorses recommendation 153 from the 1994 Report.

Recommendation 154: That a new defence of self-defence be created to take account of the reality of the lives of women who kill their abusers.[80]

Recommendation 154 focused on the history of violence between the accused and victim and envisaged removing the requirement of 'reasonableness' of response because it was felt the circumstances of a woman who was a victim of on-going violence were too readily misunderstood.[81] This recommendation was not implemented following the 1994 Report. However in 2008 the law of self-defence in WA was ultimately reformed which included providing for a new partial defence to murder of 'excessive self-defence'. These reforms are considered in the Discussion of the 2014 Recommendations below.

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77 Gender Bias Taskforce Progress Report 1997, p15.
78 Gender Bias Taskforce Progress Report 1997, p49.
79 Refer to paragraphs 1 and 31 of Chapter 8 of the 1994 Report.
80 Refer to paragraph 31 of Chapter 8 of the 1994 Report.
81 1994 Report, p214.

Recommendation 155: That in Western Australia provocation be retained as a defence.[82]

Recommendation 156: That provocation be reformulated so that it no longer requires suddenness and proportionality and the need for a specific trigger be deleted and the test becomes a subjective test.[83]

Recommendations 155 and 156 reflected the concern in the 1994 Report that the requirement in provocation[84] of an immediate response to a specific provocative incident failed to recognise the circumstances of those who are subject to on-going abuse where it might be dangerous to respond at the time of a physical attack (typically the case with many women who kill their abusive partners). It was recommended, however, that the provocation defence be retained because it gave recognition to the fact that "otherwise decent people may be provoked beyond human endurance."[85]

Recommendation 156 for the reformulation of the defence of provocation was not implemented. The defence remained unaltered for many years following the 1994 Report.

However, in its 2007 *Homicide Report*, the LRCWA specifically addressed whether the partial defence of provocation should be retained. This was because the defence had become the subject of significant criticism and controversy in many jurisdictions. At that time it had already been abolished in two Australian states and was under review in others.[86] The LRCWA specifically considered criticisms that the defence operated in a gender-biased manner,[87] particularly in the requirement for a final 'triggering incident'[88] and in respect of the circumstances in which the defence is sometimes relied upon by men (e.g. in a non-life threatening situations where extreme violence is used such as separation or a jealous rage) versus the circumstances upon which it is typically relied upon by women (where extreme violence is used for self-preservation). In the end result, in combination with the

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82 Refer to paragraph 46 of Chapter 8 of the 1994 Report.
83 Refer to paragraph 37 of Chapter 8 of the 1994 Report.
84 Which at that time was found in section 281 of the Criminal Code.
85 1994 Report, p214; see also pp215-217.
86 *Homicide Report*, LRCWA, p. 202.
87 *Homicide Report*, LRCWA, pp. 212 - 216.
88 See Tarrant S, '*The "Specific Triggering Incident" in Provocation: Is the Law Gender Biased?"* (1996) 26 UWA Law Review 190.

LRCWA's recommendations for the abolition of mandatory life imprisonment for murder and for reform of the law of self-defence (including the introduction of 'excessive self-defence'), the LRCWA recommended that the partial defence (to murder) of provocation be abolished.[89]

Following these recommendations substantial reforms to the law of homicide (and associated defences) were enacted in WA in 2008, which included abolishing the partial defence (to murder) of provocation.[90]

There is therefore no need for this 2014 Review to further consider recommendation 156.

Note that the provocation defence to assault-based offences (in sections 245 and 246 of the Criminal Code) has been retained.

Recommendation 157: That the penalty for murder no longer be a mandatory life sentence.[91]

Recommendation 157 of the 1994 Report reflected a concern, among others, that it could be unjust to require that a woman who is convicted of murdering her long-term abusive spouse or partner receive a life sentence.[92]

In 2008, also as a result of the recommendations of the LRCWA's 2007 *Homicide Report*[93], the mandatory life sentence for murder was abolished.[94] In its place a sentence of presumptive life imprisonment now applies to an adult upon a conviction for murder "unless…that sentence would be clearly unjust given the circumstances of the offence" and "the person is unlikely to be a threat to the safety of the community". In that case the maximum sentence for murder is 20 years and a judge must give written reasons why a life sentence was not imposed.[95]

There is no need to further consider recommendation 157.

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89 *Homicide Report*, LRCWA, pp. 221 - 223.
90 *Criminal Law Amendment (Homicide) Act 2008* (WA).
91 Refer to paragraph 50 of Chapter 8 of the 1994 Report.
92 1994 Report, p 218.
93 *Homicide Report,* LRCWA, chapter 7.
94 Section10 of the *Criminal Law Amendment (Homicide) Act 2008* (WA).
95 *Criminal Code* (WA), s.279 (4), (6).

DISCUSSION AND RECOMMENDATIONS ARISING FROM 2014 REVIEW

Background

Gender issues can arise in connection with the law of homicide in two distinct ways: first, where a woman kills in response to serious, ongoing violence from her partner and secondly, where a man kills as a final incident of violence against his partner. Similar issues can arise in killings that occur in same-sex relationships. These concerns remain vital, as the following data reveal.

Seven women were killed in Western Australia by their spouse or ex-spouse, between December 2011 and September 2012. Two of those were Aboriginal women. Four men were killed in WA by their spouse in the same period. Three of those four were Aboriginal men. Eleven women were killed in WA by their spouse or ex-spouse, between December 2012 and October 2013. Six of those eleven were Aboriginal women. Three men were killed in WA by their spouse in the same period. Two of those three were Aboriginal men.[96] The disproportionate representation of Aboriginal offenders and Aboriginal victims in this data cannot be overlooked however it is the subject of closer comment elsewhere in this report.[97]

The following principles informed the Chapter 8 Subcommittee's considerations in this area.

i) Laws must be appropriate for the context of domestic and family violence

In order to ensure fairness, homicide laws must take account of the context in which a killing occurs. This means the law must be capable of recognising that:

- the danger or violence involved was on-going, not once-off;
- there was a significant discrepancy between the size and strength, or power, of the offender and the victim; and
- the killing occurred within a network of family relationships.

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96 Data provided by the Women's Council on Domestic and Family Violence Services (WA), (WCDFVS).

97 This is the subject of discussion in chapters 4 and 9 of this 2014 Review Report.

The importance of these features in the context of spousal killings has been recognised for many years and were, in fact, the basis of the homicide law reform in this State.

ii) Homicide laws are domestic or family violence laws

Homicides that are 'gendered' are, generally, acts of, or responses to, domestic or family violence. Homicide laws are therefore part of a set of laws that pertain to families affected by violence. It is unrealistic to consider homicide laws in isolation where in spousal homicides there is a background of violence. In many cases those affected often had contact with social welfare and/or law enforcement agencies prior to the killing.

iii) Domestic and family violence is part of the gender culture of society as a whole

Not only should homicide laws be understood in the broader context of domestic and family violence but the relationships affected by such violence should be understood in the context of how our whole society understands and experiences gender. 'Gendered' homicides are the tip of the iceberg of domestic and family violence. Domestic and family violence is an outcome of the whole society's culture. This means that an understanding of gender in society (including economic analysis and how we 'think about' gender) and gender violence will promote effectiveness of laws.

Self - Defence

The relevant law is contained in section 248 of the *Criminal Code* (WA). This section was enacted in 2008 following closely the recommendations of the LRCWA in the *Homicide Report*.[98] However, as noted in a recent discussion paper published by the LRCWA the precise formulation of the new defence of self-defence is different from the Commission's 2008 recommendation.[99] Section 248(4) of the *Criminal Code* now provides that a harmful act[100] is done in self-defence if:

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98 *Homicide Report*, p172.

99 The LRCWA in 2008 recommended a different test whereby the accused must have believed on reasonable grounds that it was necessary to use defensive force, the accused must have

(a) the person believes the act is necessary to defend the person or another person from a harmful act, including a harmful act that is not imminent; and

(b) the person's harmful act is a reasonable response by the person in the circumstances as the person believes them to be; and

(c) there are reasonable grounds for those beliefs.

However, almost all of the LRCWA's recommendations relating to self-defence were aimed at making the law fairer for women.[101] The significant changes relating to gender were as follows:

- The requirement in the previous section that the accused had been defending themselves against an "assault" was removed; and
- The new s.248 makes clear that an accused may have been acting in self-defence even though the harm they feared was not imminent.

These changes represent significant reforms in that they recognise the danger in domestic and family violence is ongoing, and that there is often a discrepancy in size and strength between the victim and the accused such that an immediate response to a physical attack is not possible.

However, concerns remain about whether self-defence is fairly available to women who retaliate against severe, on-going violence but at a time when they were not being physically attacked. To date, there has been no appellate case in Western Australia dealing with s.248 in the context of a spousal killing. There are also few cases in other Australian jurisdictions that demonstrate the effect of similar legislative change. However, it has been noted that where this reformed version of self-defence has been successfully invoked there was, except in rare instances, a physical attack in progress or imminent.[102] The image of self-defence being limited to direct physical

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believed that the act was necessary in self defence, and the act must have been a reasonable response to the circumstances (as the accused perceived them on reasonable grounds to be). See *Homicide Report*, LRCWA, Recommendation 23.

100 A 'harmful act' is defined as 'an act that is an element of an offence under this Part other than Chapter XXXV'.

101 *Homicide Report*, see generally Chapters 4 and 6.

102 See Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, "*Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand*", (2012) 34 Sydney Law Review 467, 487-489.

combat remains compelling. The idea that a person could plan a killing in self-defence is difficult to entertain but if the law of self-defence is to cater fairly for women in some extreme circumstances, it must encompass that possibility.

Given that s.248 expressly encompasses self-defence against non-imminent danger it is in the application of the defence that gender bias can still operate; that is to say, in how the requirement of 'reasonableness' in the defence is understood. The Subcommittee considered a number of possible amendments and initiatives.

Should the terms of the Code be amended to refer expressly to self-defence in the context of domestic or family violence?

Express reference to a defence where there is a history of violence in a family context is favoured by some as a means of ensuring fair access for those who have been abused. For example, the 1994 Report recommended a defence, in addition to general self-defence, where the defensive force was directed at someone who had perpetrated a "history of personal violence" against the accused.

Queensland is the only Australian jurisdiction that has enacted a context-specific defence. Section 304B of the Queensland *Criminal Code* creates a "killing in an abusive domestic relationship" defence that is a partial defence to murder. A person is guilty of manslaughter where they unlawfully killed another where:

(a) The deceased had committed acts of serious domestic violence against the accused in the course of an abusive domestic relationship;

(b) The accused believed it was necessary for their preservation from death or grievous bodily harm to do the act that caused the death; and

(c) The accused had reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case.

Express recognition allows for rules tailored to the context and there is value in publicly declaring, in the form of criminal legislation, when a type of violence is occurring. On the other hand making a defence context specific carries the danger that cases in which a person has killed in the context of an abusive domestic relationship will tend to be dealt with only under the specific provisions. This can carry the message that self-defence in a domestic context is somehow not the 'real' self-defence founded in general principle. Of greater concern is the possibility that a

lesser defence is in fact provided (i.e. a partial defence where a full acquittal may have resulted from self-defence) as has been argued is the case in s304B of the Queensland *Code*.[103]

The weight of opinion amongst law and policy makers, and those making submissions to law reform and other agencies, is that justice for women who kill abusive partners is best served through the general self-defence provisions.[104] The Subcommittee supports this approach and takes the view that self-defence in the context of domestic or family violence should remain with the general self-defence provisions.

Should the terms of the Code be amended to include an express declaration relating to the relevance of evidence about family relationships?

A suggested approach to promoting fairness in the application of self-defence is the inclusion of an express statement that evidence of the relationship of the victim and accused, or other family relationships, may be relevant.

It is clear this kind of evidence is admissible where an accused claims they acted in self-defence against a violent spouse. All relevant evidence is, *prima facie*, admissible and will be excluded only if an exclusionary rule applies or if a trial judge exercises one of a limited number of discretionary powers to exclude. To the Subcommittee's knowledge there are no specific exclusionary rules that apply to evidence of past violence *towards* an accused. The rule against admission of propensity evidence (i.e. evidence of past acts to show a tendency in a person to commit acts of a certain kind) unless it has significant probative value applies in the case of an *accused's* past conduct, not conduct directed *at the accused*.[105] Similarly, a trial judge's discretionary powers to exclude relevant material operates to protect an accused from the admission of prejudicial evidence or evidence obtained unfairly or in violation of a public duty.

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103 Michelle Edgely and Elena Marchetti, "*Women Who Kill Their Abusers: How Queensland's New Abusive Domestic Relationships Defence Continues to Ignore Reality*", (2011) 13 Flinders Law Journal 125, 139-141.

104 See, for example, "*Women Who Kill Their Abusers: How Queensland's New Abusive Domestic Relationships Defence Continues to Ignore Reality*", *Ibid*; Australian Law Reform Commission and the New South Wales Law Reform Commission, Family Violence – A National Response (2010), pp649-650; *Homicide Report*, p289; Patricia Easteal and Anthony Hopkins, "*Walking in her shoes: Battered Women Who Kill in Victoria, Western Australia and Queensland*" (2010) 35 Alternative Law Journal 132, 135-136.

105 *Evidence Act 1906* (WA), s31A.

The inclusion of an express statutory statement relating to evidence of past family relationships would make clear that the nature of those relationships is likely to be relevant where a spousal killing has occurred and may affect how a case is prepared for trial as well as encouraging relevant evidence to be available to juries.[106]

The facts in issue in a claim of self-defence are one or more of the following:

- the accused believed she was in danger and needed to defend herself with physical force;
- there were reasonable grounds for that belief; and
- the accused did not use unreasonably excessive force in the circumstances she believed existed.

The basis of an accused's belief is therefore relevant: their experience of the victim, including violence, and their knowledge of the victim's conduct and disposition. The nature and extent of past injuries caused by the victim or the victim's controlling behaviour will be relevant. It is also well established that expert evidence of the nature and dynamics of family violence may be relevant and admissible.[107] Evidence of what is reasonably to be expected as an experience of family violence, the range and severity of controlling behaviours, the lack of visibility of the violence from outside the family relationship and the dangers sometimes associated with attempting to leave all bear on the subjective belief of an accused, whether there were reasonable grounds for those beliefs and whether the accused's lethal response was proportionate.

However, the significance of this kind of evidence turns on the acceptance that self-defence can properly be relied on where there is no immediate threat of physical harm, where danger may be ongoing or where responses to danger may involve a network of family relationships. As with the express legislative declaration that the threat need not be imminent (included in the 2008 amendments) an express provision that this kind of evidence may be relevant makes clear that self-defence in family contexts may be available. The LRCWA, the Australian Law Reform Commission and the New South Wales Law Reform Commission all recommend that

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106 See, for example, *Homicide Report*, pp. 292-293.

107 *Runjanjic and Kontinnen* (1991) 56 SASR 114; *Osland v R* (1998) 197 CLR 316.

such guidance on evidence be included in legislation.[108]The Subcommittee is persuaded by the arguments in favour of an express legislative statement relating to the relevance of evidence of past family relationships.

Two Australian jurisdictions have introduced provisions relating to the kinds of evidence that can be brought in self-defence trials involving family violence. Victoria introduced s9AH into the *Crimes Act 1958* in 2005 and Queensland introduced s132B into the *Evidence Act 1977* in 2010.

Section 9AH of the *Crimes Act 1958* (Vic) sets out six kinds of evidence that "may be relevant in determining whether" an accused believed it was necessary to defend herself or himself. The section applies to self-defence raised in the context of a charge of murder, manslaughter or defensive homicide.[109] It covers evidence of:

(a) The history of the relationship between the accused and a family member including violence involving the accused and the victim of the offence charged;

(b) The cumulative effect of the violence;

(c) Social, cultural or economic factors that impact on the accused or family member affected by family violence;

(d) The general nature and dynamics of relationships affected by family violence, including possible consequences of separation;

(e) The psychological effects of family violence on people; and

(f) Social or economic factors that impact on people affected by family violence.

Definitions of "family member", "family violence", "violence" and other terms are defined in the same section.

Section 132B of the *Evidence Act 1977* (Qld) provides that "relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed" is admissible in evidence in relation to offences

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[108] *Homicide Report,* pp292-293; Australian Law Reform Commission and the New South Wales Law Reform Commission, *Family Violence – A National Response* (2010), p 654.

[109] Defensive homicide is a form of excessive self-defence and is discussed below.

defined in Chapters 28 to 30 of the *Criminal Code* (Qld). Those offences include homicides, offences endangering life or health and assaults.

The Subcommittee favours the Victorian model that provides clear guidance about the sorts of evidence that may be adduced. In addition, the Victorian model declares that relationships between the victim and other family members may be relevant whereas the Queensland legislation limits the evidence to that of the relationship between the victim and the accused.

8.8 The Western Australian Parliament enacts a new provision of the *Criminal Code* (WA) in terms that correspond to s.9AH of the *Crimes Act 1958* (Vic) whereby certain types of evidence are recognised as being possibly relevant to determining whether an accused person believed it was necessary to defend herself or himself.

Should the defence of self-defence be amended so that its evidentiary components are consistent with self-defence provisions in other jurisdictions?

All self-defence laws create requirements relating to:

- perception of danger; and
- response to danger.

In addition, all self-defence laws determine which aspects of these requirements are subjectively or objectively determined. In fact, with one exception,[110] all Australian laws of self-defence require each element to be determined either subjectively or by a mixed objective and subjective inquiry but different jurisdictions arrange these elements differently.

Western Australia's formulation of self-defence is unique with respect to which aspects should be determined subjectively and which are determined objectively and subjectively. There is no evidence that one or other of the formulations of self-defence is better,[111]however, the lack of consistency is very probably a barrier to fairness for women. The lack of national consistency between different legislative

[110] The purely objective requirement of "assault" remains in the *Criminal Code* (Qld), s271.

[111] Recent data reported in Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, "Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand", (2012) 34 *Sydney Law Review* 467, 485-492, bears this out.

schemes also makes comparison of these schemes between jurisdictions problematic.[112] Further discussion of this occurs below.

The Subcommittee recommends, in order to promote national consistency, section 248 be amended in line with the model found in the *Commonwealth Criminal Code*, and similar provisions in New South Wales, the ACT and the NT. This was the model recommended by the 1994 Report. From a gender equality perspective this model is desirable because all considerations of 'reasonableness' are gathered into one element, making the process of dealing with this problematic element simpler.

8.9 The Western Australia Parliament amends section 248 of the *Criminal Code* (WA), in order to promote national consistency in the laws of self-defence, so that its terms correspond to the self-defence provisions in the *Criminal Code 1995* (Cwlth), the *Crimes Act 1900* (NSW), the *Criminal Code 2002* (ACT) and the *Criminal Code* (NT).

National Consistency in Legislation

All Australian jurisdictions have reformulated homicide laws with the aim of achieving fairness for women in accessing defences and preventing unfair application of the law. However, as already touched upon, there is significant difference in approach between jurisdictions. There is now a danger that the need for 'translation' between jurisdictions will occupy too much attention and prevent data and lessons from each jurisdiction benefiting everyone. Therefore, national consistency should be a principle underpinning any further reform. The Australian Law Reform Commission and the New South Wales Law Reform Commission have called for this approach with respect to family violence laws generally, including homicide laws,[113] as has the National Council to Reduce Violence Against Women and their Children.[114] However, while the Subcommittee endorses an approach that promotes national consistency in homicide laws, we do recognise that national consistency is made more difficult because the criminal laws of some states and territories remain

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112 Australian Law Reform Commission and the New South Wales Law Reform Commission, *Family Violence – A National Response* (2010), pp. 140-143; 648-654; National Council to Reduce Violence Against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children 2009-2021* (1009), Outcome 6.

113 Australian Law Reform Commission and the New South Wales Law Reform Commission, *Family Violence – A National Response* (2010), pp. 140-143; 648-654

114 *The National Plan for Australia to Reduce Violence against Women and their Children 2010-2021,*Department of Social Services (2009), Outcome 6.

codified (such as in WA) and others are not in that form (and also include concepts such as *mens rea* which do not apply in WA).

Excessive Self-defence

Excessive self-defence is a partial defence to murder created by section 248 (3) of the *Criminal Code* (WA), which provides:

> s. 248 (3) If —
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> (a) a person unlawfully kills another person in circumstances which, but for this section, would constitute murder; and
>
> (b) the person's act that causes the other person's death would be an act done in self-defence under subsection (4) but for the fact that the act is not a reasonable response by the person in the circumstances as the person believes them to be, the person is guilty of manslaughter and not murder.

Following the recommendations of the LRCWA excessive self-defence was introduced in 2008 at the same time provocation was abolished. New South Wales[115] and South Australia[116] have also introduced excessive self-defence. Victoria created a new offence with the same aims called 'defensive homicide'.[117] Other jurisdictions have rejected excessive self-defence and the defence no longer exists at common law.[118] The LRCWA recommended abolishing the partial defence of provocation (which reduced murder to manslaughter) primarily on the basis that it was unjustly relied on by men who had killed a female partner[119] and partially excused extreme violent outbursts of anger generally.[120] However, the LRCWA considered it undesirable to have no partial defence to murder because this might result in unjust murder convictions. In some cases where a woman killed her abusive spouse, the partial defence of provocation appears to have been used by the jury as a 'half-way house'. Defensive force more fairly represents the actions of a woman in these

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115 *Crimes Act 1900* (NSW), s421.
116 *Criminal Law Consolidation Act 1935* (SA), s15 (2).
117 *Crimes Act 1958* (Vic), ss9AC-9AD.
118 *Zecevic v DPP (Vic)* (1987) 162 CLR 645.
119 Or had killed in response to a non-sexual homosexual advance.
120 *Homicide Report*, pp. 210-217.

circumstances (than does provocation) and excessive self-defence was enacted to ensure women were not disadvantaged in the absence of a partial defence.[121]

The criticism of excessive self-defence in this context is that juries could too readily rely upon it. The primary focus of the law relating to killing in response to domestic violence should be self-defence.[122] Where there is limited understanding of the dynamics of domestic violence, a jury may convict of manslaughter on the basis of excessive self-defence because the reasonableness of a woman's response is not perceived. Thus, the defence could lead to compromise verdicts rather than provide a 'safety net' and could undermine the recognition of domestic violence.[123]

In the context where men have killed, the concerns about excessive self-defence focus upon the likelihood of this defence operating in practice as provocation did; as a partial excuse for outbursts of anger/violence. In October 2013 the Victorian Department of Justice published a consultation paper on 'defensive homicide' that proposed that it be abolished.[124] This is on the basis that there is no clear evidence that it is working to provide a 'safety-net' although there is evidence that it is providing a partial excuse for violence committed when the offender was out of control, rather than acting defensively.[125]

It is acknowledged that excessive self-defence in Western Australia could operate in a way similar to the way defensive homicide has operated in Victoria and carries the same risk of being gender biased. However, the Subcommittee remains convinced of the importance of the risks associated with there being no partial defence to murder, in particular the risk of unjust murder convictions where a woman has killed in response to serious domestic violence. Therefore, on balance, the Subcommittee considers that excessive self-defence should be retained however we recommend that its operation should be monitored for gender bias issues.

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121 *Homicide Report*, pp. 178-183; Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, "Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand", (2012) 34 *Sydney Law Review* 467, p 479.

122 Department of Justice, Victoria, *Defensive Homicide: Proposals for Legislative Reform, Consultation Paper* (2013), pp. 13, 88.

123 Ibid, pp. 25-27.

124 Department of Justice, *Defensive Homicide: Proposals for Legislative Reform,* p1.

125 Since its enactment in 2005, 25 of the 28 offenders have been men. Of the three female offenders, two pleaded guilty and only one was convicted after trial. The Victorian Department of Justice concluded that it was "*apparent that defensive homicide will, if relevant, only be relevant in a small number of cases in which a woman kills a man; be relevant in a significant number of cases in condoning or excusing male violence and continuing a culture of blaming the victim; and sometimes be relied upon by a man who kills a woman partner."*

8.10 Sub-section 248(3) of the *Criminal Code* (WA), which creates a defence of excessive self-defence, is retained and its operation monitored by the Western Australian Government to determine its impact upon women.

Unlawful Assault causing death - Section 281 *Criminal Code* (WA)

A new section 281 was inserted into the *Criminal Code* (WA) in 2008.[126] It now provides:

(1) If a person unlawfully assaults another who dies as a direct or indirect result of the assault, the person is guilty of a crime and is liable to imprisonment for 10 years.

(2) A person is criminally responsible under subsection (1) even if the person does not intend or foresee the death of the other person and even if the death was not reasonably foreseeable.

Section 281 effectively abolishes the defence of accident for this offence and imposes a lower maximum sentence (10 years) than for section 280 (Manslaughter - which now carries life imprisonment).

In the second reading speech of the Bill introducing the new provision the then Attorney General, the Hon. Jim McGinty, said:

> *"This new offence is to address the so-called one-punch homicide cases. An example of these types of cases is when a person who is punched falls to the ground and suffers a blow to the head from hitting the ground and dies … As the law currently applies, offenders who are charged with manslaughter in such cases are often acquitted on the basis that the death was an accident. A death will be an accident when it was not reasonably foreseeable that death would result as a consequence of the punch."*[127]

Despite the intended operation of section 281 it has also been used in prosecuting offenders for killings that have resulted from an act of domestic violence. There has been significant public concern expressed about the use of section 281 (with its lower maximum penalty) in the context of a domestic violence killing instead of murder or manslaughter. There have been a number of high profile domestic

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126 No.29 of 2008, s. 12, inserted section 281.

127 The Hon. Jim McGinty MLA, *Hansard*, Parliament of Western Australia, Legislative Assembly, 19 March 2008, p1209c-1212a.

violence cases in which it was used and it was considered that lenient sentences were imposed.[128] The most notable of these cases involved the victim Saori Jones[129] who died in 2010 following an assault by her husband Bradley Jones who had punched her to her head and fractured her skull during an argument. The accused did not seek any medical help for her after placing her in a bedroom after the assault where she later died.[130]Her body was not found by the police until almost 2 weeks after her death, despite concerns being raised with police by welfare workers which meant that her cause of death could not be clearly established.[131]Bradley Jones was convicted of assault causing death under s.281 and sentenced to 5 years imprisonment. There have also been other cases in which a woman's death in the context of domestic violence has resulted in a conviction for this offence.[132]

The gender issues raised by s. 281 are as follows.

Assault causing death is a lesser offence

The problem with using section 281 in the context of domestic violence killings is that it sends out a message that those killings are less serious than manslaughter or murder. The labeling of the offence itself suggests the death occurred as the result of a (mere) 'assault'. Moreover, the legal distinction between this offence and manslaughter is that the offences under section 281 involve accidental deaths; if they were not accidental deaths they would be prosecuted as manslaughter. Where the killing is a perpetuation of spousal violence this is problematic. The lower maximum sentence clearly creates a lesser offence. In four cases where the offender killed his female partner and was convicted of section 281 assault causing

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128 In May 2012 the Western Australian Parliament received a petition from over 2,600 residents expressing concern about the inappropriate use of the offence of unlawful assault causing death for family and domestic violence related fatalities.

129 The issue of her death and the disquiet about the subsequent prosecution was also the subject of numerous comment and discussion in the WA Parliament: see http://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/f9c561f03ed4f867482579300016548c/$FILE/C38%20S1%2020111018%20p8134b-8135a.pdf

130 The workers at a women's refuge knew and had assisted Saori because there had been a background of domestic violence with the accused.

131 *The State of Western Australia v Jones* [2011] WASCSR 136. For the public concern see, for example, "WA push to deter domestic slayings", AAP Newswire, 24 September 2012; and ABC TV, *Four Corners*, 30 July, 2012.

132 *The State of Western Australia v Warra* [2011] WASCSR 17; Unreported, *The State of Western Australia v Zyrucha* No 127 of 2009 WASC; Unreported, *The State of Western Australia v Indich,* No 211 of 2009 WASC.

death the sentences were: five years,[133] five years,[134] three years and six months[135] and two years and ten months.[136] The facts of each of these cases are set out by the LRCWA in its recent discussion paper on family and domestic violence laws.[137] Whilst caution should be exercised when comparing sentences, it can probably be said with some confidence that these are more lenient sentences than manslaughter would generally attract. The Women's Council for Domestic and Family Violence Services (WCDFVS) is strongly of the view that these sentences are too low and that they send the wrong message to the public about the seriousness of domestic violence. The Human Rights Law Centre has also concluded that s. 281 discriminates against women when applied in cases where domestic violence forms a background to a killing.[138]

The Subcommittee notes that the LRCWA has recently indicated that, based on data received from the DPP's office regarding the use of s. 281[139], they do not consider there is sufficient evidence to sustain the contention that the offence of assault causing death has been inappropriately charged in cases of family and domestic violence related fatalities.[140]

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133 Unreported, *The State of Western Australia v Zyrucha* No 127 of 2009 WASC

134 *The State of Western Australia v Jones* [2011] WASCSR 136

135 Unreported, *The State of Western Australia v Zyrucha,* Ind no. 127 of 2009 WASC

136 Unreported, *The State of Western Australia v Indich,* Ind no. 211 of 2009 WASC.

137 *Enhancing Family and Domestic Violence laws*, LRCWA Discussion Paper, Project 104, December 2013, pp. 162 – 163.

138 "Domestic violence is a distinctive and complex type of violence, importing concomitant complexities around evidence. … the application of the unlawful assault causing death offence in cases of domestic violence homicide constitutes impermissible discrimination and a failure to act with due diligence in responding to violence against women."

139 Since August 2008 until the end of 2012 there have been 18 indictments and 13 convictions for this offence. There have also been no further convictions for assault causing death involving a family and domestic relationship since 2012. For six of the 13 matters the victim and offender were in a family and domestic relationship (as defined under the *Restraining Orders Act*). The sentences imposed for the 13 matters resulting in a conviction ranged from 1 year 4 months' imprisonment to 5 years' imprisonment. The DPP indicated that, overall, the periods of imprisonment imposed for assault causing death where the offender and the victim were in a family and domestic relationship have been higher than for non-family and domestic relationships. For eight of the 13 matters resulting in a conviction, the offence of assault causing death was an alternative to murder/manslaughter (i.e. the offence of assault causing death was not the original charge preferred). It was also clarified by the DPP that in some circumstances, *assault-causing death* is the appropriate charge because the evidence is contradictory in relation to the cause of death and it will not be possible to negate the defence of accident for a charge of manslaughter. The DPP emphasised to the LRCWA that, in the absence of the offence of assault causing death, some fatalities caused in family and domestic violence cases would go unpunished: LRCWA, *Enhancing Family and Domestic Violence laws*, Discussion paper, Project 104, December 2013, pp.161 - 162.

140 LRCWA, *Enhancing Family and Domestic Violence laws*, Discussion paper, Project 104, December 2013, p.163.

There is also a further issue that arises in respect of s. 281 and that is the possibility that when a women kills her abusive partner she is much less likely to be charged under s. 281 for inflicting a 'one-punch assault' that results in death as women are more likely to resort to the use of a weapon where they are facing someone of greater size and strength. This 'disproportionate' use of weapons by women in domestic killings has (along with requirements for an imminent response) been the subject of trenchant criticism of homicide laws over a long period. Accordingly women are more likely to be charged with manslaughter or murder offences although they may seek to rely upon the defence of excessive self-defence that, in the case of a murder charge, has the effect of reducing murder to manslaughter. Such an offender is then still subject to the higher penalty that applies to manslaughter. Comparisons might be made with sentences for manslaughter in other jurisdictions where there has been a background of domestic violence. Recent Victorian statistics show that in the four such cases of 'defensive homicide' manslaughter prosecuted between 2005[141] and 2013 the sentences ranged from seven years to 12 years. The convictions in these cases imply that the offender was acting defensively but used excessive force. In each case, except the sentence of 12 years, the offender was a woman.

Defensive homicide manslaughter, of course, involves a finding that the offender intended to inflict very serious harm on the deceased. Although this is a different construction from assault causing death, it still reveals a gender bias. While it may appear 'obvious' that an "assault" is different from an "armed attack" and should therefore be prosecuted differently and attract a lesser punishment, those who kill by "assault" in a domestic violence context are more likely to be men.

The counter argument[142] that section 281 promotes justice for female victims of domestic violence is that it provides an alternative prosecution where a prosecution for manslaughter (or murder) is not open. The Subcommittee understands that the principal reason for not proceeding with a manslaughter prosecution in the case of Saori Jones was that there was insufficient evidence of the cause of her death (and accordingly a defence of accident to a manslaughter charge could have been likely

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141 When the offence was created.

142 This view was expressed by the DPP Mr. Joe McGrath SC in consultations with members of this Sub-committee (and also provided during consultations with the LRCWA – see in above footnote).

to succeed). We agree that a significant injustice to women would arise if there were no prospect of any prosecution being brought in the case of spousal deaths that occur as a result of domestic violence.

However the Subcommittee's concern is that s.281 ought not to be the preferred charge in the case of a man who kills his female spouse/intimate partner when the evidence is available that would establish manslaughter or murder. It is not in the public interest to proceed with a lesser charge of assault causing death even where a suspect is prepared to plead guilty to that offence provided there are reasonable prospects of conviction of a more serious offence. In this context the Subcommittee notes that the DPP's *Statement of Prosecution Policy and Guidelines 2005* indicates that whilst ordinarily the most serious charge disclosed by the evidence will be laid or proceeded with, it also recognises that there may be other factors which suggest that it may be appropriate to lay or proceed with a less serious charge.[143]These guidelines need to be reformed to provide greater certainty in cases where prosecutors might be considering charging under s.281 in the context of a domestic violence killing. This is discussed further below.

The existence of s.281 means that defence lawyers are entitled to argue for, and juries able to convict of, the alternative offence of assault causing death even where an accused is tried for manslaughter or murder. The Subcommittee is concerned that s.281 does not become (as has been the case with the Victorian offence of 'defensive homicide'[144]) a compromise conviction that raises gender issues.

The Subcommittee recognises that is now very difficult to properly assess whether section 281 has been appropriately used to prosecute offenders for spousal killings that would have otherwise gone unpunished.[145]However, on the other hand, it should be possible, going forward, to ascertain whether it is being appropriately used to prosecute offenders for spousal killings or, instead, functioning as a 'compromise' conviction as described above. To do this more detailed information than appears to be currently made available is required about all such cases in which charges are

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143 Refer to paragraph 58(a) of DPP's Statement of Prosecution Policy and Guidelines 2005.

144 See discussion above on excessive self-defence

145 Either because the defence of accident precluded prosecution or because the defence of accident was successfully raised on a trial for manslaughter or murder resulting in the acquittal of the accused.

prosecuted or a conviction is obtained under s.281.[146]It is therefore recommended that in order to properly monitor the appropriate use of the various provisions available to prosecute unlawful killings, the DPP should make available comprehensive data about the prosecution of all spousal or intimate partner killings that occur in the context of domestic violence and report annually on the results of any such prosecutions.

8.11 The DPP reports annually on the results of any prosecutions that concern spousal or intimate partner killings, such as the offence charged and the outcome of the prosecution and including whether a guilty plea was entered or the result of a jury verdict.

Provocation is a defence to assault causing death

The partial defence of provocation (to murder) was abolished in Western Australia in 2008. However, section 246 of the *Criminal Code,* the defence of provocation to an assault, remains. This means that a person charged under s.281 (unlawful assault causing death) can raise the defence of provocation. The partial defence of provocation was abolished because it was seen to condone violence. It was relied on to excuse outbursts of violence, overwhelmingly by men, as the requirements of immediate response and once-off conflict reflected typically male, not female, responses.[147] All these concerns, which motivated the abolition of provocation, are raised again in the context of s.281.

Proposals for Reform

The Subcommittee considered the following proposals for reform.

- *Repeal of section 281*: If s.281 were repealed the problems associated with it being a lesser offence, the availability of the provocation defence and the failure of the provision to reflect the realities of domestic violence could be addressed. However, as noted above, repeal would also risk an offender avoiding conviction for a non-intentional killing of their spouse or intimate

[146] In the Subcommittee's view this would require data on cases that are prosecuted under section 281 because manslaughter was considered unlikely to succeed, those in which manslaughter is charged and a plea of guilty to assault causing death is accepted and those in which manslaughter is prosecuted but a jury returns a verdict of guilty of assault causing death.

[147] *Homicide Report*, pp210-217.

partner if, in a case where manslaughter was instead charged, an accident defence could be raised successfully. The Chapter 8 Subcommittee also recognises that s.281 serves a legitimate public purpose in contexts other than in a case of on-going spousal or intimate partner violence and therefore does not recommend the repeal of s. 281;

- *Prosecutorial guidelines*: As indicated above the Subcommittee proposes that prosecutorial guidelines be developed that s. 281 not be used where there has been a background of domestic violence between the victim and the accused, provided there are reasonable prospects of conviction in respect of a more serious offence. This proposal would address some of the gender issues raised by the use of s. 281 in a domestic violence context;[148]
- *An aggravated form of the offence*: A proposal for amendment to the *Criminal Code* to provide for an aggravated form of the s. 281 offence, attracting a higher maximum penalty of 20 years in the context of domestic violence, was put before the WA Parliament in 2012 (in a private members Bill[149]more commonly referred to as "Saori's Law") and failed. At the time the Attorney General Michael Mischin did not support the proposed amendment as he indicated that the LRCWA would be undertaking a comprehensive review of the laws concerning family and domestic violence. That review is now underway and, as already noted, in an interim discussion paper published in late 2013, the Commission presents useful information about the use of s. 281 for death occurring in the context of family and domestic violence cases. The LRCWA also raises the possibility of an increased maximum penalty for an aggravated form of the s. 281 offence. There are of course aggravated forms of many other offences in the *Criminal Code*. This approach would alleviate the problem associated with perception that this is a lesser offence. It would not resolve the issues associated with provocation or the model underlying the offence.

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148 This approach may have been taken in Victoria with respect to defensive homicide. There has been only one case in Victoria, which occurred in 2010, in which an offender who killed his female spouse was convicted of this offence. This was followed by a public outcry equivalent to that in WA following the case involving the conviction of Bradley Jones for Saori Jones' death. The Victorian provision has not been applied in that context again.

149 The *Criminal Code Amendment (Domestic Violence) Bill* 2012

In conclusion, the Subcommittee is of the view that the use of s.281 to prosecute an offender for a death of a spouse that occurs following a history of violence towards the spouse by the offender is inappropriate. It creates a model of offending that directly contradicts the experience of women who are the subject of on-going abuse by an intimate or former partner and re-introduces into the criminal law concerns that have been canvassed for decades as being unfair. However for the reasons outlined above the Subcommittee does not recommend repeal of this provision but instead endorses the development of new prosecution guidelines concerning the use of s.281, or in the alternative, that an aggravated form of the offence be created to apply to a non-intentional killing which occurs in the context of family or domestic violence.

8.12 The Director of Public Prosecution *Prosecution Guidelines* are amended to the effect that where there has been a history of domestic violence by the accused against the deceased, a murder or manslaughter prosecution is preferred where appropriate, in preference to a prosecution under section 281 of the *Criminal Code*.

8.13 An aggravated form of the offence in section 281 of the *Criminal Code* (WA) should be created which carries maximum sentence of 20 years. The circumstance of aggravation is that the killing occurred in the context of family or domestic violence.

Concluding comments: the relationship between the culture of gender, domestic and family violence and Homicide laws

Underlying the Subcommittee's consideration of *homicide laws* is the question of how society prevents domestic homicides from occurring?

It is widely recognised that elimination of domestic and family violence requires cultural change relating not only to attitudes to the violence itself but to beliefs and practices about gender and the 'ways we think' which inform economic and social policy. This Subcommittee endorses an approach that recognises that the high rates of domestic and family violence (including homicides that occur in this context) will

not be significantly addressed unless society addresses cultural beliefs and practices about gender and domestic and family violence.[150]

Therefore the Subcommittee believes priority funding and resources should be allocated to strategies that are aimed at shifting 'ways of thinking' about gender. This approach also recognises the importance of long-term programmes and the relevance of building and maintaining communities and supporting individuals. A long-term approach advocated by the WCDFVS includes the following priorities:

- an investigation of and public and professional education about how beliefs about gender can be embedded invisibly in cultural institutions such as language and the media;
- *relationship* education in Western Australian schools;
- assistance to Aboriginal women and addressing the conditions that permit disproportionate rates of violence against them;
- the economic and social policies underpinning homelessness; and
- the economic and social policies underpinning loss of paid employment.

As these issues are the subjects of other diverse recommendations in the 2014 Review Report the Subcommittee does not make any specific recommendations in this context.

CRIMINAL IDENTIFICATION LAWS

DISCUSSION AND RECOMMENDATIONS ARISING FROM THE 2014 REVIEW

Gender bias issues in the application of criminal identification laws were not considered in either the 1994 Report or the 1997 Progress Report. However due to recent amendments to the *Criminal Identification (Identifying People) Act* 2002 (WA), the Subcommittee[151] has considered these issues[152] which fall within the terms of reference of this 2014 Review. The new provision (sometimes referred to as the new

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150 Much of the discussion is based on materials provided by WCFDVS and discussions with Ms. Angela Hartwig, CEO of that organisation.

151 UWA Law Student Rachel Lee substantially assisted the Subcommittee in compiling this section of chapter 8. Rachel carried out both the research and consultations on behalf of the Subcommittee.

152 Clause 10 of the *Criminal Investigation (Identifying People) Amendment Act* 2013 amends s.16 of the *Criminal Identification (Identifying People) Act* 2002.

'burqa law') has potential application to Muslim women who wear traditional headwear as it gives police the power to request a person remove a "face covering" to verify personal details. The Subcommittee considered whether this law might have a disproportionate, negative impact upon Muslim women in WA who wear traditional headwear.

Background

Different kinds of Islamic headwear include the hijab, niqab, chador and burqa.[153] The burqa is a long garment that covers the hands, feet and face and is associated with Afghanistan. The hijab covers the hair and neck, leaving the face exposed and is commonly worn by Muslim women from Indonesia and Malaysia. The niqab covers the face and hair, but not the whole body like the burqa. The chador is a long garment that covers the head and body.

The new Western Australia Police power to request removal of a face covering for identification purposes was drafted in response to an incident in NSW, involving a male police officer breathalysing a female driver, Carnita Matthews, who was wearing a niqab.[154] After the breath test, Matthews lodged a complaint at the police station about the conduct of the police officer while breathalysing her. She signed a statutory declaration to confirm the complaint in the presence of a Justice of the Peace. Police later found that footage of the incident did not support Matthews' allegations. She was convicted for knowingly making a false complaint about an officer, and initially sentenced to six months imprisonment.[155] On appeal, it was held it was impossible to prove Matthews was the person who signed the declaration in the presence of the JP because she was veiled by a niqab.[156] Following the incident there was extensive public debate on whether police should have power to request removal of religious headwear to identify a subject.

Muslim women choose to wear headwear for different reasons including as a feminist statement. Some Australian politicians have suggested Islamic headwear is

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153 Human Rights and Equal Opportunity Commission, *Isma Report: national consultations on eliminating prejudice against Arab and Muslim Australians,* June 2004, p. 21, retrieved 30 August 2013 from <https://www.humanrights.gov.au/publications/isma-listen-report>.

154 Mrs Liz Harvey MLA, Western Australia Parliamentary Debates, (Hansard), Legislative Assembly, 20 June 2013 p. 1933a; Hon Michael Mischin MLC, Western Australia Parliamentary Debates, (Hansard), Legislative Council, 7 August 2013, p. 2890a.

155 *R v Carnita Matthews* (Local Court of Campbelltown, Mr Rabbidge LCM, 19 November 2010).

156 *Carnita Matthews v R* (District Court of NSW, Jeffreys J, 22 June 2011).

a symbol of oppression.[157] These views are not necessarily representative of a majority view of Australian parliaments or the community but they do illustrate there are a variety of views on religious headwear. It has been reported that Muslim women face widespread discrimination in the Australian community, particularly since the 11 September 2001 attacks in the United States and the Bali bombings of October 2002.[158] Muslim women in Australia who wear traditional dress stated they felt more vulnerable to attack and abuse after these events.[159] They also reported restricting their movements, seeking safety in numbers and feeling more isolated.[160]The Subcommittee considers it is important that the dignity and personal choice of Muslim women to wear traditional dress is respected when considering possible police identification powers.

The Minister for Police, the Hon. Liz Harvey, introduced the Bill into the Legislative Assembly on 20 June 2013 to amend section 16 of the *Criminal Investigation (Identifying People) Act 2002* (WA), amongst other changes. Section 16 in the Bill applied where a police officer suspects someone is "committing, has committed or is about to commit an offence" or "may be able to assist in the investigation of an offence…" the officer may request a person to give the officer their personal details: s.16 (2). If a request under s.16 (2) is made, or personal details are requested under another law, the officer may request the removal of "headwear": s.16 (4A). "Headwear" includes "clothing, hat, helmet, mask, sunglasses or any other thing worn by a person that totally or partially covers the person's head": s.16 (1). The officer may also detain a person for a reasonable period to ensure compliance unless there is a "reasonable excuse": s.16 (4C). The penalty for failure to comply is 12 months imprisonment: s.16 (6).

The use of the phrase "headwear" was criticised in some sectors. A key concern was that the hijab, that does not cover the face, would need to be removed. After

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157 WA Minister for Women's Interest, Robyn McSweeney has stated her belief that the niqab and burqa are inherently oppressive. Federal MP Reverend Fred Nile cited a statement from Senator Cory Bernardi with approval in NSW Hansard in June 2010: "In my mind the burka has no place in Australian society. I would go as far as to say it is un-Australian. To me the burka represents the repressive domination of men over women which has no place in our society and compromises some of the most important aspects of human communication."

158 Human Rights and Equal Opportunity Commission, Isma Report: National consultations on eliminating prejudice against Arab and Muslim Australians, June 2004, p. 3, retrieved 30 August 2013 from <https://www.humanrights.gov.au/publications/isma-listen-report>.

159 Ibid.

160 Ibid, p. 78.

consultation with the Muslim and Sikh communities the wording was changed in the Bill to "face covering" which is defined as "an item of clothing, hat, helmet, mask, sunglasses or any other thing worn by a person that totally or partially covers the person's face". Limiting the law to apply only to "face covering" rather than "headwear" still means that women wearing the burqa or niqab will have to remove that item to reveal their faces, however they may not need to remove the whole garment. Women wearing the hijab will not need to remove their garment at all provided their face can be seen.

The Subcommittee agrees with the amendment made to the Bill, although one member of the Subcommittee argued that the provision should have included entire removal of a head covering because the full appearance of the head, hair, ears and shape is necessary for safe identification. Furthermore, only full headshots are used for comparison purposes on photo boards and this member does not see why different standards of identification should apply. Given it is unlikely the law will be amended to revert to the phrase "headwear" in the original Bill, this Subcommittee has not recommended amending the law to refer to "headwear" rather than "face covering". The Subcommittee also recognises that most women would carry photographic identification such as a driver's licence that could be held up against their face to identify them without the embarrassment of removing headwear that only covers the hair and neck.[161]

Accordingly the key features of the new law include the power of the police to request a "face covering" be removed, the power to detain if this request is not complied with unless there is a "reasonable excuse", and that failure to comply is an offence with a penalty of 12 months imprisonment.

Other Jurisdictions

The new Western Australian law follows similar law reform in other States. In response to the Carnita Matthews incident, the NSW legislature introduced an amendment to the *Law Enforcement Powers and Responsibilities Act 2002* (NSW) on 1 November 2011 to insert Division 4, Part 3. Part 3 gives police the power to

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[161] Mr. Chris Tallentire MLA, Western Australia Parliamentary Debates, (Hansard), Legislative Assembly, 6 August 2013, p.2641; Ms. Janine Freeman MLA, Western Australia Parliamentary Debates, (Hansard), Legislative Assembly, 6 August 2013, p. 2650.

request removal of a “face covering” for identification purposes. In the Part, "face" means a person’s face “from the top of the forehead to the bottom of the chin, and between (but not including) the ears”, and "face covering" means “an item of clothing, helmet, mask or any other thing that is worn by a person and prevents the person’s face from being seen (whether wholly or partly).”

Section 19A of this NSW law sets out the police power to require removal of face coverings for identification purposes. A police officer can require removal of any face covering where a person must provide “photo identification” or “identification of particulars” under “this or any other Act or statutory instrument”. Under section 19A(3), a police officer who requires a person to remove a face covering must, as far as is reasonably practicable, ask for the person’s co-operation and the viewing of the person’s face must be conducted in a way that provides reasonable privacy for the person if the person requests privacy and as quickly as is reasonably practicable. The requirement to ask for a person’s co-operation and provide “reasonable privacy” is a feature of the law that distinguishes it from the approach in Western Australia.[162]

Under section 19B of the NSW law, failure to remove a face covering when required, without special justification, could lead to 12 months imprisonment or 50 penalty units ($5500) if the request is made in connection with an indictable offence, or in any other case, two penalty units ($220). Special justification concerns medical reasons or a purpose in the regulations (none are yet prescribed).

In the ACT, the *Road Transport (General) Act* 1999 also contains a police power to request removal of a face covering. Under s.58B, a police officer may direct a person (“directed person”) to remove anything that “covers all or part of the person’s face” to identify the directed person or carry out a test of analysis under the *Road Transport (Alcohol and Drugs) Act* 1977. If “a thing a person is directed to remove is worn by the person for genuine religious or cultural reasons”, then s.58B (3) applies. In s.58B (3) a directed person may ask to remove the thing in front of someone of the same sex and/or “at a place or in a way (or both) that gives the directed person reasonable privacy to remove the thing.” Section 58B(4) states that a police officer must take “reasonable steps” to comply with a request under s.58B (3) but s.58B (5) qualifies

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[162] NSW Ombudsman, *Review of Division 4, Part 3 of the Law Enforcement (Powers and Responsibilities) Act 2002: face coverings and identification,* August 2013, retrieved 12 September 2013 < http://www.ombo.nsw.gov.au>.

that failure to take reasonable steps does not affect the validity of a thing done by the police officer or the liability of a person for an offence. The maximum penalty for failure to remove a thing in accordance with s58B is 30 penalty units ($3300).[163] This ACT provision goes further than the NSW provision by expressly recognising religious sensitivities, which is good recognition of the disproportionate impact the law is likely to have on Muslim women who wear religious head coverings.

Aspects of the NSW and ACT provisions are incorporated into the recommendations below to provide a more gender and culturally sensitive approach to enforcing WA's new identification laws.

There may be circumstances under the new laws where Muslim women may become embarrassed or offended where the laws involve a person's whole head to be exposed (such as removal or the burqa or niqab). In the Subcommittee's views such embarrassment or offense may be ameliorated by the following recommendations.

The new law in WA lacks consideration of the privacy of the person who is identified. Section 16(6) provides that a person, without "reasonable excuse", commits an offence if they do not comply with subsections (2), (3) or (4A). No guidance is given on what could constitute a reasonable excuse. Given the motive for the new provision appears to be include facilitating identification of women whose identity is concealed by headwear, it would follow that refusal on cultural or religious grounds to removing the headwear would not be a "reasonable excuse". Therefore there is no effective safeguard for the privacy of a person in the current law.

The NSW provision requires identification to be sensitive to individual privacy and performed as quickly as reasonably practicable. In the ACT an individual can request, on religious or cultural grounds, that identification is done "at a place or in a way (or both) that gives the directed person reasonable privacy." The drafting of the NSW and ACT legislation should be adopted as a best practice model for Western Australia.

Muslim women who choose to cover their head with traditional dress only expose it to females or close male family members. In the Western Australian Parliament Hon.

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[163] *Road Transport (General) Act 1999* (ACT) s. 58B(6)- see s133 for the value of a penalty unit, set at $110.

Liz Harvey commented that the "the Act will allow for that identification to be conducted by a female officer if a woman prefers that".[164] However, the wording of the amended s16 does not require a police officer to give a person the option to be inspected by someone of the same sex.

The Subcommittee recommends there should be the option for a person to elect to be inspected by someone of the same sex, so far as reasonably practicable. This could include the option to ask for someone of the same sex at the crime scene, or the option to be brought back to a police station to have identity confirmed in private by a female. This recommendation is consistent with the ACT's provision (s.58B (3) *Road Transport (General) Act* 1999)[165] Further, the NSW Ombudsman recommends that the NSW legislature introduce a provision that provides a female officer should perform the inspection so far as reasonably practicable.[166]

The option for an individual to be taken back to a police station without prejudice to have details verified is a recognised procedure for offences such as drink driving. The option to be inspected in a private place by someone of the same gender is used by customs officials in airports. It could be argued that the option to be inspected by someone of a particular gender could be a burden on resources. However the procedure is not unrecognised in other contexts and the qualification of "reasonably practicable" ensures that police have flexibility where it is not possible to provide the option.

8.14 The Western Australian Parliament amends the face covering provision in section 16 of the *Criminal Identification (Identifying People) Act 2002* (WA) to require Western Australia Police to conduct the identification process in a way that provides reasonable privacy. This includes the option for a woman to request a female police officer to identify them so far as reasonably practicable. This provision must ensure the validity of the police identification process is not affected by a failure to comply with the privacy requirement.

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164 Mrs Liz Harvey MLA, Western Australia Parliamentary Hansard, Legislative Assembly, 6 August 2013, p. 2641.

165 *Road Transport (General) Act 1999 (ACT)* s58B (2).

166 NSW Ombudsman, *Review of Division 4, Part 3 of the Law Enforcement (Powers and Responsibilities) Act 2002: face coverings and identification,* August 2013, p. 32 retrieved 12 September 2013 < http://www.ombo.nsw.gov.au>.

The proposed penalty for failure to remove a face covering in the new WA identification law is 12 months imprisonment for all instances. The gravity of this penalty is high and not in line with other jurisdictions. The Subcommittee recommends the maximum penalty of 12 months imprisonment should only be imposed where identification is connected to an indictable offence. As referred to above, the NSW equivalent only uses a term of imprisonment for indictable offences, and the ACT equivalent only imposes a monetary fine in all instances. Accordingly if a maximum penalty of imprisonment is applied to the new WA law it should be restricted to persons suspected of indictable offences.

8.15 The Western Australian Parliament amends the maximum penalty for the offence of refusing to remove a face covering in section 16(6) of the *Criminal Identification (Identifying People) Act 2002* (WA) so that the penalty of 12 months only applies if the person is suspected of committing an indictable offence and a monetary fine applies in all other instances.

Conclusion

It is important that any measure to assist police in identifying people with face coverings is done with sensitivity toward Muslim women. The new laws were passed after consultation with the Muslim community to ensure it respects the integrity of Muslim women whom it may affect. In the Subcommittee's view this respect for personal and religious and cultural privacy could be enhanced by the implementation of the recommendations made above. Australia's Muslim population is expected to grow by 35% in the next 20 years.[167] This means that any power given to police is likely to increase in use over the years. It is important that safeguards for the privacy of Muslim women are put into the legislation and that these women are not required to remove more coverings than are required for the purpose of identification.

[167] Pew Research Centre Forum on Religion and Public Life, *The Future of the Global Muslim Population: Projections for 2010-2030*, January 2011, p. 13.

ATTACHMENT 1

Chapter 8 - "Women and Criminal Laws"

Consultation List

- Sub-committee member Magistrate Felicity Zempilas held a discussion forum with a number of female legal practitioners in Kalgoorlie (from Legal Aid WA, ALS and from a private firm) in 2013 to discuss issues relevant to this chapter of the report
- Various criminal lawyers practising in the Perth metropolitan area
- Angela Hartwig, CEO of Women's Council for Domestic and Family Violence Services
- Some members of the Western Australian Police Force
- Joe McGrath SC, Western Australian Director of Public Prosecutions
- Aisha Novakovich (member of the Islamic community in Western Australia)

ATTACHMENT 2

Data Tables

Table 1: Number of Offences Prosecuted Summarily under Stalking laws section 338E of the WA *Criminal Code*

Year	Number of Offences
2002	48
2003	43
2004	64
2005	70
2006	95
2007	70
2008	65
2009	93
2010	98
2011	77
2012	92
2013[168]	48

[168] As at 6.9.13.

Chapter 8

"Women and Criminal Laws"

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CHAPTER 9

WOMEN AND PUNISHMENT

THE CHAPTER 9 SUBCOMMITTEE, WITH THE ENDORSEMENT OF THE STEERING COMMITTEE, MAKES THE FOLLOWING RECOMMENDATIONS:

Pre-Sentence Reports

9.1 The Department of Corrective Services:

i) continues to monitor and support the ongoing training of Community Corrections staff who prepare pre-sentence reports to ensure the reports are free from gender (or race) bias;

ii) reviews the content of pre-sentence reports annually to ensure they are free from gender (or race) bias; and

iii) supports the inclusion of a formal 'family impact statement' in a pre-sentence report for offenders who have family responsibilities (particularly women) and for whom there is a real risk that imprisonment will be imposed in order to properly inform the sentencing court of the likely impact of various sentencing options on both the offender and their family.

Sentencing of Aboriginal Offenders

9.2 The Western Australian Parliament amends the *Sentencing Act 1995* (WA) to require a sentencing court to hold a sentencing conference when an Aboriginal person is sentenced for a serious offence where there is a real risk of imprisonment and where the offender consents to such a conference being held.

9.3 The State Government of Western Australian continues to support and fund the operation of Aboriginal Community Courts.

Sentencing and Family Responsibilities

9.4 The Western Australian Parliament amends the principles of sentencing in the *Sentencing Act* 1995 (WA) so that a court, in determining whether or not to impose a custodial sentence on an offender who is a primary care-giver in a family, takes into account the effect of the sentence on the offender's family or dependants.

Sentencing Options

9.5 The State Government implements the proposals of the 2013 Statutory Review of the *Sentencing Act* 1995 for reforms to current sentencing options, particularly improvements to the flexibility of fines and community based orders, with a view to enhancing the use of non-custodial sentencing options for all offenders (with the aim of reducing the number of women, particularly Aboriginal women, imprisoned for fine default and, more generally, to address the disproportionately high rate of incarceration of women offenders).

Legal Representation

9.6 The State Government:

i) urgently conducts a review, which is published within one year of this 2014 Review Report, containing recommendations to support and appropriately fund the improved integration of existing legal services to represent women offenders;

ii) in the case of Aboriginal women offenders, seeks Commonwealth Government funding for the establishment of a separate Women's Aboriginal Legal Service (WALS); and

iii) within one year of the review being published the Western Australian Government, tables a response to the review in the Western Australian Parliament.

Research body to investigate issues of Sentencing and Punishment

9.7 The State Government supports and funds the establishment of a sentencing advisory council in Western Australia or, alternatively, appropriately supports and funds an independent criminal research body at a university to undertake, among other things, research into issues surrounding the sentencing and punishment of women.

Staffing at Women's Prisons

9.8 The Department of Corrective Services employs more women prison staff, particularly Aboriginal women, across all facilities accommodating women.

9.9 The Department of Corrective Services offers scholarships and mentoring to Aboriginal women to take up corrective service roles.

9.10 The Department of Corrective Services ensures that within 12 months of this 2014 Review Report all existing and prospective staff at all correctional facilities that accommodate women, complete the *Working with Female Offenders* course as a condition of their employment.

Need for data and research concerning the sentencing and imprisonment of women

9.11 The State Government:

i) publishes annual sentencing data and trends to better facilitate research into sentencing outcomes and practice;

ii) supports and funds research into:

a) the reasons for, and implications of, differential sentencing outcomes between men and women;

b) the factors driving the high rate of imprisonment of women (including high numbers of women on remand);

c) judges' considerations when applying non-custodial sentences versus custodial sentences; and

d) other factors explaining the decreasing number of community based sentences in Western Australia, by gender and aboriginality, and the effectiveness of non-custodial sentences for women offenders and conditions for success; and

(iii) makes public any findings of such research particularly to the courts and other relevant stakeholders where those findings may impact upon equitable policy and practice concerning the sentencing and imprisonment of women.

Correctional Programs for Women Offenders

9.12 The Department of Corrective Services, as a matter of urgency, provides Aboriginal-specific treatment programs for female prisoners and, in the absence of violent offending and sex offending treatment programs for high needs women, makes more available individual counselling to assist these women to address their offending behaviour.

9.13 The Department of Corrective Services provides better access to programs and education for women who are on remand and serving shorter sentences (recognising that this has particular importance to Aboriginal women offenders).

Mental Health of Women Prisoners

9.14 The State Government, as a matter of urgency, develops a dedicated mental health unit for women prisoners, managed by a multi-disciplinary team of clinical/allied health staff, supported by custodial staff who are trained in mental health; and further provides around the clock mental health nursing, psychiatrist and therapy care sufficient to meet prisoners' needs.

Social and Family Visits at Bandyup

9.15 The State Government, as a matter of urgency, invests in contemporary accommodation and service delivery infrastructure at Bandyup, including the replacement of the social visits centre.

9.16 The Department of Corrective Services, as a matter of urgency, extends eligibility for day stays to 'significant' children to enable grandmothers or other significant women in a child's life to be able to develop and maintain such relationships.

9.17 The Department of Corrective Services, as a matter of urgency, provides a regular Department sponsored transport service to Bandyup for social visitors.

Legal Services and Resources at Bandyup

9.18 The Department of Community Services, as a matter of urgency, ensures Bandyup prisoners, are provided with improved access to legal resources, including departmental computers and other non-legal assistance, to research their cases.

9.19 The Department of Community Services, as a matter of urgency, implements the recommendations made in the report attached to this chapter entitled *'Access to Legal Services for Women in Custody'* in order to provide all women in custody with proper access to legal services and representation.

Boronia Pre-Release Centre

9.20 The Department of Corrective Services, as a matter of urgency, improves access to Boronia's re-entry services for a greater diversity of women offenders. This involves:

i) identifying barriers to transition to Boronia for women offenders from Bandyup and other prisons;

ii) identifying ways to enhance the appeal of Boronia to Aboriginal women who are imprisoned elsewhere in WA;

iii) ensuring that more of the Aboriginal women who are classified minimum-security can progress to placement at Boronia; and

iv) changing the current practice of excluding prisoners from Boronia on grounds of mental health needs by engaging with community based mental health and counselling providers to provide their services to women at Boronia.

Parole Issues

9.21 The Prisoner's Review Board monitors, collates and comprehensively reports annually on all relevant parole information and data which would include the number of parole applications received, details of successful and non-successful applications, overview of parole conditions and reasons provided for refusal of parole (including where the applicant has not been able to access relevant programs), and any other relevant information around breaches or suspensions of parole.

9.22 The Department of Corrective Services, as a matter of urgency, ensures every woman offender due for release is provided with improved access to the necessary resources and personnel needed to develop a viable and stable parole plan.

9.23 The Department of Corrective Services oversees improved interaction and development of networks between community based corrections and community based organisations to ensure more effective pathways for referral, follow-up and support for parolees.

Support for Transition from Prison - Mentoring and Transitional Accommodation

9.24 The State Government supports and funds initiatives for mentoring and transitional accommodation for women released from prison.

Women's Services Directorate

9.25 The Department of Corrective Services, as a matter of urgency, re-establishes a women's services directorate within the Department of Corrective Services to oversee services to women in prison.

Women's Justice Advisory Group

9.26 The State Government, within 12 months of this 2014 Review Report, establishes an independent 'Women's Justice Advisory Group', whose membership is representative of various stakeholders, to co-ordinate, develop and drive strategies to deal with women's offending with a view to addressing the causes of women's offending, finding alternatives to imprisonment for women offenders and reducing the rate of imprisonment of women offenders in WA.

MEMBERSHIP OF SUBCOMMITTEE

Catherine Fletcher (Convenor), State Prosecutor DPP and former UWA Law lecturer

Gillian Bailey, Solicitor, State Solicitor's Office

Karen Farley SC, Appeals Consultant, Legal Aid WA

Associate Professor Pamela Henry, Edith Cowan University, Joondalup

Jocelyn Jones, Senior Researcher, National Drug Research Institute

Kaaren Malcolm, PhD Student and Criminology Tutor at UWA Law School

Susan Renshaw, Assistant Commissioner, Policy and Strategy, Department of Corrective Services ('DCS')

Mandy Wilson, PhD Research Fellow, National Drug Research Institute

Considerable assistance was provided to the Subcommittee by Galatee De Laubadere (former Researcher and Policy Assistant, Female Policy and Strategy, DCS), Jane Larke, (Acting Assistant Commissioner Policy and Strategy, DCS), Dr Monica Cass (Senior Evaluation and Research Officer, Policy and Aboriginal Services Directorate, Department of the Attorney General), Legal Aid lawyer Karen Shepherd (also a committee member of the Criminal Lawyers Association) and former District Court Judge the Hon. Kate O'Brien (also a Board member of Outcare).

The Subcommittee also acknowledges assistance from UWA law students Ciara O'Loughlin, Alexandra Zhu and William McDonald, who provided assistance with research and the literature review.

The views set out in this chapter do not necessarily express the views of the individual members of the Subcommittee or the organisations with whom the individual members of the Subcommittee are associated.

FOCUS OF CHAPTER 9

The focus of the Chapter 9 Subcommittee was a consideration of the issue of gender bias in respect of the punishment of women offenders. Similar to the 1994 Report the main areas of focus for the Subcommittee's investigations and recommendations concern:

i) the sentencing of women offenders;

ii) the management of sentences imposed upon women offenders;[1]

iii) the community re-integration (or 'transition') of women offenders after sentence; and

iv) the alternatives to imprisonment.

SUBCOMMITTEE'S INVESTIGATIONS – RATIONALE AND PROCEDURE

Broadly stated, the Subcommittee's agenda was to report on the implementation of the recommendations made in the 1994 Report concerning the 'Punishment of Women' and to also identify whether gender bias continues to exist in connection with the punishment of women in Western Australia.

The Subcommittee met on several occasions to identify and explore the major themes and issues arising from the 1994 Report. It then undertook a broad literature review to explore contemporary issues as well as reviewing the major political, legal and policy developments associated with women's imprisonment in Western Australia since 1994.[2] Recent sentencing and imprisonment data, current sentencing laws and practice (including recent case law), and current corrections policy and practice in Western Australia were examined and, within the limits of the Subcommittee's resources, compared with information or research from other jurisdictions.

The Subcommittee was considerably assisted by the reports of the Office of the Inspector of Custodial Services ('OICS') concerning Western Australian prisons which accommodate women; reports, policy documents and position papers

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1 In the 1994 Report the corresponding heading was 'Sentence Management'.

2 The Subcommittee was considerably assisted in this task by a very comprehensive review of this kind which exists in the materials found on the website associated with the UNSW Australian Prisons Project located at http:/www.app.unsw.edu.au/women-prison-western-australia-1970-2010.

prepared by the Department of Corrective Services ('DCS'); and also reports, papers and other documentation of non-government/not for profit/community organisations[3] that provide services to women offenders in this State both during and after their sentence.

Consultations were also held with certain key stakeholders.[4] This included visits to Bandyup Women's Prison ('Bandyup') and Boronia Pre-Release Centre ('Boronia') to view the facilities[5] and speak with senior staff[6] about many issues. Some Subcommittee members also interviewed Aboriginal women offenders imprisoned in the metropolitan women's prisons and some regional prisons.[7] Consultations took place with the Hon. Wayne Martin AC, Chief Justice of the Supreme Court, members of the Prisoner Review Board,[8] some Magistrates, Professor Neil Morgan (Inspector of Custodial Services), Mr James McMahon (Commissioner for Corrective Services) and other senior DCS staff, Mr Joe McGrath SC (State Director of Public Prosecutions[9]) and other staff of the DPP, staff of Legal Aid WA, staff of the Aboriginal Legal Service ('ALS'), staff of non-government or community organisations providing services to women offenders,[10] and members of the Criminal Lawyers Association. Subcommittee members also attended various seminars held over the course of 2013 – 2014 that dealt with issues of sentencing, punishment and parole of offenders.

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3 Such as Outcare, Women's Law Service, RUAH and the Jade Lewis Foundation.

4 A list of those consulted appears as Attachment 2 to this report. Note however, due to time and resourcing constraints, the Subcommittee not able to consult with everyone who could have contributed to this report.

5 Including attending on Boronia 'Open Day' when the community are invited in to Boronia and can interact with the women who sell goods and other services to raise money for charity.

6 Including the Superintendents of both Bandyup and Boronia.

7 Subcommittee members Mandy Wilson and Jocelyn Jones have conducted interviews with over 80 Aboriginal mothers incarcerated across the various prisons in the State as part of their research project entitled "*Social and cultural resilience and emotional well-being of Aboriginal mothers in prison*" being funded through the National Health and Medical Research Council (aimed at understanding the health and treatment needs of Aboriginal mothers in prison in WA and NSW).

8 Email correspondence with the President the Hon. Judge Robert Cock and discussions with Mr Craig Somerville.

9 Referred to from here on as the 'DPP'.

10 See n.3 above

SUMMARY OF RECOMMENDATIONS IN THE 1994 REPORT

Overview of the 1994 Report dealing with the Punishment of Women

By way of a summary it has been stated[11] that chapter 9 of the 1994 Report provided statistical information and an analysis of past research on women offenders. It concluded that in the sentencing process women are sometimes treated differently and are often 'doubly' punished because of community attitudes and stereotypes about appropriate feminine behaviour. Once sentenced, women are further disadvantaged due to their minority status within the offending population, resulting in fewer resources and services for women offenders and a lack of suitable programs designed to meet their needs.

Chapter 4 of the 1994 Report dealt with particular issues concerning Aboriginal women and the law including issues of access to justice, legal representation (of both victims and offenders), and the application of certain laws to female Aboriginal offenders.

The 1994 Report made 17 wide-ranging recommendations, arising out of both chapters 4 and 9, which dealt with the punishment of women offenders (including Aboriginal women).[12] This Subcommittee has reviewed those 17 recommendations from the 1994 Report. They can be summarised as follows.

Recommendations 181 – 185: Sentencing of Women Offenders

Recommendations 181 – 185 dealt with:

- issues of gender bias (complicated by race) in the preparation of pre-sentence reports;[13]
- differential sentencing outcomes between men and women;[14]
- sentencing principles, practice, approach and attitudes applicable to the sentencing of women;[15]

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11 *Gender Bias Taskforce Progress Report: A Report on the Implementation by Government Recommendations contained in the Chief Justice's Taskforce Report on Gender Bias*, compiled by the Women's Policy Development Office in conjunction with the Ministry of Justice, April 1997, at p.17.

12 See Recommendations 181 to 197 of the 1994 Report.

13 Recommendation 185.

14 Recommendations 181 and 184.

- the relevance in sentencing of the effect of a custodial sentence upon a primary care-giver and their family;[16]
- sentencing options available to the sentencing of women;[17] and
- the need for research on any of the above aspects concerning the sentencing of women and the dissemination of the key findings of such research to the judiciary and legal community in order to promote discussion of these issues with a view to ensuring equity and fairness in the sentencing of women.[18]

Recommendations 186 - 197: Sentence Management of Women Offenders and Community Reintegration/Transition

Recommendations 186 - 197 dealt with:

- The impact of fines and the fine default system on women offenders (particularly Aboriginal women);[19]
- The difficulties faced by women offenders, particularly Aboriginal women, complying with community sentencing dispositions;[20]
- Prison facilities and regimes (including prison staffing, training and management);[21]
- Prisoner health and welfare;[22]
- The impact of imprisonment on women offenders;[23]
- Prison programmes for women offenders;[24] and
- Support for women upon release from prison.[25]

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15 Recommendations 181 and 184.
16 Recommendation 183.
17 Recommendation 182.
18 Recommendations 181, 182 and 184.
19 Recommendations 188, 189 and 190.
20 Recommendation 191.
21 Recommendations 186, 187 and 196.
22 Recommendation 192.
23 Recommendations 193 and 194.
24 Recommendation 195.
25 Recommendation 195 of the 1994 Report.

IMPLEMENTATION OF RECOMMENDATIONS 181 – 185

The 1997 Progress Report broadly stated that the recommendations in the 1994 Report concerning the sentencing of women were being addressed by legislative changes although it noted that some of the recommendations required the endorsement of the Judiciary. Some of the issues more specifically dealt with in the 1997 Progress Report are discussed below.

Pre-sentence reports - issues of gender bias (complicated by race) in the preparation of such reports

Recommendation 185 of the 1994 Report[26] called for a review of the preparation of pre-sentence reports ('PSRs') in order to examine whether issues of gender bias (complicated by race) existed in the preparation of such reports. Recent research, at that time, reported evidence of gender bias, complicated by the factor of race, in the content of PSRs.[27]

In the 1997 Report it was reported that the, then named, Ministry of Justice ('MOJ') had completed a report on the preparation of PSRs which addressed gender and racial bias inherent in their preparation, through the provision of training to all staff including those who provide oversight of the reports. It further noted that ongoing monitoring of PSRs would be undertaken to determine future training needs of PSR writers.

This issue is explored again in the Discussion of 2014 Review below.

Research needed in respect of differential sentencing outcomes between men and women

Recommendations 181 and 184 of the 1994 Report recommended research to determine reasons for differential sentencing outcomes found to exist between women and men (particularly between male and female social security offenders[28])

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26 Discussed at chapter 9.4.4 of the 1994 Report.

27 Wilkie, M*. Sentencing Women: Pre-Sentence Reports and Construction of Female Offenders,* Research Report No.9 1993, Crime Research Centre, UWA. This study put forward reasons for this and concluded that systemic (gender) bias existed in respect of certain categories of female offending. It found this concerning and suggested it should be addressed.

28 Wilkie, M. '*Women Social Security Offenders Report; Their Experiences of the Criminal Justice System in Western Australia',* Research Report No. 8, 1993, Crime Research Centre, UWA.

as a further source of input into sentencing policy.[29] The 1994 Report referred to concerns about the apparent disregard by the courts of the differences between men and women in the causes and circumstances of their offending and also the apparent disregard for the applicable federal statutory sentencing principle[30] that imprisonment is a sentence of last resort.

The 1997 Progress Report indicated that the above recommendations were partly addressed by the 1996 MOJ Information Plan that would enable statistical information on sentencing outcomes to be made more readily available to courts. It also noted that the *Sentencing Act* 1995 contained a set of sentencing principles and provision for the issuing of guideline sentencing judgements which could facilitate the comparability of sentences for similar crimes.

See Discussion of 2014 Review below.

Research and discussion concerning sentencing principles, practice approach and attitudes applicable to the sentencing of women

The 1994 Report suggested that the sentencing data presented in Chapter 9 indicated that different factors appeared to be relevant in the sentencing of women than were deemed relevant in the sentencing of men.[31] It also suggested that it appeared that some female offenders – notably property offenders – were treated more harshly than other female offenders, and in some cases, treated more harshly than males convicted of similar offences. In addition to the need for further investigation of the data, the Report suggested that the apparent (and unacceptable) approach taken in some courts was that of 'double punishment' of some female offenders because they also 'offended' against community stereotypes about appropriate feminine behaviour. It therefore recommended efforts to stimulate public debate on sentencing principles and options with a view to ensuring equity and justice in sentencing.

The 1997 Progress Report noted Government support for stimulation of public debate on sentencing principles, with a view to ensuring equity and justice in

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29 Refer to Recommendation 181(discussed at chapter 9.3.22) and Recommendation 184 (discussed at 9.4.14 of the 1994 Report).

30 Section 17A(1) of the *Crimes Act* 1914 (Cwlth)

31 Refer to Recommendations 182 (discussed in chapter 9.4.11) and 184 (discussed in chapter 9.4.14) of the 1994 Report.

sentencing, by way of encouraging research on the sentencing of women and judicial attitudes and the evaluation of approaches to the sentencing of women. However it was also noted that the 1994 recommendations that aimed to promote such discussion among judicial officers and the legal profession required the endorsement of the Judiciary. The 1997 Progress Report also pointed out that the *Sentencing Act* 1995 contained a set of sentencing principles and provided for the issuing of guideline sentencing judgements which, it suggested, could facilitate the comparability of sentences for similar crimes.

See Discussion of 2014 Review below.

Promotion of discussion regarding sentencing options available to the sentencing of women[32]

The 1994 Report also recommended the promotion of discussion within legal and judicial circles of sentencing options for women. The 1997 Report noted that this required the endorsement of the Judiciary.

However the 1997 Progress Report also observed that the Government had implemented a number of strategies to provide alternative sentencing options for offenders that were expected to be of significant benefit to women offenders given the nature and type of offences they generally committed.[33] Therefore this recommendation appears to have led to new sentencing options that were anticipated to be of particular benefit to women offenders.

See Discussion of 2014 Review below.

The relevance in sentencing of the effect of a custodial sentence upon a primary care-giver and their family

One of the few recommendations from Chapter 9 of the 1994 Report which the Western Australian Government did not support was that Western Australian statutory sentencing principles should be amended to require a court to take account of the effect of a custodial sentence on a sole carer of children and their family –

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32 Recommendation 182 (discussed at Chapter 9.4.8 - 9.4.11 of the 1994 Report).

33 This was the first time the option of a suspended sentence became available. It was said to be targeted at offenders for whom a prison sentence may be warranted but where the best option would be to suspend the sentence. It was noted that when considering whether to suspend a sentence Judges and Magistrates may take into account the nature of the offence committed and the offender's personal circumstances.

recommendation 183.[34] This recommendation arose from the fact that s.16A(2)(p) of the Commonwealth *Crimes Act* 1916 provided that in the sentencing of federal offences "*In addition to any other matters, the court must take into account…the probable effect that any sentence or order under consideration would have on any of the person's family or dependant*s".[35]

The *Sentencing Act* 1995 (WA) came into effect on 16 January 1996 without a provision reflecting this recommendation of the 1994 Report.

The 1997 Progress Report noted that the Government did not support this recommendation because it considered the new sentencing principles in the *Sentencing Act* 1995 were appropriate and that it would be inappropriate for a principle of sentencing to create any advantage in law for any particular class of persons. Accordingly the above recommendation was *not implemented* in the WA *Sentencing Act* 1995.[36]

See Discussion of 2014 Review below.

IMPLEMENTATION OF RECOMMENDATIONS 186 – 197

The 1997 Progress Report broadly stated that the recommendations in the 1994 Report concerning the sentence management of women offenders were being addressed by legislative changes in the area of fines enforcement and as part of a wider Ministry of Justice ('MOJ') '*Review of Services to Adult Women Offenders'*.[37] Some of these recommendations were quickly implemented however, where that did not happen, certain recommendations were endorsed, repeated or reformulated in later reports, and then eventually implemented.[38]

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34 Discussed at Chapter 9.4.18 of the 1994 Report.

35 The 1994 Report also noted the 1990 decision in *Sinclair v R* (1990) 51 A Crim R 418 which had held that s16A(2)(p) merely restated the common law which permitted the effect of dependants to be taken into account only in 'exceptional circumstances'. Similarly, in the 1993 WA case of *Burns v R* unreported, CCA SCt of WA, No 228 of 1993 Anderson J stated that the circumstances of the dependants must be 'truly exceptional' before compassion for them can have any worthwhile effect on sentence.

36 The sentencing principles contained in the *Criminal Law Amendment Act* 1994 came into effect in January 1995 (in the *Sentencing Act* 1995).

37 Ministry of Justice Policy and Legislation Division, *Report on the Review of Services to Adult Women Offenders (in Western Australia)*, (1997) May.

38 For example see Mohoney, D. (QC), (2005) *Inquiry into the Management of Offenders in Custody and in the Community, Western Australian Government* ('the Mohoney Report')

Fines enforcement and Fine default system[39]

The 1994 Report noted that women in prison, at that time, were more likely to be received into prison for fine default than men.[40] In particular it noted that Aboriginal women, who then amounted to just 1.4% of the WA population, made up 11.5% of all people received into prison for fine default. However at that time only 6.6% of Work and Development Orders[41] ('WDOs') were issued to Aboriginal women whereas 63% of all such orders were issued to non-Aboriginal males (for whom imprisonment for fine default was lowest of all). The 1994 Report suggested that it could not be assumed that programs such as the WDO program, designed for the majority of fine defaulters – non Aboriginal males - would be suitable for, and equally accessible to, other groups. In particular it did not take account of the particular needs and circumstances of women, particularly Aboriginal women.

The 1994 Report recommended that the government give attention, in consultation with relevant Aboriginal organisations and communities, to the design of programmes to operate as meaningful alternatives to imprisonment of Aboriginal women for fine default.

The 1997 Progress Report indicated that in respect of issues concerning fines enforcement:

- The *Fines, Penalties, Infringement Notices Act* 1994 was successful in reducing the number of women imprisoned for fine default;[42]
- Section 53 of the *Sentencing Act* 1995 requires courts to take account of the financial circumstances of offenders;[43]

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39 Refer to Recommendation 188 – 190 of the 1994 Report

40 The figures provided were that approximately 71% of Aboriginal women, 56% of non-Aboriginal women, 41% of Aboriginal men and 39.2% of non-Aboriginal men were received into prison in WA for fine default between January and June 1992.

41 Which allow conversion of a fine into a community work order where the fine cannot be met.

42 Due to the introduction of flexible time to pay provisions and alternative methods of fine enforcement such as suspension of drivers/motor vehicle licence, execution on goods and WDOs accessed on 2.4.13.

43 Such information is also provided in PSRs. The Report suggested that defence counsel would be expected to continue to present this information on behalf of clients. It was also noted that under the *Sentencing Act* a court is not to fine an offender if, after paying victim compensation, the offender will be unable to pay a fine within a reasonable time.

- The 1996 MOJ Aboriginal Plan required liaising with Aboriginal communities to minimise fine default in order to reduce the rate of imprisonment of Aboriginal people for fine default;[44] and
- MOJ Aboriginal Community Corrections and Juvenile Justice Officers were available in some courts to provide advice to the Judiciary on matters relating to culture where that is relevant - such as on questions of penalty.

See Discussion of 2014 Review below.

Community Sentencing Dispositions

The 1994 Report observed that, given the relatively small numbers of women who are the subject of community sentencing dispositions, the Department's programmes and supervision models were predominantly designed for men. It noted that community based orders ('CBOs') were not often suitable or flexible enough to deal appropriately with child caring responsibilities, particularly for Aboriginal women who had comparatively lower rates of successful completion of these orders. It also suggested other specific issues that impacted upon women offenders serving community based orders included:

- the minimum hours to be performed per week (14 hours);
- a lack of flexibility with hours to complete work;
- the location of programmes and Community Correction Centres;
- a lack of availability of public transport to and from such centres; and
- a lack of availability of childcare or child minding facilities.

The 1994 Report recommended[45] that special consideration should be given to the particular difficulties experienced by women offenders, particularly Aboriginal women, meeting their obligations under community based orders.[46] A similar recommendation was included in the 1996 MOJ Aboriginal Plan.

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44 It also noted that Aboriginal Fines Officers and Aboriginal Court Advisory staff (appointed by the MOJ) would be located in various metropolitan and regional centres to assist Aboriginal people with fine and court related matters;

45 Refer to recommendation 191 of the 1994 Report

46 Refer to paragraphs 5.12 and 5.13 of the 1994 Report that deals with 'Community Corrections'.

The 1997 Progress Report indicated that in respect of issues concerning community based orders:

- The 1997 MOJ *Review of Services to Adult Women Offenders* identified the need for more culturally appropriate programs for Aboriginal women and recommended Community Corrections managers encourage more local Aboriginal communities to provide opportunities for Aboriginal women to undertake their orders;
- The 1996 MOJ *Aboriginal Plan*, in addition to what is noted above, provided for the maintenance and expansion of the number of Aboriginal Communities (then about 40) contracted to provide supervision of offenders on community supervision orders and, where facilities exist, required Aboriginal offenders to be given culturally appropriate placements for community work; and
- The majority of community corrections field staff was, at that time, reported as being women and most community work placements were reported as being flexible and accommodating to the needs of women.

See Discussion of 2014 Review below.

Services provided to women in custody (including reintegration support and services)

The 1994 Report considered issues such as prison facilities and regimes, prisoner health and welfare, prisoner programs and prison management awareness of gender issues.[47] It made a number of recommendations concerning these issues.[48]

In the 1997 Progress Report it was broadly reported that the issues highlighted in the 1994 Report concerning the above issues were being addressed as part of a wider 1997 MOJ *Review of Services to Adult Women Offenders* ('the 1997 MOJ Review').[49] The 1997 MOJ Review called for a change in the 'mind set' of MOJ staff in terms of their orientation and understanding of the specific needs of women.[50] The 1997 MOJ Review examined the services provided to women in custody and

47 Refer to the discussion in the 1994 Report that occurs between paragraphs 5.1 to 6.7 (with the exception of paragraphs 5.12 and 5.13 which deals with 'Community Corrections')

48 Refer to Recommendations 186,187 192, 193, 194, 195, 196 and 197 of the 1994 Report

49 Ministry of Justice Policy and Legislation Division Report on *The Review of Services to Adult Women Offenders (in Western Australia),* (1997) May.

50 UNSW Australian Prisons Project located at http:/www.app.unsw.edu.au/women-prison-western-australia-1907-2010 accessed on 2.4.13.

outlined how those services could be improved to better meet the needs of women offenders. It made wide ranging recommendations concerning:[51]

- the needs of minimum security and remand prisoners;[52]
- assistance to women to maintain their family and community contacts;[53]
- a review of the mother and baby policy to allow mothers from remote localities to keep their babies past the age of 12 months;
- expansion of the range of employment, educational and other development programs and identifying the means to achieve this;
- the gender mix of staff at Bandyup;[54]
- the specific health care needs of women prisoners;[55]
- the importance of pre and post release programs to the successful rehabilitation of the offender;[56] and
- gender awareness training for Prison Officers and Community Corrections staff.

In addition to the above, the 1997 Progress Report noted:

- The establishment, and operation, of a Family Support Centre at Bandyup since July 1995;[57]
- An improvement in medical, nursing and psychiatric services at Bandyup;[58]

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51 53 recommendations were made.

52 Including strategies to address particular disadvantages they face such as accommodation and current prison security classification system.

53 By improving the prison visiting scheme and addressing the needs of women from remote localities and women from non-English speaking backgrounds and cultures.

54 Including the need to introduce more flexible working arrangements at the prison to ensure the current gender balance was maintained and more female prison officers were encouraged into the system.

55 It also reviewed the healthcare facilities and services provided to women offenders, including the need for increased health prevention and treatment programs.

56 Including the need for 'life skills' courses and drug/alcohol treatment programs and increased involvement of community agencies in the provision of such programs.

57 To provide information and emotional support to prisoners' families, child care services during visiting times, help with establishment and maintenance of linkages with welfare agencies, and to provide general assistance for visitors on prison business including assistance with Statutory Declarations, administrative matters and liaising with prison staff

58 This included an increase in doctors' visits from two to three days per week and a regular weekly psychiatric service (rather than on an 'as needs' basis in the past). Since May 1996 the nursing coverage at Bandyup had been increased from 13 to 24 hours per day.

- the government's improved recognition of the specific health needs of women who have experienced sexual or domestic abuse;[59]
- at that time, the pro-female gender mix of staff at Bandyup;[60] and
- the government was examining the feasibility of establishing a minimum security facility for women offenders in the Perth area.

In addition to the above 1997 Progress Report some other reports in Western Australia between 1994 and 1997 dealt with particular issues associated with women's imprisonment in Western Australia. Of particular note are the following two reports.

In 1995 the Taskforce on Families in Western Australia produced a report entitled '*WA Families – Our Future*' which pointed to the impact of imprisonment on families as severe and contributing to family breakdown. The Taskforce recommended that courts should be required to consider this in all sentencing decisions and called for a more flexible approach towards allowing children to remain with their mothers in prison. The maximum-security rating of Bandyup was noted as detrimental to women in the prison who were not classified at this level.

In 1996 the MOJ's '*Towards Integration*: *Future Directions Report*' noted that while the justice model approach to corrections had been popular in the 1970s it provided few opportunities for the rehabilitation of offenders. It suggested that internationally there had then been a shift towards 'what works' as a philosophy in terms of addressing re-offending and that relevant strategies could, in fact, reduce recidivism. The report emphasised the need to develop appropriate models of assessment and management for women offenders given the low-risk they generally posed to the community.

See Discussion of 2014 Review below.

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59 It indicated work had begun on a comprehensive evaluation of health services available to offenders in custody. The 1997 Report noted that the MOJ Offender Management Division had identified the care and management of long term prisoners as a particular concern

60 The mix then was 60% women and 40% men (which it was noted was considered as a good balance by both prisoners and prison administration). It was also reported there were, at that time, female staff holding senior positions in the prison administration.

DISCUSSION AND RECOMMENDATIONS ARISING FROM 2014 REVIEW

Overview

In this section the Chapter 9 Subcommittee:

(i) considers the current issues of gender bias arising in connection with the punishment of women;

(ii) considers whether any recommendations from the 1994 Report require ongoing endorsement or re-statement in order to address gender bias which continues to exist; and

(iii) explains and puts forward 'new'[61] recommendations to address gender bias not previously addressed in either the 1994 or 1997 Reports (due to resourcing these are focussed in a few key areas we consider require priority attention).

The question of whether gender bias exists in the sentencing and punishment of women offenders is complicated by factors such as poverty, class and economic disempowerment. The question is even more complex in the case of Aboriginal women for whom the above factors are compounded by issues of race, dispossession, cultural oppression and lack of understanding of spiritual and cultural beliefs.[62] It is with these issues in mind that we also consider broader issues of disadvantage and discrimination concerning all women offenders.

In the twenty years since the 1994 Report there have been very few studies or reports concerning the sentencing of women offenders in this State and consequently there is little public discussion of these issues.

However the Subcommittee's research suggests that gender-related concerns continue to exist in connection with the sentencing of women. For example, disparities continue to exist in the sentencing outcomes between men and women for certain types of offending; that the adequacy of pre-sentence reports concerning women offenders is an issue for many criminal practitioners; and that serious

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61 On some issues the Subcommittee has endorsed the findings and/or recommendations of others (although it does so without detracting from the importance of other recommendations which it has not specifically endorsed).

62 Mark Brown and Stuart Ross, "*Assisting and Supporting Women released from Prison: is Mentoring the answer",* (2010) 22(2) Current Issues in Criminal Justice 217; Mark Brown and Stuart Ross, "*Mentoring, Social Capital and Desistance: A study of women released from Prison",* Australian and New Zealand Journal of Criminology (Australia) Volume 43, Number 1, April 2010, p.31.

concerns exist about women's access to legal resources and services. This is very concerning given the disproportionately high (and growing) rate of women's imprisonment in WA. In this section the Subcommittee also considers whether the statutory sentencing principles contained in the *Sentencing Act* 1995 adequately address relevant gender related issues for women, and particularly race and gender issues for Aboriginal women offenders. This chapter has considered current proposals for the reform of available sentencing options and whether these might be of particular benefit to the sentencing of women. The Subcommittee makes a number of recommendations addressing these issues that arise in connection with the sentencing of women.

In connection with the punishment of women, possibly due to recommendations made by the Inspector of Custodial Services over ten years ago,[63] the Department of Corrective Services in Western Australia now recognises and responds to women offenders as 'equal but different' to male offenders which includes acknowledging they require gender-specific services, support and facilities during the period of their sentence. It is also generally acknowledged within the justice sphere that, while one of the legitimate aims of punishment includes rehabilitation,[64] the criminal justice system alone cannot successfully address the underlying the causes of most offending. However, as a result of the findings in this 2014 Review, the Subcommittee concludes that there is an urgent need for better government resourcing and action to more equitably provide for the treatment of, and services to, women offenders and to develop and promote more effective alternatives to imprisonment for women. This chapter make a number of recommendations addressing these and other issues that arise in connection with the management of women offenders.

SENTENCING OF WOMEN OFFENDERS

Pre-sentence reports

The recommendation from the 1994 Report concerning pre-sentence reports, and the 1997 Progress Report response to that, has been discussed above.

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63 *Key Steps to Reforming Women's Imprisonment in Western Australia*, OICS Briefing Note, 23 April 2003.

64 *Sentencing and Criminal Justice*, Andrew Ashworth, Cambridge University Press, 6th Ed, 2014.

Pre-sentence reports provide prescribed information to a judge or magistrate sentencing an offender. The issues to be addressed by a PSR can be the subject of specific direction by a court however where that does not occur a PSR is to set out matters about the offender that are, by reason of the *Sentencing Act* or sentencing practice, relevant to sentencing the offender.[65] Pre-sentence reports tend to follow a fairly standardised format in which the circumstances of the current offending, the personal and criminal history of the offender, the risks of re-offending and prospects for rehabilitation are commonly addressed. They also usually address the suitability of the offender for particular sentencing options. The importance of the PSR in sentencing should not be underestimated.[66]

To investigate the issue of whether there are any gender bias issues with PSRs the Subcommittee sought the views of criminal lawyers and others working in the criminal justice system on the adequacy of PSRs for women offenders.[67]A number of people surveyed expressed concerns about the content of PSRs for women offenders. Those concerns commonly dealt with the lack of detail about the personal circumstances of the women (such as family, childcare, mental health or victimisation issues). One respondent noted that some women offenders, particularly those with fraud/stealing type offending, often have complex psychological problems which require a more detailed analysis than is typically provided in a PSR.[68] Another respondent suggested that PSRs "*show very little empathy and understanding of women with complex needs*".

Mr Peter Collins, an experienced senior criminal defence lawyer with the ALS, holds the view that PSRs seldom adequately portray the extreme social disadvantage, dysfunction and common victimisation of Aboriginal women offenders. He suggests this maybe because some PSR writers have difficulty eliciting the relevant information from Aboriginal women who are often shy or distrustful of non-Aboriginal authority figures. There may also be other factors (such as language and cultural

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65 Refer to ss. 20 and 21 of the *Sentencing Act* 1995 (WA).

66 In Wilkie's 1993 analyses of pre-sentence reports, in the case of female property offenders, Wilkie found that such reports, which were generally marked by a harsher attitude, appeared to correspond with harsher penalties for this type of offending than other types of female offending.

67 This was largely done via a survey of Criminal Law Practitioners issued by the Chapter 9 Subcommittee for the 2014 Gender Bias Review distributed May/June 2013. However the Subcommittee also interviewed some individual criminal law practitioners about this issue.

68 Note that whilst this information can be provided to the Court in a psychological report the availability of such a report at sentencing is sometimes dependent upon it being sought by a defence lawyer.

issues or gender roles) that preclude many Aboriginal women offenders engaging in frank discussions about their offending. However this practitioner also indicated he considered it the role of defence counsel to build the necessary rapport with a female client in order to elicit the information required for a comprehensive plea of mitigation. Mr Collins also goes so far as suggesting that PSRs should not even deal with the offender's attitude to their current offending as Aboriginal offenders have a cultural tendency to tend to shift blame and this is often interpreted as a lack of remorse which counts against them in sentencing.[69]

Pre-sentence reports also often address an offender's capacity to pay a fine and the extent to which a fine might burden an offender.[70] Former District Court Chief Judge the Hon Antoinette Kennedy, has said "*… while CCOs (community corrections officers) can find some objective information such as the total fines that an offender owes, in general the CCO does not have the time or skills to investigate an offender's financial position."*[71]

The issues raised above in connection with PSRs also served to highlight for the Subcommittee the importance of women offenders having competent and experienced counsel to represent them, particularly Aboriginal women, in court proceedings. This issue is explored further in this Report under the heading of '*Legal representation of Women Offenders'*.

In response to these issues DCS informed the Subcommittee that the program, '*Working with Female Offenders',* is made available to all Community Corrections staff (including those who produce PSRs) in order to provide them with an understanding of the issues specific to female offenders and strategies to work effectively with them.[72]

The Subcommittee was also informed that senior officers supervising the preparation of PSRs ensure that these reports take into consideration parenting

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69 ALS senior lawyer Peter Collins (views expressed at Law Society of WA Sentencing Seminar held in 2013 and again in interview with Catherine Fletcher at the ALS on 22.4.14).

70 These are matters that must be taken into account when a court is considering fining an offender.

71 View expressed for the 2013 Statutory Review of the *Sentencing Act*.

72 This three day course includes an overview of women's issues, the effects of physical and sexual abuse, the impact of mental health and substance use issues and the importance of the role some women have as mothers. DCS suggest the course also provides an understanding of issues that are specific to Aboriginal female offenders. DCS suggest that senior officers also mentor and train officers to complete PSRs in a manner that is consistent with equal opportunity principles and contemporary practice that is free of gender or racial bias.

responsibilities, cultural factors, role in the community and any other factors that impact upon the individual offender's situation.[73]

The Subcommittee's conclusion on this issue is that although Community Corrections staff receive training aimed at generating fair and informative reports there is a perception among criminal law practitioners that PSRs have limitations and could be improved. One initiative we recommend is the incorporation of a formal 'family impact statement' in a PSR to provide the sentencing court with a more thorough assessment of an offender's family situation and the likely impact of various sentencing options on both the offender and their family. This should also include a more detailed assessment of an offender's financial position. It is unlikely any legislative change is required to do this (given the existing broad terms of s 21 regarding the content of PSRs). We recommend this should be incorporated into a PSR in every case where an offender with parenting responsibilities (i.e. the majority of women offenders) is at risk of being sentenced to imprisonment. This concept of a 'family impact statement' being provided at sentencing is discussed again further below.[74]

9.1 The Department of Corrective Services:

i) continues to monitor and support the ongoing training of Community Corrections staff who prepare pre-sentence reports;

ii) reviews the content of pre-sentence reports annually to ensure they are free from gender (or race) bias; and

iii) supports the inclusion of a formal 'family impact statement' in a pre-sentence report for offenders who have family responsibilities (particularly women) and for whom there is a real risk that imprisonment will be imposed in order to properly inform the sentencing court of the likely impact of various sentencing options on both the offender and their family.

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73 The Subcommittee was also informed that DCS has reviewed and made recommendations to update the Adult Community Corrections Handbook to reflect best practice for working with female offenders and in particular, those from diverse cultural backgrounds. This review also highlights the need to comply with the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders.

74 Under the heading of '*Sentencing Principles and Practice applicable to the sentencing of Women: Offender Family Responsibilities'*

Need for research regarding differential sentencing outcomes between men and women

In order to facilitate research recommended in the 1994 Report concerning differential sentencing outcomes between men and women, the 1997 Progress Report referred to improvements in the availability of sentencing data and the provision of guideline sentencing judgements that could facilitate the comparability of sentences for similar crimes.

As no guideline sentencing judgements exist in Western Australia[75] we have instead considered the DPP's comparative sentencing tables[76] and also examined recent data[77] to discover any sentencing trends for men and women offenders in WA.[78] However the DDP tables, although broadly acknowledged in the legal community as a valuable resource,[79] are limited in that they primarily only record appellate sentencing decisions.[80] Moreover, although they typically specify the gender of the offender, they do not readily illustrate sentencing trends for either gender.

The Department of the Attorney General (WA) ('DOTAG') provided data to the Subcommittee showing sentencing differentials between men and women continue to exist across many offence categories. As men come before the courts in far greater numbers than women (77% men: 23% women)[81] it is not surprising that there are more men than women in prison in WA (91% men: 9% women). As at 30 June 2013 there were 4,475 men and 451 women in WA prisons.

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75 Sentencing guideline judgements have never been handed down in WA pursuant to Part 20 of the *Sentencing Act* 1995 by either the Court of Appeal or the Chief Magistrate. The Subcommittee also found that there is little support in WA for guideline judgements despite the view of prominent UK criminal law academic Andrew Ashworth that they may offer an alternative to the introduction of mandatory minimum sentences.

76 The DPP Comparative Sentencing Tables are accessed on the ODPP website which says that the tables outline decisions of appeal hearings that consider the sentences imposed for various criminal offences. The Tables are published to assist legal practitioners and members of the public.

77 The Subcommittee obtained sentencing data for matters finalised between 1 January 2012 and 31 December 2012. Refer to tables 1 - 6 in Attachment 3.

78 However the Subcommittee has not specifically re-examined the issue of differential sentencing outcomes between men and women for social security offences because these are federal offences to which Commonwealth sentencing legislation applies. It is outside the scope of this chapter and overall 2014 Review to investigate Commonwealth sentencing legislation.

79 The Chief Justice and others have applauded the establishment of the comparative tables.

80 That is, they are not a comprehensive database of all sentencing decisions.

81 In 2012 there were 18,519 penalties (23%) handed down to female offenders and 61,326 penalties (77%) handed down to male offenders.

Across all offence types, fines are overwhelmingly the most common penalty handed down upon conviction for all adults regardless of gender. This is similar to findings in the 1994 Report.[82] However when it comes to comparing imprisonment as a penalty for men and women the data[83] shows that, compared to women, men are more than *twice as likely* to receive imprisonment as a penalty.[84] Again this is broadly similar to the findings of the 1994 Report.

However these broad generalisations do not hold up for every offence type. The data obtained[85] continues to show there are some significant differences in sentencing outcomes between men and women for particular offence groupings. For example, in the category of offences of '*Abduction, harassment and other offences against the person*', while men and women receive roughly equal proportions of penalties for matters finalised in the lower courts (with half of all men and women convicted receiving a fine), in the higher courts (which deal with more serious offences) almost 67% of women receive a penalty of a non-custodial order, while less than 40% of men receive the same penalty. The remaining third of women convicted receive a penalty of imprisonment, while more than half of men convicted for the same group of offences are imprisoned. This is a typical trend for most offence groups i.e. men are more often imprisoned than women in the higher courts.

However a very different picture emerges for the category of '*Theft and related offences'* sentenced in the higher courts where 80% of women were imprisoned for this category of offence in 2012 whereas for the same offence only 41.9% of men were imprisoned.[86] This is similar to the research findings in the 1994 Report which found that female social security offenders were more harshly punished than male

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82 Tables 2 and 3 in Attachment 3 show all matters finalised in the courts in 2012 as a result of a conviction (by gender). Table 2 shows the proportions of penalties received by adults in the Magistrates Court, District Court and Supreme Court, while Table 3 shows penalties received in the Children's Court.

83 Refer to Table 1 in Attachment 3 (which shows Use of Imprisonment by Sex and level of Court 2012; 6% of all sentenced male offenders go to prison whilst only 2.9% of all female sentenced offenders go to prison).

84 In 2012 across all offence groupings women were sentenced to imprisonment much less often than men (2.4% for women versus 4.6% for men in the lower courts; 50% for women versus 66.7% for men in the higher courts).

85 Refer to Table 4 in Attachment 3, which shows the proportion of penalty types received for men and women across the lower and higher courts, by the offence type of the representative charge. This data is for matters finalised as a result of a conviction in the Children's Court and Magistrates Court ('the lower courts'), and the District Court and Supreme Court ('the higher courts').

86 Yet in the lower courts the general trend of women being much less likely to be imprisoned than men is confirmed.

social security offenders (the 'double punishment' of women theory referred to earlier discussion).

The Subcommittee found that there is virtually no current research or discussion in Western Australia about the role or impact of gender in sentencing policy and practice. This is probably due both to the limited awareness and explanation of differential sentencing outcomes between men and women. Accordingly, in terms of current sentencing outcomes and practice concerning women offenders, it is impossible to know if gender bias exists in Western Australia either in favour or against women offenders. This lack of enquiry and knowledge regarding the sentencing of women is unacceptable.

Outside of Australia research into gender differences in sentencing, and the development of theories to explain such differences, has taken place over many decades with most studies being conducted in North America.[87] In Australia three studies took place between 1987 and 1993 exploring gender differences in sentencing outcomes in lower courts. Similar studies have been done in New Zealand.[88]

In Australia there have been two recent studies that examined differential sentencing outcomes in the higher courts of South Australia[89] and across all courts in Victoria.[90] The findings of both studies were broadly consistent with a large body of literature in this field. Several key conclusions drawn from these studies, relevant to this discussion, follow:

- men and women have different patterns of criminal behaviour with women's offending tending to be less serious and less likely to be involve violence;

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87 For a summary of some of this research see Rodriguez, Curry and Lee. *Gender Differences in Criminal Sentencing: Do Effects Vary Across Violent, Property and Drug Offenses?* Social Science Quarterly, Vol. 87, No. 2, June 2006.

88 In combination, this research suggests that the sex of an offender may have both a *direct* and *interactive* effect on sentencing outcomes i.e. (i) women are less likely to be imprisoned (than men) and, once sentenced to prison, receive a shorter period of incarceration (*direct effect*) and (ii) compared with women, variables measuring current and past offending behaviour appear more likely to aggravate the sentences of men (*interactive effect*).

89 Jeffries, Samantha and Bond, Christine (2010),*Sex and sentencing disparity in South Australia's higher courts*, Current Issues in Criminal Justice, 22(1). pp. 81 – 97.

90 *Gender Differences in Sentencing Outcomes"*, Sentencing Advisory Council of Victoria, July 2010 accessed online at http://www.sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/gender_differences_in_sentencing_outcomes.pdf as at17.3.14.

- for most offences women are more likely to be sentenced to a wholly suspended sentence or a community-based order (both served in the community rather than in custody) rather than imprisonment;
- however, when imprisoned, women's sentences are shorter because they are more likely than men to have a constellation of factors that can create legitimate mitigating circumstances which validly reduce the length of a sentence; and
- it is these mitigating factors that lead to disparities in sentencing outcomes for men and women in the criminal courts.

The above research supports the view that gender is indeed a relevant and legitimate factor in sentencing. It has been suggested that the typical disparities in sentencing between men and women (where women are sentenced less harshly than men) "*may well be warranted and not indicative of any pervasive 'bias'*."[91] That is, it may be that these disparities do not necessarily indicate gender discrimination or bias in sentencing but rather that judicial officers are taking into account the more complex reality of women's lives (e.g. economic marginalisation, family responsibilities etc.) and differences in the factors involved in women's offending and rehabilitation (e.g. less violence, the higher incidence of mental illness and past or current victimisation). Accordingly, in the Subcommittee's view, gender should be given formal recognition in the sentencing process and this issue is addressed further below.[92]

The Subcommittee concurs with the view that knowing *whether* judges consider gender in their decision making process is important because it permits the question to be raised as to *how* they consider this factor in their sentencing decisions. This can then inform policy makers who might reform sentencing principles to ensure equitable treatment of women offenders.[93] The Subcommittee therefore makes a number of recommendations regarding research concerning the sentencing of women because it has the potential to assist the courts, DCS and others in the

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91 *Gender Differences in Sentencing Outcomes"*, Sentencing Advisory Council of Victoria, July 2010 at p.48.

92 Under the heading '*Sentencing principles and practice applicable to the sentencing of women',* see Recommendation 9.5.

93 Sarnikar, Sorenson and Oaxaca, *'Do you receive a lighter prison sentence because you are a woman? An economic analysis of Federal Criminal Sentencing Guidelines'*, June 2007, USA Institute for Study of Labour, p. 31.

criminal justice system to plan for, and address, issues associated with the offending and punishment of women. These recommendations are set out further below.[94]

Sentencing principles and practice applicable to the sentencing of women

As noted above the 1997 Progress Report indicated that the Western Australian Government supported the promotion of discussion of sentencing principles and options, with a view to ensuring equity and justice in the sentencing of women, by way of encouraging research and evaluation of judicial attitudes and approaches to sentencing. However it was also noted that recommendations that aimed to promote such discussion among the Judiciary, required the endorsement of the Judiciary.

The paucity of research concerning sentencing outcome differentials between men and women has been addressed above. In addition to this we have found that there is scant research of any other kind that concerns the sentencing of women in WA. The exception to this is some recent research concerning the intersection of aboriginality, gender and sentencing in WA higher courts.[95] This is discussed below.

The other aspect of sentencing of particular application to women - of which there is also surprisingly little public discussion in Western Australia (again probably due to a lack of local research) - is the impact of imprisonment on the families of offenders. This is particularly disappointing because there appears to be an extensive discourse in the literature about this and related issues. We also explore this issue further below.

1) Aboriginality

The 1994 Report did not explore the intersection of issues of Aboriginality, gender and sentencing. In fact, there has been very little exploration of the interaction of these issues until recent times. However there has been considerably more attention, over the years, both here in Australia and elsewhere, to the issue of Aboriginality in sentencing (absent the added factor of gender). This is particularly so in Australia due to the recent High Court

94 Refer to recommendation 9.11 of this 2014 Review Report.

95 Jeffries, S. and Bond, C. (2013). *Gender, Aboriginality, and the Criminal courts: a narrative exploration of women's sentencing in Western Australia* available at http://gcecs.edu.au/wp-content/uploads/2013/08/Gender-Aboriginality-and-the-Criminal-Courts-A-Narrative-Exploration-of-Womens-Sentencing-in-Western-Australia.pdf.

decisions in late 2013 of *Bugmy v The Queen*[96] and *Munda v Western Australia.*[97] Neither of those decisions specifically considered the sentencing of Aboriginal women offenders.[98] However the Subcommittee takes the view that the issues raised in those cases have considerable application to Aboriginal women offenders.

At common law, the need to take account of the specific circumstances of Aboriginal offenders was first recognised in 1982 in *Neal v R.*[99] In 1992, in the NSW case of *R v Fernando*,[100] Justice Wood set out eight principles relevant to sentencing disadvantaged Aboriginal offenders.[101] However, Bartels[102] (citing Manuell, 2009[103]) notes that there has been criticism that the '*Fernando* principles' have been 'applied unevenly in the appellate courts' and that a narrowing of the '*Fernando* considerations' has contributed to high rates of imprisonment for Aboriginal Australians.[104] It has also been recently noted that there had been only six cases considering the principles that involved female offenders, with no real elaboration of how the principles might relate to women.[105]

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96 *Bugmy v The Queen* [2013] HCA 37.

97 *Munda v Western Australia* [2013] HCA 38.

98 For a comprehensive analysis of both decisions including a discussion of the ramifications of both decisions see Ian Freckleton SC (2013) *Imprisonment of Australia's Aboriginal Offenders*, Psychiatry, Psychology and Law, 20.6, 799 – 811 accessed online at http://dx.doi.org/10.1080/13218719.2013.860662 on 2.4.14.

99 (1982) 149 CLR 305.

100 (1992) 76 A Crim R 58.

101 In *R v Fernando*, Wood J considered various reports, papers and authorities to distil sentencing principles relevant to Aboriginal offenders. His Honour listed the propositions at pp. 62-63 of that case.

102 Bartels, L. (2012). Sentencing of Aboriginal women, *Aboriginal Justice Clearinghouse Brief*, Brief 14 November 2012, at p.6.

103 Manuell, J. 2009. *The Fernando Principles: the sentencing of Aboriginal offenders in NSW.* Discussion Paper. Sydney: NSW Sentencing Council available at http://www.sentencingcouncil.lawlink.nsw.gov.au/agdbasev7wr/sentencing/documents/pdf/sentencing_Aboriginal_offenders_nsw.pdfhttp://www.sentencingcouncil.lawlink.nsw.gov.au/agdbasev7wr/sentencing/documents/pdf/sentencing_Aboriginal_offenders_nsw.pdf.

104 Richard Ackland, 'Let punishment fit crime – but the circumstances too', *Sydney Morning Herald* (online), 23 August 2013 at http://m.smh.com.au/comment/let-punishment-fit-crime--but-the-circumstances-too-20130822-2seai.html

105 Stubbs, J. *Aboriginal women in Australian criminal justice: Over-represented but rarely acknowledged [*online]. Australian Aboriginal Law Review, Vol. 15, No. 1, 2011: 47-63. Available online at http://search.informit.com.au/documentSummary;dn=272068255545988;res=IELIND>ISSN: 1835-0186. [cited 06 Apr 14].

In *Bugmy v The Queen*, the High Court did not accept that courts should take judicial notice of the systemic background of deprivation of Aboriginal offenders, stating that in any case in which it is sought to rely on an offender's background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background. In the majority judgment their Honours said that "...*there is no warrant, in sentencing an Aboriginal offender… to apply a method of analysis different from that which applies in sentencing a non-Aboriginal offender. Nor is there a warrant to take into account the high rate of incarceration of Aboriginal people when sentencing an Aboriginal offender."* However the majority also accepted that the effects of profound deprivation do not diminish over time and are to be given full weight in the determination of the appropriate sentence in every case. Their Honours clarified that this was not to suggest that an offender's deprived background has the same mitigatory relevance for all of the purposes of punishment.

The High Court considered similar issues in *Munda v Western Australia,* a case concerning the sentencing of an Aboriginal male for the manslaughter of his de facto spouse against a backdrop of recurrent family violence. The offender had grown up in an Aboriginal community in which entrenched violence, alcohol abuse and social disadvantage were the prevailing normality. In the majority judgment it was said that '*To accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of human dignity*.' Their Honours noted that mitigating factors must not be allowed to result in a penalty which is disproportionate to the gravity of the offence and that consideration of moral culpability must be balanced with the seriousness of the offence.

Both of these High Court cases considered the effect of section 718.2 of the Canadian *Criminal Code* (effective since 1996) which provides that 'A court that imposes a sentence shall also take into consideration the following principles: -(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders'.

In 1999, in *R v Gladue* [1999] 1 SCR 688, the Canadian Supreme Court stated that this provision '[*directs] sentencing judges to undertake the process of*

sentencing Aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case' and that sentencing judges '*must give attention to the unique background and systemic factors which may have played a part in bringing the offender before the courts'*. The Canadian Supreme Court also recently confirmed that sentencing judges have a duty to apply s.718.2(e) and the '*Gladue'* principles in every case involving an Aboriginal offender.[106]

2) Aboriginality, Gender and Sentencing

Since 2010, researchers Jeffries and Bond have published a number of studies concerning the intersection of gender, aboriginality and sentencing in higher courts. In one study of sentencing in Western Australia's higher courts they have found that Aboriginal female offenders are *less likely*, than non-Aboriginal women (under like statistical circumstances) to be sentenced to imprisonment.[107] They suggested, that judges were more critical when non-Aboriginal women failed to 'take advantage of their rehabilitative opportunities' and were more likely to acknowledge Aboriginal women's expressions of remorse, good employment prospects and community bonds. They also suggested judges were more likely to express concern that incarceration would adversely affect children and to see a social cost to imprisonment for Aboriginal women. The researchers concluded that surprisingly little is known about how judges construct intersections of gender and aboriginality in rationalising their sentencing decisions.[108] This is consistent with their earlier findings in South Australia.[109]

However the same researchers have found the reverse in lower courts whereby Aboriginal offenders appear to be *more* harshly treated than non-Aboriginal

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106 See *R v Ipeelee*, 2012 SCC 13.

107 Jeffries, S. and Bond, C. (2013) *Gender, Aboriginality, and the Criminal courts: a narrative exploration of women's sentencing in Western Australia.* http://gcecs.edu.au/wp-content/uploads/2013/08/Gender-Aboriginality-and-the-Criminal-Courts-A-Narrative-Exploration-of-Womens-Sentencing-in-Western-Australia.pdf.

108 Refer to a discussion of this research in Bartels, L. *Sentencing of Aboriginal Women*, Aboriginal Justice Clearinghouse, Brief 14 (November 2012) accessible online at http://www.indigenousjustice.gov.au/briefs/brief014.pdf.

109 Jeffries, S. Bond, C. (2009) *Does Aboriginality Matter?: Sentencing Aboriginal Offenders in South Australia's Higher Courts*. Australian and New Zealand Journal of Criminology, *42, (1),* 47-71.

offenders in comparable circumstances.[110] They explain that this may be because magistrates are required to make sentencing determinations under tighter time constraints and with less information and, that when constrained in these ways, they utilise 'perceptual short hands' to make sentencing determinations. This conclusion is particularly concerning given anecdotal evidence that many Aboriginal women in lower courts lack legal representation and there is less reliance upon PSRs for all offenders in lower courts.

The above research suggests that Aboriginality *does matter* in sentencing in both higher and lower courts although the effect it has may depend, in part, upon the constraints such as time and information, under which judicial officers sentence. The researchers conclude that exploring the way judges think about cases and offenders would allow a more nuanced theoretical understanding of how information about cases and offenders is transformed into observed sentencing outcomes.[111]

How do the above developments sit with the imperative of addressing the high rates of incarceration of Aboriginal offenders, particularly women, in Western Australia? One commentator has suggested that there are several ramifications of the *Munda* and *Bugmy* decisions. First, that it imposes upon those representing Aboriginal offenders the difficult obligation to establish, often by way of expert evidence, that issues arising from deprivation and a familial experience of alcohol-associated violence, play a role in reducing an offender's moral culpability or are relevant to the suitability of particular sentencing options or objectives. Secondly that these decisions leave the issues where they belong – a challenge for Australian governments to address the background factors that give rise to the "*appallingly disproportionate rates of imprisonment*" of Aboriginal people.[112] Finally this commentator supports the view - which the Subcommittee also endorses – that "*sentencing innovation by itself cannot*

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110 Naylor, B. *Sentencing Female Offenders in the Magistrate's Courts: Preliminary Report on a Pilot Study* accessed at http://www.aic.gov.au/media_library/publications/proceedings/16/naylor.pdf.

111 Bond, C. and Jeffries, S. (2012). *Harsher Sentences?: Aboriginality and prison sentence length in Western Australia's higher courts.* Journal of Sociology 2012 48: 266 available online at http://jos.sagepub.com/content/48/3/266

112 Ian Freckleton SC, (2013) *Imprisonment of Australia's Aboriginal Offenders*, Psychiatry, Psychology and Law, 20.6, 799 – 811, at 808: accessed online at http://dx.doi.org/10.1080/13218719.2013.860662 *on 2.4.14.*

remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system."[113] This theme is developed further below in a consideration of alternatives to imprisonment.

At present, in Western Australia, there are no specific legislative sentencing options for Aboriginal offenders or principles of sentencing specific to Aboriginal offenders. However some Australian jurisdictions make specific reference to an offender's Aboriginal status in their sentencing legislation (see s. 33(m) *Crimes (Sentencing) Act 2005* (ACT); s. 9C *Criminal Law (Sentencing) Act 1988* (SA);[114] s. 9(2)(p) *Penalties and Sentences Act 1992* (Qld); s. 104A *Sentencing Act 1995* (NT)).

The Subcommittee has considered whether it should recommend an enactment of provisions similar to these and further, whether any of these provisions are effective in reducing Aboriginal imprisonment.

In respect of the Canadian provision it has been suggested that the effect of section 718.2 has been limited, with Aboriginal women's representation (as a proportion of female prisoners) in Canada actually rising from 17-18 % in 1998-2000 to 23-24 % in 2006-2008.[115] Accordingly, due to the apparent lack of improvement in the incarceration rate of Aboriginal persons in Canada after the introduction of section 718.2(e), so-called '*Gladue courts*' were established in that country, with Aboriginal caseworkers appointed to provide reports to the court on the systemic and background issues affecting the lives of Aboriginal offenders, together with available culturally relevant sentencing options. Canadian Department of Justice evaluations have shown that *Gladue* court participants have reoffending rates about half those of non-participants.[116]

In the 2013 Review of the *Sentencing Act* 1995 (WA) ('the 2013 Review') it was recommended that, in order to address the high rates of incarceration of Aboriginal people in this State, consideration should be given to having a provision similar to section 9C of the *Criminal Law (Sentencing) Act 1988* (SA) which states that prior to any court sentencing an Aboriginal offender, it may,

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113 See the decision of the Supreme Court of Canada in *R v Gladue* [1999] 1SCR 679 at [65].
114 See a discussion about this section further below.
115 Manuell, 2009 – see above.
116 Manuell, 2009 – see above.

with the offender's consent, convene a sentencing conference and take into consideration views expressed at that conference. The 2013 Review noted that this is clearly an option available to the court and if it does take place the judicial officer is not bound by the views of those attending the conference. And further that most stakeholders including a number of judicial officers expressed support for a provision similar to that described above be inserted in Western Australian legislation.

The 2013 Review also noted that the South Australian legislation that uses 'sentencing conferences' for Aboriginal offenders is similar to the Aboriginal Community Court, which has operated since 2006 on an extended trial basis in Kalgoorlie.[117] It also noted that this court operates within existing law (i.e. without specific legislative authority and sanction) and should the option of sentencing conferences be extended beyond Kalgoorlie, there would be no need for specific legislation.

The Subcommittee was informed during its consultations that the Aboriginal Community Court offers considerable benefits for both the Aboriginal woman offender and the court because a more holistic approach to offending is taken whereby a discussion is held with the offender about their offending and the possible reasons for it.[118] According to DOTAG information these courts are designed to be more culturally inclusive of Aboriginal people than traditional courts and with an approach targeted towards reducing recidivism among participants.[119] Sentencing is then put on hold (utilising bail) pending other issues in the offender's life being addressed (such as sorting out fines, housing or parenting issues), which could reduce the risk of re-offending. However, one of the main difficulties faced by the Community Courts is the lack of designated programs to support the referrals the court would like to make.[120]

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117 The Subcommittee was informed during investigations that this court employs a 'circle sentencing' approach in which Aboriginal elders participate in the court process with the Magistrate.

118 Aboriginal women will even sometimes discuss past abuse in this forum whereas in the regular Court that won't occur.

119 Refer to the website of the Department of Attorney General of WA which explains the operation of the Aboriginal Community Courts: available at http://www.courts.dotag.wa.gov.au/A/aboriginal_community_court.aspx?uid=4279-5018-6799-1500

120 Consultation with Magistrate Felicity Zempilas conducted by C. Fletcher over the telephone on 24.10.13.

In light of the positive information the Subcommittee received about the operation of the Kalgoorlie Community Court and the benefits of the court receiving more detailed information about the offender, the Subcommittee supports amending sentencing legislation in Western Australia to promote the use of a sentencing conference in cases where an Aboriginal person is charged with an offence for which there is a serious risk of imprisonment. This could also be of particular benefit to Aboriginal women offenders.

On a related issue the Subcommittee is aware that the continued operation of the Community Courts in Western Australia is under review by DOTAG. Exploring all the arguments for and against the continuing operation of Community Courts is beyond the scope of the Subcommittee's investigations. However we are aware of extensive support for the establishment for such courts[121] (and on-going support) from relevant stakeholders, including the Judiciary (particularly the Chief Justice).[122] Accordingly the Subcommittee recommends on-going government support for Community Courts and further suggests that the measure of success of such courts ought not simply be defined in terms of recidivism rates for participants.

9.2 The Western Australian Parliament amends the *Sentencing Act* 1995 (WA) to require a sentencing court to hold a sentencing conference when an Aboriginal person is sentenced for a serious offence where there is a real risk of imprisonment and where the offender consents to such a conference being held.

9.3 The State Government of Western Australian continues to support and fund the operation of Aboriginal Community Courts.

121 See discussion in the final report of the Law Reform Commission of WA concerning '*Aboriginal Customary Laws'*, Project no. 94, September 2006, pp. 124 – 136.

122 See Paper delivered by the Hon. Wayne Martin AC, Chief Justice of Western Australia, to the JCA Colloquium on '*Customary Law – Western Australia'*, October 2007, Sydney, NSW. The Chief Justice has also lamented the existence of "some ill-informed comment on the operation of such courts": see Paper delivered to The Magistrates of Western Australia Annual Conference 2006, 8.11.06.

3) Offender's Family Responsibilities

Recommendation 182 of the 1994 Report was one of the few recommendations *not* implemented, namely that statutory sentencing principles in Western Australia should be amended to require a court to take account of the effect of a custodial sentence upon a sole carer, their children and their family.

A review of recent Western Australian cases undertaken by the Subcommittee found cases dealing with both (i) the general common law principles regarding the care of children as a mitigating factor in sentencing offenders and (ii) the mitigating factors set out in s.16A(2)(p) of the *Crimes Act 1914* (Cth) which applies to the sentencing of federal offences.

In terms of the common law principles that apply in Western Australia the Hon. Justice Beech summarised, in a recent case,[123]the principles applicable to the care of children as a mitigating factor in sentencing offenders. His Honour noted that:

- the general principle is that ordinarily, hardship caused to an offender's children by imprisonment of an offender will not be taken into account in the sentencing process unless the degree of hardship is exceptional, or where imprisonment will result in the children being deprived of parental care;
- whether, and to what extent, hardship to children may be taken into account depends on the gravity of the offence and the circumstances of the case - the more serious the offence, the less capacity the court has to mitigate punishment by having regard to the hardship of the offender's family; and
- the period over which the offences are committed may be relevant to the weight to be given to the impact of imprisonment upon the offender's children.

123 *Western Australia v Chapman* [2012] WASCA 203, (at pp119 – 130).

Commentators have also discussed the meaning of 'exceptional circumstances'.[124] The above principles are consistent with other recent WA case law in which the principle of general deterrence continues to have greater weight than the mitigating factor concerned with care of children. The above case confirms that the applicable legal principles have not significantly changed since the 1994 Report.

The contrasting effect of s.16A(2)(p) of the *Crimes Act 1914* (Cwlth) is illustrated by the Western Australian case in 2001 of *Nguyen v The Queen* [2001] WASCA 72. Malcolm CJ (with whom Wallwork J agreed) found that the sentencing judge did not say how he took the effect of the sentence on the offender's children into account or make any inquiry about the fate or future of the children. His Honour suggested that the Court should have sought a PSR that dealt with these issues and concluded that the sentence had been imposed without complying with section 16A(2)(p). The appeal against sentence was allowed on this ground.

The Subcommittee is concerned with the inconsistency that exists between the sentencing principles that apply to Commonwealth and State offences because the current common law sentencing principles do not permit a court to take account of the effect of imprisonment upon an offender's family other than in '*exceptional circumstances'*. Our concern arises because of the following factors:

- a large body of research that points to the significant negative impact that the incarceration of a mother can have on her relationship with her children and the consequences that has on her prospects for rehabilitation;[125]

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124 See *Sentencing: State and Federal Law in Victoria,* Fox and Freiberg, 2nd Ed, 1999.

125 For example: see Stanley, E. and Byrne, S. *Mothers in Prison: Coping with Separation from Children, University of South Australia*, Paper presented at the 'Women in Corrections: Staff and Clients Conference' convened by the AIC held in Adelaide, 31 October – 1 November 2000; see also Goulding, D. *Severed Connections: An Exploration of the impact of imprisonment on women's familial and social connections,* Murdoch University, 2004; and Bartels, L & Gaffney, A 2011, *Technical and Background Paper: Good Practice in Women's Prisons: A literature review*, AIC Reports, No 41, Australian Institute of Criminology, Canberra.

- a large body of research that points to the significant negative impact that the incarceration of a parent, particularly a mother, can have on children – often contributing to the 'cycle of crime' in families;[126]
- as mothers, Aboriginal women tend to have more biological children than non-Aboriginal women and often have caring responsibilities for extended family members;[127] and
- the disproportionately high number of Aboriginal children in juvenile detention in Western Australia.

For these reasons, and in addition to recommendation 9.1(iii) above, the Subcommittee recommends that there should be a modification of the requirement for '*exceptional circumstances'* in the case of any offender who is the sole carer of dependent children. Whilst not advocating for differential treatment of Aboriginal offenders in all cases, and recognising that each case must be judged on its merits, the requirement for a 'one size fits all' set of sentencing principles serves, in our view, to perpetuate intergenerational Aboriginal offending and is antithetical to the therapeutic approach implicit in a 'women's centred' approach to corrections. Therefore the Subcommittee reformulates this recommendation from the 1994 Report.

9.4 The Western Australian Parliament amends the principles of sentencing in the *Sentencing Act* 1995 (WA) so that a court, in determining whether or not to impose a custodial sentence on an offender who is a primary care-giver in a family, takes into account the effect of the sentence on the offender's family or dependants.

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126 For example: see Karen Lain and Peter McCarthy, *Risk, Protection and Resilience in the Family Life of Children and Young People with a Parent in Prison: A Literature Review,* Newcastle, *Newcastle Centre for Family Studies*.

127 See data from WA and other states that indicate the majority of Aboriginal women offenders have the care and custody of children at their time of imprisonment.

Sentencing options available to the sentencing of women

The 1994 Report sought to promote discussion about sentencing options for women. The 1997 Progress Report pointed to alternative sentencing options that the government anticipated would be of significant benefit to women offenders.

There have been a number of significant legislative developments in respect of sentencing in Western Australia in recent years. It is beyond the scope of this chapter to canvass all of those changes here however the Subcommittee has considered whether the current range of sentencing options in Western Australia is suitable for the sentencing of women.

In the 2013 Review the Government reviewed all available options under the *Sentencing Act* 1995.[128] Although the 2013 Review purported to consider the impact of various sentencing options in the context of the high rate of incarceration of Aboriginal offenders in Western Australia it did not consider any data concerning the use of current sentencing options. It also did not address any particular issues concerning the sentencing of women.

The 2013 Review considered the introduction of the pre-sentence order ('PSO') in 1993 (as a matter preliminary to sentencing[129]) and the introduction of mandatory sentencing in 1996.[130] It also reviewed all of the more commonly employed non-custodial sentencing options such as the Community Based Order ('CBO')[131], the Intensive Supervision Order ('ISO')[132], the Suspended Imprisonment Order ('SIO')[133] and the Conditional Suspended Imprisonment Order ('CSIO')[134] as well as the

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128 The 2013 Review was carried out to fulfil the requirement of s.150 of the *Sentencing Act* 1995. The stated purpose of the report was to determine, on balance, whether the policy objectives of the *Sentencing Act* remain valid and whether the terms of the legislation remain appropriate for securing those objectives: refer to the 2013 Review at p. 3. It also did not purport to look beyond existing sentencing options.

129 Refer to Part 3A of the *Sentencing Act* 1995.

130 The PSO was introduced in 1993 to enable a court (particularly the Drug Court) to defer imprisonment and give an offender an opportunity to address their offending behaviour. If an offender successfully completes a PSO it may reduce the penalty when sentencing eventually takes place. Mandatory sentencing was first introduced in 1996 not long after the commencement of the *Sentencing Act* 1995 (which partly aimed at reducing the use of imprisonment). The impact of both of these 'sentencing devices' is explored further in the Discussion arising from the 2014 Review dealing with the Sentence Management of Women Offenders.

131 Refer to Part 9 of the 2013 Review.

132 Refer to Part 10 of the 2013 Review.

133 Refer to Part 11 of the 2013 Review.

134 Refer to Part 12 of the 2013 Review.

options of fines, release without sentence (or spent conviction orders), conditional release orders ('CROs') and imprisonment. The 2013 Review concluded that:[135]

- the majority of stakeholders were satisfied with most options available under the *Sentencing Act* 1995 however it noted that the sentencing options of fines, community based orders and imprisonment caused most concern to stakeholders;
- fines could be improved by expanding flexibility in the imposition of fines by including a suspended fine option, a partially suspended fine option[136] and a stand-alone community work order;[137]
- the process of referring fines more directly to the Fines Enforcement Registry ('FER') is endorsed so that time to pay arrangements can be more promptly entered into;
- there is a need for a more flexible approach to CBOs in order to marry CBO requirements with individual skill deficits, using a formalised graded approach in respect of compliance outcomes,[138] and to widen the eligibility for a PSO to include CBOs, ISOs and SIOs so that in the event that an offender successfully completes a court ordered treatment program a court may order an immediate spent conviction order;
- at the far end of the sentencing hierarchy, there is a need for increased flexibility of conditions for suspending imprisonment[139] which could offer a greater range of credible, rehabilitative and cost effective alternatives; and
- the *Sentencing Act* should be amended to return minimum imprisonment sentences from six to three months because of a 'net widening' effect that has occurred since the abolition of sentences of six months or less in which

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135 From the 'Executive Summary' of the Review at pp. 3 - 5.
136 Considered to be particularly suitable to Aboriginal offenders
137 Where hours of work can be equated to a specific fine amount.
138 As compared with the current breach or compliance dichotomy.
139 Such as introducing partially suspended sentences and electronic tagging (in preference to any proposal for periodic detention) It was also recommended that consideration be given to amending the *Sentencing Act* so that the authority to impose CSIO is available to all Magistrates Courts.

> offences that previously attracted a term of less than six months now tend to be dealt with by way of a longer term rather than a community based option.[140]

The 2013 Review also considered the arguments for and against periodic detention. It noted that stakeholders were fairly evenly divided on whether it should be considered for Western Australia.

The Subcommittee considered whether the introduction of periodic detention would be of particular benefit to women offenders. During consultations the Subcommittee was persuaded to support the above proposal for increased flexibility of suspended imprisonment in preference to the introduction of periodic detention as an alternative to immediate imprisonment. The Subcommittee is therefore generally supportive of the above proposals most of which are likely to be of benefit to women offenders as they are likely to improve the use of the non-custodial options in the *Sentencing Act* 1995 over the use of imprisonment.

However because the 2013 Review did not specifically address the suitability of the current sentencing options for women there is also an urgent need for an examination of non-custodial options better suited to women offenders, particularly Aboriginal women. Examples of other effective non-custodial options particularly suited to Aboriginal women offenders have been recently described by Bartels.[141] There is also a need for research to examine how the options of the pre-sentence order[142] (which is really preliminary to sentence), suspended sentence[143] and mandatory sentencing (which is becoming increasingly common) are impacting upon rates of imprisonment for women.[144]

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140 This had unanimous support from stakeholders notably from the Chief Justice Wayne Martin AC, the DPP Joe McGrath SC and Aboriginal communities.

141 Bartels, L. *Sentencing of Aboriginal Women,* Brief 14, Nov 2012, Aboriginal Justice Clearinghouse.

142 Note that the PSO is utilised in the START (Mental Health Court) and Drug Courts in WA to allow these Courts to defer sentencing whilst a participant is on the court program. The Subcommittee obtained some data from START Court to show that for all people listed in the START Court between 18.3.13 and 31.3.14 almost 31% were female and almost 67% were male. As START Court is only a new court there are no measures of success data yet available to gauge the effectiveness of this Court: refer to email from L Wilkinson, START Court Coordinator, Magistrates Court of WA, Perth Court and Tribunal Services, DOTAG to C Fletcher, 7.4.14.

143 See also discussion in Sentencing Advisory Council of Victoria, *Suspended Sentences and Intermediate Sentencing Orders, Suspended Sentences*, Final Report—Part 2, April 2008.

144 Data obtained from START Court shows that for all people listed in the START Court between 18.3.13 and 31.3.14 almost 31% were female and almost 67% were male. As START Court is only a new court there are no measures of success data yet available to gauge the effectiveness

Whilst the Subcommittee endorses the proposals in the 2013 Review, it also recommends elsewhere in this chapter[145] further research into the availability and use of the various sentencing options for women and the impact these have on the rates of imprisonment for women.

9.5	The State Government implements the proposals of the 2013 Statutory Review of the *Sentencing Act* 1995 for reforms to current sentencing options, particularly improvements to the flexibility of fines and community based orders, with a view to enhancing the use of non-custodial sentencing options for all offenders (with the aim of reducing the number of women, particularly Aboriginal women, imprisoned for fine default and, more generally, to address the disproportionately high rate of incarceration of women offenders).

Legal representation of Women Offenders

The issue of legal representation for persons charged with a criminal offence is an important issue at all stages of a prosecution not only for those charged but also for the police, the prosecutors and the courts. A lack of proper legal representation can result in delays, misunderstandings and more serious injustices. However the allocation of legal aid funding for criminal matters is becoming increasingly restricted to the most serious offences for which a real risk of imprisonment exists. Women accused of offending are at a particular disadvantage when legal aid is denied because they are often more economically marginalised than men (and so often have to self-represent if they cannot afford a private lawyer). The issues are, of course, far more complex than just described.

However the Subcommittee seeks to highlight the particular situation concerning the representation of Aboriginal women offenders as a significant area of possible gender bias. Anecdotally, it is generally understood that the Aboriginal Legal Service (ALS) will sometimes experience a conflict of interest whereby they cannot act for a female offender because she may have been either a victim of an existing ALSWA client or her victim is an existing ALSWA client. Furthermore, because Aboriginal women offenders are also often more significantly socially and economically

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of this Court: email from L Wilkinson, START Court Coordinator, Magistrates Court of WA, Perth Court and Tribunal Services, DOTAG to C Fletcher, 7.4.14.

145 Refer to Recommendations 9.7 and 9.11 of this Chapter below.

disadvantaged than other women offenders, they at greater risk of being without legal representation particularly in proceedings before Magistrates Courts.[146]

In light of the disproportionate growth in women's imprisonment in Western Australia (particularly that of Aboriginal women) this Subcommittee considers it is imperative that all women offenders (especially Aboriginal women offenders) should be able to access competent and affordable legal representation at all stages of criminal proceedings (including sentencing).

To this end the Subcommittee recommends the better integration of existing services to represent all women offenders or, alternatively, in the case of Aboriginal women offenders, support and funding for the establishment of a separate Women's Aboriginal Legal Service (WALS) to represent Aboriginal women offenders. This issue is further explored below in the context of services to women in custody.

9.6 The State Government:

i) urgently conducts a review, which is published within one year of this 2014 Review Report, containing recommendations to support and appropriately fund the improved integration of existing legal services to represent women offenders;

ii) in the case of Aboriginal women offenders, seeks Commonwealth Government funding for the establishment of a separate Women's Aboriginal Legal Service (WALS); and

iii) within one year of the review being published, tables a response to the review in the Western Australian Parliament.

The need for a research body to consider, among other things, issues concerning the sentencing of women

As already noted the Subcommittee has found that there is very little publicly available research that focuses on the sentencing of women in WA.

Bartels has observed that to ensure a more comprehensive analysis of sentencing patterns and inform sentencing policy there is a need for the collection of detailed

[146] The duty lawyer services of Legal Aid and ALSWA only provide one off appearances for short appearances or pleas in mitigation. Rarely do they represent impecunious women offenders at summary trials unless there is serious risk of imprisonment.

administrative sentencing data that disaggregates outcomes in relation to both gender and Aboriginal status. She also observes that there has been a paucity of research to date on Aboriginal women and non-custodial sentencing options.[147]

There has been little in the way of independent, academic research concerning women's offending or sentencing in WA in over 20 years. The WALRC has not had a specific reference on either sentencing or gender issues.[148] The 2013 Statutory Review of the *Sentencing Act 1995* (WA) did not address any particular issues concerning the sentencing of women. The DPP's comparative sentencing tables do not provide a comprehensive picture of sentencing trends for women.

Accordingly the Subcommittee has found it difficult to get a clear picture of the state of women's offending and sentencing in Western Australia. In order to develop fair and equitable sentencing policy that can properly address the disproportionate rate of imprisonment of women in Western Australia, the Subcommittee believes that the government needs to ensure comprehensive offending and sentencing data is readily available which may in turn encourage and facilitate research concerning women's offending and the impact of various sentencing options upon women (including imprisonment).

In the 2013 Review it was reported that there was widespread support among stakeholders for a sentencing advisory council in Western Australia. Sentencing advisory bodies exist in NSW and Victoria. The role of these bodies commonly includes advice to government on sentencing matters, preparation of research papers and reports on sentencing issues and recommendations for sentencing law reform. The members of these bodies usually include people involved in the process of justice ranging from victims of crime to legal professionals. The work of these bodies also serves to improve public understanding and confidence in the sentencing process.

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147 Lauren Bartels, *Sentencing of Aboriginal Women,* Brief 14, Nov 2012, Aboriginal Justice Clearing house available online at http://www.Aboriginaljustice.gov.au/briefs/brief014.pdf

148 However sentencing issues were considered in the Law Reform Commission's 2008 Homicide reference, the 2006 Aboriginal Customary Laws reference and the 2010 reference on Court Intervention Programs. As far as gender and the law goes, the only relevant reference is the 2008 Homicide Law reference: email communication from Heather Kay former CEO of LRCWA to Catherine Fletcher on 25.3.14.

Another model for a research body is a centre for independent research based at a university. An independent research body attached to a university would provide access to a wide range of academics thus providing various multidisciplinary approaches to law reform. Furthermore university students could be credited academically for providing their research assistance to such a body. We understand that there are such centres at some Western Australian universities but they do not have a primary focus on sentencing issues. They would also need improved funding and government support to carry out this role and the expectations of a sentencing advisory council described above.

9.7	The State Government supports and funds the establishment of a sentencing advisory council in Western Australia or, alternatively, appropriately supports and funds an independent criminal research body at a university to undertake, among other things, research into issues surrounding the sentencing and punishment of women.

MANAGEMENT OF SENTENCES IMPOSED ON WOMEN OFFENDERS

Overview

In the past 20 years there have been a number of reports, studies and policy papers that have dealt with imprisonment issues concerning sentenced women offenders in Western Australia.[149] The management of other (non-custodial) sentencing options imposed on women is less commonly explored.

As already observed there has been commendable progress in recent years across government and community agencies towards developing more gender-sensitive policy and practice concerning women offenders. It is also apparent DCS acknowledge the importance of addressing the causes of female offending and high rates of imprisonment of women in this State. However, in line with the findings of the Office of the Inspector of Custodial Services (OICS), the Subcommittee has found there are often gaps between departmental policy objectives and the achievement of those objectives. In order to bridge those gaps the Subcommittee

[149] The most significant of these, up to 2010, have been comprehensively summarised in research undertaken for the UNSW 'Australian Prisons Project' located at http:/www.app.unsw.edu.au/women-prison-western-australia-1907-2010 accessed on 2.4.13

considers that a whole of government response to women's offending and punishment is needed. A more targeted approach to the complex issues involved in women offending should also better address any systemic gender bias experienced by women while serving their sentence either in prison or in the community.

Staffing at women's prisons and awareness of gender issues

In the 1997 Progress Report it was indicated that the issue of gender balance within staffing at women's prisons was supported, in principle, by the government. An agreement with the WA Prison Officers' Union ('POU') was (then) in place whereby 60% of staff at Bandyup had to be female. At that time women held senior positions at Bandyup.

The informal agreement with the POU for a 60 to 40, female to male ratio at Bandyup still persists. DCS informed the Subcommittee that in all circumstances, wherever possible, it aims to ensure that 60% of officers who work with female offenders are female.[150] Staff working with female prisoners can also complete the '*Working with Female Offenders'* training however, to our knowledge, this is currently only compulsory for prison staff that work at Boronia and not Bandyup.

However the 2011 OICS inspection of Bandyup revealed a gender imbalance within staff officers whereby 48% were female and 52% were male. The OICS advises that at women's prisons, only female staff can perform many of the duties and thus the proportion of male officers presents practical difficulties. As such, the workload on women officers rostered in areas that are otherwise male dominated is substantial. The OICS recommends that if a women-centred philosophy is to be achieved at Bandyup, a greater commitment to women working and advancing within the prison must be made.[151]

The Subcommittee met with the female superintendents at visits to the metropolitan women's prisons and were very impressed with the commitment of senior staff at both of these facilities. However the Subcommittee agrees with a recommendation

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150 In December 2011 the State Administrative Tribunal (SAT) granted DCS a five-year exemption from the operation of section 11 of the *Equal Opportunity Act 1984.*[150] The exemption was sought to enable 50 % of senior prison officer and principal officer positions to be filled by women at both Bandyup and Boronia. The SAT acknowledged that the exemption is made in furtherance of a plan to promote the best interests of women prisoners, the people employed there and the public.

151 OICS, Report of an Announced Inspection of Bandyup Women's Prison, August 2011.

made by OICS (which is supported by DCS[152]) that the delivery of services to women could be improved by the employment of more women custodial officers, particularly Aboriginal women, properly trained in working with women offenders. In the Subcommittee's view DCS could also offer scholarships, complimented by mentoring, to Aboriginal women to train as, for example, social workers or counsellors in order to attract Aboriginal women to corrective services roles within prisons.

9.8	The Department of Corrective Services employs more women prison staff, particularly Aboriginal women, across all facilities accommodating women.
9.9	The Department of Corrective Services offers scholarships and mentoring to Aboriginal women to take up corrective service roles.
9.10	The Department of Corrective Services ensures that within 12 months of this Report all existing and prospective staff at all correctional facilities that accommodate women, complete the *Working with Female Offenders* course as a condition of their employment.

The state of women's imprisonment in Western Australia

Although there are far fewer women in prison in Western Australia than men[153] (as is the trend in most jurisdictions) the number of women in prison in this state has been steadily growing in recent years.[154] It also of concern that the number of women in prison in Western Australia is growing at a faster rate than the rate of growth of men in prison. In other words, the adult female prison population is the fastest growing sector of the adult prison population in Western Australia. Furthermore, the rate of women's imprisonment in Western Australia has often been higher than the national average.[155]

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152 OICS, Report of an Announced Inspection of Bandyup Women's Prison, August 2011- Recommendation 11.

153 As at 28 March 2014 the total number of adult prisoners in Western Australia was 5100.Of this number 472 were adult women prisoners (9.2% of the adult prison population). Of the adult women prison population, 106 (22.4%) were unsentenced and 221 (46.8%) were Aboriginal.

154 In Western Australia, in the three years prior to 2012, there was a *significant rise* in the number of women in prison (including a 21% rise in the number of Aboriginal women in prison). Correspondingly in the same period there was a *significant decrease* in the number of CBO's for women offenders (including a 31% reduction for Aboriginal women

155 During the 1990s the state's female prison population rose rapidly (more than doubling) within a five-year period from 111 women in 1995 to 237 women in 2000. This equated to a rise from 5%

Of particular concern in Western Australia is the disproportionate incarceration of Aboriginal people when compared to other states.[156] There has been no significant improvement in this data over the last 20 years.[157] The situation concerning the imprisonment of Aboriginal women is particularly alarming. In 2014, almost 47% of women prisoners in Western Australia are Aboriginal[158] (although Aboriginal women comprise only 3.8% of the adult female population in Western Australia). The rate of growth of numbers of Aboriginal women in prison is also a significant problem. The number of Aboriginal women in full-time custody in Australia rose by 7% between the 2011 and 2012 March quarters, compared with a 5% increase for Aboriginal men and 2% for the general female population. The national Aboriginal women's imprisonment rate for the March 2012 quarter was 16.5 times that of the general female population (which is even higher than the degree of overrepresentation for Aboriginal men at 13.4 times).

Reasons for and the ramifications of, the high rates of imprisonment of women in Western Australia

Section 6(4) of the *Sentencing Act 1995* (WA)[159] reflects the principle that imprisonment should be utilised only as a sanction of last resort. Further, section 39 of the *Sentencing Act 1995* (WA) requires that the option of imprisonment cannot be

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to 7.6% of the overall State prison population (2.6% increase). Nationally, over roughly the same period, the proportion of women in the prison population rose from 4.8% in 1995 to 6.6% in 2002 (1.8% increase): source - DCS document "*Key Factors in sentencing for women offenders*", August 2013.

156 In 2013, ATSIC prisoners made up 40% of Western Australia's prison population while comprising only 3.8% of the adult population. Nationally, ATSIC prisoners comprised just over 27% of the total Australian prisoner population although only 3% of the total national adult population. In 2013, Western Australia had the highest imprisonment rate for Aboriginal prisoners in Australia (at 3,314.5 prisoners per 100,000 adult Aboriginal population) and also the highest ratio of Aboriginal to non-Aboriginal imprisonment rate in Australia (21 times higher for Aboriginal prisoners): Source: 'ABS Prisoners in Australia, 2013 – Western Australia' accessed on 7.5.14 at http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4517.0main+features432013.

157 In 1996, the incarceration rate for Aboriginal persons was 4,726 per 100,000 while the incarceration rate for non-Aboriginal persons was 180 per 100,000 (26:1). In 2006 Aboriginal persons were 26 times more likely than non-Aboriginal persons to be incarcerated in WA prisons. Source: http://www.law.uwa.edu.au/__data/assets/pdf_file/0008/748826/Crime_and_Justice_Statistics_for_WA-2006-Adult_Imprisonment.pdf accessed 19.1.14.

158 Although Aboriginal women's imprisonment rate is lower than for Aboriginal men, they account for a higher proportion of their respective prison population (35% vs 26%).

159 Which provides that imprisonment must not be imposed unless a court decides that the seriousness of the offence justifies imprisonment or the protection of the community requires it. Note this was a central recommendation made by the Royal Commission into Aboriginal Deaths in Custody (RCIADIC),

imposed unless the court is satisfied that all other sentencing options are inappropriate.[160]

The Subcommittee notes that since 1994, for the total adult offending population, the rate of use of imprisonment has increased markedly in WA's higher courts – from 44.8% to 64.2%[161] (although it has declined slightly in WA's lower courts from 5.1% to 4.1%). Whether this contributes to the increasing rates of imprisonment of women in Western Australia is not known. It appears to be an issue that remains largely unexplored in contemporary research.

During consultations with DCS it was observed that increases in the women's remand prisoner population appear to be contributing significantly to the rate of growth of adult women in the overall prison population. As at 29 August 2013 35% of the Aboriginal women at Bandyup were on remand compared with just 28% of the non-Aboriginal women. A recent analysis by DCS of the adult remand population in WA between 2007 and 2012 identified that while the number of adult male remand prisoners has risen by 32% (reflecting a similar trend in population growth of sentenced prisoners), the number of female remand prisoners in that same period had increased by 44%.[162] This is a significant percentage in itself but also much higher than the growth rate of male remand prisoners. The Subcommittee does not know how many of these women are ultimately given a sentence of imprisonment.

The Subcommittee considers that the reasons for the increasing rate of women's imprisonment are likely to very complex. It is very difficult to get an accurate picture of what is driving this problem. It clearly requires further investigation and research if it is to be addressed.

Any such research should include a thorough review of bail and remand practices in respect of women. During consultations the view was expressed to the Subcommittee that there are a number of problematic bail issues particularly for Aboriginal women. For example, the effect of clause 3A of Schedule 1 of the *Bail Act* 1982 whereby an accused on bail for a 'serious offence' (listed in Schedule 2 of the Act) who is then charged with a further 'serious offence' shall be refused bail for the

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160 http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/DP/Part_05H.pdf

161 Refer to the data presented in the 1994 Report and data presented at Table 1 in Attachment 3.

162 DCS Policy & Strategy, Organisational Strategy & Performance, Analysis of the Adult Remand Population, Based on end of month census figures 30 Jun 2007 to 30 Jun 2012.

second serious offence unless 'exceptional circumstances' can be established by the accused. Many Aboriginal women consider bail conditions as too onerous to meet such as surety requirements and alternative residential conditions.[163]

The disproportionate growth rate of women on remand is also concerning for other reasons. Firstly, this group of unsentenced prisoners (most of whom are held in Bandyup) clearly require legal assistance for forthcoming legal proceedings. As noted elsewhere in this report there are significant obstacles to women at Bandyup obtaining legal assistance while in prison. Secondly, women on remand are also at a particular disadvantage in that programmed prison interventions such as counselling, mental health, education, vocational services and other social supports, cannot be accessed by these women due to their temporary status within the system.

These are not new issues and have been previously considered in Western Australia.[164] However as the number of women on remand is disproportionately high, and appears to be contributing to the disproportionate numbers of women in WA prisons, it is timely that the government again investigate remand practices impacting upon women offenders.[165]

Another issue raised in consultations was the use of 'Prohibitive Behaviour Orders' ('PBOs') and the belief that they are having an impact upon women's imprisonment and a real impact on women, particularly on homeless Aboriginal women and women with mental health disorders. Although these are civil orders, once breached there are criminal sanctions. PBO's are considered to have a 'net-widening' effect.[166]

Elsewhere in this chapter the Subcommittee notes the impact of disproportionate imprisonment on the delivery of services to women offenders and the consequential impact upon families, communities and society when women go to prison. The Subcommittee also recommends the Government urgently supports research into how custodial and community correction services might be better delivered so as to

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163 Consultation conducted with Peter Collins of the ALS by C Fletcher on 22.4.14.

164 For example in 1997 there was an Auditor General's review of bail and remand practices. Also in 2000 The Nevill Report reviewed the management of prisons in which the high rate of imprisonment was discussed and recommendations made to tackle this with community based sanctions and ensuring remand (in custody) was used only when absolutely necessary: Nevill, M, (MLC) *Report of the Standing Committee on Estimates and Financial Operations in Relation to the Financial Management of Prisons*, Western Australian Legislative Council, (2000).

165 The Subcommittee is aware that DCS have been looking at this issue. However a stakeholder's discussion forum to which Women Lawyers of WA were invited which was scheduled for a date in 2013 has, to our knowledge, not yet taken place.

166 Consultation conducted with Peter Collins of the ALS by C Fletcher on 22.4.14.

bring about improved outcomes for women offenders and the community (including whether there are alternatives to imprisonment for some women offenders). The Subcommittee also considers the support and assistance provided to women upon their transition to the community following completion of their sentence.

The Western Australian Government must again urgently look into these issues so measures can be taken to address the disproportionate numbers of women, particularly Aboriginal women, in custody in Western Australia. The Subcommittee has revisited in further detail below some of the particular issues explored in the 1994 Report that are relevant to this debate.

9.11 The State Government:

i) publishes annual sentencing data and trends to better facilitate research into sentencing outcomes and practice;

ii) supports and funds research into:

a) the reasons for, and implications of, differential sentencing outcomes between men and women;

b) the factors driving the high rate of imprisonment of women (including high numbers of women on remand);

c) judges' considerations when applying non-custodial sentences versus custodial sentences; and

d) other factors explaining the decreasing number of community based sentences in Western Australia, by gender and aboriginality, and the effectiveness of non-custodial sentences for women offenders and conditions for success; and

iii) makes public any findings of such research particularly to the courts and other relevant stakeholders where those findings may impact upon equitable policy and practice concerning the sentencing and imprisonment of women.

Fines Enforcement and Fines Default System - Imprisonment issues

Fines currently make up over 80% of all sentencing outcomes in Western Australian Magistrates Courts.[167] However, despite their popular usage, there is widespread concern in the community that the fines system is not operating effectively.[168] Significantly, the rate of imprisonment for fine default for Aboriginal people, especially women, continues to be much higher than for non-Aboriginal people.[169]

As noted above the 1997 Progress Report pointed to a number of reforms aimed at addressing high rates of incarceration of women for fine default (particularly of Aboriginal women).

The *Fines Enforcement* legislation[170] probably did assist to reduce women's incarceration rates for fine default as women represented 9% of those in prison for fine default after its introduction compared with 11.5% in 1994-5. However in Western Australia in 2000 over 40% of Aboriginal women entering prison did so for fine default. In 2003 the figure rose to 46% (with Aboriginal women comprising 79% of all female fine defaulters). Recently the Chief Justice of WA the Hon. Wayne Martin AC pointed to the example that of 700 sentences served by adult women in WA in 2012/13, 31% were for unpaid fines only. In the six months between 1 January 2012 and 30 June 2012 almost 71% of women commencing imprisonment for fine default were Aboriginal women.[171]

These results might be explained by the possibility that an unintended consequence of the *Fines Enforcement* legislation is that often the offender won't know their licence has been suspended and will continue to drive.[172] The Western Australian Government has recently attempted to address this problem by introducing the '*Time to Pay Up Strategy*' designed to inform people who are not aware that their licences have been suspended and assist with more effective methods of making

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167 DOTAG '*Statutory Review of the Sentencing Act 1995 (WA)'*, October 2013 at p.35.

168 DOTAG '*Statutory Review of the Sentencing Act 1995 (WA)'*, October 2013 at p.35.

169 Presentation on '*Access to Justice'* at NDU on 26.2.14 for inaugural 'Eminent Speakers Series'.

170 The *Fines, Penalties, Infringement Notices Act* 1994 (WA) introduced alternative non-custodial methods of enforcing fines such as driver's licence suspension and seizure of goods. The *Sentencing Act* 1995 (WA) and the *Sentence Administration Act* 1995 (WA) provided a new range of sentencing options as alternatives to the imposition of fines. Amendments to the *Sentencing Act 1995* made in the last decade also abolished short prison sentences

171 DCS Performance and Statistics, Women commencing Imprisonment for Fine Default for period 01 Jan 2012 to 30 Jun 2012, 10 July 2013

172 This factor is well recognised as a considerable problem in remote Aboriginal communities. This results in the imposition of further fines for the offence of driving under a suspended licence.

payments.[173] These changes may bring about an improvement in imprisonment rates for fine default. However it has also been suggested that the lower socio-economic status of women would mean they are still more likely than men to be incarcerated under this scheme because they are less likely to have a driver's licence, or have property that can be seized in lieu of payment, and, therefore ultimately, less likely to be able to pay fines.[174] However, the fact is, imprisonment of women for fine default, particularly Aboriginal women, continues at unacceptably high rates. When considered against the appalling rates of incarceration of women, particularly Aboriginal women, there is clearly a need for some reforms to the fines and fine default systems.

The 2013 Review examined the current fines system. It noted the difficulties brought about by the imposition of fines (especially mandatory fines) on impecunious and Aboriginal offenders. It reported that overall, while stakeholders rejected proposals for changes to fines structure they were unanimous in their support for greater flexibility in the imposition of fines.[175] The 2013 Review also considered the use of CBOs) as an alternative to fines for impecunious offenders. This is considered further below.[176] The Subcommittee has already recommended support for urgent implementation of the recommendations of the 2013 Review above in the hope that it may also address high rates of imprisonment in Western Australia of women offenders for fine default.

Community Sentencing Dispositions

The Subcommittee has noted elsewhere the decreasing usage of community corrections orders in Western Australia over the last three years to 2012 during

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173 Fines and Infringements from 21 August 2013, on the DOTAG website, http://www.justice.wa.gov.au.

174 Refer to UNSW Australian Prisons Project located at http:/www.app.unsw.edu.au/women-prison-western-australia-1907-2010 accessed on 2.4.13

175 The report suggested there was merit in a number of possible changes,[175] such as (i) introducing a suspended fine option equivalent to a CRO with bond forfeiture; (ii) introducing a process where fines can, as soon as they are imposed, be referred to the FER so that time-to-pay arrangements can be entered into promptly; (iii) introducing a stand-alone work order as a direct alternative to a fine where hours of work can be equated to a specific fine amount; and (iv) investigating the practical implications of introducing a partially suspended fine.

176 Note that a number of stakeholders were concerned that CBOs (which have a supervision requirement not present in fines) should not be used in lieu of fines, as that would be inconsistent with the sentencing hierarchy described in s. 39 of the *Sentencing Act*.

which time the use of imprisonment for women offenders increased. During 2012[177] a total of 7815 community orders were issued for all offenders with 1800 (23%) being issued for female offenders.[178] Just over half of these were issued for Aboriginal women.

Female offender rates for successfully completing community orders during 2012 was generally above 50% for all orders.[179] In every case, except bail orders, women appear to have more success on community orders than men. However Aboriginal women have *significantly lower* success rates across most categories of community orders than non-Aboriginal women (except Work and Development Orders) with almost 50% of Aboriginal women breaching their orders (compared with just under 30% of non-Aboriginal women who breach across all orders). This is similar to the finding in the 1994 Report in which only 62% of Aboriginal female offenders successfully completed community orders compared to a little over 80% of non-Aboriginal female offenders who successfully completed community orders.[180] Although the figures are not directly comparable these recent figures tend to suggest that, across both Aboriginal and non-Aboriginal female offenders, the success rate for completion of community orders has *got worse* and not better in 20 years. Breach rates of community orders are considered an important indicator of efficiency and relevance of community-based sentences and orders. Therefore, simply stated, the conclusion must be that community orders do not work well for Aboriginal women offenders.

The Subcommittee was unable to find any publicly available research explaining the use, or effectiveness, of the various sentencing options in respect of the sentencing of women or that explained the declining success of women on community orders in Western Australia.[181] However other research indicates that the most common cause

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177 DCS provided data for all community orders (includes a 'bail order') in WA for the period 1.1.12 to 30.12..12

178 Community Based Orders ('CBOs') were the most common category for female offenders (43%), followed by Work Development Orders ('WDOs')[178] (17%) then Intensive Supervision Orders ('ISOs') (12%) and finally bail orders[178] (11.6%).

179 Refer to table 5 in Attachment 3.

180 These overall figures are based on the average of the figures shown in table 6 in chapter 9 of the 1994 Report and briefly discussed at paragraph 3.8 (although the data shown was for successful completion of (then) three most common orders: WDOs, Probation and Community Service Orders).

181 However DCS provided to the Subcommittee a couple of very useful papers which summarise the literature and WA data dealing with women on community orders: DCS position paper, '*Characteristics of women on orders in the community'*, Research and Evaluation, Strategic and

of breach of community orders by women is failure to meet order requirements (by omission) rather than re-offending.[182] What research there is, suggests that the breach factors are related to practical issues (such as childcare and transport) or to structural issues (such as corrections officer's role, the case management system; inadequate assessment and programs; enforcement practice and case officer discretion regarding unacceptable absences; and difficulty complying with multiple orders). A number of these factors were mentioned to the Subcommittee during consultations as possible reasons why some women do not succeed on community orders.

Addressing some of these issues DCS informed the Subcommittee that community correction supervisors are trained to be sensitive to the needs and issues of women offenders, particularly of Aboriginal women, such as parental responsibilities when scheduling appointments, assigning culturally appropriate community service projects or when referring them to programs.[183] DCS also advised that Community Corrections Centres implement various strategies to improve compliance by female offenders (e.g. providing transport in specific circumstances for program or community service attendance); and that there is now better flexibility for managers in determining whether breach action must proceed.[184]

In connection with non-custodial options for women, DCS's *Female Prisoners Plan* 2012-2022 (FPP) contains a recommendation that DCS should research and initiate the development of alternative options to imprisonment.[185] In the context of other recommendations from the FPP[186] it was identified that the research should focus on improving current alternatives to imprisonment, rather than looking at new alternatives at this stage. According to DCS, this involves identifying ways to enhance and promote the use of community based sentences for female offenders

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Executive Services, DCS (2012); DCS position paper, '*Literature Review: Women on community-based orders*', Galatee de Laubadere, DCS (2008)

182 However there is a gap in the research concerning the factors explaining the high rates of breach of orders by women.

183 DCS also advise that the majority of community corrections field staff are women. We were also informed also that, increasingly, community corrections officers have arrangements with Aboriginal communities and organisations for supervision attendance.

184 This includes consideration of the offender's circumstances such as residence in a regional or remote area, carer responsibilities and health issues.

185 Recommendation 6 from FFP

186 e.g. recommendation 7 "Analysis of current community supervision orders to ensure they are appropriate for women offenders and are not setting them up to failure"

including the gathering and presentation of information on the factors leading to community based sentences versus custodial sentences for female offenders.[187]

DCS also informed the Subcommittee that it has been considering a number of new initiatives currently in place in other Australian states that could lead to better use of, as well as to better management and outcomes for, community based sentences. It has formed a working group to look at some of these initiatives with a view to assessing the benefits of implementation in Western Australia.[188]

The 2013 Review of the *Sentencing Act* also considered reforms that might improve the use of community orders.[189]

As there appears to be significant departmental interest in promoting the use of non-custodial sentencing options for women offenders and other reforms proposed to improve the use of non-custodial sentencing options, the Subcommittee does not make any specific recommendations regarding community sentencing dispositions but supports the above initiatives and urges the government to prioritise implementation of any reforms as part of a suite of measures aimed at addressing the high rates of imprisonment of women in Western Australia.

Other sentencing 'devices' that may impact upon rates of imprisonment

The Subcommittee referred above to the need to investigate the impact of the use of the pre-sentence order (PSO) and mandatory sentencing on the imprisonment of women.

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187 In doing so, while looking at the data on women and community orders in recent years DCS says it has become apparent that there is a need to better understand the key factors influencing sentencing decisions regarding female offenders.

188 The initiatives being considered include:
- Working with the judiciary to provide information to judges and magistrates on the effectiveness of sentencing orders for women offenders;
- Sharing research on women offenders with defence lawyers;
- Introducing a generic 'Community Correction Order' to replace a number of other community based dispositions to provide to courts a single means of sanctioning offenders without sending them to prison;
- Making available a child care and transport subsidy

189 It suggested support existed for (i) modifications to CBOs so that they might become more flexible in order to more appropriately target underlying issues of offending[189] and (ii) investigating opportunities for engaging community based organisations (such as Aboriginal corporations) to assist with providing community work. The Review noted that these measures could lead to greater use of CBOs as an effective non-custodial option, particularly in regional and remote areas, and could be delivered without legislative amendment.

Mandatory sentencing has been the subject of much debate.[190] However, despite significant concern expressed recently[191] about moves to introduce further mandatory sentencing in Western Australia, in particular the expected increase in imprisonment rates - particularly for Aboriginal offenders - in an already overcrowded prison environment, the Western Australian Government continues to enact mandatory sentencing laws as part of a 'tough on crime' law and order strategy.[192]

No research examining this issue appears to have been done in Western Australia although the Subcommittee noted recent research in Victoria about the impact of the introduction of PSOs on imprisonment rates.[193] However preliminary findings from the *Aboriginal Mothers in Prison* research suggest that mandatory sentencing does impact on the incarceration of Aboriginal women with some women stating that the 'three strikes' law was responsible for their current sentence.

In connection with pre-sentence orders (which allow deferral of a sentence where imprisonment is being considered to allow an offender to address the cause of their offending and thereby possibly avoid imprisonment upon successful completion) one would expect that their use might contribute to a reduction in rates of imprisonment. However the Subcommittee has also not been able to find any research that specifically considers the impact of PSOs on the imprisonment rates of women in Western Australia.[194]

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190 For an example of the arguments made against mandatory sentencing see, as an example, Brown, David. "*Mandatory Sentencing: A Criminological Perspective*" [2001] AUJlH Rights 16; (2001) 7(2) Australian Journal of Human Rights 31.

191 See the *Human Rights in Western Australia: a Report Card on Developments*, Human Right Law Group, Community Legal Centres Association (Western Australia) Inc. and King & Wood Mallesons Human Rights Law Group; also "*Mandatory Sentencing Judge warns of great injustices*", The Weekend West, p. 9, 3 April 2014, in which retiring Supreme Court judge, Justice Christopher Pullin expressed concern about further mandatory sentencing laws being enacted in WA.

192 Some recent examples involve introduction of mandatory penalties for assaults upon police that result in bodily harm: also for offences of selling/supplying (or so offering) drugs to children or manufacturing or preparing a prohibited drug or cultivating a prohibited plant in circumstances that endanger a child. Current proposals exist to further extend mandatory sentencing in respect of home burglaries.

193 In respect of Aboriginal youth, the introduction of mandatory sentencing in WA has been shown to have a disproportionate impact upon their incarceration rates. For example, see Blagg H, Morgan, N & Williams V, (2001) '*Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth*', Aboriginal Justice Council, Perth.

194 For discussion of the probable effect of the introduction of PSOs see Morgan, N (2003) '*The 2003 sentencing legislation - Part 1: Pre-sentence orders & the abolition of 6-month sentences*', 30(10) *BRIEF* 11.

There is also a further issue of whether the option of 'suspended sentence' is an effective sentencing option that operates to reduce imprisonment rates. We note that considerable research and discussion has been conducted in Victoria for example about the impact of the introduction of the suspended sentence option on imprisonment rates.[195]

This Subcommittee has already recommended above that there is a need for research into the high rates of imprisonment of women in Western Australia and urges the government to consider some of the above factors as part of that research.

SERVICES PROVIDED TO WOMEN IN CUSTODY

Implications of the high rate of growth of imprisonment of women in Western Australia

The high growth rate of imprisonment of women in Western Australia has, not surprisingly, had an impact upon the delivery of services to women in custody. The most obvious illustration of this is the recent severe overcrowding at Bandyup (particularly in 2010) which saw large numbers of women 'double bunking' in single occupancy cells. This severe overcrowding has been relieved in recent times with additional accommodation for women becoming available in a number of regional correctional facilities. Prison overcrowding also places considerable pressure on the availability of offender programmes, education and training, health and counselling services, official visits and support for transition. However, despite the exceeded capacity, prisoner numbers and ailing infrastructure (particularly at Bandyup), DCS appears to maintain many key services for women. For a comprehensive report on these issues see the most recent OICS reports concerning Bandyup and Boronia. The Subcommittee has endorsed particular recommendations from each of those reports further below which, following its investigations, the Subcommittee seeks to highlight for priority implementation.[196]

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195 For example, see the Final Report of the Sentencing Advisory Council of Victoria, *Suspended Sentences and Intermediate Sentencing Orders,* April 2008.

196 Note that the reports of the OICS provide a comprehensive and recent review of corrective services and facilities, which are experienced by women offenders. The Subcommittee does not seek to reproduce or replicate the content of those reports. We simply highlight some of the issues we consider require priority.

DCS also acknowledges that the increasing women's prison population poses considerable current and future challenges for custodial facilities and services that are already stretched beyond capacity. The Subcommittee was advised by DCS that providing sufficient prison beds is only the beginning of ensuring that female prisoners' requirements are addressed. It was suggested by DCS that they address the specific needs of female offenders in a number of ways: via the *Female Offender Policy* (FOP),[197]the *Female Offender Framework* (FOF),[198] the *Female Prisoners Plan 2012-2022* (FPP)[199] and the consideration of alternatives to imprisonment for the future.[200]

Profile of women in prison

In order to provide appropriate services to women in prison DCS has conducted several studies into the profile of women in prison. The most recent study, completed in 2008,[201] assembled data about women in prison but was also based on discussions with a large representative sample of women whose experience of prison was examined. It reported that the women interviewed were generally very damaged due to histories of varied abuse resulting in extensive mental distress, and that they also presented with poor education and limited vocational skills. The study made particular findings about Aboriginal women (see below). It found that women offenders are a gestalt of problems and issues and suggested that to address just one problem (such as drug use, abuse trauma or social isolation) would be to ignore the co-morbidity between the different issues that dominate these women's lives. It concluded that women offenders require a 'supportive' rather than a 'corrective model' of management. It therefore recommended holistic, multiple agency, long-

197 FOP guides the future development and delivery of equitable corrective services taking into account the diverse and unique needs, characteristics, life experiences and family circumstances of female offenders.

198 FOF supports a coordinated, targeted and integrated approach to managing female offenders in line with the Female Offender Policy.

199 FPP, which aligns projections of prisoner numbers, sentencing trends and other relevant information with future infrastructure and service requirements ensures that prisons have the capacity to achieve improved outcomes for women during their contact with the Department;

200 Including "front-end" alternatives to custody at sentencing and "back-end" measures to facilitate more effective reintegration into the community.

201 Profile of Women in Prison 2008, Final Report, DCS, August 2009 accessed on 4.414 at https://www.correctiveservices.wa.gov.au/_files/about-us/statistics-publications/students-researchers/profile-women-prison-2008-final.pdf.

term programmes of restoration as the most suitable response to addressing the needs of these women.

Some additional facts about Aboriginal women in prison from the 2008 DCS study include:

- A high proportion of Aboriginal women originate from regional centres;[202]
- Aboriginal women have much higher rates of victimisation and trauma (and are the most victimised group in the community);[203]
- Aboriginal women engage in high rates of substance abuse, mainly alcohol;
- Aboriginal women are imprisoned for fairly serious crimes often involving violence in the context of intoxication and extreme emotion (rage and jealousy);
- Aboriginal women have the care of children (both their own and often those of extended family) at the time of their incarceration;
- Aboriginal women receive far fewer visits from their family and children while incarcerated (see below);
- Aboriginal women have disordered lifestyles with high levels of abuse and violence resulting in frequent contact with the criminal justice system (many Aboriginal women have significant prior criminal histories); and
- Aboriginal women prisoners tend to be serving shorter sentences than non-Aboriginal women prisoners.[204]

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202 Over half of the Aboriginal women (59%) were regional or remote areas – and are therefore out of country.

203 Female Prisoners Fact Sheets, DCS Strategic and Executive Services, Strategic Planning and Review Branch.

204 WA data shows that Aboriginal women are imprisoned more frequently but for shorter periods while non-Aboriginal women tend to serve fewer, but longer sentences. Recent national data indicates that the median sentence for Aboriginal women was half the length of non- Aboriginal women's sentences (18: 36 months) and the expected time to serve was also much shorter (10: 19 months) (ABS 2011).

Some important facts about women in prison therefore include:

- Most women in prison are more likely to be there for non-violent offences although Aboriginal women are more likely to be imprisoned for violent offences;[205]
- Women's offending commonly involves substance abuse[206] and most women in prison have substance abuse issues;[207]
- A majority of women in prison have experienced physical or sexual abuse;[208]
- A significant proportion of the women in prison have mental health issues;[209]
- Large numbers of women have had accommodation issues before coming to prison;[210]
- Most women offenders have a prison history (note that the Western Australian figures are *significantly* worse than national figures for Aboriginal women's prison history);[211]
- A majority of the women were in a relationship prior to going to prison and most have dependent children;[212]

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205 The most common serious offence for Aboriginal women was assault, followed by driving related offences. For non-Aboriginal women the most common serious offence was driving license offences, followed by dealing and trafficking in drugs, and then by break and enter and other offences involving theft.

206 Nearly all women's offending was related to substance abuse in some way (81%), including being under the influence during the offence (71%), offending to obtain drugs (43%), and selling drugs (21%).

207 Most women had a substance abuse issue (78%). Aboriginal women tended to report problematic use of alcohol (69%) while for non-Aboriginal women amphetamines was the most common problem (50%).

208 A large majority of women indicated they had experienced physical or sexual abuse at some point in their lives (90%), with most of them experiencing abuse as an adult (83%), and about half of the sample experiencing abuse as a child (44%). Nearly half of all Aboriginal women indicated that they had experienced abuse both as a child and as an adult (52%).

209 The proportion of women that indicated they had a specific mental health issue was 39%.

210 Nearly half of the women had no permanent accommodation prior to arrest and were homeless or staying at friends' or family's houses.

211 A majority of the women offenders in WA have been to prison before (69%). Nationally, Aboriginal women are much more likely to have previously served time in prison than non-Aboriginal women (67% v 36%: ABS 2011). However in WA Aboriginal women are *significantly* more likely to have previous imprisonments (91%) than non-Aboriginal women (47%). Furthermore 48 % of Aboriginal women have been to prison more than five times previously (Stubbs, 2011).

- Most women in prison had limited educational and employment history.[213]

More recent research concerning incarcerated Aboriginal women in Western Australia confirms much of these earlier findings about the profile of Aboriginal women offenders. Within the course of research for the *Aboriginal Mothers in Prison* project Subcommittee members Jocelyn Jones and Mandy Wilson conducted in-depth interviews with 84 Aboriginal mothers incarcerated in prisons in Western Australia during 2013.[214] These women, aged between 21 and 49 years, had between them 275 children. Over half (58%) of the women were mothers of three or more children. Two thirds of the women had one or more dependent children living with them prior to their incarceration. Only 15 % of the 275 children were with being looked after by their fathers while their mothers were in prison.[215] Many of the women had experienced high levels of trauma over their lifetimes including the premature and often violent death of family members, the incarceration of parents (in fact, intergenerational patterns of offending were profound[216]), and separation from family and transient living arrangements as children. Of the women interviewed, 78% had left school by year ten, with 21% having received education of year eight or less. Over half (58%) were living in public housing prior to imprisonment – many of whom lost or were at risk of losing their house while incarcerated – and one quarter were experiencing unstable housing arrangements with most of these women shifting between relatives and friends. 58% of women had been incarcerated more than once with 28% reporting being in prison five or more times previously. Almost half (46%) of these women had been detained as juveniles. Many women reported substance use issues. A third of women had received a mental health diagnosis at some stage during their lives. Many of the women had been victims of violence

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212 A majority of the women were in a relationship prior to going to prison (66%). Most of the women had children (67%) with three-quarters caring for them prior to arrest (74%).

213 Around half of the women had not completed year ten at school (48%). Two thirds of the women were not employed prior to their imprisonment (67%), with Aboriginal women being much more likely to have never been employed (58%) than non-Aboriginal women (12%).

214 Prisons included: Bandyup Women's Prison (36), Boronia Pre-release Centre for Women (14), Eastern Goldfields Regional Prison (8), Greenough Regional Prison (14) and West Kimberley Regional Prison (12).

215 Maternal and paternal grandparents were looking after 31% of the children and the balance were either living independently or were dispersed among other family members/friends/in foster care arrangements or were incarcerated.

216 Within this group: 56 % reported their mother and/or father had been incarcerated at some stage; 77 % had siblings who had also spent time in prison; the children of 38 % of the women had been in trouble with the police; and, of the women who had children aged 10 and above (70), 16 % of these children were currently incarcerated which caused the women considerable stress.

during their lifetimes (86%), had perpetrated violence against others (61%) and approximately a third of participants reported unwanted sex or touching as children and just under a third, as adults.

The majority of women described experiencing some level of distress or concern borne out of being separated from their children due to imprisonment. Some women were unable to contact their children at all and others described having very limited involvement and decision-making opportunity in their children's everyday lives since their incarceration. Of those women who were asked whether they had seen their children since entering prison (66), 38 % of women had not.[217]

Services and Programmes provided to women offenders

Across all prisons (male and female) and in the community, DCS provide offence specific programs, cognitive skills programs, prison counselling services, psychological services in the community, specialist assessment services of indeterminate prisoners, prison support services and health services.[218] DCS have indicated that the provision of improved gender specific services and interventions for female prisoners whilst in custody is a departmental priority.[219]

Provision of offender and other programmes

Correctional interventions are important if prisons aim to rehabilitate offenders and reduce the numbers of offenders re-offending and re-entering prison.[220]

DCS has responsibility to direct part of its resources and efforts to the rehabilitation of prisoners in this State. Offender programs provided by DCS are delivered both in prison and also in the community. A significant proportion of the DCS budget is

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217 Preliminary findings suggest a number of reasons for this including: having only recently been incarcerated; distance from family and/or difficulty for family or carers to get to the prison; making the decision not to see their children due to not wanting their children to see them in prison, because they felt they (themselves or their children) would become too upset or because they felt the visiting facilities were inadequate; and, because they were still waiting for their children to be brought in for a visit.

218 See further detail about each of these services in Attachment 6 to this Report.

219 DCS also referred the sub-committee to the Guiding Principles in the *Corrective Services Bill* 2011 which includes a principle that the management of offenders should make provision for gender and cultural diversity where appropriate, and that the maintenance of family, cultural and community ties is an important factor in the effective management of offenders and their reintegration into society.

220 Cameron, M., *Women Prisoners and Correctional Programs*, Trends and Issues in Crime and Criminal Justice, Paper no. 194, Australian Institute of Criminology, February 2001.

allocated to offender programs.[221] DCS offender programs have been the subject of significant, and sometimes adverse, comment in the OICS reports over the years. However in the most recent 2011 report concerning Bandyup it was noted that the delivery of offender treatment programs at the prison had improved since the 2008 inspection when the range and number of programs delivered was both limited and not meeting demand. This report noted recent steady increases in program delivery with prisoners providing positive feedback about program delivery. However despite this the OICS noted that there were a number of inequities in service provision because there were no Aboriginal-specific programs for women and a lack of gender-specific programs designed specifically for women to address violent or sex-offending behaviour[222].

It also noted that there were, at that time, no prospects for the development of a treatment program for female sex offenders being made available and that, in the absence of such programs, individual counselling which had been previously provided was no longer offered. Accordingly the OICS concluded that those women who need such programs are being unfairly disadvantaged for two main reasons: firstly, they do not have the opportunity to address their offending behaviour which may reduce their chances of successful rehabilitation, and secondly because there are no intensive programmes for female prisoners to deal with violence a number of female prisoners are being refused parole because of these unmet treatment needs (even though the provision of relevant programs is out of their control).[223]

DCS informed the Subcommittee during consultation that it considers the provision of improved gender specific services and interventions for female prisoners whilst in custody is a priority for Western Australia. Attachment 6 to this chapter provides a description of the current range of DCS programs suitable for female offenders in custodial and community settings.

Through the course of its investigations the Subcommittee also met with some DCS staff and external agencies involved in delivering some of these programs and were

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221 Refer to the DCS Annual Report 2012/2013 available online at: http://www.correctiveservices.wa.gov.au/_files/about-us/statistics-publications/dcs-annual-report-2012-2013.pdf.

222 Despite such programs being provided to Aboriginal women in regional prisons and Aboriginal men in both metropolitan and regional prisons.

223 That this occurs was confirmed for the sub-committee by the Chairman of the PRB the Hon. Judge Robert Cock in an email to C Fletcher dated 12.2.14.

impressed by their motivation, optimism and energy for the rehabilitation of offenders. Unfortunately it was not possible within the resources of this Subcommittee to undertake an extensive review of current offender programs in Western Australia although information was provided about the offender programs delivered at Bandyup prison. In particular the Subcommittee has not had an opportunity to consider any of the community -based programs for offenders delivered in Western Australia. Furthermore, again due to resourcing, the Subcommittee has not been able to consider what assessments are in place to measure the effectiveness of such programs.

However anecdotally, the Subcommittee is aware that in some places there are few, and sometimes no, appropriate offender programmes available, particularly for Aboriginal women especially in regional areas.

It was noted that all of the available offender programmes,[224] with only one exception, are non-specific to females. The only female specific program is called *Choice, Change and Consequences (CCC*) that targets a range of criminogenic needs specific to women. DCS advised that as at 2012 there were still no Aboriginal-specific programs suitable for female offenders but suggested that the existing suite of programs are delivered in a 'culturally responsive manner' to female Aboriginal offenders who are considered suitable for inclusion in mainstream programs [225].

Given the high numbers of Aboriginal women in prison or on community orders, the increased prevalence of violent offending and high rates of re-offending among Aboriginal women, the complete absence at Bandyup of offending-related programs specifically designed for Aboriginal women[226] suggests significant on-going disadvantage and indirect discrimination towards this group of offenders. As already noted one of the effects of this is that it can count against such women in the Prisoner Release Board's (PRB)

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224 Refer to the programmes described in Attachment 6.

225 DCS advised the Subcommittee that Aboriginal-specific programs are provided to Aboriginal offenders who, for a variety of reasons, are unsuitable for more mainstream programs (being moved out of country, language barriers, and other cultural barriers). Aboriginal specific programs are typically designed locally and require significant input, time and community consultation. Further, they require long-term evaluation to ensure they are effective in addressing the criminogenic needs of the population for which they are designed. As such, the Department often sources evidence based programs from other jurisdictions and adapts these to the local context. As at 2012 there were no Aboriginal-specific programs in the Offender Programs suite that are suitable for female offenders.

decision regarding parole for these women. It is of concern that prison programs are only offered to offenders in prison for periods of more than 6 months and consequently women serving shorter sentences (typically Aboriginal women) and on remand are further disadvantaged.

The lack of suitable programs for women may arise in part because women represent only a small proportion of the offender population. This may result in there being limited economic incentives for the development and delivery of gender-specific programs for women. The Subcommittee understands that DCS looks to many external providers to deliver offender programs.

In some other jurisdictions external providers of correctional programs are encouraged to develop and deliver such programs by being 'paid for results' in that they receive additional or bonus payments if delivered programs can be shown to have reduced rates of re-offending.[227] Given the unacceptable rate of growth of women's offending in Western Australia in recent years and that this sector of the offending population is poorly served by offender programs the government should give urgent consideration to investigating the merits of similar incentive schemes for the development and delivery of effective offender programs, for women (particularly Aboriginal) offenders.

Other factors that impact upon women's participation in various programs (particularly educational and vocational programs) are literacy and numeracy skills. Almost half of the female offender population have not completed Year 10 at school. These issues were recently the subject of extensive investigation by the Community and Justice Standing Committee of the WA Parliament[228] and also closely considered in various OICS reports.

DCS states that an integrated model of program and educational service delivery has been developed whereby prisoners with low literacy skills are encouraged to attend literacy classes prior to, and while engaging in, the programs. The Educational Vocational and Training Unit (EVTU) provides pre-literacy programs. However DCS informed the Subcommittee that education and vocational training

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227 This is sometimes referred to as 'incentivisation'. Refer to the 'Strategic Objectives for Female Offenders', UK Ministry of Justice, March 2013 available on-line at cjwst@justice.gsi.gov.uk.

228 Community and Justice Standing Committee of the WA Parliament, '*Making our Prisons Work'; An Inquiry into the efficiency and effectiveness of prisoner education, training and employment strategies,* Report No. 6 in the 38th Parliament, November 2010.

options have significantly expanded to allow women prisoners to engage in 'on the job' vocational training and traineeships in industries such as furniture making, hospitality, horticulture, asset maintenance, laundry, retail, transport and logistics. DCS advises that career and employment advice and advocacy is tailored to the specific needs of Aboriginal and non-Aboriginal women and also explores options for women in non-traditional trades.

Recent OICS reports have been mostly complimentary of DCS's efforts in delivering vocational and educational programs to women offenders. However there are some criticisms such as the almost total lack of provision of external work-related (and other) activities for women, low involvement of Aboriginal women in educational activities and a lack of computer access for educational purposes.

The Subcommittee has not had sufficient resources to properly investigate these issues and makes no specific recommendations in this area, with the exception of recommendation 9.13 below.

Whilst the Subcommittee generally endorses OICS recommendations in both the 2011 Bandyup Report and the 2012 Boronia Report relating to issues concerning educational and vocational programs for women and also the findings and recommendations of the Community and Justice Standing Committee of the WA Parliament in its report '*Making Our Prisons Work',* it does not repeat those in this 2014 Review Report. The Subcommittee does however make two recommendations concerning offender programs for women.

9.12 The Department of Corrective Services, as a matter of urgency, provides Aboriginal-specific treatment programs for female prisoners and, in the absence of violent offending and sex offending treatment programs for high needs women, makes more available individual counselling to assist these women to address their offending behaviour.

9.13 The Department of Corrective Services provides better access to programs and education for women who are on remand and serving shorter sentences (recognising that this has particular importance to Aboriginal women offenders).

Provision of mental health services

As noted earlier in this chapter there is an alarmingly high and disproportionate incidence of mental health issues among women offenders in Western Australia. The existence of a mental health condition brings added complexity to the sentencing process. The issue has been the subject of significant public discussion in recent times.[229]

The high incidence of mental health issues among women offenders and the ramifications of that for dealing with women's offending have been the focus of considerable research in Australia and overseas. However in Western Australia these issues remain under-researched with the exception of a recent study into mental health issues among prisoners in Western Australia's maximum-security prisons (which includes Bandyup).[230] In that study the following key findings concerning women offenders were as follows:

- female prisoners are more than twice as likely to have a history of mental health treatment than male prisoners and there is a general consensus that mental health problems are more common amongst females than males;[231]
- females are more likely to present with mood disorders, anxiety/phobias, post-traumatic stress disorder and obsessive compulsive disorders;[232]
- females prisoners were more likely than males to report self-harming in prison and females indicated that the main reason for self-harming was to relieve tension or pain (possibly associated with a history of sexual abuse);

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229 For example see recent papers delivered on this issue by the Chief Justice, the Hon. Wayne Martin AC which were made available on the Supreme Court website: *Mental Health and the Judicial System,* paper presented at the Arafmi Breakthrough Series, 1 August 2011; and *At the crossroads of criminal justice and mental illness; where to from here? - an* address to the Rural and Remote Mental Health Conference 2013, 18 September 2013.

230 Fleming, J. Gately N., and Kraemer S. (2011). *Creating HoPE: Mental Health in Western Australian Maximum Security Prisons,* Psychiatry, Psychology and Law, doi: 10.1080/13218719.2010.543405.

231 Another finding was that recent Australian studies show that prisoners experience major mental disorders at a rate of 2 – 4 times the expected rates in the community, with substance abuse and personality disorders being over-represented

232 Whereas males are more likely to present with conduct disorders, attention-deficit/hyperactivity disorder, substance abuse and learning disorders.

- female prisoners (more so than males) tended to report that their thoughts on suicide had increased since imprisonment;
- whilst there were no specific findings regarding mental health issues of Aboriginal women offenders, it was noted that there are also large discrepancies in the mental health and emotional wellbeing of Aboriginal Australians compared with non-Aboriginal people; and
- mental illness in the Aboriginal population is multi-dimensional and Aboriginal offenders demonstrate higher rates of mental health problems associated with alcohol and drug dependency and may not request help until reaching crisis point.

With these findings in mind the Subcommittee sought information about the provision of mental health care for women offenders in prison. During consultations with DCS the Subcommittee was informed that mental health care is provided to women in Bandyup on an individual needs basis; that women who have been victims of domestic violence or child sexual abuse can access the Mental Health Team and the Prison Psychology Service; and that Bandyup also provides a crisis care facility for prisoners who need a more protective environment than the prison infirmary[233] but who do not require 24 hour per day nursing care.

However during consultations with others the Subcommittee were informed that women incarcerated at Bandyup often have significant difficulty accessing the Prison Psychology Service for anything other than crisis care and that for many women, long term and underlying psychological issues (which may have contributed to their offending) often remain largely unaddressed whilst they are in prison.[234] The difficulties remand prisoners face accessing most services has already been noted earlier in this chapter – they are therefore even more disadvantaged than most other prisoners when it comes to accessing mental health services in prison.

In the 2011 OICS *Inspection of Bandyup Report* considerable attention was given to the issue of mental health of women prisoners. Many findings similar to those above were recorded. It was also observed that the prison environment is less than ideal for

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233 There is a small infirmary at Bandyup accommodating 2 beds (compared to 20 beds in Casuarina for men) where a patient can be cared for a period of 24 hours or more.

234 These concerns were raised during discussions with staff at the Women's Law Centre and in a number of responses provided by criminal law practitioners to the Subcommittee's survey.

the treatment of mental illness and, moreover, that there are many aspects of prison which have the potential to adversely affect mental health including overcrowding, poor environmental conditions, poor quality food, inadequate health care, aggression, lack of purposeful activity, availability of illicit drugs, enforced solitude, distance from family and lack of privacy.

The OICS report also found that health services at Bandyup struggle to manage high rates of morbidity in a counter-therapeutic environment due to a lack of qualified staff. It suggested the prison is not designed to manage a substantial burden of mental health issues, and is ill equipped to respond. The report pointed to insufficient psychiatric input, increasing pressure upon the Prison Counselling Service and a lack of access to the Western Australian Forensic Mental Health Service at the Frankland Centre. Despite of all of this the OICS paid credit to the prison psychology and counselling service as contributing to an extremely effective crisis and risk management and suicide prevention programme. However it concluded that the resources allocated did not meet prisoner need and this arguably undermines a women-centred approach and the prospects for successful re-entry of offenders to the community. Accordingly OICS recommended the development of a dedicated mental health unit for women prisoners, with trained professional staff, supported by custodial staff trained in mental health and the provision of around the clock mental health nursing coverage, and psychiatrist and therapy input sufficient to meet prisoners' needs.[235] To the Subcommittee's knowledge these important recommendations have not yet been implemented.

Accordingly this Subcommittee endorses the recommendations of the OICS (noted above) to address these issues.

9.14 The State Government, as a matter of urgency, develops a dedicated mental health unit for women prisoners which is managed by a multi-disciplinary team of clinical and allied health staff, supported by custodial staff who are trained in mental health; and further provides around the clock mental health nursing coverage, and psychiatrist and therapy input sufficient to meet prisoners' needs.

[235] Recommendations 32 and 33 of the 2011 OICS *Inspection of Bandyup Report*.

OTHER SPECIFIC ISSUES CONCERNING BANDYUP WOMEN'S PRISON

Overview

In the 2011 OICS Report the Inspector of Custodial Services, Professor Neil Morgan, described Bandyup as "*a very complex multi-purpose prison, catering for a particularly complex group of prisoners*" and *"probably the most complex, multi-purpose prison in the state."*

OICS Reports over successive years have been very critical of Bandyup although generally such criticisms are directed at the inadequate government funding for infrastructure and services rather than at staff. The most recent 2011 OICS report on Bandyup provides a comprehensive review of services, programmes, facilities and staffing at Bandyup as at August 2011.[236]

In 2012 the WA Parliamentary Standing Committee on Public Administration also held hearings to consider various issues associated with imprisonment in Western Australia including the conditions for women prisoners. The Standing Committee concluded that there were several priority issues that impacted upon equality and equity for women prisoners at Bandyup namely;[237]

- the inadequate state of the social visits centre;
- the fact that Bandyup is poorly serviced by public transport;
- the accommodation of mainly Aboriginal women in the most run-down part of the prison; and
- the need for improvement in services at the prison such as more culturally appropriate rehabilitation programs, better health screening and improved access to health services, and reducing barriers to family and community contact.

In relation to government expenditure on Bandyup the Standing Committee noted, with concern, that despite DCS having identified for some time the need for a new women's prison, no plans for one had yet been documented. It also noted that out of

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236 The Subcommittee understands there has been a further announced inspection by OICS of Bandyup in 2014 the results of which have not yet been published.

237 Report 15 of the Standing Committee on Public Administration Omnibus Report – Activity during the 38th Parliament, Nov 2012.

a list of recent departmental funding proposals for capital investment (which included upgrades to the health centre and a new visits centre at Bandyup) not one had been approved that was specific to Bandyup. The Standing Committee also noted that there has been no funding allocated for a dedicated mental health unit for prisoners.[238]

In this section of the chapter, (having already dealt with mental health issues above) the Subcommittee seeks to highlight, for priority attention, the issues of maintenance of family and social connections of women offenders, and the access to legal services and resources, at Bandyup. The Subcommittee's concerns are not intended to reflect adversely on current staff who make the most of the resources they have to work with. Further, the discussion of the following issues should also not detract from the importance of other issues.

Maintenance of family and social connections of women offenders

The maintenance of social and family connections is likely to be very important for most women prisoners particularly because many of them are mothers who were caring for children at the time of their incarceration.

Many studies and the Subcommittee's own investigations, have confirmed that incarcerated women suffer high degrees of stress and anxiety as a result of the difficulties they experience maintaining family and community connections when they are in prison. Beyond this there are compelling reasons to address this issue as it is also well established that women offenders have far better prospects for successful community re-integration and rehabilitation if their social and family contacts can be properly maintained whilst they are in prison.[239] This is very much at the heart of a women's-centred approach to the imprisonment of women.

During the Subcommittee's consultations and visit to Bandyup the issue of the inadequacy and unsuitability of the social visits centre was confirmed. Compared to what is provided at the men's prisons and some of the regional prisons it is not surprising that women at Bandyup express significant dissatisfaction with the social

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238 At the hearing the Committee Chairman summed up the Committee's view that the "limitation on infrastructure is holding up what could be done to give those women a better chance of not getting back into the criminal cycle once they are released".

239 Refer above to the discussion of 2014 recommendations dealing with sentencing of women under the heading 'Offender's Family Responsibilities'.

visits area.[240] According to the OICS both prisoners and visitors consistently re-iterate that the visits centre is not designed, or appropriate, for women and children.

The *2011 OICS Inspection of Bandyup Report* also highlighted other issues concerning maintenance of family and social connections namely:

- the considerable difficulty visitors face getting to the prison if they are without an independent means of transport;[241]
- the problems of meeting demand from prisoners to have their babies stay with them at the prison (this has, on occasion, denied breast-feeding mothers an opportunity to have their babies stay with them); and
- the difficulties having young children for extended (such as day, over-night or after-school) visits at the prison.

In connection with the social visits centre, during 2013 DCS informed the Subcommittee that a number of alternatives to personal visits are available to prisoners located away from family and friends at Bandyup. In addition to standard visits, special visits are available outside standard visit hours upon request. Video link facilities are also available at Bandyup (as is the case in Greenough, West Kimberly and Eastern Goldfields regional prisons) to help maintain family contact. Aboriginal out of country or remote prisoners are eligible to receive two free ten-minute phone calls (intrastate, interstate or international) per week to family or friends where they do not have adequate funds and cannot maintain contact without such assistance.

The Subcommittee's findings are that given the importance of family and social connections to women there is significant scope for improvement in enhancing the services at Bandyup that are required to maintain these connections. The Subcommittee therefore endorses the following recommendations made by OICS in the 2011 inspection report regarding social and family visits at Bandyup.

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240 The facilities at Bandyup do not compare with what is provided at many other prisons. For a stark illustration of this refer to photographs of the various visits facilities across WA Prisons shown at the 2011 OICS Report on Bandyup at p. 55. The facilities at Bandyup do not compare with what is provided at many other prisons.

241 Note that the Subcommittee is aware that a bus service operating to take visitors to Bandyup does apparently operate on a Saturday afternoon but it is a very limited service.

9.15 The State Government, as a matter of urgency, invests in contemporary accommodation and service delivery infrastructure at Bandyup, including a replacement social visits centre.

9.16 The Department of Corrective Services, as a matter of urgency, extends eligibility for day stays to 'significant' children to enable grandmothers or other significant women in a child's life to be able to develop and maintain such relationships.

9.17 The Department of Corrective Services, as a matter of urgency, provides a regular DCS sponsored transport service to Bandyup for social visitors.

Legal Resources and Services

The importance of access to legal resources and legal services (particularly those of criminal defence lawyers) for prisoners, particularly remand prisoners, requires almost no explanation. However, one such service not commonly afforded to women prisoners by criminal defence lawyers is assistance with their parole applications.[242] Women prisoners in Bandyup also have many non-criminal legal issues that they need assistance with.[243]

Many criminal law practitioners informed the Subcommittee of considerable difficulties taking instructions from, and providing legal advice to, women prisoners at Bandyup. The extent of this and related issues are detailed in a comprehensive report prepared for the Subcommittee in 2013 by Legal Aid lawyer Karen Shepherd[244] (annexed to this chapter as Attachment 5). Shepherd's findings are, essentially, that access to legal services for women in Bandyup (many who are on remand) is particularly inadequate to the extent that that their access to justice is likely to be significantly more compromised than men in prison. It is an issue this Subcommittee takes very seriously. There are many important recommendations in that report for improving the access to legal services for women at Bandyup however they are too numerous to list in this chapter.

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242 Presentation by the Hon. Wayne Martin AC entitled '*Access to Justice*' at Notre Dame University, 26.2.14; this was also the subject of comment to this sub-committee by Mr Peter Collins of ALS and the Hon. Robert Cock, President of the Prisoners Review Board.

243 This arose from discussions with the Women's Law Centre who provide a weekly legal service to women at Bandyup and Boronia.

244 Karen Shepherd is also a committee member of the Criminal Lawyers Association of Western Australia.

The OICS has also considered the issue of access to legal resources for women at Bandyup. In the 2011 OICS Report it stated there had been no improvement since 2008 when it concluded that self-represented prisoners and appellants were not well served by the legal resources available in the Bandyup library. It indicated that this was a breach of the OICS inspection standards and accepted principles with respect to prisoners on remand. It called upon DCS to urgently address the situation.

To the Subcommittee's knowledge there are still considerable difficulties providing women at Bandyup with access to their legal entitlements.[245]

9.18 The Department of Community Services, as a matter of urgency, ensures Bandyup prisoners, are provided with improved access to legal resources, including departmental computers and other assistance, to research their cases.

9.19 The Department of Community Services, as a matter of urgency, implements the recommendations made in the report attached to this chapter entitled '*Access to Legal Services for Women in Custody*' in order to provide all women in custody with proper access to legal services and representation.

SPECIFIC ISSUES CONCERNING BORONIA PRE-RELEASE CENTRE FOR WOMEN

The establishment of a minimum-security prison for women was one of the key recommendations of chapter 9 of the 1994 Report.[246] The commencement of the Boronia Pre-release Centre for Women in May 2004 as a purpose built low-security prison for women with a re-entry focus (located close to the Perth CBD)[247] was a significant development in the history of corrective services for women in WA.[248] Boronia has received wide spread acclaim as a 'best practice' facility for imprisoned women.

The Subcommittee visited Boronia during 2013 and met with senior staff. Boronia clearly operates under a 'women-centred' model of imprisonment that recognises the

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245 These recommendations incorporate the recommendations in Shepherd's paper and recommendation 22 from the 2011 OICS Inspection of Bandyup Report.

246 Recommendation 186 (and see chapter 9.5.3) of the 1994 Report.

247 Boronia is located 8km from the Perth CBD at Bentley. It is well serviced by public transport.

248 Note that Boronia replaced Nyandi Women's Prison – the first minimum-security facility for women in WA, which opened in 2002. Nyandi operated nearby at an existing building.

unique needs of women in prison. There is provision for children to live with their mothers until the age of four, and for older children up to the age of 12 years to have regular extended day and/or overnight stays. It was originally designed to accommodate 71 women however that has been increased in recent years to 82 women.[249] There is a palpable operational philosophy at Boronia that while imprisonment serves as a punishment for crime, it also provides an opportunity to maximise the potential of women to positively, confidently and safely reintegrate with their families and communities following release. The women contribute to society through doing voluntary work in the local community for businesses and not-for-profit organisations.[250] The women live in small group housing, some with young children, and are responsible for their own cooking, cleaning, budgeting and shopping at the centre's supermarket. The women are required to work or study and can enrol in traineeships in various fields. All these daily activities mirror the responsibilities faced by women in everyday life and support a strong community and family focus by integrating work or study with domestic and family duties.

Since the establishment of Boronia there have been three inspections of this facility by the OICS.[251] While acknowledging that Boronia is deserving of its special reputation amongst WA correctional facilities for model best practice, OICS has some concerns regarding its operation. The most significant of these, identified in the *2012 OICS Inspection of Boronia Report*[252] were as follows:

- that Boronia does not accommodate a representative cross-section of prisoners;
- the opportunities for community outreach activities have not yet been maximised;

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249 Note that at the time of the last OICS inspection in 2012 there were 76 women, ten of whom were Aboriginal and eight who were Vietnamese (the next most significant cohort). There were six children residing with their mothers.

250 For a full description of the facilities and services provided at Boronia see the *Report of an Announced Inspection of Boronia Pre-release Centre for Women*, Report No. 79 OICS, July 2012.

251 In addition to the 2012 inspection there were inspections in 2006 (see 2007 Report no. 42) and 2009 (see 2009 Report no. 62) – both available online at the website of the OICS.

252 *Report of an Announced Inspection of Boronia Pre-release Centre for Women*, Report No. 79 OICS, July 2012.

- there is a need to develop an evaluation method to assess whether Boronia contributes to the successful transition of women back to the community in comparison with the transition of offenders from other facilities.

A number of other issues concerning the operation of Boronia were also identified in the 2012 OICS Report. It is not feasible to re-state all of those in this Report. It is also beyond the capacity of this Subcommittee to have made our own investigations of many of these issues.

In this chapter the Subcommittee highlights only two particular issues concerning Boronia:

- the low number of Aboriginal women at Boronia; and
- provision of mental health services at Boronia.

(Note that the Subcommittee also considers the issue of transition services in the next section of this chapter - which is a significant aspect of the operations at Boronia).

Low numbers of Aboriginal women at Boronia

At the time of the 2012 OICS inspection there were 76 women in the centre. Ten of these were Aboriginal women (three of whom were 'out of country') and a number of foreign nationals.[253] There were six children residing with their mothers. The OICS report notes that the majority of offences committed by the residents involved drugs, driving or fraud and that very few violent offenders were present on site. It therefore suggested that Boronia housed a very 'select' group of female offenders, with many women having far lower re-entry needs than those imprisoned at Bandyup.[254]

Of principal concern to the OICS was the very low numbers of Aboriginal women in Boronia. The numbers of Aboriginal women had actually declined since the 2009 inspection by OICS. These very low numbers were considered "deeply disturbing" given that Aboriginal women comprise approximately 50% of women offenders at Bandyup, have high needs whilst in prison, high re-entry needs and high rates of recidivism. This group of women offenders could most benefit from Boronia's

253 Of whom eight were Vietnamese - the next most significant cohort. A large number of the foreign national women (9) were either due to, or were liable to, be deported on release.

254 The majority of violent women offenders are held Bandyup. They are noted as having high re-socialisation and re-entry needs.

therapeutic environment. The OICS was particularly critical of DCS for not addressing the reasons, or any possible solutions, for the low numbers of Aboriginal women accessing Boronia (as these issues had been raised by OICS in a previous inspection report).

The OICS also identified that some Aboriginal women appear to be reluctant to transfer to Boronia from Bandyup, possibly because the transition to Boronia is often very challenging and the environment at Boronia is very unfamiliar to them. The OICS identified a number of initiatives that could be taken, both at Boronia and Bandyup, to increase the number of Aboriginal women offenders accessing Boronia. OICS identified that one of the biggest obstacles for Aboriginal women accessing Boronia is the requirement for an offender to have a minimum-security rating. Beyond this condition, there are further assessments that might prove problematic for many Aboriginal women such as whether their physical and mental health needs can be met. Boronia does not have 24-hour nursing, dedicated mental health staff or on-site counselling. The OICS report suggests that exclusion on the grounds of mental health needs is a significant factor that operates against the transfer of many Aboriginal women to Boronia.

The Subcommittee attended Boronia in 2013 and were very impressed by the facility and the staff. However it was apparent the Centre accommodated very few Aboriginal women offenders.[255] The Subcommittee was informed that when considering a transfer from Bandyup to Boronia, the Superintendent of Boronia is able to override the offender's security rating in order to get them into Boronia. An assessment team at Bandyup initially makes an identification of potential candidates for transfer. However the Subcommittee gained the impression that overriding a security classification is an unusual occurrence, for example it might occur when a Bandyup prisoner is pregnant and about to give birth.

Low numbers of Aboriginal women at Boronia remains a continuing issue. The Subcommittee's principal concerns are that DCS take action to:

i) increase the accessibility of, and the services at, Boronia for Aboriginal women offenders; and

[255] As at 27 March 2014 there were still only 15 Aboriginal women at Boronia.

ii) promote the advantages of transition to Boronia to women accommodated at Bandyup, so that more women (particularly Aboriginal women) seek transfer to Boronia.

However in the Subcommittee's view this also involves gaining a better and more informed understanding of the reasons why many Aboriginal women do not seek transfer to Boronia and why they sometimes get transferred back to Bandyup after a period of time at Boronia. More research is needed to explore the barriers to accessing Boronia for Aboriginal women. These issues have been recommended by OICS and are endorsed by the Subcommittee below.

Mental health services at Boronia

The Subcommittee has already noted one of the most significant barriers to women transferring to Boronia is the lack of mental health services at the centre to meet the needs of women offenders who have complex mental health issues or conditions.

The 2011 OICS inspection of Bandyup revealed 59 women (25% of the Bandyup's population) had been diagnosed with a mental disorder. This compared to the 2012 OICS inspection of Boronia, where only nine women (11% of the Boronia's population) had been diagnosed with a mental disorder. This suggests that there are many women at Bandyup with such disorders who could substantially benefit from the more extensive re-integration services provided at Boronia yet they are excluded from it often for the reason they have mental health issues.

As has already been noted above Aboriginal women suffer higher rates of mental illness than non-Aboriginal women. Accordingly exclusion on the grounds of mental health disproportionately affects Aboriginal women offenders.

Noting the limited and finite resources of DCS for the provision of health services and the significantly greater need for better provision of mental health services at Bandyup the OICS was prepared to accept that such resources for mental health services should not be diverted from Bandyup to Boronia. However it stated that it expected that Boronia management should be proactively establishing links with mental health support and counselling services in the community (as it has done with many other services) as this could address the issue of unnecessary return of women to Bandyup for reasons of mental health and also permit access to Boronia for those with mental health issues. In addition to the above suggestion the OICS

Report also noted the lack of on-site availability of the prison counselling service. This was an issue for many of the women at Boronia and another reason it suggested that Boronia should expand the use of its outreach opportunities to engage with community-based counselling services.

As a result of these investigations the Subcommittee endorses, and highlights for priority attention, the following recommendations made by the Inspector of Custodial Services in his 2012 Inspection Report of Boronia.[256]

9.20 The Department of Corrective Services, as a matter of urgency, improves access to Boronia's re-entry services for a greater diversity of women offenders.

This involves:

i) identifying barriers to transition to Boronia for women offenders from Bandyup and other prisons;

ii) identifying ways to enhance the appeal of Boronia to Aboriginal women who are imprisoned elsewhere in Western Australia;

iii) ensuring that more of the Aboriginal women who are classified minimum-security can progress to placement at Boronia; and

iv) changing the current practice of excluding prisoners from Boronia on grounds of mental health needs by engaging with community based mental health and counselling providers to provide their services to women at Boronia.

TRANSITION TO THE COMMUNITY

Upon completion of sentence women offenders will generally need assistance to successfully re-integrate into the community. Successful re-integration, at the very least, involves not re-offending but arguably also encompasses much more, such as feeling safe, secure and developing a sense of self-worth.

The rates of re-offending (or recidivism rates) in Western Australia for offenders who have been sentenced to community orders is significantly lower (33%) than the

256 Neil Morgan, Inspector of Custodial Services, *Boronia Pre-Release Centre for Women: 2012 Inspection Report*

recidivism rate of offenders returning to corrective services within two years after serving a sentence in custody (47%). Women also are generally more successful than men at not re-offending. However Aboriginal women have higher rates of recidivism than non-Aboriginal women following both community and custodial sentences.[257] These facts suggest that Aboriginal women who have been in custody need additional support for successful re-entry to the community.

It is not feasible to discuss in this chapter all of the transition services that are made available to women. However the Subcommittee was informed that DCS administers and manages service agreements with various not-for-profit agencies which help re-integrate people leaving custodial facilities back into their family and wider community. Some of the agencies providing re-entry services with whom the Subcommittee consulted during its investigations included RUAH[258], Outcare[259] and the Jade Lewis Foundation[260]. The Subcommittee also consulted with the DCS Manager of Transitional Services Mr Peter Clarke.[261]

In terms of identifying what services and other support women need it is noted that RUAH Women's Support Services ('WSS')[262] advise that many women leaving prison are provided with support for issues of mental health, substance abuse, homelessness, past abuse or trauma, family and domestic violence and vocational and educational needs. In addition WSS also assists significant numbers of women with other issues such as parenting, sexuality and prostitution. WSS emphasises that the majority of women offenders have a history of trauma and are at risk of being re-traumatised by the prison experience and justice system.[263]

A number of agencies attend at both Bandyup and Boronia to help women plan for their release.[264] These agencies perceive a number of barriers to successful re-integration. For example, there are multiple demands placed on the women by the

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257 Refer to Table 2 in Attachment 7 in this chapter.

258 Subcommittee member C Fletcher was present during a presentation by Sally Scott from RUAH at the Australasian Parole Authorities Conference 2013 and was later provided with some information by RUAH about their services: refer email from S Scott to C Fletcher dated 21 January 2014.

259 K. Malcolm interview with Amanda Wheeler, CEO Outcare on 28.11.13. Kate O' Brien also provided the Subcommittee with information concerning Outcare

260 Jade Lewis email to K. Malcolm on 18.10.13.

261 K. Malcolm interview with Peter Clarke, Transitional Manager, DCS on 24.10.13.

262 RUAH Women's Support Services (WSS) have been operating since 1999 to work with women in prison to assist them re-integrate back into the community.

263 Refer to email from S Scott (RUAH) to C Fletcher (DPP) dated 21 January 2014.

264 RUAH is the principal provider of re-entry services at Boronia.

parole authorities and child protection authorities; and many women return to chaotic environments in which the underlying problems that may have contributed to their offending conduct still persist. It is a challenge for these women to re-stabilise themselves so as they do not re-offend. Accordingly, assisted transition does appear to promote better prospects that an offender will not re-offend. WSS has significant success with assisting their clients to avoid re-offending (only 7% return to prison).

However, in addition to what is noted above, some other DCS and other services that support transition include:

- The transitional managers at each prison which act to co-ordinate, and link women to, the various transitional services available;
- The Re-entry Link Program;[265]
- Parenting and Support Services (PASS);[266]
- Family Support Service Centres (FSSC);[267]
- A range of accommodation and support services for offenders leaving custody who are at risk of re-offending if their accommodation needs are not met;[268] and
- The COAG Health Aboriginal re-entry program.

Whilst the Subcommittee has not had capacity to assess all of these services its consultations indicate that many released offenders have accommodation problems

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265 The Re-entry link program is available at all prisons. It supports prisoners and their families in areas such as maintaining healthy relationships, financial management, and finding and keeping accommodation. Prisoners can seek this service six months prior to and twelve months after release.

266 PASS assists prisoners who are parents or expectant parents; providing women with support, information and advice regarding parenting skills, child development and strategies for change. PASS also supports women affected by family and domestic violence. PASS operates at Bandyup, Hakea, West Kimberly and Wooroloo prisons and Boronia Pre-release Centre.

267 FSSC provides support, information, crèche and referral services to prisoners' families, friends and other prison visitors which help makes their prison visit a positive experience. FSSC operates in the Perth metropolitan area and at Bunbury and Albany regional prisons.

268 Support agencies work with prisoners prior to and after release. These programs are available to female and male clients and include:
- The Transitional Accommodation and Support Service (TASS).
- Short-term and emergency accommodation for up to three months, in metropolitan area; transitional accommodation for up to nine months, for ex-prisoners, mothers with babies, families and people with intellectual disabilities, in the metropolitan area;
- Accommodation for up to 18 months for single people, in the metropolitan area;
- Assistance in finding long term accommodation options for adults and young people exiting prison and at risk of homelessness (via the National Partnership Agreement Homelessness, managed by the Department of Child Protection), as well as in a number of regional areas.

because the availability of housing and alternative accommodation is limited and doesn't meet demand. In connection with accommodation issues there is further discussion below regarding the need for transitional centres.

DCS also advised the Subcommittee that it is committed to reintegration programs for women. The Subcommittee recognises that at Bandyup, prisoners are provided with work and other prison-based opportunities and activities, including self-development and therapeutic programs although as previously noted there are no specific offender programs for Aboriginal women. With its emphasis on re-entry Boronia has a particularly strong emphasis on developmental programs for women prisoners[269] and generally the OICS is very complimentary of the support for transition provided to women at Boronia. As previously noted, many Aboriginal female prisoners are not eligible for, or prefer not to seek, transfer to Boronia so they miss out on these programs. The Subcommittee sought data from the Prisoner Review Board (and also from DCS and DOTAG) about the numbers of women who may have been refused parole due to non-completion of relevant programs that were unavailable to them. This data was not readily available and could not be provided. However this information is clearly important to identify service gaps and it is recommended below that the Prisoner Review Board collect this data.

A key aspect of transitional support for women in custody is that planning for transition (and a law-abiding lifestyle) needs to commence as soon as possible after a woman is received into a correctional facility. The 2011 OICS Inspection of Bandyup Report revealed that preparation for release in the form of case management generally begins almost immediately after sentence. However with increasing numbers of women in prison this has placed additional pressure on prison transition managers, which can impact upon their ability to assist prisoners with early planning for their release.

The OICS also points out that if a prisoner has a sentence of less than six months, they are only exposed to what is referred to as a Management and Placement (MAP) assessment. Those sentenced to longer than six months undergo a more rigorous assessment, which generates an Individual Management Plan (IMP). These assessments are intended to recognise and identify the individual needs of the

[269] Boronia does not provide offender treatment programs as residents will generally have completed these elsewhere before transferring to Boronia.

female prisoner and are intended to reduce the risk of recidivism. There is therefore a need for improved planning for, and delivery of services, to women on short-term sentences of six months or less. This issue is more comprehensively addressed in the OICS reports.

The Subcommittee highlights the issue of parole in respect of Aboriginal women in more detail because of the issues that can impact upon the successful re-integration of these women.

Parole Issues for Aboriginal women offenders

During the Subcommittee's consultations[270] it was observed that there are often significant barriers for Aboriginal women accessing parole. It has been previously noted in this chapter that some Aboriginal women have not completed a treatment program to address their offending behaviour because these are typically not available to them (particularly programs addressing violent or sexual offending). Lack of suitable accommodation upon release is also considered to be a significant barrier to parole.[271] Poor education levels amongst Aboriginal prisoners impact upon their ability to provide a sound written parole plan and other documentation as required. Aboriginal women are also typically unable to access adequate professional assistance to develop a stable/viable parole plan. Other prisoners are regularly called upon to assist with parole plans.

It was further noted that, even where Aboriginal women are granted parole, there are further barriers to successful completion of parole for Aboriginal women as they have difficulty accessing programs in the community that provide ongoing support and assistance. This is evidenced by some of the data obtained by the Subcommittee.

Between January 2012 to December 2012, 12.8% of all parole orders[272] and 15.7% of all short-term parole orders[273] were issued for women offenders.[274] Although

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270 The Subcommittee was considerably assisted to understand these issues through consultations withCraig Somerville (Deputy Chair of the Prisoners Review Board) and Peter Collins (of the Aboriginal Legal Service).

271 Parole requires that the parolee is able to provide suitable accommodation that observes specific conditions such as not returning to reside with a co-offender or within a certain region. Such stipulations make it difficult to find accommodation as it is often the family and communities that will provide assistance.

272 Refer to table 3 in Attachment 7.

273 Refer to table 4 in Attachment 7.

274 DCS Performance and Statistics, Community justice statistical reports for period 01 Jan 2012 to 30 Jun 2012, 10 July 2013

female offenders generally have a higher success rate than men for completion of parole orders, both male and female Aboriginal parolees, have significantly lower success rates on parole orders than non-Aboriginal parolees.[275]

Findings emerging from the *Aboriginal Mothers in Prison* project also suggest other difficulties for many Aboriginal women applying for parole. A large number of sentenced women interviewed for the project had either:

- Chosen not to apply for parole as they believed they would not be able to meet the parole conditions;
- Chosen not to reapply for parole because, having been already denied parole, they felt they would be refused again; or,
- Believed they were being discriminated against for parole and treated differently to non-Aboriginal women who had committed equivalent offences.

Of those women who had applied for parole and been refused, reasons given by the PRB included:

- not enough support indicated upon leaving prison;
- not enough programs completed or no evidence that the woman had learnt anything from programs;
- risk to the safety of the community; and
- lack of suitable accommodation.

Some women also seemed to not understand why they had been refused parole, which suggests that these women need further assistance to understand the process of parole and parole decisions.

The significance of accessing parole is of course that it provides important support and assistance to women during their re-integration back into the community and their families. Being released from prison without that support increases the risk that women will re-offend. This Subcommittee therefore recommends greater support for women obtaining parole as well as adequate and appropriate support for women once on parole.

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[275] Refer to Tables 3 and 4 in Attachment 7.

Note that in connection with parole applications the Subcommittee recommended previously in this chapter that improved access to legal services for women offenders, particularly Aboriginal women offenders, could provide an opportunity for women to be supported in their parole applications.

As the Subcommittee has already made other recommendations above concerning the enhanced availability of programs and increased provision for legal assistance for prisoners it does not seek to repeat those again here.

9.21 The Prisoner's Review Board monitors, collates and comprehensively reports annually on all relevant parole information and data which would include the number of parole applications received, details of successful and non-successful applications, overview of parole conditions and reasons provided for refusal of parole (including where the applicant has not been able to access relevant programs), and any other relevant information around breaches/suspensions of parole.

9.22 The Department of Corrective Services, as a matter of urgency, ensures every woman offender due for release is provided with improved access to the necessary resources and personnel needed to develop a viable and stable parole plan.

9.23 The Department of Corrective Services oversees improved interaction and development of networks between community based corrections and community based organisations to ensure more effective pathways for referral, follow-up and support for parolees.

Mentoring Programs and Transitional Centres

From the Subcommittee's investigations and literature review it learnt of a number of important developments in other jurisdictions involving mentoring and the availability of transitional centres for female offenders who have been released from prison. These appear to be two initiatives that could provide significant and much needed support for women offenders upon re-entry into the community and accordingly the Subcommittee recommends government support for both of these initiatives.

Mentoring

In connection with mentoring of ex-prisoners the Subcommittee notes that there is a general consensus in the literature that it is under-utilised as an intervention strategy.[276] However there are successful examples of its use such as in Victoria where the VACRO Women's Mentoring Program (VWMP) exists to provide social support for women exiting prison or on Community Correctional Orders. Now in its twelfth year, this program was initially funded through philanthropic trusts but in 2007 it became part the Department of Justice Women's Policy Unit. There is also evidence that mentoring, particularly when provided by other rehabilitated ex-prisoners, is a powerful intervention strategy that discourages further offending.[277]

To our knowledge DCS does not provide one on one mentoring to female prisoners after they leave prison. However the Subcommittee is aware of a local mentoring program for offenders developed by the Jade Lewis Foundation for young girls and women in Western Australia. The aim is to train mentors (which includes ex-women prisoners) to provide one on one mentoring to girls and women for an extended period following their release from detention or prison.[278]

Transitional accommodation

Studies have shown that a majority of men leaving prison expect to return to live with their parents or a partner whereas the majority of women leaving prison do not expect to be able to return to live with family or partners upon release.[279]

It was noted in a 2004 study[280] concerning women in prison in Western Australia that many will experience homelessness upon leaving prison because they either had no stable or secure housing at the time of their arrest or lost their State housing while in

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276 Brown, M. and Ross, S. *Mentoring, social capital and desistance from crime: A study of women released from prison,* Australian and New Zealand Journal of Criminology (Australia), Volume 43, Number 1, April 2010, p.31.

277 Keating, C., *'Evaluation of the Women and Mentoring Program: Final Report',* February 2012, available atwww.wipan.net.au/pdf/Women%20and%20Mentoring%20Wellington%20Report_Final270212.pdf see also Brown, M.,Ross, S. *Assisting and Supporting Women Released from Prison: Is Mentoring the Answer?,* Current Issues in Criminal Justice, Vol 22 Issue 3 (Mar 2011).

278 That program has sought funding from the Department of Communities and is planned to roll out over the next year or two.

279 For example see Baldry, McDonnell, Maplestone and Peeters. '*Ex-prisoners, Homelessness and the State in Australia'*, 2006 ANZJOC, Volume 39, No. 1.

280 Goulding, D. (2004) '*Severed Connections: An exploration of the impact of imprisonment on women's familial and social connectedness',* Murdoch University WA available online at http://researchrepository.murdoch.edu.au/10995/.

prison. The same study made various recommendations concerning the provision of emergency housing and support services to address this situation. To the Subcommittee's knowledge these recommendations have not, either fully or partially, been implemented.

As previously noted this is an area of priority concern in which RUAH and other agencies continue to provide assistance to women leaving prison in Western Australia. Research and investigations indicate that there are numerous and significant barriers to women ex-prisoners securing stable housing upon their release.[281] The currently high cost of private rentals and the long wait for State housing further exacerbates the difficulties. Without secure and stable housing any attempts by ex-women prisoners to re-connect with family, establish community links or find employment is close to impossible. Homeless ex-prisoners are at significant risk of re-offending, particularly Aboriginal women, because many end up on prohibitive behaviour orders that they typically breach.[282]

The Subcommittee therefore recommends urgent government support and funding for the provision of transitional accommodation for women leaving prison. Such transitional accommodation would also need to make available support from post-release service providers to assist the women with any issues in order that they are successfully re-settled into their accommodation and the community. This transitional accommodation should be available to these women for as long as is needed until they can establish other more permanent and long-term accommodation.

9.24 The State Government supports and funds initiatives for mentoring and transitional accommodation for women released from prison.

EFFECTIVE LEADERSHIP FOR WOMEN'S JUSTICE ISSUES AND JUSTICE RE-INVESTMENT

Women's Services Directorate and Women's Justice Advisory Group

281 The Transitional Manager Peter Clarke discussed this issue and pointed out that many women have difficulties with the *100 points* identification needed for securing accommodation. The existence of outstanding fines is another problem. Peter also pointed out that women exiting prison are able to apply within 12 months of leaving prison for help and support with accommodation and other issues. They are made aware of this option upon release from prison.

282 This view provided by Peter Collins of the ALS during interview with C. Fletcher on 22.4.14.

From the Chapter 9 Subcommittee's investigations it is aware that addressing the numerous issues involved in the offending and punishment of women is complex. In the case of Aboriginal women offenders this complexity is further compounded by the intersection of race and other issues.

The Subcommittee acknowledges that the Government (principally through the DCS and the DOTAG), in conjunction with many not for profit agencies and private sector providers, strive to assist women offenders during their sentence to address the causes of their offending and provide women offenders with meaningful assistance to rebuild their lives. There are however significant gaps in the provision and co-ordination of those services which leads to, or is the result of, a lack of strategic vision concerning women's offending and punishment. Furthermore the Subcommittee perceives there is a disconnect in the various aims of sentencing and what is achieved in sentencing women offenders.

The concern over a lack of strategic planning for women's punishment in WA has been highlighted in past OICS reports. It was also the subject of significant comment by the WA Parliamentary Community Development and Justice Standing Committee in a 2010 report '*Making Our Prisons Work*'. In that report it was noted that the abolition of the DCS role of Director of Women's Custodial Services (which existed between 2004 and 2010) caused concern to both DCS staff and the Inspector of Custodial Services. The Standing Committee noted that this role "brought the needs of women in the prison system to the fore…(it) significantly impacted the effectiveness of the rehabilitation strategies…" The Standing Committee noted further that the responsibility for female prisoners now lies with the individual superintendents of prisons where women are accommodated and that there was evidence that this was not easy for them to manage on top of existing workloads. It concluded that the abolition of the Director of Women's Custodial Services role "*reflects a gap between the espoused policy of developing a women centred approach and the practiced reality*".

Given the reports suggesting a lack of focus on women's needs in the prison system and the importance of ownership and direction for policy and practice in this area the Subcommittee recommends the re-establishment of a women's services directorate within DCS to oversee the services to women in prison.

Further to this the Subcommittee takes the view, which is shared by a number of persons consulted as part of this 2014 Review, that there is a need for an independent steering or advisory group comprised of persons from the following areas: academia, government (logically DCS and/or DOTAG), legal (including judicial), other service providers (such as welfare, counselling or vocational support groups), police and ex-prisoner/prison reform groups (particularly representing Aboriginal women). The role of the steering or advisory group would be to provide the strategic vision, drive and co-ordination to address the needs and issues of women offenders. A key focus for this group would be to address the causes of women's offending, finding alternatives to the imprisonment of women and reducing the imprisonment of women. The Subcommittee considers this could provide a 'whole of community' outlook and direction in dealing with women's offending which could improve community support for the rehabilitation and re-integration of women offenders.

In support of such an initiative the Subcommittee notes with interest the recent establishment of a nine-member 'Youth Justice Board' with expertise in a range of areas (including Aboriginal mental health, Aboriginal affairs, drug research, child health and business) to develop "*innovative strategies focused on crime prevention and diversion, drug and alcohol abuse, and alternatives to custody.*"[283]

Given the data and arguments presented by the Subcommittee in this chapter about women's imprisonment and the impact this has on individuals, families and the community in Western Australia a recommendation follows for a similar initiative to be taken in respect of the justice issues that arise in connection with women's offending.

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283 Announced by the Minister for Corrective Services, the Hon. Joe Francis, in Parliament on 2 April 2014: Minster Joe Francis Ministerial Media Release "Board to bring new focus on youth justice" accessed on 7.5.14 at http://www.mediastatements.wa.gov.au/Pages/StatementDetails.aspx?listName=StatementsBarnett&StatId=8209.

9.25 The Department of Corrective Services, as a matter of urgency, re-establishes a women's services directorate within the Department of Corrective Services to oversee services to women in prison.

9.26 The State Government establishes an independent 'Women's Justice Advisory Group', within 12 months of this 2014 Review Report, whose membership is representative of various stakeholders, to co-ordinate, develop and drive strategies to deal with women's offending with a view to addressing the causes of women's offending, finding alternatives to imprisonment for women offenders and reducing the rate of imprisonment of women offenders in Western Australia.

Justice Re-investment

The annual cost of delivering corrective services in Western Australia is approaching almost $1 billion.[284] The total annual cost of imprisonment alone was over $500 million in the financial year for 2012/2013. The most recent figures indicate it costs $310/day (or $113,150 per annum) to imprison an adult male and $383/day (or $139,795 per annum) to imprison each adult female in Western Australia.[285] In comparison, the current cost for engagement with Community Corrections for an adult offender is $49 per day (or $17,885 per annum), which is clearly substantially lower than the cost of either male or female imprisonment.[286]

With high rates of return to prison for many offenders,[287]many people in the community (including senior figures in both government and the legal system in Western Australia[288]) now question whether imprisonment provides value for money

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284 2012/ 2013 DCS Annual Report: the DCS cost of providing corrective services for this period was $816 million (costs of adult services was $716 million).

285 Refer to Tables 5 and 6 in Attachment 7 (Data provided by Mala Dharmananda, DCS to the Subcommittee on 9 May 2014).

286 However note that included in the costs of imprisonment are the costs of more intensive therapeutic programs than those available to offenders in the community. Also included are the costs of health care, including mental health care, dentistry and treatment for the drug and alcohol addictions. These services are not provided by DCS for offenders in the community: information provided by Jane Larke, A/Assistant Commissioner, DCS to Subcommittee on 9.5.14.

287 In 2013, 62 per cent of prisoners in WA had known prior adult imprisonment: see ABS data Prisoners in Australia, 2013 accessed on 7.5.14 at http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4517.0main+features432013.

288 For example Commissioner Karl O'Callaghan, Corrective Services Minister Joe Francis and the Hon. Wayne Martin, Chief Justice AC: see "*Crime Re-think: Top Cop backs fresh tactics*" by Rhianna King, West Australian newspaper 31.5.13. Also addressed by Mr James McMahon,

in terms of successfully tackling crime and are instead looking for new ways to tackle crime.

The concept of 'Justice Re-investment' has attracted significant attention in recent times in Australia[289] and also overseas as an alternative to traditional crime prevention strategies particularly imprisonment. A Western Australian Parliamentary Committee has also recently considered the potential application of justice re-investment principles in Western Australia.[290] The Parliamentary Committee pointed out that when addressing crime we primarily focus on the management of the criminal individual rather than on the communities they come from. They described justice re-investment as (i) recognising that most offenders come from a small number of disadvantaged communities; (ii) redirecting money into crime prevention and community services in those identified communities thereby responding both to the individual and to the causes and sources of crime through a less centralised/more localised approach to reducing offending. It also noted that justice re-investment recognises that the causes of offending, particularly that of Aboriginal offending, are often external to the justice system and therefore the solutions are unlikely to be found within the justice system. The Parliamentary Committee also noted that the success of justice re-investment initiatives requires high-level inter-agency co-operation, collaborative goals and performance indicators, and the active engagement and support of Ministers, heads of departments, decision-makers and key stakeholders. The Parliamentary Committee recommended the government trial a justice re-investment strategy in one metropolitan and one regional 'high stakes' community and also made further recommendations concerning inter-agency collaboration and accountability.

This Subcommittee has also had regard to other policy and research documentation outlining justice re-investment strategies and is broadly supportive of such

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Corrective Services Commissioner at the Criminal Lawyers Weekend Workshop held at Notre Dame University, May 2014.

289 For example see the Federal Senate Inquiry into the '*Value of a justice reinvestment approach to criminal justice in Australia'*, June 2013, Commonwealth of Australia, available online at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/~/media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2010-13/justice_reinvestment/report/report.ashx.

290 Community and Justice Standing Committee of the WA Parliament, '*Making our Prisons Work'; An Inquiry into the efficiency and effectiveness of prisoner education, training and employment strategies,* Report No. 6 in the 38th Parliament, 25 November 2010.

strategies.[291] However this Subcommittee does not support a definition of justice re-investment that re-directs money out of or away from prisons or community corrections budgets, which are already under-resourced. Instead this Subcommittee endorses greater support and funding for non-custodial alternatives to punishment and programmes and services that support families and individuals in the community to lead a crime-free lifestyle.

From this, and other consultations, the Subcommittee takes the view that there is broad support in Western Australia for the considerable potential benefits of justice re-investment strategies to address the causes of offending in certain high-risk communities. As this is likely to be of particular benefit to both the general community and also to Aboriginal women (and to their families and communities), the Subcommittee lends its broad support to such initiatives (although makes no specific recommendation in this regard).

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[291] For example, see Sister's Inside 2013 submission to the Federal Senate's 'Inquiry into the Value of a Justice Reinvestment Approach to Criminal Justice in Australia' available online at http://www.sistersinside.com.au/media/SIS%20Submission%20D2%20Justice%20Reinvest%20Mar13.pdf

ATTACHMENT 1

Recommendations 181 To 197 in the 1994 Report

RECOMMENDATION 181: Need for further research[292]

That further research be undertaken to determine the reasons for differences in sentencing outcomes for women and men as a further source of input into sentencing policy.

RECOMMENDATION 182: Approaches to the sentencing of women[293]

That efforts be made to stimulate public debate on sentencing principles and options, with a view to ensuring equity and justice in sentencing, including:

a) stimulation and funding of research on the sentencing of women in WA and judicial attitudes;

b) publication of "position" papers describing and evaluating a range of approaches to the sentencing of women; and

c) promotion of discussion within the ranks of the judiciary, the magistracy, and the legal profession about:

   i) sentencing principles and practice;

   ii) attitudes to the sentencing of women; and

   iii) sentencing options.

RECOMMENDATION 183: Section 16 of the Crimes Act (Commonwealth)[294]

That the proposed Sentencing Bill include a principle of sentencing to the effect that the court, in determining whether or not to impose a custodial sentence on an offender who is the sole care-giver in a family, take into account the effect of the sentence on the offender's family or dependents, and the effect on the offender of the sentence on their family or dependents.

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292 Refer Chapter 9 at paragraph 3.22
293 Refer Chapter 9 at paragraph 4.11
294 Refer Chapter 9 at paragraph 4.18

RECOMMENDATION 184: Social Security Fraud[295]

That the findings of the Crime Research Centre study which examined the attitude of the Courts in Western Australia to social security offending by women and, as they arise, other research findings and statistical information on sentencing outcomes, be disseminated to members of the judiciary.

RECOMMENDATION 185: Pre-sentence reports

That the Ministry of Justice review the preparation of pre-sentence reports in view of a study conducted by the Crime Research Centre which reported evidence of gender bias complicated by factor of race.[296]

RECOMMENDATION 186: Prison facilities and regimes

That the Ministry of Justice examine the feasibility of establishing a minimum security facility for women prisoners in the Perth metropolitan area.[297]

RECOMMENDATION 187: Prison facilities and regimes[298]

That the Ministry of Justice recognise the desirability of women prisoners being managed by women staff and of at least one member of the senior administration of Bandyup Women's Prison being a woman.

RECOMMENDATION 188: Judiciary to consult with aboriginal advisers on cultural issues where relevant[299]

Appropriate Aboriginal advisers be consulted by judicial officers on matters relating to culture where that is relevant – e.g. on questions of penalty.

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295 Refer Chapter 9 at paragraph 4.14
296 Refer Chapter 9 at paragraph 4.4.
297 Refer Chapter 9 at paragraph 5.3.
298 Refer Chapter 9 at paragraph 5.5.
299 Refer Chapter 4 at paragraph 75.

RECOMMENDATION 189: Fine default options for Aboriginal Women[300]

That attention be given by the Ministry of Justice in consultation with relevant Aboriginal organisations and, on a local level, with Aboriginal Communities, to the design of programmes to operate as meaningful alternatives to imprisonment of Aboriginal women for fine default.[301]

RECOMMENDATION 190: Ability to pay fines[302]

When fines are imposed the courts take more account of ability of offender to pay the fine.

RECOMMENDATION 191: Community Corrections[303]

That in the administration of community based orders and the development of legislation, special consideration be given to the particular difficulties experienced by women offenders, in particular Aboriginal women offenders, in meeting their obligations under the order.

RECOMMENDATION 192: Prisoner Health and Welfare[304]

That the quality of health care services provided to prisoners at Bandyup be reviewed with particular reference to:

- The extent to which existing services cater for the special health care needs of women, and those who have been victims of child sex abuse or domestic violence; and
- The desirability of 24 hour per day nursing coverage.

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300 Refer Chapter 9 at paragraph 4.7 and also Chapter 4 at paragraph 133.

301 Note that this particular recommendation comes from chapter 9. A recommendation in similar terms arises from chapter 4 as follows: "There be a review of the whole system of fines and default of payment of fines and the replacement of fines where possible by culturally appropriate sentencing options (for Aboriginal women) e.g. work orders to be performed with Aboriginal or local Government organisations".

302 Refer Chapter 4 at paragraph 134.

303 Refer Chapter 9 at paragraph 5.13.

304 Refer Chapter 9 at paragraph 5.9.

RECOMMENDATION 193: Impact of Imprisonment[305]

That the Ministry of Justice establish a family support centre at Bandyup to assist in the maintenance of family relationships.

RECOMMENDATION 194: Access to Support Networks[306]

That means of maintaining family and community contact by women prisoners, particularly those from the country who are imprisoned in Bandyup, be investigated.

RECOMMENDATION 195: Prisoner Programmes[307]

That means to expand the range of employment, vocational, educational and other developmental programmes for women prisoners, and to expand their participation rate in those programmes be examined by the Ministry of Justice.

RECOMMENDATION 196: Awareness of gender issues[308]

That corrective services staff participate in a programme of gender awareness training which complements the existing programme of cross cultural awareness training.

RECOMMENDATION 197: Post release support[309]

That properly resourced pre-and post-release community reintegration programmes specifically tailored to the needs of women be developed and offered to women prisoners and ex-prisoners, and that a package of relevant information be made available to women prisoners at the time of their release.

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305 Refer Chapter 9 at paragraph 6.2.
306 Refer Chapter 9 at paragraph 6.4.
307 Refer Chapter 9 at paragraph 5.11.
308 Refer Chapter 9 at paragraph 5.15.
309 Refer Chapter 9 at paragraph 6.7.

ATTACHMENT 2

Summary of Consultations

The list of those consulted for this report is as follows:

- His Honour Chief Justice Wayne Martin AC, Chief Justice of the Supreme Court of WA;[310]
- His Honour Judge Robert Cock, President of the Prisoner Review Board of Western Australia;[311]
- Mr Craig Somerville, Deputy Chairman of the Prisoner Review Board of Western Australia;[312]
- Magistrate Vicki Stewart, START Court (Mental Health Court of WA);[313]
- Magistrate Felicity Zempilas, Central Law Courts, Perth;[314]
- Members of the Criminal Lawyers Association of Western Australia ;[315]
- Professor Neil Morgan, Inspector of Custodial Services and staff at OICS;[316]
- Mr Joe McGrath SC, Director of the ODPP;[317]
- Mr Peter Collins, Principal Legal Officer at the Aboriginal Legal Service of Western Australia;[318]
- Mr James McMahon, Commissioner for Corrective Services, Department of Corrective Services of Western Australia;[319]

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310 A delegation of the Subcommittee met with the Chief Justice at Supreme Court on 2.4.14.

311 Subcommittee member Catherine Fletcher had informal discussions with Judge Cock at both the Australasian Parole Conference and a Law Society Criminal Law Seminar in 2013 and also email communications following these discussions.

312 Subcommittee member J. Jones met with Mr Sommerville on 24.3.14

313 Email to C Fletcher on 7.4.14.

314 A telephone discussion with C Fletcher on 24.10.13.

315 A survey of Criminal Law practitioners regarding sentencing, punishment and legal representation of women offenders was conducted during June/July 2013. In addition Legal Aid Lawyer Karen Shepherd, who was a 2013 committee member on the Criminal Lawyers Association, has provided extensive assistance with the part of the report dealing with legal services to imprisoned women offenders.

316 Inspector of Custodial Services Neil Morgan and OICS staff member Stephanie McFarlane met with Subcommittee member C. Fletcher (State Prosecutor DPP), Linda Black (President, Criminal Lawyers Association), Maureen Kavanagh and Karen Shepherd (both from Legal Aid WA) to discuss the state of access to legal services for women at Bandyup) on 8 February 2013; Subcommittee members C. Fletcher and K. Malcolm met with the Inspector again in March 2014.

317 On several occasions C. Fletcher held discussions with Joe McGrath SC on various issues.

318 C. Fletcher met with Peter Collins on 22.4.14.

- Staff of the Department of Corrective Services of Western Australia;[320]
- Staff of the Department of the Attorney General;[321]
- Staff of Boronia Pre-Release Centre;[322]
- Staff of Bandyup Women's Prison;[323]
- Staff and Board Members of the Women's Law Centre;[324]
- Staff of the Crime Research Centre of Western Australia;[325]
- Aboriginal women offenders in metropolitan and regional women's prisons;[326]
- Jade Lewis of the Jade Lewis Foundation;[327]
- Staff and Board Members of Outcare;[328] and
- Staff of RUAH.[329]

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319 C. Fletcher met with the James McMahon on 31.1.14.

320 DCS Subcommittee member Susan Renshaw, former DCS staff member Galatee De Laubadere and other staff members at DCS provided significant assistance throughout the project. Other important consultations were held with Mr Peter Clarke, Manager of Transition Services at DCS regarding the role of transition managers at the prisons; and with other DCS staff regarding the Peer Support Scheme that operates in certain prisons.

321 Significant assistance has been provided throughout the project by Dr Monica Cass, Senior Evaluation and Research Officer, Policy and Aboriginal Services Directorate, Department of the Attorney General and also Ms Cheryl Gwilliam, Director-General of the Department of the Attorney General; data was also provided to the Subcommittee

322 Various members of the Subcommittee met with Ms Janet Allen, Superintendent of Boronia Pre-release Centre on 15.3.13.

323 Subcommittee members C. Fletcher, G. Bailey and S. Renshaw met with Ms Marie Chatwin, Superintendent, Bandyup and other DCS staff at Bandyup Women's Prison on 22.3.13.

324 C. Fletcher, Dr M. Wilson and G. Bailey met with WLC staff on 28.613.

325 Dr Hilde Tibex spoke with C. Fletcher on several occasions and assisted with some data for this chapter.

326 Interviews have been held with Aboriginal women for a project being conducted by Subcommittee members Dr M. Wilson and J. Jones entitled the '*Social and cultural resilience and emotional well being of Aboriginal mothers in prison*' funded through the National Health and Medical Research Council.

327 Subcommittee member K. Malcolm met with Jade Lewis in November 2013. Their discussion focussed on a proposed mentoring scheme being developed by the Foundation for women in custody and who are to be released from custody.

328 Subcommittee member K. Malcolm met with Amanda Wheeler, CEO of Outcare on 28.11.13 regarding support for women's transitioning into the community after prison; Email between K. O'Brien (board member Outcare) and Sandra Martin, Executive Assistance, Outcare dated 10.4.13.

329 C. Fletcher met briefly with Sally Scott of RUAH at the 2013 Australasian Parole Conference and was also provided with some information about the services of RUAH for women offenders in February 2014.

ATTACHMENT 3

Tables of Sentencing Data

The following series of tables contains data obtained by the Subcommittee from the DOTAG and DCS for matters[330] finalised between 1 January 2012 and 31 December 2012.

Note that while some of these tables look similar to those provided in the 1994 Report, the figures are not directly comparable, as different data sources[331] and counting rules have been used, as well as a different offence classification system, when compared to the data utilised in the 1994 Report.

Table 1: Use of Imprisonment by Sex and Level of Court – 2012

Sex	Lower Courts	Higher Courts	Total
Females	2.3%	50.0%	2.9%
Males	4.6%	66.6%	6.0%
Total	**4.1%**	**64.2%**	**5.3%**

Table 1 shows the proportion of matters finalised as a result of conviction, which received imprisonment as a penalty as compared to some other penalty. It shows that men are more likely to receive imprisonment as a penalty compared to women, and for matters finalised in the higher courts are more likely to attract an imprisonment penalty than matters finalised in the lower courts. This is to be expected as the higher courts deal with more serious matters.

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330 For reference, a matter is defined as a group of charges for a single defendant, lodged in court on the same day. The charge with the most serious final outcome is selected to represent the matter. For example, if a matter consists of three charges, where one charge resulted in imprisonment, the second charge resulted in a fine, and the third charge was dismissed, then the matter would be represented by the charge, which received the imprisonment penalty.

331 The data is a count of matters finalised as a result of a conviction in the Children's Court and Magistrates Court (the lower courts), and the District Court and Supreme Court (the higher courts). The data is sourced from the lower courts case management system CHIPS and the higher courts case management system ICMS (via the relational data mart tables): Department of Corrective Services, *Update Report for Women Lawyers of WA*, January 2013.

Table 2: Adult Courts Penalties by Sex – 2012

Penalties	Females	Males	Total
No penalty	0.5%	0.4%	0.5%
Fine	87.0%	85.4%	85.8%
Non-Custodial	9.6%	8.4%	8.6%
Custodial	2.9%	5.8%	5.1%
Total - n	18,519	61,326	79,845

For adults, fines are the most common penalty handed down for a conviction, regardless of gender.

Table 3: Children's Court Penalties by Sex – 2012

Penalties	Females	Males	Total
No Penalty	25.1%	20.9%	21.6%
Fine	16.2%	17.3%	17.1%
Non-Custodial	54.1%	52.6%	52.9%
Custodial	4.6%	9.2%	8.4%
Total - n	999	4,671	5,670

For matters finalised as a result of a conviction in the Children's Court, a non-custodial order is the most common penalty type handed down.

Tables 2 and 3 show all matters finalised in the courts in 2012 as a result of a conviction. Table 2 shows the proportions of penalties received by adults in the Magistrates Court, District Court and Supreme Court, while Table 3 shows penalties received in the Children's Court.

Table 4 (further below) details the proportion of penalty types received for men and women across the lower and higher courts, by the offence type[332] of the representative charge.

[332] The Australia and New Zealand Standard Offence Classification has been used to group offence types, and these are displayed by division, which is the highest classification level, and group offences together into one of 16 categories.

Table 4: Penalty by Offence Type – 2012

Penalties		No Penalty		Fine		Non-Custodial		Custodial	
	Court Level	Females	Males	Females	Males	Females	Males	Females	Males
01) Homicide and related offences	Lower	0.0%	0.0%	0.0%	0.0%	75.0%	55.6%	25.0%	44.4%
	Higher	0.0%	0.0%	0.0%	0.0%	0.0%	3.0%	100.0%	97.0%
02) Acts intended to cause injury	Lower	3.7%	2.2%	39.7%	40.8%	46.0%	38.3%	10.6%	18.6%
	Higher	0.0%	0.0%	4.2%	2.1%	62.5%	30.6%	33.3%	67.4%
03) Sexual assault and related offences	Lower	0.0%	0.8%	20.0%	25.0%	60.0%	54.2%	20.0%	20.0%
	Higher	0.0%	0.0%	0.0%	2.6%	50.0%	33.0%	50.0%	64.4%
04) Acts endangering persons	Lower	0.2%	0.6%	92.4%	89.3%	5.8%	5.8%	1.6%	4.3%
	Higher	0.0%	0.0%	0.0%	0.0%	58.3%	33.3%	41.7%	66.7%
05) Abduction, harassment & other offences against the person	Lower	0.0%	3.4%	50.0%	50.0%	38.9%	35.2%	11.1%	11.4%
	Higher	0.0%	0.0%	0.0%	7.9%	66.7%	39.5%	33.3%	52.6%
06) Robbery & related offences	Lower	1.9%	1.0%	0.0%	0.0%	70.4%	52.9%	27.8%	46.1%
	Higher	0.0%	0.0%	0.0%	0.0%	52.4%	23.6%	47.6%	76.4%
07) Burglary & related offences	Lower	5.6%	6.3%	12.4%	6.9%	63.3%	57.1%	18.6%	29.7%
	Higher	0.0%	0.0%	2.6%	2.6%	53.8%	30.5%	43.6%	66.9%
08) Theft & related offences	Lower	3.3%	6.1%	74.4%	62.7%	19.8%	24.2%	2.4%	7.0%
	Higher	0.0%	0.0%	0.0%	7.0%	20.0%	51.2%	80.0%	41.9%
09) Fraud & related offences	Lower	0.0%	0.0%	56.3%	76.3%	36.9%	14.6%	6.8%	9.0%
	Higher	0.0%	0.0%	10.0%	2.4%	33.3%	40.5%	56.7%	57.1%

	Court Level	Females	Males	Females	Males	Females	Males	Females	Males
10) Drug offences	Lower	0.5%	1.1%	90.3%	91.4%	7.6%	6.0%	1.6%	1.4%
	Higher	0.0%	0.7%	1.7%	3.4%	27.1%	27.6%	71.2%	68.3%
11) Weapons & explosive offences	Lower	1.0%	1.6%	89.9%	85.7%	7.1%	7.8%	2.0%	5.0%
	Higher		0.0%		20.0%		40.0%		40.0%
12) Property damage & pollution	Lower Courts	8.1%	9.2%	62.9%	59.7%	25.4%	25.3%	3.6%	5.8%
	Higher Courts	0.0%	0.0%	12.5%	10.5%	62.5%	42.1%	25.0%	47.4%
13) Public order offences	Lower Courts	2.1%	1.5%	91.8%	92.5%	5.9%	5.2%	0.2%	0.7%
	Higher Courts	0.0%	0.0%	0.0%	0.0%	100.0%	66.7%	0.0%	33.3%
14) Traffic & vehicle offences	Lower Courts	0.3%	0.4%	95.8%	95.4%	3.3%	3.4%	0.6%	0.8%
	Higher Courts		0.0%		0.0%		0.0%		100.0%
15) Offences against government procedure, security and operation	Lower Courts	4.6%	3.7%	77.8%	79.2%	13.7%	11.2%	3.9%	5.9%
	Higher Courts	0.0%	1.4%	25.0%	6.8%	56.3%	25.7%	18.8%	66.2%
16) Misc. offences	Lower Courts	1.0%	0.2%	96.9%	98.0%	1.0%	1.3%	1.0%	0.6%
	Higher Courts	0.0%	0.0%	0.0%	0.0%	100.0%	80.0%	0.0%	20.0%
Total	**Lower Courts**	**1.8%**	**1.9%**	**84.5%**	**82.4%**	**11.4%**	**11.0%**	**2.4%**	**4.6%**
	Higher Courts	**0.0%**	**0.2%**	**4.4%**	**2.9%**	**45.6%**	**30.4%**	**50.0%**	**66.6%**

Table 5: Successful completion rate for the four most common community service orders by gender and Aboriginality between 1.1.12 and 31.12.12

	% of Community Based Orders		% of Work and Development Orders		% of Intensive Supervision Orders		% of Bail Orders	
	Male	**Female**	**Male**	**Female**	**Male**	**Female**	**Male**	**Female**
Aboriginal	40.8	41.3	69.5	69.8	33.6	40.7	63.7	58
Non-Aboriginal	61.4	66.8	67.9	73.8	52	62	80.4	81
Total success rate (%)	**51.1**	**54.05**	**68.7**	**71.8**	**42.8**	**51.35**	**72.05**	**69.5**

Table 6: Status of prisoners, either sentenced/remand, by gender and by Aboriginality between January 2012 to December 2012[333]

	Male (%)			Female (%)		
	Aboriginal	Non Aboriginal	**% of total Male receivals (10,277)**	Aboriginal	Non Aboriginal	**% of total Female receivals (1,841)**
Sentenced at Reception	12	20	**32**	22.8	17.5	**40.3**
Became sentenced during period	13	12	**15**	10.9	7.1	**18**
Remained Unsentenced during period	18.7	23.7	**42.4**	22.8	18.7	**41.5**

[333] DCS Performance and Statistics, Custodial Receptions and Recaptures for period 01 Jan 2012 to 31 Dec 2012: 10 July 2013

ATTACHMENT 4

Summary of Department of Corrective Services

Female Prisoners Plan 2012 – 2022[334]

The Female Prisoners Plan 2012 – 2022 aims to maximise the potential for women to achieve improved outcomes during their contact with corrective services in Western Australia. The plan's strategies and principles reflect the Department's understanding of its female prisoner population and their specific needs, to improve the lives of female prisoners whether through re-entry services or life skills. The plan works towards achieving the provision of safe, secure female prisoner estates and facilities and providing services such as education and vocational training, employment skills, parenting skills, healthcare, counselling and support, and programs within a structured work day. The plan also focuses on a statewide infrastructure approach that addresses the current inadequacies in the female prisoner estate. The following infrastructure developments are in line with the Department's Strategic Plan and will ensure that female prisoners are managed safely, securely and humanely.

Bandyup Women's Prison

A critical component of the plan is a full upgrade of Bandyup, which, if implemented will significantly improve the service provision to prisoners and their children. The proposed upgrade will enable the women to have continued contact with family members, particularly dependent children, with provision for day, overnight and after school stays for children up to 12 years of age. The proposed upgrade will also provide improved visit facilities, additional employment opportunities for prisoners and sufficient program rooms to accommodate the increase in prisoner population.

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334 Summary provided by DCS to the Subcommittee in 2013.

Boronia Pre-Release Centre

The maintenance of family relationships is evident at Boronia Pre-Release Centre for Women - a community-oriented facility for women, comprised of self-care residential units. The facility includes three four-bedroom nursery houses designed as shared mother-baby accommodation. Permission can be granted for children up to the age of four years to live with their mothers, and for older children up to the age of 12 to have extended day visits and overnight stays. Mothers in custody can undertake parenting activities related to the medical, educational, developmental and cultural needs of their children.

Greenough Regional Prison

The Department has committed to the ongoing development of the Greenough Regional Prison (GRP) Woman's Precinct as a dedicated secure female area. The precinct will provide improved and appropriate facilities for women including their own areas for recreation, employment, education, health and life skills services. GRP Stage One, which opened on 20 December 2012, is a short term solution to increase the immediate capacity and significantly improve living conditions for female prisoners. It involved the re-development of an existing unit as a dedicated female unit through minor modifications and the installation of transportable buildings. There is a separate outside recreation area and an education or programs transportable building which can also be used by medical staff as a consultation clinic. GRP Stage Two aims to provide a long-term solution to address the increasing female prisoner population by enabling the development of decanting strategies between the metropolitan based and regional women centres. A business case will be developed to explore the possibility of developing the GRP site as part of the statewide integrated regional estate for women. This stage will require the specification of 'fit for purpose' buildings to be constructed within the female area which should include a visits area, a house for extended or overnight stays with children, education and designated work areas, medical centre and program rooms.

West Kimberly Regional Prison

The West Kimberly Regional Prison opened in November 2012; one of its guiding principles is the recognition and acceptance that familial responsibilities are central to the fabric of Aboriginal society and critical to the well being of the community and the individual. The prison has 20 self-care units on the prison site, with four different housing types for women that are arranged so that prisoners can be located according to family ties, language and security rating.

Eastern Goldfields Regional Prison

The new Eastern Goldfields Regional Prison will replace the existing prison in the Eastern Goldfields, allowing more male and female offenders from the Goldfields to serve their sentences close to their families and communities, in modern custodial facilities. The prison will provide an additional 250 beds (total 350 beds) in the Goldfields region for prisoners of all security ratings; designed to engage Aboriginal prisoners in culturally appropriate programs and courses, and for the first time in the region, have a separate and specific focus on the needs of female prisoners.

Warburton Work Camp[335]

The Warburton Work Camp opened in August 2012; it is a purpose-built facility that provides accommodation for up to 24 low-risk prisoners. The camp enables both male and female offenders on community-based orders from the Ngaanyatjarra and surrounding areas to undertake skills-based reparation activities while receiving family and community support. Priority is given to maintaining and strengthening relationships between offenders, their families and the communities they will eventually return to. The work camp, in partnership with the community, facilitates the interaction of prisoners and offenders within the community as they undertake their approved work. In time, the work camp will have the capability to undertake reparation in more remote communities via mobile work camps.

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[335] The Subcommittee are not aware that there are any women using this facility at all.

ATTACHMENT 5

Review Report - Access to Legal Services

For Women in Custody

1) BACKGROUND AND OVERVIEW

The 1994 and 1997 reports did not specifically address the issue of access to justice for women prisoners.

2) SUBCOMMITTEE INVESTIGATIONS – RATIONALE AND PROCESS ADOPTED

2.1) What the Subcommittee investigated

The Subcommittee investigated the extent to which female prisoners in Western Australia have access to legal advice and legal resources. The major focus of the research related to access to justice for female prisoners held at Bandyup Women's Prison. Some comment may be made about access to justice for those female prisoners held in regional prisons, however, the focus of the review centred on access to justice for prisoners held at Bandyup Women's Prison.

2.2) Why this issue was investigated

Concerns have been raised by individual lawyers and by The Criminal Lawyers' Association about the lack of, and sub-standard, facilities at Bandyup Women's Prison and the impact this has on the ability of female prisoners to readily access their legal advisers and access legal advice in general.

2.3) Does gender bias exist in relation to the area of women and access to justice?

It is the conclusion of the Subcommittee that female prisoners at Bandyup Women's prison are disadvantaged when compared to male prisoners at other prisons, most notably those male prisoners held at Hakea prison.

The Subcommittee concluded that the lack of, and sub-standard, facilities at Bandyup Women's prison have a direct correlation with female prisoners remanded or incarcerated at that prison having more difficulty in accessing legal advice and legal services than male prisoners remanded or incarcerated at Hakea and other prisons in WA.

Accordingly, it is the view of the Sub-committee that gender bias does exist in the area of women and access to justice.

2.4) Who was consulted and why

The Criminal Lawyers Association canvassed its members in early 2013 seeking feedback on whether legal practitioners have experienced any difficulty in accessing their female clients held at Bandyup Women's prison.

A separate survey was conducted with those members of the legal profession who attended the Criminal Lawyers Association Continuing Professional Development weekend on 18 and 19 May 2013. Again feedback was sought on the experience of those practitioners who have represented female offenders, both on remand or as sentenced prisoners, held at Bandyup Women's prison.

In order to highlight the conclusion of the Subcommittee that gender bias does exist for women prisoners at Bandyup Women's prison, other prisons in Western Australia were surveyed to ascertain what facilities are available to enable prisoners to access legal advice and legal services generally.

A table of comparative facilities relevant to accommodating access to justice is attached at Attachment One.

3) BREAKDOWN OF ISSUES

A number of issues were identified as being problematic at Bandyup Women's Prison leading to the conclusion that there is most certainly an inequality of facilities for female prisoners held at Bandyup.

The Subcommittee concluded that the lack of facilities at Bandyup Women's prison to accommodate the current prison population directly attributes to the view of the Subcommittee that female prisoners held at that prison are disadvantaged in terms of accessing justice.

The analysis of why there exists, or appears to exist, gender bias in accessing justice is assisted by examining the key facilities available at Bandyup in this regard.

The analysis examines the number of interview rooms available for legal visits, the demands on those rooms by different service providers, the facilities for remote access to women prisoners such as video-link, Skype or legal telephone calls, the facilities for viewing digitally served evidence as well as the set up of the visiting area within the prison.

Comment is also made, following the survey and feedback sought from the legal profession, about other non-physical aspects of Bandyup Women's prison which are seen as contributing, or possibly contributing, to the overall conclusion that women remanded at that prison are disadvantaged when it comes to accessing legal advice.

3.1) Lack of Interview Rooms and related issues

At the time of writing the population at Bandyup stands at 290. Of that, 104, almost 36% of prisoners are currently remand prisoners. As such, these women are identified as being in need of access to legal advice given that their court proceedings have yet to be resolved.

It was identified that one of the major issues currently facing women prisoners at Bandyup seeking access to legal advice is the lack of available interview rooms. At present there are only four demountable interview rooms for the entire Bandyup prison population.

The additional difficulty is that the four demountable rooms are utilised not only for legal visits, but are the interview rooms for all official visitors needing to access the prisoners. The four interview rooms are therefore utilised for appointments with other service providers, not just legal service providers. Those other service providers might be such agencies as DCP, Centrelink, RUAH and so on.

Where the prison is at over capacity, the extent of the demands on the limited interview rooms available is that much greater. It is submitted that four official interview rooms for a prison population of 290 is grossly inadequate.

It is noted that Hakea, by comparison, has 14 interview rooms available for its prison population of 971. In addition to those 14 rooms, Hakea also has one non-contact visiting room, as well as one police room and one holding room.

The practitioners surveyed for this review reported ongoing difficulties in obtaining an appointment at Bandyup to interview a prisoner for the purposes of giving legal advice. Practitioners find that unless booked well in advance, they are often faced with little or no available appointments.

When coupled with the lack of alternative facilities through which to provide legal advice to female prisoners, such as video-link, Skype and legal telephone facilities that are available at Hakea and other prisons, the lack of interview rooms at Bandyup assumes greater significance. The lack of alternative facilities through which to provide legal advice is examined in more detail in section 3.2 below.

Another issue identified as potentially impacting on women prisoners accessing justice is the restricted effective appointment times for all official visits. The available times for such visits are 8:30 am to 11:30 am and then 1:00 pm to 3:30 pm. As many criminal practitioners are engaged in Court in the morning, it leaves a very small time frame in order to access female prisoners in the afternoon.

Whilst many other prisons in WA operate with a break over the luncheon period, when one considers the lack of available interview rooms and the lack of any other means by which women can properly access legal services, which is discussed in 3.2 below, the limited interview times add an additional layer of difficulty in practitioners accessing their clients, and in women prisoners accessing legal advice.

Whilst prison visiting officials at Hakea also have an official break in visiting times for the lunch period, it is the experience of many legal practitioners that they are permitted to continue a conference with a male prisoner over the lunch period where that conference has already begun prior to the official lunch break time. This has the practical effect of expanding the available interview time with prisoners held at Hakea from 8.30am to 3.45pm, or 7 hours and 15 minutes.

Additional hurdles reported by practitioners surveyed included that even where legal appointments have been booked, prisoners are often brought up to the official visiting area later, and in some instances cited, much later, than the booked appointment time. As Bandyup is so heavily booked, practically speaking this has resulted in legal visits being cut short.

The cause of the delays in bringing prisoners to the official visits area is not known with any degree of certainty. However, one factor may be the lack of any holding room or holding area available at Bandyup where prisoners due to see their legal adviser can wait. This means that at the conclusion of each visit the next prisoner on the list may have to be located from elsewhere in the prison (work or unit) and then brought up to the official visits area.

Compare this to Hakea prison that has a holding area enabling prisoners who have an official visit booked, to be brought to the official visits section and held until they are required. This saves valuable interview time.

Additional difficulties identified by the legal practitioners canvassed for this review included a difficulty in getting through to the official visits officer at Bandyup Prison in order to book an appointment.

This may be because there is no direct booking system with dedicated prison official visits staff, as is the case with Hakea prison where two permanent official visits officers are contacted directly to book appointments.

There is a lack of continuity of prison officers in the official section at Bandyup. There is an inability for lawyers and staff booking legal visits to contact prison officers manning official visits directly. Accordingly, there is an inability for lawyers / other official visitors to establish working relationships with prison officers staffing the official visiting areas.

Where there are dedicated official visits staff, such as at Hakea, it is possible for lawyers or other official visitors to establish working relationships with those dedicated official visits officers.

Anecdotally it has been reported that at Hakea, for example, where there is any difficulty in accessing a prisoner and where the matter is urgent, such as where a Court date is imminent, Hakea staff will always ensure that the lawyer either gets a visiting room, a video link appointment or an unlimited telephone appointment with the prisoner.

No such relationship exists at Bandyup and practitioners surveyed reported that it is not unusual for Court dates to be adjourned because of an inability to access female prisoners for the purposes of taking instructions or providing legal advice.

There is also a need for at least one non-contact visiting room to be made available for official visitors needing to interview female prisoners. At present there is no such facility.

Again given the lack of any alternative means of effectively communicating with female prisoners at Bandyup other than in person, there is a real need for a non-contact visiting room to be built or otherwise made available.

RECOMMENDATION 1

The number of interview rooms be increased to be on par with the number available at Hakea prison. This would mean an increase by at least three fold on what is currently available so that there are at least 12 interview rooms at Bandyup.

RECOMMENDATION 2

That two dedicated official visits officers be assigned to manage all official visits.

RECOMMENDATION 3

That all booking requests for appointments in the official visiting area be managed by the two dedicated official visiting officers.

Further that a dedicated booking email address be provided to facilitate the booking of legal appointments and other official visits.

RECOMMENDATION 4

That the effective appointment times be extended by allowing appointments to continue throughout the lunch break.

This might be achieved by the appointment of two dedicated official visits officers who can manage the official visiting area over staff rostered lunch breaks.

RECOMMENDATION 5

That a holding area be built in Bandyup to enable prisoners waiting for a legal visit to be brought up and made available for appointments at the scheduled appointment time.

RECOMMENDATION 6

That a non-contact appointment room be built at Bandyup prison.

3.2) Lack of alternatives to in person legal advice – video link, Skype and legal telephone calls.

The lack of interview rooms available at Bandyup assumes greater significance when one considers that there is, practically speaking, no real alternative to provide legal advice to female prisoners other than to physically attend the prison.

In 2013 with the technology that is available for remote communication, such as video link facilities and Skype facilities, even effective telephone

conferences, it is surprising that Bandyup does not have such facilities available.

Again a comparison with the facilities available at Hakea is illustrative. Hakea boasts 3 video link lines which are available to be booked for legal practitioners from 1pm to 3.30pm once court link ups have concluded for the day.

In addition to the 3 video link lines available, Hakea also has 5 Skype machines available for practitioners to book to give their male clients legal advice.

Bandyup, by comparison, is still languishing in a bygone era with no video link or Skype facilities available for the provision of legal advice. As has been noted above, this places increased pressure on the limited number of interview rooms currently available at Bandyup.

Legal practitioners surveyed for this review also report that telephone communication with their female prisoners is also very much hit and miss. Some practitioners report that messages left for prisoners to return phone calls do not appear to be getting to prisoners.

Additionally, and again unlike Hakea prison, there is no facility for lengthy legal telephone calls to be booked with prisoners at Bandyup. Whilst the official response at Bandyup is that a 20 minute telephone call can be booked if cleared in advance, in practice practitioners report that they have been limited to the 10 minute timed Arunta calls.

At Hakea prison, the dedicated official prison visiting personnel will facilitate an unlimited legal telephone call with a prisoner where the practitioner advises that the call is necessary for the purposes of pending court proceedings. This may well arise from the fact that the dedicated official visits staff at Hakea are able to develop working relationships with key stakeholders. A result is that the official visits staff at Hakea will do everything they reasonably can to facilitate access to justice of their male prisoners, a fact that is noted and appreciated by the legal profession.

Practitioners have noted that the lack of facilities at Bandyup to discuss legal matters with prisoners has, in practical terms, meant the provision of legal advice 'on the fly', and matters discussed with female prisoners in a far more cursory fashion than with their male counterparts at Hakea prison.

RECOMMENDATION 7

That video link facilities be installed at Bandyup to enable legal appointments to take place. These video link facilities need to be in addition to video link lines required for Court purposes which may run into the afternoon lists (e.g. Drug Court, IDD Court and Stirling Gardens Magistrates Court all of which often sit into the afternoon).

RECOMMENDATION 8

That Skype facilities be installed at Bandyup Prison to facilitate the access of prisoners to legal advice.

RECOMMENDATION 9

Bandyup to make available telephone lines in a confidential setting to allow for legal telephone appointments to take place.

RECOMMENDATION 10

That those telephone calls to be of unlimited duration.

3.3) Lack of equipment to view digitally served evidence

Another key example of the lack of modern facilities at Bandyup is the lack of any facilities whatsoever to enable digitally served evidence to be shown to female prisoners.

In 2013 it is the practice of the police and the State to serve increasing quantities of evidence digitally. There are no facilities in the 4 demountable interview rooms at Bandyup to enable female prisoners to view evidence served other than in hardcopy. This might include showing a prisoner their video record of interview with police, a search

video, showing CCTV footage of an offence, listening to telephone intercept material and so on.

For security reasons legal practitioners are not permitted to take laptops or any other electronic equipment into the prison in order to show the prisoner the material that has been served electronically.

It is surprising, and disappointing, that in an age where much of the evidence against prisoners is served electronically by the DPP that female prisoners are unable to view the material. In many offences given the increase in CCTV footage and other surveillance equipment, it is simply vital that female prisoners be entitled to view the evidence in the case against them.

Again when compared to the facilities available at Hakea Prison, female prisoners are not afforded the same opportunities as their male counterparts.

In Hakea Prison there are five machines that are available in order to show prisoners evidence served electronically. Additionally at Hakea the official visits officers who are permanently placed in the official visiting section at Hakea are extremely helpful in assisting legal practitioners play the footage to prisoners. These machines can be booked in Hakea in advance of the legal visit.

The inability to show a female prisoner evidence served electronically has been raised informally at Bandyup. One practitioner wanting to show a prisoner evidence served on disc was told to contact the Prisoners' Security Officer in order to get clearance to take the digitally recorded evidence into the prison. However, the lawyer was told that even if permitted to take the digitally recorded evidence into the prison, she was not permitted to take a laptop or any other equipment into the prison in order to play the digitally recorded evidence.

Additionally, the lawyer was told that the prison was unable to supply a laptop or any other equipment to enable the digital evidence to be shown to the prisoner.

Again when compared to Hakea there is a clear disadvantage to female prisoners who are simply unable to view evidence the State relies on in the case against them.

This constitutes a breach of the accused person's right to know the prosecution case against her.

Practitioners surveyed for this review noted that female prisoners often have to accept the opinion of their legal adviser, who has viewed the digital evidence, as the female prisoners have not been able to view that evidence.

It cannot be acceptable that in 2013 where there is an increasing trend by prosecuting authorities to serve evidence digitally those female prisoners are denied their right to view the case against them.

Again the flow on effect of the lack of equipment at Bandyup to enable female prisoners to view the evidence served digitally means a greater burden on defence lawyers to reduce the digitally served evidence into evidence in hard copy format, and for the lawyers to take that evidence into the prison to physically show their clients.

RECOMMENDATION 11

That Bandyup Women's prison be provided with IT equipment in at least 6 interview rooms to enable digitally served evidence to be shown to accused persons.

RECOMMENDATION 12

That lawyers representing female accused be permitted to take into Bandyup Women's prison evidence served electronically against their clients.

3.4) Prisoners not returning lawyers phone calls

It was reported by a number of practitioners canvassed for this review that in many instances female prisoners fail to return phone calls to lawyers.

It is unclear why this occurring. Legal practitioners have reported leaving messages for female prisoners either with the main switchboard or directly with the Unit in which the prisoner is held, however, those telephone calls are not being returned.

It is difficult to ascertain whether the messages are not being relayed to the female prisoners, whether prisoners are not being permitted to return phone calls to lawyers or whether prisoners are choosing not to return the calls.

There is some anecdotal evidence from female prisoners that telephone messages are not being passed on to prisoners, however the veracity of this feedback has not been tested.

RECOMMENDATION 13

Directive from the Superintended that officers are to record incoming telephone messages from lawyers in a book or on the computer.

RECOMMENDATION 14

That the officers are to record when that message is passed on to the prisoner.

RECOMMENDATION 15

On-going education to officers that prisoner access to justice, especially for prisoners on remand who are not yet convicted, is critical.

3.5) Limited access to prisoners appearing by video link in Court

An additional issue reported by legal practitioners canvassed for this review reported that it was very difficult to speak to a prisoner on the morning of Court where that prisoner was appearing in Court by video link from Bandyup Prison.

It is understood that there is no separate holding area for prisoners appearing by video link from Bandyup Prison. Members canvassed for this review reported that they had telephoned 30 to 40 minutes prior to a

video link up in Court to request that the prisoner be brought up early so that the lawyer could speak to the prisoner prior to Court.

Despite giving prior notice the practitioner reported regularly not having access to female prisoners until sometimes minutes before Court commenced, if at all. Other lawyers corroborated this and also reported similar experiences in accessing prisoners about to appear in Court by video link.

This leads to Courts having to adjourn to enable lawyers to speak to accused appearing by video link.

This becomes especially problematic when compounded with the issues raised above of lawyers leaving multiple messages for prisoners to call them and prisoners either not being permitted to call back or reporting that they had not been given the message to call their lawyer.

Again it is illustrative compared to Hakea where prisoners are brought to the holding area and are made available to speak to their lawyers prior to a video link up with Court. Again anecdotally it was reported by legal practitioners canvassed for this review that they do not experience any difficulty in accessing the male prisoners prior to a video link up in Court.

One legal practitioner gave the example of not having been able to play the CCTV footage to a female prisoner charged with three counts of armed robbery offences. The prisoner disputed a factual element involving the use of the weapon throughout the offence.

The lawyer had not only been unable to play the CCTV footage of the three armed robberies to the female prisoner for the reasons outlined in 3.3 above, but she had also been unable to reach the prisoner by telephone prior to her appearance in Court.

The lawyer reported that she used her mobile telephone to speak to the female prisoner outside Court for less than a minute prior to the prisoner entering her pleas in relation to three very serious charges.

This is completely unacceptable for any accused held in custody but especially where the charges carry individual sentences of life imprisonment.

RECOMMENDATION 16

That a holding area for prisoners appearing in Court by video link be established at Bandyup and prisoners due to appear in Court by video link be brought to the holding area 30 minutes prior to the scheduled Court appearance.

RECOMMENDATION 17

Lawyers wishing to discuss matters with prisoners due to appear in Court be permitted to telephone the holding area prior to Court.

TABLE SHOWING FACILITIES FOR LEGAL ADVICE AT BANDYUP WOMEN'S PRISON COMPARED TO HAKEA AND OTHER PRISONS

FACILITIES	BANDYUP	HAKEA	CASUARINA	ACACIA	GREENOUGH	ALBANY
No of Visiting Rooms	4	14	7	1 big room	2	Not known
Video Link Lines (for legal appts)	0	3	2		1	Not known[336]
Skype facilities	0	5	0	Not known	0	Not known[337]
Legal Phone Calls Available	20 mins		0	0	Yes[338]	10 min duration (multiple calls available)
Non Contact Visiting Rooms	0	1[339]	2	5	2	3
Facilities to watch electronic evidence	0	5[340]	Yes, 1 laptop available	0	Yes	Available but difficult to access as not located in visits area

336 Albany regional prison would not disclose this information.
337 Albany regional prison would not disclose this information.
338 Greenough prison need to be advised of day, date and duration of legal call at the time of booking
339 1 non contact room plus 1 police room and 1 holding room
340 5 rooms have DVD players in them

FACILITIES	BANDYUP	HAKEA	CASUARINA	ACACIA	GREENOUGH	ALBANY
Number of Official Officers in Official Visits	1	2[341]	1		Not known	Not known
Number of Official Officers in Video Link	0	4	2		1	2
Official Visits hours	8.30am - 11.30am Mon - Thurs; 1.30pm - 3.30pm Mon - Fri	8.30am - 3.45pm[342]	8am - 4pm daily	8.30am - 11.15am; 1.00pm - 4.30pm	9am - 11.30am; Mon, Tues, Thurs, Fri 1.30pm - 3.30pm Mon - Fri	9.00am - 11.30am Mon - Fri; 1:00pm - 3:30pm Mon - Thurs
Official Video Link hours (for legal appointments)		1.30pm - 3.15pm[343]	7am - 3pm		1pm - 3.30pm; can facilitate video link appts on weekends by request	Not known
Lockdown Days	Fri AM		Tuesday AM	Nil	Wed am until 11.30am.	Friday PM

341 Hakea prison officials in the official visiting area will accommodate lawyers accessing prisoners in Hakea by booking legal telephone calls (unlimited duration) where matters are urgent, will pass on faxes and messages to prisoners for urgent matters and generally

342 Official visiting hours are 8.30am-3.45pm. Muster takes place between 11 to 12.30pm. Bookings will not be taken for this time period, however, lawyers in consultations with prisoners over the lunch/muster period are permitted to remain in the interview area and continue with their legal consultation.

343 Lawyers are permitted to speak to their clients appearing in Court prior to Court from 8.50am onwards.

ATTACHMENT 6

Overview of Department of Corrective Services (DCS)

Services to Women Offenders[344]

Prison Counselling Services:

This service is offered to male and female prisoners by psychologists who work alongside health to help prisoners deal with difficulties they may experience in custody. The range of services offered by Prison Counselling Services includes crisis management/resolution and risk assessment of prisoners to identify potential risk or self-harm.

Prison Support Services:

The Prison Support Officer (PSO) works in a multidisciplinary team with an integrated approach aimed at the early identification and support of male and female prisoners at risk of self-harm or suicide. PSO's contribute to the overall suicide and self-harm prevention strategy. In particular, PSO's will identify and recruit suitable prisoners to join a Peer Support team that assists prisoners experiencing adjustment and other problems.

Treatment Assessment:

- ***Assessments, Prisons:*** Assessments are conducted with male and female prisoners with an effective sentence length of *more than six months*, typically within the first 28 days of their sentence. Re-assessments are regularly conducted with those prisoners who have already completed their initial treatment assessment and are due for a review of their program needs.
- ***Assessments, Community*:** Referrals will be received from Adult Community Corrections. Once a referral is received an assessment is conducted to determine program suitability – and, if appropriate, the male and/or female offenders will then be placed on the demand list for the identified program.

344 Information provided by DCS to the Subcommittee in 2013.

Programs provided to female offenders within custodial and community settings:

Offender Programs provided by DCS (for male and female) can be separated into four categories: those that address risk factors associated with violence, cognitive skills programs, sex offending and substance use offending. DCS say that their aim with programs is to address the criminogenic and psychological factors known to correlate with offending in order to both improve the lives of offenders while also striving to increase community safety.

DCS indicated to the Sub-committee that it recognises that women are a unique *minority* group in the criminal justice system that require specific services which recognise and address their distinctive characteristics. DCS state they source appropriate and relevant female-specific programs. Where programs are not female-specific DCS say they are delivered in a 'gender responsive' manner to meet the unique needs of women. They aim to address health and wellness concerns, relationships and communication skills, trauma (and trauma containment), spirituality and links with community supports.

DCS state that the delivery of programs is typically dependent on the assessed demand and resource availability. DCS periodically review demand and are guided by demand for delivery thereby allocating resources to deliver programs in the areas of highest demand and risk. DCS has significantly increased its prison program delivery to female prisoners since 2007/08. The following table illustrates the growth in program participation.

Female Prison Participation in programs that finished by financial year

Year	**2007/08**	**2008/09**	**2009/10**	**2010/11**	**2011/12**
Participation	68	116	211	181	185

DCS provided the Subcommittee with information about its programs available to women offenders in prison.

Refer to the Table below which details the types of programs offered to female offenders in custodial and community settings. The number of participants for each program is between 8 and 12.

In relation to each of the facilities that accommodate women DCS provided the following information.

Bandyup Women's Prison: DCS currently runs substance use programs, cognitive skills programs and generalist offending programs at this prison. DCS informed the Subcommittee it has increased its program delivery to female prisoners since 2008/09. However, due to the lack of options for program room space, any further plans to increase program delivery in Bandyup Women's Prison is necessarily restricted at this current time.

Boronia Pre-Release Centre for Women**:** The focus of this prison is on preparing female prisoners to return to the community by engaging them in work placements and traineeships, and linking them to childcare services and other pre-release activities. Given the philosophy of the prison, it is expected that most female prisoners will have already completed therapeutic program requirements prior to their location at this facility. However short cognitive skills programs are offered here on a regular basis.

Regional Prisons: The services offered in regional areas include the delivery of offender programs, as well as prison counselling services, prison support services and treatment assessments for prison and community offenders. DCS indicates these services are provided to female offenders in a 'gender-responsive' manner. In respect of particular facilities: -

- At the *West Kimberley Regional Prison (WKRP)* prison counselling services and programs are provided although it is anticipated that this will increase as the prison population rises;
- In the *Eastern Goldfields Regional (EGRP) Prison* prison counselling services is available however programs are not typically delivered to women in this facility due to the low demand; and
- In the *Greenough Regional Prison (GRP)* where capacity has recently increased to approximately 95 female prisoners resources have been allocated to increase service provision to female prisoners and is currently being monitored to ensure sufficient coverage.

TABLE OF DCS PROGRAMS SUITABLE FOR FEMALE OFFENDERS IN CUSTODIAL AND COMMUNITY SETTINGS

PROGRAM CATEGORY	PROGRAM	TARGET GROUP	DESCRIPTION*
Addictions Offending	**Breaking Out** (Community, mainstream)	Non-specific female program	A 90-hour program for med-high risk offenders in the community. The goals are to reduce alcohol and drug use and raise awareness of the interplay between alcohol and drug use and offending behaviour.
	Pathways (Prison and community, Aboriginal-specific program)	Non-specific female program	An evidence-based, 100-hour manual guided treatment program for adults with a history of criminal conduct and alcohol and other drug use problems.
Cognitive Skills	**Think First** (Prison)	Non-female specific program	A 60-hour program designed to teach cognitive skills to participants. The program aims to help participants develop their skills for thinking about problems and for solving them in real life situations.
	Cognitive Brief Intervention (CBI) (Prison and community, Mainstream)	Non-specific female program	A 20-hour program designed to provide participants with greater awareness about themselves, others and the world, while addressing offending behaviour. It covers self-control, critical reasoning, problem solving, interpersonal perspective taking and relapse prevention.

Generalist Offending	**Choice Change and Consequences** (Prison, mainstream)	Female – Specific program	A 100-hour (40 sessions) generalist-offending program developed specifically for female offenders who have been assessed as medium to high-risk offending. The program is a cognitive-behavioural, skills based program and targets a range of general criminogenic needs, including violence propensity, offence-related emotions and cognitions, criminal associates and attitudes, impulsivity task taking and self-management, emotional regulations and distress tolerance, problem solving, relationships, lifestyle balances, and victimisation and drug and alcohol issues as they relate to offending.
	Change and Emotions (Community, mainstream)	Non-specific female program	A 40-hour (16 sessions) programs aims to enhance understanding of the link between, and impact of thoughts feelings and behaviour, coupled with the exploration of developmental, social and cultural factors.

ATTACHMENT 7

Data Tables

Table* 1:** The ***following table shows the major offence categories for female offenders in WA between January to June 2012.[345]

Offence Category	**Aboriginal**	**Non-Aboriginal**
Offences against the person	21.8% (of which 95 % is assault, excluding sexual assault)	6%
Driving, motor vehicle, traffic and related offences	28.4% (of which 48% are driving license offences and 45% are driving under the influence)	26.7% (of which 76% are driving license offences)
Offences against good order	22.7% (of which 67% is breaches/escapes)	16% (of which 83% is breaches/escapes)
Break and enter and other offences involving theft	18%	26%
Drug Offences	Less than 1%	16% (of which 70% is dealing and trafficking drugs and 26% is manufacturing and growing drugs)

345 DCS Performance and Statistics, Major offences of sentences imposed for period 01 Jan 2012 to 30 Jun 2012, (information provided by DoTAG as at 10 July 2013)

***Table* 2:** Recidivism[346] rates by gender and aboriginality for 2 years prior to period January 2012 to December 2012.[347]

	Male (%)		**Female (%)**		**Total all offenders (%)**
	Aboriginal	Non-Aboriginal	Aboriginal	Non-Aboriginal	
Community Recidivism	50.3	27.6	33.6	21.6	**33**
Prison Recidivism	57.5	39.2	45.4	42	**47**

***Table* 3:** Successful completion rates of parole orders by gender and Aboriginality between January 2012 to December 2012

	Male (%)	**Female (%)**
Aboriginal	50	42.8
Non-Aboriginal	65.7	84.6
Total success rate (%)	**57.85**	**63.7**

***Table* 4:** Successful completion rate for Short term Parole orders by gender and Aboriginality between January 2012 to December 2012

	Male (%)	**Female (%)**
Aboriginal	44.4	30
Non-Aboriginal	55.3	63.3
Total success rate (%)	**49.85**	**46.6**

***Tables* 5 and 6:** Costs of Imprisonment[348]

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346 Community Recidivism is number of distinct persons with orders terminated during the selected period, returned to corrective services within 2 years of termination date. Prison Recidivism is number of distinct persons who exited prison after serving a non-fine-default-only sentence during the period selected and returned to corrective services within 2 years under a non-fine-default-only sentence.

347 DCS Performance and Statistics, Prison Recidivism (COAG detail) for period 01 Jan 2012 to 31 Dec 2012; 10 July 2013.

***Table* 5:** Cost Per Day and Total Costs for Adults in the care of DCS for the Financial Year 1 Jul 2012 to 30 Jun 2013

Prison Cohort	**Cost/Day**	**Cost/Year**
Female	$383.00	$139,795.00
Male	$310.00	$113,150.00
All	$317.00	$115,705.00
Community Justice		
Adult clients	$49.00	$17,885.00

***Table* 6:** Daily Average Population and Total Costs for Adults in the care of DCS for the Financial Year 1 Jul 2012 to 30 Jun 2013

Prison Cohort	**Average daily pop**	**Annual total cost**
Female	443.29	$61,969,725.55
Male	4507.50	$510,023,625.00
All	4950.79	$572,831,156.95
Community Justice		
Adult clients	2951	$52,778,635.00

NB: Due to the use of aggregated and averaged figures for costs per day and daily populations the totals for All Adult Prisoners do not match exactly with the sum of the individual male and female cohorts. This discrepancy is attributable to rounding.

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348 Data provided by Jane Larke, Acting Assistant Commissioner Policy and Strategy, DCS on 9.5.14; email to C Fletcher from Mala Dharmananda, Assistant Commissioner, Office of Reform, Department of Corrective Services on 9.5.14.

Chapter 9

Women and Punishment

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