

Law Reform Commission of Western Australia

Aboriginal Customary Laws

Project 94

DISCUSSION PAPER OVERVIEW

(February 2006)

Law Reform Commission of Western Australia

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The Aboriginal Customary Laws Project

In December 2000, the Commission received a reference to 'inquire into and report upon Aboriginal customary laws in Western Australia' and consider whether, and if so how, Aboriginal customary laws should be recognised within the Western Australian legal system. The Commission's terms of reference for this project were wide-ranging, giving the Commission the freedom to investigate all areas of Aboriginal customary laws in Western Australia other than native title issues and matters addressed under the *Aboriginal Heritage Act 1972* (WA).

In taking decisions about the areas of law upon which to concentrate its research efforts, the Commission took advice from key Indigenous advisors and its Indigenous Special Commissioners, Professor Michael Dodson and Mrs Beth Woods. The Commission was also guided by the concerns and issues raised by Aboriginal communities during its extensive consultative process in the metropolitan, regional and remote areas of Western Australia.

The Commission's Discussion Paper

The Commission has produced a lengthy Discussion Paper which examines in detail the opportunities for recognition of Aboriginal customary laws in the Western Australian legal system. The Discussion Paper is presented in ten parts.

Part I provides an overview of the Commission's research methodology and management of the reference.

Part II provides background and statistical information about Aboriginal peoples in Western Australia and introduces some general findings from the Commission's consultative visits to Western Australian Aboriginal communities.

Part III addresses the question, 'What is customary law?' and discusses issues and methods of recognition of Aboriginal customary law within the Western Australian legal system.

Part IV examines the concept of Aboriginal customary law in the international arena, including in the human rights context.

Part V deals with the Commission's substantive investigation into the interaction of Aboriginal people and the criminal justice system. It discusses traditional Aboriginal law and punishment; Aboriginal community justice mechanisms; Aboriginal courts; criminal responsibility; sentencing of Aboriginal offenders; bail issues; and the practices and procedures of courts, police and prisons.

Part VI deals with Aboriginal customary law and the civil law system including tortious acts and omissions; distribution of property upon death; contractual arrangements and protection of Indigenous consumers; Indigenous cultural and intellectual property rights; coronial matters; funerary practices and burial rights; and guardianship and administration.

Part VII examines the significance of Aboriginal customary law in the family context including traditional Aboriginal marriage; the interaction between Aboriginal

customary laws and family law in Western Australia; matters relating to the care and custody of Aboriginal children; and issues of family violence and the protection of Aboriginal women and children.

Part VIII examines ways to improve the recognition of customary law in relation to hunting, fishing and gathering and associated land access issues.

Part IX investigates ways of making practical changes to procedures of courts, particularly in respect of the reception of evidence of Aboriginal witnesses.

Part X explores Aboriginal community governance and discusses what is being done (and what more can be done) to maximise Aboriginal peoples' participation in the decision-making processes that affect their daily lives.

For the purposes of the Commission's Discussion Paper and this Overview reference to Aboriginal people includes Torres Strait Islander people.

About this Overview

This Overview follows the same structure of the Discussion Paper and addresses the main points of the Commission's inquiry into each of the areas set-out above. The Commission's proposals and invitations to submit are referenced throughout the Overview in square brackets. The text of the proposals and invitations to submit are reproduced at the end of this Overview. Those wishing to read a more detailed explanation of the Commission's proposals or of the arguments or information supporting the Commission's conclusions may do so by turning to the page of the Discussion Paper indicated in square brackets throughout this paper. In order to present the information in this Overview in as concise a form as possible the Commission has excluded explanatory and attributive footnotes.

How to make submissions

The Commission invites interested parties to make submissions in respect of the proposals for reform, invitations to submit or on any other matter contained in its Discussion Paper or in this Overview. The Commission also wishes to hear about any discrete areas of interaction between Aboriginal customary laws and the Western Australian legal system that are not covered by its Discussion Paper but that are nonetheless relevant to the Commission's Terms of Reference. Submissions will assist the Commission in formulating its final recommendations to the Western Australian Parliament for reform of the law in this area. All submissions will be considered by the Commission in its Final Report on Project No 94.

Submissions may be made by telephone, fax, letter or email to the address below. Alternatively, those who wish to request a face-to-face meeting with the Commission may telephone for an appointment.

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Aboriginal Peoples in Western Australia

Western Australia has the third largest Indigenous population in Australia today. Of the estimated 1.9 million people resident in Western Australia, almost 66,000 are Indigenous. The highest number of Aboriginal people in the state resides in the Perth metropolitan area; although, there are significant numbers of Aboriginal people in the state's regions, in particular, the Kimberley. A large number of traditional Aboriginal people—for whom Aboriginal customary law is a daily reality—reside in the East and West Kimberley, East Pilbara, and Western Desert regions. Some language groups in those regions only experienced their first substantial contact with non-Aboriginal people in the mid-twentieth century. [pp 18–19]

It is important to note from the outset that, like the general Western Australian population, the Aboriginal population of the state is extremely diverse in its makeup, culture, customs and beliefs. Norman Tindale's anthropological studies during the 1950s and 1960s indicate that over 120 language groups or tribes existed in Western Australia at that time. Each of these tribes had its own language, culture and customs. Due to the fact of colonisation—as well as past government practices of assimilation, removal of Aboriginal children from their families and segregation of Aboriginal people on designated reserves—some of these tribes have died out or their lands, languages and cultural practices have been lost. In addition, new communities of Aboriginal people have been established in and around former mission centres and reserves. These communities (often made up of Aboriginal people forcibly removed from other areas) contain individuals who descend from different language groups and who may have integrated their traditional cultural practices over a period of many years. [p 19]

The Commission's consultations

From 2002 to 2003, the Commission made a series of consultative visits to Aboriginal communities and organisations across Western Australia. The Commission held consultations with Aboriginal people in the metropolitan area, regional centres and remote communities. The format of the consultations varied according to the requirements of the local communities and the advice obtained by the Commission in its pre-consultation visits to communities. In many cases, consultations took place over a number of days and included large public meetings, gender-based discussion groups, theme-based discussion groups and one-on-one (or restricted group) confidential briefings. The consultations were guided by four key questions that together provided a focal point for the discussion of customary law issues:

- How is Aboriginal customary law still practised?
- In what ways is it practised?
- In what situations is it practised?
- What issues confront Aboriginal people when practising their law today?

While the Commission employed these questions as a general guide for discussion of law issues, the questions were not always in direct alignment with the issues confronting particular Aboriginal communities. A degree of flexibility in the consultation process was therefore required. [pp 12–13]

From the beginning of the research-gathering phase, the Commission has operated under cultural respect protocols designed by the Commission in collaboration with the Aboriginal Research Reference Council appointed for this reference. The protocols are in the form of a signed Memorandum of Commitment to work with honesty and integrity with Aboriginal people, to protect confidential information and to treat Aboriginal stories, cultural information, narratives and traditional knowledge with respect and honour. A copy of the Memorandum was presented to each Aboriginal community consulted by the Commission. [pp 10–11]

Consultation findings

During the Commission's consultations a number of issues arose that were of particular concern to Aboriginal communities. These included issues surrounding the decline of cultural authority; children and youth; health and wellbeing; Aboriginality and identity; racism and reconciliation; education, training and employment; housing and living conditions; and substance abuse. While these issues may have links to the *customs* of Aboriginal communities, they often have far less clear connections with Aboriginal *law*. Nonetheless, the Commission was of the opinion that these issues fell within its mandate as matters relevant to 'the views, aspirations and welfare of Aboriginal persons in Western Australia' and were crucial to the proper execution of the reference. Part II of the Commission's Discussion Paper discusses each of these issues in detail, tying the voices of Aboriginal people consulted for this reference to the many reports that have sought to draw attention to these issues in the past. None of these issues are new – they have been recurrent themes in Australian Indigenous affairs for at least half a century. And yet, the extent of Indigenous disadvantage in Western Australia confirmed by the Commission's consultations and research for this reference remains significant and unacceptable. The gaps between the expectations, substance and recommendations of these earlier reports and the achievement of actual positive outcomes for Indigenous Australians are of considerable concern to this Commission. [pp 20–42]

Overcoming Indigenous disadvantage

The current fragmentation of services to Indigenous Western Australians and the lack of communication between the agencies that deliver these services was clearly evident in the Commission's research and consultations for this reference. The Commission believes it is vital that agencies work together to achieve real outcomes for Indigenous people. For instance, there is sufficient evidence that the typical overcrowding in Aboriginal houses is not simply a problem for the state housing authority: it is also a matter that affects health outcomes; education and employment figures; the rates of child abuse and

family violence; and crime and substance misuse statistics. Overcoming these problems requires cooperation between each of these policy areas at all levels – state, regional and local. In practice this may mean the joint funding of cooperative programs, the holding of regular inter-agency conferences or the combined delivery of services in the regions. At the very least it imposes upon each agency the responsibility to constructively communicate with other agencies regarding Indigenous service delivery and to appreciate the potential capacity for input from other policy areas. [pp 42–43]

A whole-of-government approach

The Commission has proposed that the state government adopt a genuine whole-of-government approach to the delivery of services to Aboriginal people in Western Australia. This would require meaningful multi-agency cooperative responses that deliver tangible outcomes which impact upon the problems of Indigenous disadvantage that currently exist in Western Australia.

[Proposal 1, p 43]

Cultural awareness

The success of the whole-of-government approach to addressing issues of Indigenous disadvantage in Western Australia will depend, in part, on the awareness and appreciation of government in regard to Aboriginal customary law and cultural issues. The Commission's consultations and research demonstrated that Western Australian government agencies and service providers are not sufficiently apprised of relevant cultural issues at the regional and local levels. The Commission has therefore proposed that staff of all Western Australian government departments, agencies and public service providers who have regular dealings with Aboriginal people be required to undertake cultural awareness training delivered at the regional or local level. The Commission has also proposed that consideration be given to making agency-arranged cultural awareness training a condition of contract where contractors or sub-contractors to any Western Australian government agency work directly with Aboriginal people.

[Proposal 2, p 44]

Recognition of Aboriginal Customary Law

What is Aboriginal customary law?

Definitional matters

The Terms of Reference ask the Commission to investigate whether ‘there may be a need to recognise the existence of, and take into account within [the Western Australian] legal system, Aboriginal customary laws’. In order to facilitate discussion and determination of this question the Commission found it necessary to address certain definitional matters at the outset; in particular, the terms ‘Aboriginal’ and ‘customary law’.

‘Aboriginal’

From its earliest days the Western Australian Parliament has employed a definition of ‘Aboriginal’ in relevant legislation. Originally the term ‘native’ was used to describe an Aboriginal person; but, as the category of ‘full-blood’ native began to break down with the infamous success of government removal policies, the definition of Aboriginal person became more and more inclusive, moving from ‘half-caste’ to ‘quadroon’. It is now clear that as a consequence of government policies, racial integration and the passage of time there are now significantly varying degrees of biological descent amongst people who identify as Aboriginal. Perhaps, for this reason, contemporary definitions of the term ‘Aboriginal’ are beginning to involve cultural factors such as whether the person self-identifies as Aboriginal and is accepted as Aboriginal by his or her community. [p 47]

There are a number of definitions of ‘Aboriginal’ found in current Western Australian legislation. Some statutes adopt a threefold test combining biological descent with the cultural criteria of self-identification and community acceptance; while others still employ the potentially offensive protection era terminology of ‘full-blood’ and ‘quarter-blood’ descent. Another definition, favoured by Commonwealth and some Western Australian legislation, refers to membership of ‘the Aboriginal race’. This definition has been judicially interpreted to require satisfaction of the threefold test described above with the descent criterion being a ‘quantum of Aboriginal genes’. The test used by Western Australian administrative decision-makers to assess whether a person is ‘Aboriginal’ is unclear; however, it is probable that the threefold test is used in these circumstances. The Commission has invited submissions on the problems faced by Aboriginal people in Western Australia in proving their Aboriginality for the purposes of accessing programs and benefits offered by Western Australian government agencies for the exclusive benefit of Aboriginal people. [Invitation to Submit 1, p 31]

In its Discussion Paper the Commission has expressed concern that the threefold test may be too demanding and that some Aboriginal people—in particular, members of the stolen generation who have not yet reconnected with family—may be unable to satisfy the cultural criterion of community acceptance. The cultural criterion of self-identification has also proved problematic in adoption

cases because infants cannot self-identify as Aboriginal and would therefore not satisfy the threefold test. Parliament has recently rectified this problem by amending the *Adoption Act 1994 (WA)* to include a definition of 'Aboriginal person' based on descent alone.

In its 1986 report *The Recognition of Aboriginal Customary Laws* the Australian Law Reform Commission (ALRC) took the view that the definition of 'Aboriginal' should be left sufficiently vague as to be able to be determined on a case-by-case basis. However, it is this Commission's opinion that the application of legislation by government departments and administrative authorities requires a degree of certainty in definition. This must be so to ensure that administrative and departmental discretions are not abused and that all applications of legislation to Aboriginal people are not required to be determined by costly judicial process. Taking into account the arguments discussed at length in its Discussion Paper and being deeply conscious of the concerns of Aboriginal people, it is the Commission's preliminary view that a standard definition of 'Aboriginal person' in terms of descent should be adopted for the purposes of all Western Australian legislation. In order to ensure that the standard definition of 'Aboriginal person' is not unduly restrictive the Commission proposes that the following factors may be of evidentiary or probative value in determining whether a person is wholly or partly descended from the original inhabitants of Australia:

- genealogical evidence;
- evidence of genetic descent from a person who is an Aboriginal person;
- evidence that the person self-identifies as an Aboriginal person; or
- evidence that the person is accepted as an Aboriginal person in the community in which he or she lives.

It should be noted that no fixed proportion of Aboriginal descent is identified and that the weight to be given to each or any of these factors is a matter for the decision-maker and may vary from case to case. [Proposal 3, p 49]

The Commission considers that a broad definition of this nature will remove the difficulties in some circumstances of having to satisfy all three tiers of the threefold test while allowing cultural criteria to be probative in determining Aboriginality. The Commission stresses that the definition of Aboriginal person should be regarded as such only for the purposes of Western Australian legislation or application of government policy. The Commission recognises that identification as an Aboriginal person for social or cultural purposes must be determined by Aboriginal people alone. [pp 47–49]

'Customary law'

During the Commission's consultations with Western Australian Aboriginal communities, Aboriginal people emphasised that their traditional 'law' was a part of everything, was within everyone and governed all aspects of their lives. In other words, customary law cannot be readily divorced from Aboriginal society, culture and religion. The Commission found that Aboriginal customary law, as it is understood and practised in Western Australia, embraces many of the features typically associated with the western conception of law in that it is a defined

system of rules for the regulation of human behaviour which has developed over many years from a foundation of moral norms and which attracts specific sanctions for non-compliance. But it was also clear that, in the words of one Aboriginal respondent, Aboriginal customary law

connected people in a web of relationships with a diverse group of people; and with our ancestral spirits, the land, the sea and the universe; and our responsibility to the maintenance this order.

The Commission found that the existence of Aboriginal customary law in Western Australia today is beyond doubt. It is, however, fair to say that traditional laws are more evidently in existence (or more overtly practised) in some Aboriginal communities than in others. For example, for some Aboriginal people, particularly those living in remote communities such as Warburton, Aboriginal customary law is clearly a daily reality and it is Aboriginal law, not Australian law, which provides the primary framework for people's lives, relationships and obligations. On the other hand, amongst urban Aboriginal communities, the existence of Aboriginal customary law is less immediately evident. Nonetheless the Commission found that traditional law is still strong in the hearts of urban Aboriginals. [p 51–52]

The Commission determined that the term 'customary law' cannot be (and on some arguments *should* not be) precisely or legalistically defined. Instead the Commission favoured an understanding of the term that encompassed the holistic nature of Aboriginal customary law which the Aboriginal people of Western Australia shared with the Commission. [p 50]

What constitutes customary law?

Many non-Indigenous Australians associate Aboriginal customary law with 'payback' or traditional punishment; however, as noted above, Aboriginal customary law governs all aspects of Aboriginal life, establishing a person's rights and responsibilities to others as well as to the land and natural resources. For example, there are laws that define the nature of a person's relationship to others, including how or whether a person may speak to, or be in the same place as, another; laws that dictate who a person may marry; laws that define where a person may travel within his or her homelands; and laws that delimit the amount and type of cultural knowledge a person may possess.

While there are common threads that unite Aboriginal laws across Western Australia, the diversity of laws (as with the diversity of Aboriginal peoples) must be stressed. Unlike Australian law, there is no single system of customary law that applies to all Aboriginal people. Because of the differences in the laws of different tribal groups and the complex application of rules within Aboriginal kinship systems it is an impossible task to attempt an exhaustive list of what constitutes the substance of Aboriginal customary law. In these circumstances the Commission has taken the view that the issue of what constitutes Aboriginal customary law should be left to Aboriginal people themselves; in particular, those people in each Aboriginal community whose responsibility it is to pronounce upon and pass down the law to future generations. [pp 52–53]

Who is bound (and who should be bound) by customary law?

The Commission's Terms of Reference require it to determine who is bound, and who should be bound, by Aboriginal customary law. In the Commission's community consultations responses to this question varied. Some suggested that being involved in Aboriginal law today is a choice for families based on their circumstances and their beliefs. However, the Commission was warned that Aboriginal people needed to be consistent about their choice – they should not simply be allowed to 'opt in' or 'opt out' of Aboriginal customary law when it was convenient to them. Others suggested that those Aboriginal people who did not live in the traditional way should not be subject to Aboriginal law at all; yet they stressed that this did not mean that those people do not have respect for Aboriginal law or that they opposed its recognition within the Western Australian legal system. There was also the suggestion that, when people who were not ordinarily subject to Aboriginal law visited traditional Aboriginal lands, they should consider themselves bound by the law practised there.

It is the Commission's view that voluntariness should be the guiding principle in application of customary law to individuals. Just as it is not the Commission's place to determine the precise nature and content of customary law, it is not its place to dictate who should or should not be bound by that law. That is a matter for Aboriginal people: communities and individuals. [pp 53–54]

Recognition of Aboriginal customary law

How should Aboriginal customary law be recognised?

The Commission has weighed the arguments for and against the recognition of Aboriginal customary law and has determined that the continuing existence and practice of Aboriginal customary law in Western Australia should be appropriately recognised. [pp 55–56] The Commission accepts that there are jurisdictional limitations to recognition of customary law. For instance, there are some areas of law (such as the making of treaties and some aspects of family law) that are outside the legislative domain of the Western Australian Parliament. [pp 56–57] The Commission also accepts that recognition of customary law must work within the existing framework of the Western Australian legal system. [p 64] Because of the difficulty of precisely defining what constitutes Aboriginal customary law and the varying content and practice of Aboriginal customary law in Western Australia, the Commission rejects any attempt to comprehensively codify Aboriginal customary law. [p 62]

Forms of recognition

The Commission has considered many different forms of recognition of Aboriginal customary law; among them constitutional recognition, administrative recognition, judicial recognition and statutory recognition. Each of these forms of recognition has advantages and disadvantages. For example, administrative recognition has the advantage of being flexible and therefore being able to adapt to changing circumstances; however, it lacks the transparency and consistency in application of statutory recognition. [pp 62–64] At the same time, statutory recognition

has the potential to disempower Aboriginal people by removing, in some circumstances, Aboriginal autonomy over the content, application and interpretation of Aboriginal customary law. [p 62]

Support for 'functional recognition'

The Commission has therefore expressed its support for the ALRC's approach of 'functional recognition'; that is, recognition of Aboriginal customary law for particular purposes in defined areas of law. This approach allows for a variety of methods of recognition (legislative, judicial, administrative and constitutional) resulting in proposals for recognition of Aboriginal customary law that fall broadly into two categories: affirmative and reconciliatory. [p 64]

Affirmative recognition

In the affirmative category, the objectives of the Commission's proposals are the empowerment of Aboriginal people, the reduction of Indigenous disadvantage, and the resolution of problems and injustice caused by the non-recognition of Aboriginal customary law in the Western Australian legal system. This would be achieved by such changes as:

- the introduction of statutory provisions and guidelines requiring courts and government agencies to take account of Aboriginal customary law in the exercise of their discretions where circumstances require;
- the adoption of a whole-of-government approach to service delivery for Indigenous Western Australians;
- the introduction of models of self-governance for Aboriginal communities;
- the functional recognition of traditional Aboriginal marriage; and
- the empowerment of Aboriginal Elders and other respected community members to play an active role in the administration of justice.

Reconciliatory recognition

In the reconciliatory category, the objectives of the Commission's proposals are the promotion of reconciliation between Indigenous and non-Indigenous Western Australians and of pride in Aboriginal cultural heritage and identity. This would primarily be encouraged by the amendment of the Western Australian Constitution to, among other things, acknowledge the unique status of Aboriginal peoples as the descendants of the original inhabitants of Western Australia and as the original custodians of the land. [Proposal 4, pp 57–60] The Commission considers constitutional change to be vital in the achievement of meaningful recognition of Aboriginal customary law and culture – a belief supported by the many Aboriginal respondents consulted for this reference.

The proposals for affirmative and reconciliatory recognition of Aboriginal law and culture contained in the Commission's Discussion Paper are more than simply symbolic gestures. These proposals are the first step towards the institution of meaningful recognition of Aboriginal law and culture in Western Australia and, it is hoped, towards a more harmonious and respectful relationship between its Indigenous and non-Indigenous peoples. [p 64]

Aboriginal Customary Law in the International Context

In framing its proposals for recognition of Aboriginal customary law the Commission is required by its Terms of Reference to have regard to relevant Commonwealth legislation and to Australia's international obligations. The rights of indigenous peoples or ethnic minorities are recognised in a number of international instruments that have been ratified by Australia. These include the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention Concerning Indigenous and Tribal Persons in Independent Countries* and the *International Convention on the Elimination of All Forms of Racial Discrimination*. [pp 69–70]

In response to growing international concern during the past two decades about the marginalisation of the world's indigenous peoples, the United Nations has established several mechanisms dedicated to indigenous issues and is working toward an International Declaration on the Rights of Indigenous Peoples. [pp 70–72]

Do conflicts between Aboriginal customary law and international human rights law create a barrier to recognition?

As outlined in the Discussion Paper, there are three main areas of potential conflict between Aboriginal customary law and international human rights law that could present barriers to recognition of Aboriginal customary law in Western Australia. The first is that specific recognition of the laws of a section of society would violate the principle of equality before the law. However, there are peculiar reasons why Aboriginal people should be seen as a special case. Firstly, as the original inhabitants of Australia, Aboriginal people cannot simply be seen as one of many ethnic minorities; and secondly, the concrete conditions of inequality experienced by Aboriginal people (described in Part II of the Discussion Paper) suggest the need for affirmative discrimination which is permitted under the *Racial Discrimination Act 1975* (Cth). In addition, it must be acknowledged that the cultural rights of Indigenous peoples are also protected by the *International Covenant on Civil and Political Rights*. [pp 72–73]

The other two potential conflicts involve the recognition of particular Aboriginal customary practices that may contravene international laws, such as spearing and non-consensual child marriage. The discussion in relation to each of these areas highlights the fact that, although recognition of Aboriginal customary law may be considered desirable as part of a program of affirmative discrimination and reconciliation, blanket recognition is not possible. [pp 74–75] The clear message from both Aboriginal and non-Aboriginal commentators is that the potential for recognition of particular laws and practices to impact upon protected individual human rights must be determined on a case-by-case basis. This is considered essential not only to protect the fundamental human rights of all Australians, but also to protect the rights of vulnerable groups, such as women and children, within the Indigenous minority. [p 76]

The Commission has already voiced its opinion that Aboriginal customary laws and culture should be appropriately recognised in Western Australia and that such recognition could take many forms including constitutional, administrative, legislative and judicial recognition. In view of the potential conflict described above, the Commission has taken, as its threshold test for recognition, the consistency of relevant Aboriginal customary laws or practices with international human rights standards. [Proposal 5, p 76] The Commission also recognises that international human rights standards and the decisions of international treaty bodies provide important benchmarks against which the protection and promotion of the rights of Indigenous peoples in Western Australia can be measured.

Aboriginal Customary Law and the Criminal Justice System

Judicial recognition of Aboriginal customary law in the Western Australian criminal justice system has generally focused on recognition of physical traditional punishments during sentencing proceedings. The acknowledgment of Aboriginal customary law in the criminal justice system has been dependent upon the views and awareness of individual judicial officers and others, such as lawyers and police officers, who work within the system. Many of the Commission's proposals in Part V of the Discussion Paper aim to achieve more consistent recognition of Aboriginal customary law as well as encouraging customary law to be understood in its broadest sense.

Any discussion about Aboriginal people and the criminal justice system cannot and should not ignore the issue of over-representation of Aboriginal people within the system. Many of the proposals aim to reduce the level of over-representation of Aboriginal people in the criminal justice system. A significant reduction in the rate of imprisonment of Aboriginal people is required not only because it is necessary for the welfare and aspirations of Aboriginal people but also because the 'mass incarceration' of Aboriginal people in this state is 'destructive of Aboriginal law and culture'.

The Commission has formed the view that Aboriginal customary law processes may assist in solving law and order issues in Aboriginal communities. In particular, the Commission has aimed to enhance the cultural authority of Elders by providing a role for Elders in the criminal justice system. [p 83]

Traditional Aboriginal law and punishment

The Commission has considered forms of 'criminal law' under Aboriginal customary law and compared these, where possible, to Western Australian criminal law concepts. After considering the foundation of and concept of responsibility under traditional Aboriginal law, traditional offences and punishments, and traditional dispute resolution methods the Commission found that there are three main areas of conflict between Aboriginal customary law and the Western Australian criminal justice system. [pp 84–91]

- An Aboriginal person who inflicts traditional physical punishments under Aboriginal customary law may commit an offence against Australian law.
- An Aboriginal person who violates both Aboriginal customary law and Australian law may be liable to punishment under both laws and therefore suffer 'double punishment'.
- There are significant differences between traditional Aboriginal dispute resolution methods and the Australian criminal justice system. For example, family and communities are directly involved under Aboriginal customary law and decision making is collectively based. As a result of these differences Aboriginal people often feel alienated from the criminal justice system.

[pp 92–93]

Although many aspects of the practice of traditional Aboriginal law have changed over time, the Commission's consultations revealed that many Aboriginal people in Western Australia remain subject to Aboriginal customary law offences and punishments.

Many Aboriginal communities consulted by the Commission stressed the importance of Elders and some communities referred to the breakdown of the traditional role of Elders. A number of the Commission's proposals aim to assist dispute resolution in Aboriginal communities by creating the means by which the cultural authority of Elders can be recognised and respected. At the same time the Commission is of the view that the exact role of Elders is a matter best determined by the relevant Aboriginal community. Therefore the Commission has formulated proposals with the aim of supporting the authority of Elders without imposing unnecessary restrictions upon the manner in which Elders may resolve disputes in their communities. Where appropriate the Commission has proposed changes to legislation, practices and procedures within the criminal justice system in order that aspects of Aboriginal customary law can be accommodated within the system to assist Aboriginal people to obtain the full protection of (and avoid discrimination and disadvantage within) the criminal justice system. [p 93]

Aboriginal people and the criminal justice system

Historically, Aboriginal people have been discriminated against in the criminal justice system. Currently, Western Australia has the highest rate in the nation of Aboriginal imprisonment (in proportion to non-Aboriginal imprisonment). Although only constituting about three per cent of the state's population, Aboriginal people make up approximately 40 per cent of the adult prison population and between 70 and 80 per cent of juveniles in Western Australian detention centres. Despite various inquiries and reports (since the Royal Commission into Aboriginal Deaths in Custody) addressing the over-representation of Aboriginal people in the criminal justice system, there has been little improvement. The Commission is of the view that meaningful recognition of Aboriginal customary law must be accompanied by a resolute determination to substantially reduce the level of over-representation of Aboriginal people in the criminal justice system in this state. [pp 94–95]

In broad terms, the factors which contribute to the over-representation of Aboriginal people in the criminal justice system can be classified as: offending behaviour; underlying factors such as social and economic disadvantage; and issues within the criminal justice system itself. While offending rates are part of the reason for Aboriginal over-representation, the Commission is of the view that structural racism or bias must account in part for the disproportionate rate of Aboriginal arrests, detention and imprisonment. As explained by the Inspector of Custodial Services, structural racism or bias refers to the discriminatory impact of laws, policies and practices rather than individual racist attitudes. The effect of structural bias is evidenced by the higher disproportionate rate of imprisonment and detention in Western Australia compared to other states and territories. Further, the fact that the level of Aboriginal involvement increases at each progressive stage of the criminal justice system supports the conclusion that

structural bias exists. Similarly, the general under-representation of Aboriginal juveniles in diversionary options contributes to the disproportionate rate of Aboriginal detention. [pp 95–99]

Alienation from the criminal justice system

Aboriginal people feel alienated from the criminal justice system. This sense of alienation stems from the negative history of relations between Aboriginal people and criminal justice agencies; the language, cultural and communication barriers experienced by Aboriginal people; and the differences between traditional Aboriginal dispute resolution methods and Western criminal justice processes.

The Commission is of the view that the general sense of alienation felt by Aboriginal people within the system can be improved by the establishment of Aboriginal courts, the development of more effective cultural awareness programs, and the greater involvement of Aboriginal people in justice issues. These matters are the subject of separate discussion below. [pp 99–100]

Mandatory sentencing

After considering the various criticisms of the mandatory sentencing laws for home burglary in Western Australia—in particular, the discriminatory impact of the laws on Aboriginal children and the ineffectiveness of the laws in reducing the level of home burglary—the Commission has proposed that the mandatory sentencing laws should be repealed. [Proposal 6, pp 100–101]

Legal representation

Because of the alienation felt by Aboriginal people from the criminal justice system adequate legal representation is essential. During the Commission's consultations many Aboriginal people identified problems with legal representation, especially the inadequate funding of the Aboriginal Legal Service. The Commission supports a suggestion for the development of protocols for lawyers who work with Aboriginal people. The Law Society of Western Australia is currently in the process of adapting the protocols which were established by the Law of Society of the Northern Territory in 2004. When completed, these protocols could be used by the Aboriginal Legal Service, the Legal Aid Commission, private practitioners, and lawyers working for the Director of Public Prosecutions.

In addition, the Commission considers that lawyers who regularly work with Aboriginal people should undertake cultural awareness training, preferably presented by Aboriginal people. The Commission is of the view that with adequate resourcing the Law Society of Western Australia would be the most appropriate agency to coordinate cultural awareness training programs for legal practitioners and has proposed that the Western Australian government provide adequate resources for the development of such programs. [Proposal 7, p 103]

Cultural awareness training

Aboriginal people consulted by the Commission expressed the view that all people working for criminal justice agencies should be provided with more effective

cultural awareness training. Proposals for cultural awareness for judicial officers, police and lawyers are considered separately. The Commission proposed that all employees of the Department of Justice who work directly with Aboriginal people (such as community corrections officers, prison officers and court staff) be required to undertake cultural awareness training. In addition, such training should be made available to volunteer workers. In its proposal the Commission has emphasised that cultural awareness training should include programs which are specific to local communities and are presented by Aboriginal people.

[Proposal 8, pp 103–104]

Lack of involvement of Aboriginal people in the administration of criminal justice

The Commission's consultations with Aboriginal people supported the increased employment of Aboriginal people by criminal justice agencies. The Commission recognises that the negative relationship between criminal justice agencies and Aboriginal people creates a barrier to employment. The establishment of Aboriginal community justice mechanisms will provide a method for increasing the involvement of Aboriginal people in the criminal justice system without requiring direct employment by justice agencies. The Commission has proposed the establishment of community justice groups (see below). Members of community justice groups will be actively involved in criminal justice issues but at the same time they will be accountable to their respective communities. [pp 104–105]

Traffic offences and related matters

Aboriginal people are over-represented in custody for traffic offences and drivers licence suspension orders resulting from fine default. Aboriginal people from remote communities, where there is no public transport, are particularly disadvantaged if they are not permitted to drive. In these communities Aboriginal people may need to drive for the purpose of appearing in court, attending funerals or seeking medical treatment.

Under s 76 of the *Road Traffic Act 1976* (WA) a person may apply for an extraordinary drivers licence and, if granted, this licence will permit the applicant to drive for specific purposes and at particular times. Because of the restrictive transport conditions in remote Aboriginal communities, the Commission is of the view that the criteria for granting an extraordinary drivers licence should include the cultural obligation under Aboriginal customary law to attend funerals as well as the need to attend court. In addition, the current criteria that refer to hardship experienced by an applicant's family should be extended to include a member of the applicant's Aboriginal community (thus recognising Aboriginal family and kin relationships). The Commission has also proposed similar amendments to the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) for those people who are not able to make an application for an extraordinary drivers licence (because their licence is subject to fines suspension). Therefore, a person who is subject to a fines suspension order may be able to apply for that order to be cancelled because of the need to attend a funeral or attend court.

[Proposals 9 & 10, pp 105–106]

Aboriginal community justice mechanisms

The Commission's consultations with Aboriginal people revealed a strong desire for greater participation by Aboriginal people in the operation of the criminal justice system and recognition of traditional forms of dispute resolution. In addition, there was extensive support for Aboriginal community justice mechanisms. The Commission uses the term 'Aboriginal community justice mechanism' to refer to any structure which has been established by an Aboriginal community or its members, with or without government assistance, to deal with social and criminal justice issues affecting Aboriginal people. In this context the Commission has emphasised that community justice mechanisms should be community-owned rather than merely community-based.

In Western Australia there are existing examples of Aboriginal community justice mechanisms, such as night patrols. However, current developments in this area are informal and dependent upon specific individuals and government policy at the time. Further, because there is no formal recognition of their status, there is no provision for Aboriginal community justice mechanisms to operate within the criminal justice system. The Commission has examined in detail other inquiries and reports that have considered Aboriginal community justice mechanisms; the Western Australian government's policies and initiatives with respect to Aboriginal people and the criminal justice system; and existing Aboriginal community justice mechanisms throughout Australia. [pp 109–115, 127–131]

The Western Australian Aboriginal community by-law scheme

The Commission has comprehensively analysed the Western Australian Aboriginal community by-law scheme under the *Aboriginal Communities Act 1979* (WA). The scheme, which commenced in the late 1970s, aimed to assist certain Aboriginal communities to control and manage behaviour on their community lands. After considering the arguments in support of and against the by-law scheme the Commission concluded that the *Aboriginal Communities Act* should be repealed. The primary reason is because the by-laws appear to simply create another layer of law applicable only to Aboriginal communities, but they have no cultural basis in the custom of those communities. Further, enforcement of the by-laws has been particularly problematic because of the lack of police presence in many Aboriginal communities. [Proposal 11, p 120]

As an alternative to the by-law scheme the Commission has proposed that Aboriginal communities should be empowered to establish community justice groups and decide their own community rules and sanctions (see discussion directly below). The Commission has proposed that these groups be established under proposed new legislation – the 'Aboriginal Communities and Community Justice Groups Act'. Aboriginal communities should be consulted about whether they support the repeal of the by-law legislation and also whether they wish to establish a community justice group, and if so, on what terms.

By-laws currently deal with a number of matters that are also covered by the general criminal law, such as damage, disorderly conduct, trespass, drink driving, careless driving and littering. In the absence of by-laws to deal with these

matters the Commission has proposed amendments, where appropriate, to ensure that the general law is applicable to the circumstances in discrete Aboriginal communities (that is, the types of communities that are now subject to by-laws).

Disorderly behaviour

The offence of disorderly conduct under s 74A of the *Criminal Code* (WA) is only applicable to conduct that occurs in a 'public place'. The Commission has proposed that the definition of a public place in s 1 of the *Criminal Code* be amended to include a discrete Aboriginal community declared under the proposed 'Aboriginal Communities and Community Justice Groups Act' (other than an area of that community which is used for private residential purposes).

[Proposal 12, p 121]

Traffic offences

For offences that regulate the manner of driving (such as careless driving, dangerous driving and drink driving offences) the alleged driving must, pursuant to s 73 of the *Road Traffic Act*, occur on a road or in any place where members of the public are permitted to have access. Courts have interpreted this on a case-by-case basis depending upon the particular circumstances. In order to ensure that the definition of driving is applicable to Aboriginal communities, the Commission has proposed that s 73 of the *Road Traffic Act* be amended to include lands of an Aboriginal community declared under the proposed 'Aboriginal Communities and Community Justice Groups Act'.

[Proposal 13, p 122]

Trespass

While the offence of trespass under s 70A of the *Criminal Code* would be relevant to 'outsiders' who enter an Aboriginal community without permission, it is not necessarily applicable to a member of the community who may have been asked to leave. Under the *Aboriginal Communities Act* communities have enacted by-laws permitting the community council to exclude members of the community. In the absence of by-laws the Commission is of the opinion that it is necessary to preserve the right of a community to exclude one of its members, if considered necessary. The Commission notes that, although exercised infrequently, the right to exclude is part of Aboriginal customary law.

The Commission has proposed that the 'Aboriginal Communities and Community Justice Groups Act' include a provision relating to the prohibition and restriction of people on community lands and a specific provision in relation to the exclusion of community members. It is proposed that community members must be given reasonable notice before being required to leave. [Proposal 14, pp 122–123]

It is recognised that there may be circumstances where an Aboriginal person has been asked to leave a community for a specified period of time and is subsequently required to return for a specific customary law purpose, such as participation in a ceremony. In this context the customary law obligations of traditional owners need to be acknowledged. The Commission considers that

there may need to be a customary law defence to the offence of trespass proposed above.

Many communities have enacted a by-law that it is a defence to an offence of breaching a by-law if the person can show that what he or she did was a custom of the relevant community. The Commission is not aware of any cases where this defence has been successfully relied upon (because transcripts of proceedings before Magistrates Courts are not publicly available) and has therefore invited submissions about the effectiveness of this defence. [Invitation to Submit 2, p 116] The Commission has also invited submissions as to whether (and if so, on what terms) there should be a customary law defence to the offence of trespass in the proposed 'Aboriginal Communities and Community Justice Groups Act'. [Invitation to Submit 3, p 123]

Substance abuse

Substance abuse was a serious concern of Aboriginal people consulted by the Commission. Eleven Aboriginal communities have enacted by-laws prohibiting the possession, sale and supply of deleterious substances. Section 206 of the *Criminal Code* prohibits the supply of volatile substances and other intoxicants (excluding liquor) in circumstances where the person knows or where it is reasonable to suspect that someone will use the substance to become intoxicated. It is therefore only the possession of these substances which is immune from general criminal liability. In the absence of by-laws the Commission does not consider that it is appropriate to criminalise inhalant use. To do so would be contrary to the recognised need to divert Aboriginal people, especially young people, away from the criminal justice system. Instead the Commission supports improved services for inhalant users, supply reduction strategies and options developed by Aboriginal communities (such as those that may be developed by community justice groups).

In addition, the Commission has concluded that the power to confiscate volatile substances under the *Protective Custody Act 2000* (WA) should be extended. The Commission has proposed that the definition of 'public place' in the *Protective Custody Act* should be amended to include discrete Aboriginal communities which have been declared under the proposed 'Aboriginal Communities and Community Justice Groups Act'. This will give the police and other authorised officers the power to confiscate volatile substances in discrete Aboriginal communities. The Commission has also proposed that the Commissioner of Police should seek nominations from Aboriginal community councils for the appointment of persons as community officers under s 27 of the *Protective Custody Act*. Members of a community justice group or other community members (such as patrol members or wardens) could therefore be appointed and have the power to confiscate substances in their own communities.

[Proposal 15, pp 123–124]

Alcohol

The prohibition and regulation of alcohol use is one of the main reasons that many Aboriginal communities have joined the by-law scheme. However, the by-

law scheme does not appear to have been effective at preventing alcohol abuse in Aboriginal communities. Bearing in mind the problems identified with the by-law scheme generally, the Commission is of the view that a complementary model which encompasses both community and statutory control is the preferable way to deal with alcohol restrictions in Aboriginal communities. After considering strategies in the Northern Territory and Queensland, as well as a recent review of the *Liquor Licensing Act 1988* (WA), the Commission has proposed that the prohibition or restriction of alcohol use in discrete Aboriginal communities should be included in regulations enacted under the *Liquor Licensing Act*. Under the proposal the Director-General of the Department of Indigenous Affairs has the power to apply for regulations on behalf of a discrete Aboriginal community which has been declared under the proposed 'Aboriginal Communities and Community Justice Groups Act'. The proposal states that an application can only be made if it is supported by a majority of the community. Therefore, any use of alcohol contrary to the regulations would constitute an offence. [Proposal 16, pp 125–126] Of course, Aboriginal communities will be able to develop their own strategies for dealing with alcohol problems. For example, a community justice group may decide as part of its community rules that specified areas of a community should be declared as a dry area.

The Commission recognises the serious implications of the illegal sale or supply of alcohol to an Aboriginal community that has prohibited the use of alcohol. It has proposed that it is an offence for a person to sell or supply alcohol to another where that person knows, or it is reasonable to suspect, that the alcohol will be taken into an Aboriginal community which has prohibited the consumption of alcohol under the *Liquor Licensing Regulations*. [Proposal 17, p 127]

The Commission's proposal for community justice groups

After examining Aboriginal community justice mechanisms in all Australian jurisdictions as well as various commentaries about the topic, the Commission believes that the key principles for developing effective Aboriginal community justice mechanisms are:

- **Partnerships** between Aboriginal people and government for the purpose of assisting Aboriginal communities to determine their own issues.
- **Capacity building** in Aboriginal communities so that there are appropriate structures and services in place to allow communities to deal with justice and social issues in a meaningful and sustainable way.
- **Consultation and planning** to ensure long-term success. (At the same time the Commission recognises the danger in continued consultation with Aboriginal people that does not result in any positive change.)
- **Cultural authority** in order to secure the most effective community justice mechanisms. (The Commission's proposals recognise the cultural authority of Elders and aim to restore that authority in places where it may have broken down.)

- **Formal recognition within the criminal justice system** to enable Aboriginal community justice mechanisms to play a direct role in the diversion of offenders and provide information to courts about Aboriginal customary law and other cultural issues.
- **Recognition of Aboriginal customary law** in the criminal justice system as a more effective method of dealing with Aboriginal offenders.

[pp 131–133]

The Commission has taken into account these principles when formulating its proposal for community justice groups.

The establishment of community justice groups

As discussed above, the Commission is of the view that the *Aboriginal Communities Act* should be repealed and new legislation (the 'Aboriginal Communities and Community Justice Groups Act') should be enacted to provide for the establishment of community justice groups. [Proposal 18, p 140] Aboriginal communities that are currently declared under the *Aboriginal Communities Act* will be deemed to be declared under the new legislation.

The proposed 'Aboriginal Communities and Community Justice Groups Act' will distinguish between discrete Aboriginal communities—those communities with identifiable physical boundaries—and all other Aboriginal communities. A community justice group in a discrete Aboriginal community will be able to set community rules and community sanctions. The Commission does not impose any restrictions upon the types of rules and sanctions that may be set by a community justice group other than the constraints of Australian law. Non-discrete communities will not be able to set community rules and sanctions. This is because the concept of community rules and sanctions envisages that members of the community will voluntarily abide by the sanctions that are agreed upon and, if sanctions are not followed, the community has the option to request that a member of the community leave for a specified period of time. Where there are no identifiable physical boundaries this would not be possible.

Discrete Aboriginal communities that are not deemed to be declared under the proposed 'Aboriginal Communities and Community Justice Groups Act' will need to apply to the Minister for Indigenous Affairs for their community to be declared under the legislation. Such a declaration will bring those communities within the terms of other legislative provisions (such as those dealing with disorderly conduct and traffic offences discussed above).

For discrete communities that occupy land pursuant to a crown lease or a pastoral lease it is proposed that the community lands are the entire reserve area or pastoral lease, whichever is applicable. For any other discrete community the community lands will need to be declared by the Minister for Indigenous Affairs.

The Commission has proposed that an application to the Minister for Indigenous Affairs for the approval of a community justice group will be approved if:

- the rules in relation to the membership of the group provide for equal representation of all relevant family, social or skin groups in the community and equal representation of men and women; and
- there has been adequate consultation with the members of the community and a majority of the community members support the establishment of a community justice group.

These criteria are considered necessary in order to ensure that Aboriginal women are protected and have a voice in community justice processes and to discourage one dominant group within a community from determining the outcome in any particular case.

The Commission has proposed that an Aboriginal Justice Advisory Council should be set up to assist and advise communities in the implementation of this proposal. The current work that is being undertaken in relation to the Aboriginal Justice Agreement and the development of regional and local justice plans is acknowledged by the Commission. These arrangements can operate in tandem with implementation of the Commission's proposal. [pp 133–136]

Community rules and sanctions

As discussed, the Commission has not imposed any restrictions upon the nature of community rules and sanctions other than the constraints of Australian law. In other words, a community would not be permitted to impose a sanction that constitutes a criminal offence. Each community can determine its own rules and sanctions and these may consist of offences under Aboriginal customary law, offences under Australian law or rules that are not based on either general criminal law or customary law offences.

Where behaviour constitutes a breach of community rules as well as a breach of Australian criminal law, the parties involved, the community justice group and the police will have a choice about whether the matter will be dealt with by the community justice group or by the general criminal justice system.

The Commission is of the view that Aboriginal people must determine who should be bound by the community rules. Membership of a community will probably require adherence to community rules but of course a community may decide to exclude certain people from the application of specific community rules. This may be appropriate for service providers in some cases. All people, whether members of a community or not, will be subject to those matters that are covered by Australian law (such as the regulation of alcohol, disorderly conduct and traffic offences). [pp 136–138]

Roles within the criminal justice system

It is proposed that any community justice group will have a significant role within the Western Australian criminal justice system. For example, members of a community justice group may present information to courts for sentencing and bail purposes about an accused who is a member of their community. In addition, community justice groups may be involved in diversionary programs and

participate in the supervision of offenders who are subject to court orders. The Commission also envisages that community justice groups could play a pivotal role in the establishment of Aboriginal courts and provide a suitable panel from which Elders could be chosen to sit with the magistrate. [p 138]

Other matters

The Commission considers it is vital that community justice groups are accountable to the community that they serve but the method by which a particular group is held accountable should be determined by the community itself.

Members of a community justice group should be reimbursed where they provide services (such as patrols), operate diversionary programs, supervise offenders and provide information to courts. Further, members should be indemnified for any civil liability that arises from their roles within the criminal justice system. [p 139]

The potential benefits of the Commission's proposal for community justice groups [Proposal 18, p 140] are that it will:

- assist Aboriginal people to develop their own processes for dealing with justice issues within their community;
- recognise aspects of Aboriginal customary law in a practical way with as little interference as possible by the Australian legal system;
- enhance the cultural authority of Elders;
- reduce offending;
- improve the potential for Aboriginal people to be diverted away from the criminal justice system;
- reduce the rate of Aboriginal imprisonment and detention;
- provide more effective sentencing and bail options for courts;
- enable Aboriginal people to be actively involved in the criminal justice system;
- assist in improving the level of understanding of the criminal justice system in Aboriginal communities; and
- assist in improving the broader governing capacity of Aboriginal communities.

Aboriginal courts

The Commission uses the term 'Aboriginal courts' to refer to all of the current models in Australia where Aboriginal Elders are involved in court proceedings. These models include the Nunga Court, Koori Court, Murri Court and circle sentencing. Aboriginal courts, as they currently exist, operate within the boundaries of the Australian legal system and in no case does an Aboriginal Elder have the authority in the Australian legal system to decide a case or impose punishment. The role of Elders is primarily to advise the court and in some cases Elders may speak to the accused (about the consequences of their behaviour) in a culturally appropriate manner.

Because court-like structures or processes do not appear to be part of Aboriginal customary law, the Commission does not support the establishment of Aboriginal-controlled community courts. Although indigenous-controlled courts do operate in other countries, the Commission agrees with the view of the ALRC that it is preferable to establish structures which do not involve the exercise of western judicial power. Any attempt to create an Aboriginal-controlled court which is partly based on Aboriginal customary law and partly based on general legal principles is fraught with difficulties.

Aboriginal courts are in existence throughout Australia. At the same time as Aboriginal courts have been developed, other specialist courts (for example, children's courts, sexual offences courts and liquor licensing courts) and problem-solving courts (for example, drug courts and family violence courts) are emerging. In addition, the practice of therapeutic jurisprudence has evolved. The Commission considered how Aboriginal courts fit within these categories and has strong reservations about the categorisation of Aboriginal courts as problem-orientated or problem-solving courts. If there is a problem to be solved it is the failure of the criminal justice system to accommodate the needs of Aboriginal people and to ensure that they are fairly treated within that system.

Many Aboriginal communities consulted by the Commission expressed support for one or more Elders to sit with a magistrate in court and supported the various models of Aboriginal courts which are currently operating. The Commission has examined in detail these various models in Western Australia and other Australian jurisdictions. Due to the diversity of Aboriginal communities throughout Australia the exact procedure for each Aboriginal court differs; however, there are a number of key features common to the various Aboriginal courts models.

[pp 152–156]

Physical layout

Aboriginal courts generally have a different physical layout than mainstream courts. Some employ a circle layout while others have all parties (including the magistrate and the Elders) sitting at the same level, thus removing the hierarchical and elevated position of the judicial officer.

Informal procedure and communication

Aboriginal courts encourage better communication between the judicial officer, the offender and other parties involved in the process. Proceedings are informal and the use of legal jargon is discouraged. In some cases Elders speak to the defendant in their own language.

Resource intensive

Because of the greater participation by all parties in the proceedings and the holistic approach taken to the offender's circumstances, the Commission acknowledges that Aboriginal courts are more resource intensive than mainstream courts. If in the long-term Aboriginal courts are able to reduce the level of over-representation of Aboriginal people in the justice system and cut reoffending rates, then Aboriginal courts will be truly cost effective.

Jurisdiction

Aboriginal courts in Australia operate at a magistrates court level and in some jurisdictions they operate for both adults and children. The Commission is aware that there are plans for an Aboriginal court to commence at the District Court level in Queensland. The Commission sees no reason why in time Aboriginal courts in Western Australia could not operate at the superior court level.

Enabling legislation and establishment

Some jurisdictions, having experienced government support for Aboriginal courts, have enacted legislation to cover the operation of their court. In other places, it appears that Aboriginal courts have developed from the industry of individual magistrates. While this approach has the advantage of flexibility it leaves the entire scheme vulnerable to changes of judicial officer.

Aboriginal court workers

Most jurisdictions have an Aboriginal court worker or Aboriginal justice officer employed by the Aboriginal court, providing an effective link between the general criminal justice system and the Aboriginal community.

Aboriginal Elders

Elders and other respected persons play an important role in all Aboriginal courts. Some speak directly to the offenders, while in other courts Elders provide advice to the magistrate. The presence of Elders or respected persons in court can be effective in imparting a positive and constructive notion of shame and Elders provide valuable information to the judicial officer about the offender and relevant cultural matters.

Because an Elder may have kin and family ties with the offender there may be a potential conflict of interest. The fact that the ultimate sentencing authority is retained by the magistrate provides some protection in these circumstances. It is important to ensure that Aboriginal communities are directly involved in the selection of Elders to sit with the magistrate. The Commission believes that members of a community justice group may provide a suitable panel from which to select Elders.

Effectiveness

While it is still too early to judge the effectiveness of Aboriginal courts, especially in terms of repeat offending, it appears that these courts have achieved significant gains in terms of justice outcomes for Aboriginal people. In particular, Aboriginal courts have reportedly attained substantial improvements in court attendance rates.

Although some people may assume that Aboriginal courts are a 'soft option', the Commission is of the view that this opinion is misguided. Aboriginal courts operate within the same justice system and are subject to the same sentencing principles as any other court. Both the defence and the prosecution are entitled to appeal against any perceived sentencing errors. What Aboriginal courts appear

to be able to achieve, through the active involvement of Aboriginal Elders, is a more meaningful court experience. Offenders are more likely to comply with the order of the court and change their behaviour. Aboriginal communities are strengthened by the reinforcement of the traditional authority of Elders.

The Commission's view

The Commission is of the view that Aboriginal courts are not based upon Aboriginal customary law and the proposal for community justice groups is the most appropriate way to recognise Aboriginal customary law justice processes. Nevertheless, the Commission considers that Aboriginal courts have the potential to make the criminal justice system more responsive to the needs of Aboriginal people and assist in reducing the number of Aboriginal people in custody. [p 156]

While the efforts of individual magistrates and others in developing Aboriginal courts in Western Australia is commended, the Commission believes that there should be a formal government policy to establish Aboriginal courts in order to ensure long-term sustainability. The Commission has proposed the development of pilot Aboriginal courts in both the metropolitan area and specific regional areas (subject to consultation with the relevant Aboriginal communities). Aboriginal courts should operate for both adults and children. At this stage legislative change is not required as the *Magistrates Court Act 2004 (WA)*, *Sentencing Act 1995 (WA)* and *Sentencing Regulations 1996 (WA)* provide for the establishment of speciality courts and for a separate division of the Magistrates Court to be established. After two years of operation there should be an independent evaluation of the pilot Aboriginal courts to determine their effectiveness, whether any legislative changes are required and whether any Aboriginal courts should be afforded permanent status. [Proposal 19, p 157]

Criminal responsibility

Under Australian law criminal responsibility is determined by assessing three possible elements:

- the act or omission (conduct) that constitutes the offence;
- any mental element such as intention or wilfulness; and
- any defence that may be applicable in the circumstances.

Under the present Western Australian law, an Aboriginal person is not relieved from criminal responsibility for an offence because the conduct was required under Aboriginal customary law. Therefore, in order for Aboriginal customary law to be taken into account in deciding criminal responsibility it must be relevant under one of the existing mainstream criminal law defences. [p 158]

Defences based on Aboriginal customary law

The Commission has considered whether there should be a defence based on Aboriginal customary law. In examining this issue the Commission acknowledges the dilemma faced by Aboriginal people who may be obligated under Aboriginal customary law to engage in conduct that is unlawful under Australian law. In either case failure to comply with the law may result in punishment.

However, during the Commission's consultations there was no indication of any support for separate rules of criminal responsibility for Aboriginal people. It was pointed out that 'two laws may be divisive'. The Commission also emphasises that a customary law defence (applicable to all or even a wide range of offences under Australian law) would not provide adequate protection for other Australians, including Aboriginal people. In particular, such a defence could relieve criminal responsibility for violent conduct (including traditional physical punishments) regardless of the individual circumstances. Therefore the Commission does not support a general defence of Aboriginal customary law. [pp 159–160]

Partial defence to homicide

In Western Australia any person convicted of wilful murder or murder must be sentenced to life imprisonment. If an Aboriginal person was convicted of wilful murder or murder as a consequence of complying with Aboriginal customary law there is little scope for taking into account any relevant customary law issues. One option is to provide for a partial customary law defence (reducing an offence of wilful murder or murder to manslaughter). The alternative is to remove the mandatory requirement of life imprisonment for wilful murder and murder. This would allow courts to take into account any mitigatory circumstances (including Aboriginal customary law issues) when determining the appropriate sentence. Because the Commission is concurrently working on a dedicated reference dealing with homicide, it has invited submissions as to whether there should be a partial defence of Aboriginal customary law applicable to offences of wilful murder and murder or whether the penalty for these offences should be changed to a maximum of life imprisonment. [Invitation to Submit 4, p 161]

Specific defences

Although the Commission does not support a general customary law defence, there are circumstances where a specific defence is appropriate. A specific defence may be justifiable if it does not significantly interfere with the rights of other people or result in inadequate protection of other members of society. The Commission has identified two areas where a specific defence may be appropriate:

- In the area of customary harvesting, the exemption of Aboriginal people from the application of general laws dealing with the regulation of harvesting flora, fauna or fish is entirely proper.
- A customary law defence for the offence of trespass under the proposed 'Aboriginal Communities and Community Justice Groups Act' may be appropriate and is the subject of Invitation to Submit 3. [pp 161–162]

Intention

When a judicial officer or jury is required to determine the intention of an accused at the time of an alleged offence, the judicial officer or jury will generally apply their own understanding of human behaviour. In the case of Aboriginal people, wrong assumptions or inferences may be made if there is no evidence before the court about their culture, customs and beliefs. The main issue is ensuring that the rules of evidence do not prevent courts from hearing about

Aboriginal customary law where it is necessary to determine the intention of the accused at the relevant time. In Part IX of the Discussion Paper the Commission makes proposals to eliminate some of the impediments to the admissibility of evidence of Aboriginal customary law. [p 162]

Consent

Aboriginal people who inflict physical traditional punishment may be guilty of an offence under Western Australian law (such as assault, assault occasioning bodily harm, unlawful wounding, grievous bodily harm or homicide). For violent offences that require proof of an assault the consent of the victim may mean that the accused is not held criminally responsible. For other violent offences the consent of the victim is irrelevant. The distinction between offences in which lack of consent is an element and those in which it is not, has significant implications for Aboriginal people who inflict physical traditional punishments. The distinction also has the potential to affect any Western Australian.

Whether a person can 'legally consent' to violence and, if so, to what level of violence or harm, is a complex question and subject to conflicting opinions. The Commission considers, as background to this issue, the common law position in relation to consent to violence and then examines the situation under the Western Australian *Criminal Code*. [pp 163–167] Under the *Criminal Code* consent is relevant to an offence of assault occasioning bodily harm but not to unlawful wounding. Bodily harm requires an injury that interferes with health and comfort. Unlawful wounding has been interpreted as requiring the breaking of the skin and penetration below the outer layer of the skin. [pp 164–166]

The Commission does not consider that the distinction between unlawful wounding and assault occasioning bodily harm in terms of consent is valid primarily because:

- both offences have the same maximum penalty and are therefore regarded by Parliament to be as serious as one another;
- the facts of any particular case will determine whether a specific example of unlawful wounding is more or less serious than an example of assault occasioning bodily harm;
- the concept of unlawful wounding is difficult because it potentially covers a wide range of harm; and
- it is apparent Parliament considers that consent to unlawful wounding may be appropriate in some situations but this is not reflected in the current criminal law of Western Australia. A person who pierces an ear or other body part of another with their consent would, under the present law, be guilty of unlawful wounding. On the other hand, Parliament's acceptance of ear and body piercing is evidenced by the *Health (Skin Penetration Procedure) Regulations 1998 (WA)* which regulates skin penetration procedures. [p 166]

Traditional Aboriginal punishments

The Commission recognises that traditional physical punishments, including spearing, are important in many Aboriginal communities. In some circumstances

there is no alternative to spearing under Aboriginal customary law. Depending upon the nature of the traditional punishment an offence of common assault, assault occasioning bodily harm, unlawful wounding or grievous bodily harm may be committed. Some traditional punishments may even cause death. In the case of spearing, whether the injury amounts to unlawful wounding or grievous bodily harm will depend upon where the spear penetrates, how deep the wound is, and how many times the person was speared.

The distinction between assault occasioning bodily harm and unlawful wounding appears to be arbitrary in the context of traditional physical punishments. A traditional punishment that consists of a beating with sticks or other instruments would probably result in a charge of assault occasioning bodily harm. Even if the person punished was bruised and swollen all over, the consent of the person punished would remove criminal responsibility. On the other hand, a spearing that caused a two centimetre cut would probably result in a charge of unlawful wounding and the consent of the person punished would be irrelevant.

[pp 167–168]

It is particularly difficult to determine whether an Aboriginal person consents to the infliction of physical traditional punishment. Under Australian law consent generally must be freely and voluntarily given without force, threats, intimidation or deceit. Underlying the Western concept of consent is individual freedom of choice. The issue is complicated because of mutual obligations and collective responsibilities under Aboriginal customary law. In particular, the Commission understands that some Aboriginal people may agree to undergo spearing because failure to do so will mean that family members will be liable to the punishment instead. On the other hand, as the ALRC concluded, Aboriginal people follow their laws not just because of fear of punishment but because of a 'belief in their legitimacy'. After considering the various accounts by Aboriginal people during the consultations, the Commission concluded that in some cases Aboriginal people may consent to being speared because they fear that someone close will be punished instead. In other cases, they may agree to undergo punishment because they do not wish to be rejected by their community or because they truly wish to undergo the traditional punishment process.

[p 170]

The Commission highlights that the issue of consent is particularly difficult where the person punished is under 18 years of age. Under the *Criminal Code* there is nothing to prevent a child from legally consenting to an assault (as would be the case for some sporting activities). However, in relation to physical traditional punishments, it is arguable that children should be protected.

Traditional Aboriginal punishments and fundamental human rights

It has been suggested that spearing and other forms of physical traditional punishments may contravene international human rights standards, especially those that prohibit torture and other acts of cruel, inhuman or degrading punishment. The Northern Territory Law Reform Committee emphasised that what is cruel, inhuman or degrading should be determined from a cultural perspective. The Commission understands that from an Aboriginal point of view

imprisonment may be considered cruel and inhuman. The question whether physical traditional punishments will breach international human rights standards will depend upon the individual circumstances. [p 170]

Options for reform

The Commission does not support the blanket legalisation of all physical punishments. To do so regardless of the individual circumstances (such as whether the person being punished consents, the age of the person being punished and the nature of the punishment) would potentially breach international human rights standards. Due to the difficult and complex issues involved some people may consider that it is preferable to do nothing. Any accommodation of physical punishment may be seen to encourage violence. But to ignore this issue fails to address the inconsistencies between the offences of assault occasioning bodily harm and unlawful wounding. These inconsistencies not only affect Aboriginal people but all Western Australians.

In the Commission's view the three possible options for legislative reform are:

- To amend the *Criminal Code* to introduce an element of consent into the offence of unlawful wounding. (Thus treating unlawful wounding in the same manner as assault occasioning bodily harm).
- To remove the offence of unlawful wounding and therefore the criminal law would rely upon the distinction between bodily harm and grievous bodily harm.
- To reconsider the current classifications of harms resulting from violence. For example, the concepts of harm and serious harm (as set out in the Model Criminal Code) may be appropriate.

If any one of these options was to be implemented the potential benefits would include:

- Properly sanctioned and consensual spearing that is not likely to cause permanent injury or death could take place without the person who inflicted the punishment being liable to a criminal sanction.
- It may provide some guidance to assist police officers in their approach to traditional punishment.
- It may provide some flexibility to courts when dealing with bail applications and in sentencing decisions.
- It would remove the unnecessary distinction between assault occasioning bodily harm and unlawful wounding. [pp 171–172]

In the absence of submissions from Aboriginal people and the wider community the Commission has been unable to reach a conclusion about this issue. Therefore, the Commission invites submissions as to whether the law in this area should be amended and, if so, which of the three options above is preferred.

[Invitation to Submit 5, p 172]

Ignorance of the law

Ignorance of the law does not provide any excuse for criminal behaviour. This rule may cause injustice in circumstances where a person could not be expected to know the law. Aboriginal people with cultural or language barriers may not appreciate that conduct acceptable under Aboriginal customary law is actually prohibited under Australian law. Further, traditional Aboriginal people may not realise the need to consider and understand Australian written laws because their system of law is based on oral tradition.

The publication of criminal laws in the government gazette may not be an effective way of advising Aboriginal people (and others) about the content of those laws. The Commission's consultations indicated that many Aboriginal people were concerned about their lack of knowledge of Australian law and sought improved education about Australian law and the legal system. [pp 172–173]

The Commission examined the possible options for reform to deal with the potential for injustice arising from the rule that ignorance of the law is not an excuse. After taking into account the relevant arguments, the Commission concluded that ignorance of the law should not provide a defence. To allow Aboriginal people to be excused from criminal behaviour in circumstances where they did not know that they were breaching the law does not provide adequate protection for other people, including other Aboriginal people. The Commission is of the opinion that for Aboriginal people to be protected by Australian law they must also be bound by it. Of course, ignorance of the law may be a matter that can properly be taken into account in mitigation of sentence. [pp 173–174]

The Commission is of the view that improved education about Australian law is the best way to reduce the potential for injustice for Aboriginal people. In other sections the Commission has proposed educative measures to improve understanding about a particular law (for example, hunting and foraging, 'promised' child marriages and discipline of children). As a general suggestion the Commission has proposed that relevant government departments provide culturally appropriate information about changes to the criminal law that may significantly affect Aboriginal people. [Proposal 20, p 175]

Honest claim of right and native title defence

Honest claim of right

There is one limitation to the general rule that ignorance of the law does not provide an excuse for a criminal offence. Under s 22 of the *Criminal Code*, in the case of an offence that relates to property, if the accused is ignorant (or mistaken) about their entitlements to that property they may have a defence. In order for this defence (known as 'honest claim of right') to apply:

- the offence must relate to property;
- the accused must have had an honest belief that he or she was entitled to do the act or make the omission giving rise to the offence; and
- the belief must be of such a nature that if true it would exonerate the accused from criminal responsibility.

The Commission discusses the application of Aboriginal customary law to this defence. [pp 176–178] In summary, the defence may apply where an accused believes that they are entitled to do something with respect to property under Aboriginal customary law and also believes that Australian law recognises that right.

The defence of honest claim of right is particularly relevant to offences relating to customary harvesting. An Aboriginal person may engage in customary harvesting believing that Australian law allows them to do so. In cases where the relevant Australian law prohibits a particular activity for all people, then it will be extremely difficult for Aboriginal people to rely on the defence. However, in other cases, where the law allows an exemption for Aboriginal people, the legal position is not so clear. For example, s 16 of the *Wildlife Conservation Act 1950* (WA) states that it is an offence to take protected fauna (from any land) without a licence. Aboriginal people are exempted from this provision in certain circumstances. From time-to-time this exemption is subject to change. The governor may declare that particular fauna is restricted, even to Aboriginal people. For an Aboriginal person who is unaware of this restriction, it is arguable that he or she may have a defence to a charge of taking fauna without a licence. The Commission explains how this defence might apply [p 178] but notes that successful reliance upon this defence could undermine the conservation objectives that underlie the restrictions imposed by the governor.

[See also Proposal 73, p 376]

Native title defence

While the defence of honest claim of right is based upon a mistaken belief that Australian law recognises customary harvesting rights, a native title defence claims that Australian law does recognise those rights. In practice, the strict evidential requirements to establish native title have proved difficult to meet. Further, proof of native title does not necessarily mean that a native title holder is immune from all legislative provisions that regulate fishing and the taking of flora and fauna. [pp 178–179] The Commission discusses strengthening of the legislative recognition of customary harvesting rights in Part VIII of the Discussion Paper.

Compulsion

The defence of compulsion applies to situations where an accused commits an offence because they are forced or somehow compelled to engage in the prohibited conduct. The most relevant aspect of compulsion for this reference is duress. In order to rely on the defence of duress under s 31(4) of the *Criminal Code*:

- the accused must have done the act or made the omission in order to save himself or herself from immediate death or grievous bodily harm;
- death or grievous bodily harm must have been threatened by someone actually present and in a position to execute the threats; and
- the accused must have believed that he or she was otherwise unable to escape death or grievous bodily harm.

The defence of duress in Western Australia is more restrictive than most other Australian jurisdictions. [p 180]

The Commission recognises that some Aboriginal people may engage in conduct that is against Australian law (such as spearing) because they fear that if they do not they may be subject to traditional punishment themselves. However, in these circumstances there may not necessarily be an actual threat. Instead the fear may arise because the person simply knows that if they do not comply with their obligations under Aboriginal customary law then punishment will follow. The Commission does not consider that it is appropriate to remove the requirement of an actual threat. To do so would allow people to be excused from criminal conduct merely because they feared that they would be harmed, even if this fear was unfounded.

On the other hand, the Commission is of the view that the requirements of the defence—namely, that there must be a threat of immediate death or grievous bodily harm and that the threat must be to harm the accused—are unduly restrictive. It would be rare for punishment to follow immediately after a breach of Aboriginal customary law had taken place. And in some cases an Aboriginal person may respond to threats to harm a member of their family. [pp 181–182]

The Commission has proposed that the defence of duress in Western Australia be amended in similar terms to the defence in the Australian Capital Territory and under the law of the Commonwealth. The defence in these jurisdictions requires that there must be a threat that will be carried out unless the offence is committed. This broader approach is balanced by the requirement that the response to the threat must be reasonable and there is no reasonable way to make the threat ineffective. In making this proposal the Commission has taken into account the fact that some Aboriginal people may be compelled by threats to inflict traditional punishment. In addition, the fact that the Western Australian defence of duress is potentially gender biased has informed the Commission's conclusion. [Proposal 21, p 183]

Provocation

The defence of provocation recognises that a person may be less morally blameworthy if he or she commits a crime as a consequence of a sudden loss of self-control, usually the result of anger. In Western Australia the existence of provocation may reduce wilful murder or murder to manslaughter and may also operate as a complete defence to offences of assault. The Commission considers the defence of provocation and, in particular, whether the defence in Western Australia adequately allows Aboriginal customary law and other cultural issues to be taken into account. The Commission is also aware that the relevance of provocation as a defence is increasingly being questioned and this issue is being considered by the Commission in its separate reference on homicide.

One aspect of the defence of provocation is the 'ordinary person test'. This test has two stages:

- the first stage is an assessment of the gravity or seriousness of the provocation; and
- the second stage requires an assessment of whether an ordinary person would have been deprived of the power of self-control in the same circumstances.

In relation to the first stage, the law allows individual characteristics of the accused (including the person's culture) to be taken into account when determining the seriousness of the provocation. Therefore, matters associated with Aboriginal customary law can be considered. For example, the utterance of a deceased person's name would not cause difficulty for a non-Aboriginal person, but such conduct could be extremely offensive and upsetting for an Aboriginal person.

The second stage of determining the power of self-control of an ordinary person is far more complicated. Whether an ordinary person should be a person of the same cultural background for this purpose is subject to conflicting views. The Commission has considered all of the relevant arguments [pp 184–186] and decided that it would be premature to suggest changes to the law in relation to provocation until the reference on homicide is completed. Therefore, the Commission has invited submissions as to whether an ordinary person should be a person of the same cultural background as the accused for the purpose of assessing whether an ordinary person could have lost self-control.

[Invitation to Submit 6, p 187]

Discipline of children

The Commission's consultations revealed that many Aboriginal people were concerned about the discipline of their children and some believed that Australian law interfered with the right to discipline their children. The Commission found that under traditional Aboriginal law physical discipline of children was rare. [p 187] In contemporary Aboriginal societies unreasonable physical discipline of children appears to be met with disapproval.

Under Western Australian law (s 257 of the *Criminal Code*) reasonable physical discipline is permitted as long as it for the purpose of correcting the child's behaviour and not for retribution. Courts have held that the reasonableness of any physical discipline must be judged according to current community standards. It is also necessary to take into account the age, physique and mental development of the child. Despite the common practice throughout Australia of smacking children, there is a growing trend of opinion that physical punishment of children is ineffective and undesirable.

It appears that many Aboriginal people are under a misapprehension that they are not allowed to smack their children under Australian law. While the Commission does not wish to promote the use of physical discipline, it considers that Aboriginal people in Western Australia should be made aware that they currently have the same right as any other Australian to discipline their children in a reasonable way bearing in mind the child's individual characteristics. The Commission has proposed that the Western Australian government introduce strategies to educate Aboriginal communities about effective methods of discipline and inform them about their

rights in relation to the discipline of children under Australian law. [Proposal 22, p 189] Recognising the negative history between the Department of Community Development and many Aboriginal people, the Commission has invited submissions in relation to the most appropriate agency to coordinate this education proposal.

[Invitation to Submit 7, p 189]

Bail

When a person is charged with a criminal offence under Australian law a decision is made whether they will be released into the community on bail or remanded in custody until the charge is finalised. A bail undertaking is a promise to appear in court on a specified day and time. The factors which are relevant to this decision are set out in the *Bail Act 1982* (WA). The main purposes of bail are to ensure that accused people attend court and that they do not commit any further offences. Conditions may be imposed upon accused people while they are subject to bail to make sure that they attend court and refrain from offending.

The problems in relation to bail for Aboriginal people

Statistics indicate that Aboriginal people are more likely to be refused bail and if bail is granted they are more likely to be unable to meet the conditions that have been imposed. The Commission has considered some of the reasons why Aboriginal people experience problems in obtaining bail.

Sureties

In some cases an accused will only be released on bail if they can find a person to act as a surety. A surety is a person who enters into an undertaking (promise) that he or she will forfeit a specified sum of money if the accused does not appear in court at the required time. It is well known that Aboriginal people experience difficulties in finding people who can act as a surety because family members and friends often do not have sufficient assets.

The Commission has proposed, as a viable alternative to surety bail for adults, that an accused can be released on bail if a responsible person enters into an undertaking promising that the accused will attend court as required. [Proposal 23, p 193] While recognising that there would be no financial incentive for the responsible person to ensure the accused person's attendance, the Commission believes that Aboriginal Elders and other respected persons would take on this role effectively because of social and cultural duty. The Commission suggests that members of a community justice group might act as a responsible person in appropriate circumstances. The proposal is strengthened by providing that the person making the decision whether to grant bail would have to be satisfied that the proposed responsible person is suitable. [pp 191–193]

In cases where surety bail is still considered necessary, the Commission has proposed that the person setting the amount of the surety should take into account the financial position of the proposed surety. [Proposal 24, p 193] A surety's incentive to encourage the accused to attend court is likely to be affected by the amount of money that the surety is liable to lose (if the accused does not attend court) relative to their overall financial position.

The requirement for a responsible person for juveniles

In all cases, regardless of the nature of the alleged offence, a child under the age of 17 years who is required to attend court on bail can only be released if a responsible person also signs an undertaking. This requirement causes problems for many Aboriginal children who may not be able to find a responsible person because of socio-economic disadvantage such as lack of transport. Aboriginal children from regional and remote locations who are not released on bail are further disadvantaged because they must be detained in Perth. Of course, many adults are also disadvantaged when bail is not granted in regional areas. The Commission has proposed that all accused (both children and adults) should be entitled to apply for bail by telephone to a magistrate if they are dissatisfied with a bail decision made by a police officer, justice of the peace or authorised community services officer. This application can only be made if the accused would not otherwise be taken before a court by 4.00 pm the following day.

[Proposal 25, p 194]

The Department of Justice operates a supervised bail program for those juveniles who are unable to locate a responsible person. At the beginning of 2005 there was only one supervised bail program in operation in regional areas (Yandeyarra). The Commission has proposed that the Department of Justice continue to develop, in partnership with Aboriginal communities non-custodial bail facilities.

[Proposal 26, p 195]

Personal circumstances of the accused

The *Bail Act* provides that when determining if an accused should be released on bail the 'character, previous convictions, antecedents, associations, home environment, background, place of residence, and financial position' must be considered. These criteria (many of which focus on western concepts) have the potential to disadvantage Aboriginal people applying for bail. Many Aboriginal people experience high rates of homelessness and overcrowding in public housing. They also have a higher incidence of unemployment than non-Aboriginal people. For Aboriginal people assessment of their family, kin and community ties would be more appropriate. The Commission notes that in some other Australian jurisdictions bail legislation refers to aspects of Aboriginal culture.

In Western Australia the *Bail Act* provides that an authorised officer or judicial officer who is deciding whether an accused will be granted bail is to consider any relevant matter. Therefore, Aboriginal customary law or other cultural issues can properly be taken into account. Nevertheless, in order to promote consistency and ensure that authorised officers and judicial officers are directed to consider Aboriginal customary law and cultural matters, the Commission has proposed that the *Bail Act* be amended. In the case of an accused who is an Aboriginal person, an authorised officer or judicial officer will be required to consider any cultural or Aboriginal customary law issues that are relevant to bail. The Commission has not limited this proposal to the personal circumstances of the accused because Aboriginal customary law may be relevant in other ways. It may provide a reason why an accused previously failed to attend court. Aboriginal customary law processes may impact upon the choice of appropriate bail

conditions. The Commission has also proposed that an authorised officer or judicial officer must take into account any submissions made by a member of a community justice group from the accused's community.

[Proposal 27, pp 196–197]

Aboriginal customary law and bail

Funeral attendance

Given the importance of Aboriginal customary law to many Aboriginal people, cultural and customary obligations may take precedence for them over the requirement to attend court. During the consultations the Commission heard numerous comments about the importance of funeral attendance and the Commission understands that Aboriginal people may not attend court because they are required to attend a funeral. It appears that Aboriginal people may be charged with an offence of breaching bail (when they miss court due to a funeral) because they do not tell the court the reason why they cannot attend and they do not later appear at court once the funeral ceremony is over. The Commission is of the view that this issue needs to be addressed through improved communication when Aboriginal people enter into their bail undertaking. The Commission has proposed that bail forms and notices be amended to include culturally appropriate educational material in relation to the obligations of bail including what accused people can do if they are unable to attend court.

[Proposal 28, pp 197–198]

Traditional punishment and bail

Concern was expressed during the Commission's consultations that when an Aboriginal person was charged with an offence under Australian law (and had also breached Aboriginal customary law) the person was taken away by police before there was an opportunity for traditional punishment to take place. As a consequence there may be disharmony in the Aboriginal community and family members may instead be liable to face punishment.

[pp 198–199]

The Commission has examined the relevant law in Western Australia, including the provision in the *Bail Act* which states that when deciding whether an accused is to be released on bail it is necessary to consider if the accused needs to be held in custody for his or her own protection. Case law indicates that although a court can recognise that traditional physical punishment may take place, it cannot release an accused on bail for the purpose of traditional punishment where that punishment would constitute an offence against Australian law. However, if all relevant criteria under the *Bail Act* are met, a court should release an accused even when it is aware that traditional physical punishment may take place, provided that the proposed punishment is not unlawful under Australian law.

[p 199]

Further, where the proposed punishment under Aboriginal customary law is not unlawful under Australian law (such as community shaming or compensation) there is no reason why a court could not release the accused for the purpose of participating in that punishment or any other customary law process. In fact, the Commission's proposal outlined above (the legislative direction for courts

determining bail to consider Aboriginal customary law and other cultural matters) will encourage this to happen. The Commission does not consider that it is appropriate to impose conditions upon the nature of the customary law punishment where that punishment is otherwise lawful. [p 201]

Sentencing

Aboriginality and sentencing

General sentencing principles

Sentencing is the stage of the criminal justice process when a court determines the appropriate penalty for an offence. The judge or magistrate is required by law to take into account all relevant factors when sentencing an offender. Each case is decided on an individual basis because the circumstances of each offence and each offender are different. In Western Australia a number of sentencing principles are contained in the *Sentencing Act 1995 (WA)*. For children relevant principles are set out in the *Young Offenders Act 1994 (WA)*. The common law (judge-made law) has also developed various principles that apply to sentencing decisions.

The relevance of Aboriginality to sentencing

Sentencing principles apply equally irrespective of the cultural background of the offender. In other words, an Aboriginal person cannot be sentenced more leniently or more harshly just because he or she is Aboriginal. However, the individual characteristics of an offender can be taken into account when determining the sentence to be imposed. The High Court of Australia has held that sentencing courts are bound to take into account all relevant facts including those which exist only because the offender is a member of a particular ethnic group.

Numerous cases have taken into account factors associated with an offender's Aboriginality, including socio-economic disadvantages; alcohol and substance abuse; the hardship of imprisonment for Aboriginal people; historical factors such as separation from family; and Aboriginal customary law. The Commission has considered cases throughout Australia that have referred to these (as well as other) factors connected to Aboriginality. [pp 203–208] In some Australian jurisdictions there is legislative authority that the cultural background of the offender is a relevant sentencing factor. In Western Australia the *Sentencing Act* is silent on this issue although the *Young Offenders Act* does provide that the cultural background of a young offender is to be taken into account.

Overall, the cases have focused on socio-economic disadvantages and historical factors but a handful of cases have referred to the disadvantages experienced by many Aboriginal people within the criminal justice system. While recognising that there is ample case law authority to allow matters associated with an offender's Aboriginality to be taken into account during sentencing proceedings, the Commission has found that the cases are not consistent in approach. For this reason and to ensure that important issues associated with an offender's

Aboriginality are not overlooked, the Commission has proposed that the *Sentencing Act* be amended to include as a relevant sentencing factor the cultural background of the offender. [Proposal 29, p 208]

Imprisonment as a sentence of last resort

Despite the practice of sentencing courts taking into account relevant factors associated with Aboriginality and the numerous reports and inquiries that have recommended changes to the criminal justice system, the rate of imprisonment of Aboriginal people continues to rise and remains disproportionate to the rate of imprisonment of non-Aboriginal people. In this regard Western Australia has the worst record in Australia. As discussed above, it is widely acknowledged that part of reason for the high levels of over-representation of Aboriginal people in custody is the cumulative effect of discriminatory practices within the criminal justice system.

Legislative provisions in Western Australia which require that imprisonment should only be used as a sanction of last resort have not yet achieved any significant reduction in the rate of Aboriginal imprisonment. While there are specific proposals throughout the Discussion Paper aimed at reducing the level of over-representation of Aboriginal people in the criminal justice system, the Commission acknowledges that these reforms will take time to implement and even longer to have any significant impact on imprisonment rates. In the meantime, it is unacceptable for Aboriginal people to continue to be imprisoned at such excessive rates.

The Commission has considered the situation in Canada where indigenous peoples are also subject to high imprisonment rates. In 1996 the Canadian Criminal Code was amended to provide that all available sanctions other than imprisonment should be considered for all offenders, with particular reference to the circumstances of indigenous offenders. This provision was designed to reduce the level of indigenous imprisonment in Canada and recognise that the circumstances of indigenous offenders are different from those of non-indigenous offenders.

The Commission considered arguments in favour of and against the introduction of a similar provision in Western Australia. [pp 210–212] It concluded that the lack of acknowledgement of the discriminatory effect of practices within the criminal justice system upon Aboriginal people justifies the introduction of such a provision in Western Australia. It is proposed that the *Sentencing Act* and the *Young Offenders Act* provide that when a court is considering whether a term of imprisonment is appropriate it is to have regard to the particular circumstances of Aboriginal people. [Proposal 30, p 212] The Commission emphasised that this proposal does not mean that every Aboriginal offender will automatically receive a reduced sentence. General sentencing principles will still apply and where an offence is particularly serious imprisonment would be required. It would also be necessary in any particular case for the sentencing court to consider the personal circumstances of the offender and whether that offender's history indicates that he or she may have suffered the negative effects of a system that generally discriminates against Aboriginal people.

Aboriginal customary law and sentencing

There are two main ways in which courts have taken Aboriginal customary law into account during sentencing proceedings. The first and most common way is in relation to traditional punishment. The second is where Aboriginal customary law provides a reason or explanation for the offence.

Traditional punishment as mitigation

From an examination of how Australian courts have taken traditional punishment into account as mitigation, the Commission has identified what it considers to be the most important principles and issues in order to determine whether reform is required.

- Courts cannot condone or sanction the infliction of traditional punishment that may be unlawful under Australian law.
- Cases where traditional punishment has not yet taken place are difficult because there is no guarantee that the punishment will in fact take place or will take place in the manner suggested to the sentencing court.
- It is important for courts to bear in mind that Aboriginal people may face double punishment if they have done something which breaches both Aboriginal customary law and Australian law.
- The Western Australian cases (as compared to other jurisdictions) that have taken into account traditional punishment have generally involved physical punishments only.
- It is vital that courts make sure that any suggested traditional punishments have in fact taken place in accordance with Aboriginal customary law and are not, for example, confused with alcohol-related violence. [pp 212–215]

Aboriginal customary law as the reason or explanation for an offence

Courts have been reluctant to take into account Aboriginal customary law as the reason or explanation for an offence. In some cases this is because of the manner in which the information about Aboriginal customary law has been presented to the court. In other cases it is because the court did not accept that the relevant behaviour was required under customary law. In some instances, even though an offender has engaged in conduct that is either obligatory or acceptable under Aboriginal customary law, courts have taken the view that the offence is too serious under Australian law for there to be any significant reduction in penalty. This has usually arisen in cases of violence or sexual assault against Aboriginal women and children.

Despite instances in the past where courts have treated Aboriginal men who commit violent or sexual offences against women and children more leniently than non-Aboriginal offenders, it appears that more recently courts have rejected suggestions that family or domestic violence is acceptable under Aboriginal customary law. There is, however, some continuing debate about offences that arise from the practice of promised brides under traditional Aboriginal law. The Commission has looked at relevant Northern Territory cases where it has been

argued that sexual offences against children are justified to a degree because of the practice of promised brides. The Commission concluded that it is unlikely any such arguments would succeed in Western Australia because, unlike the Northern Territory Criminal Code, the *Criminal Code* (WA) has never recognised traditional marriage as a defence to having sexual relations with a child under the age of 16 years. Further, the Commission has no evidence that the practice of promised brides is common in this state.

The Commission strongly condemns any suggestion that family violence or sexual abuse against Aboriginal women and children is justified under Aboriginal customary law. However, there may be situations where Aboriginal women are liable to traditional physical punishments under customary law. The Commission recognises the potential for offenders to argue that violent behaviour against women is acceptable under customary law. However, this does not justify a ban on courts considering Aboriginal customary law issues. Due to the discretionary nature of sentencing, courts are able to balance Aboriginal customary law and international human rights that require the protection of women and children.

[pp 218–219]

The Commission's view

Although there is an abundance of judicial authority to support the consideration of Aboriginal customary law during sentencing proceedings, the Commission has found that in Western Australia there is no consistent approach. Further, reform is necessary to ensure that Aboriginal customary law is viewed more broadly rather than judicial recognition being primarily limited to traditional physical punishments. The Commission also suggested that the recognition of Aboriginal customary law in sentencing should come from Parliament as well as the judiciary. It is proposed that the *Sentencing Act* and the *Young Offenders Act* provide that when sentencing an Aboriginal offender the court must consider:

- any aspect of Aboriginal customary law that is relevant to the offence;
- whether the offender has been or will be dealt with under Aboriginal customary law; and
- the views of the Aboriginal community of the offender and the victim in relation to the offence or the appropriate sentence.

[Proposal 31, pp 219–220]

In all cases the court will retain discretion and determine the appropriate weight to be given to Aboriginal customary law depending upon the circumstances of the case. For Aboriginal customary law to be properly taken into account as a relevant sentencing factor, it is vital that reliable evidence or information about customary law is presented.

Evidence of Aboriginal customary law in sentencing

Generally, sentencing courts are entitled to hear information about the case in any manner that the court considers appropriate. Unlike other court proceedings, sentencing courts are not bound by the strict rules of evidence. There is a need to balance the requirement for reliable evidence about customary law and the flexible nature of sentencing proceedings.

References to false claims being made by Aboriginal people or their lawyers that an offender had been or would be subject to traditional punishment or that behaviour was permitted under Aboriginal customary law was a recurrent theme of the Commission's consultations. Therefore, the Commission understands the importance of ensuring that false claims about Aboriginal customary law are discouraged.

In practice, information presented to sentencing courts about Aboriginal customary law has been varied. Courts have heard expert evidence from Elders; oral evidence from Aboriginal people; written statements from Aboriginal people; and submissions by defence counsel which have sometimes been accepted or verified by the prosecution. Courts throughout Australia have stressed the importance of ensuring reliable evidence about Aboriginal customary law and have established important principles in this area. Nevertheless, in a number of cases in Western Australia information about customary law has only been given through the submissions of defence counsel without any evidence (including evidence of Aboriginal people) being presented.

The Commission is of the view that it is inappropriate for a court sentencing an Aboriginal offender to be informed about relevant customary law issues solely from the submissions of defence lawyers. This is not a criticism of defence lawyers. Defence lawyers have a professional obligation to their clients and there may be a conflict between the interests of the offender and the views of the relevant Aboriginal community in relation to the customary law issues. Defence lawyers may also be limited by lack of resources to properly fund an investigation into customary law issues.

The legislative provisions in the Northern Territory and Queensland that deal with the reception of information about Aboriginal customary law for sentencing purposes have been examined. The Commission has proposed that there should be a legislative provision in Western Australia to promote more reliable and balanced methods of presenting evidence about customary law to a sentencing court. It is proposed that a sentencing court must have regard to any submissions made by a representative of a community justice group or by an Elder or respected member of the Aboriginal community of the offender or the victim. Submissions may be made orally or in writing on the application of the accused, the prosecution or a community justice group. The sentencing court is to allow the other party a reasonable opportunity to respond to the submissions if requested. [Proposal 32, pp 221–224]

Sentencing options

Diversionsary schemes

In the criminal justice system there are two types of diversionsary options: those that divert offenders away from the criminal justice system and those that divert offenders away from custody. The Commission examined the existing diversionsary options available to courts in Western Australia for Aboriginal offenders (both adults and juveniles). [pp 224–225] Although the diversionsary option of a referral to a juvenile justice team has been recently improved (by the provision

for Aboriginal Elders and others to become more directly involved in the team process), the Commission concluded that diversionary options managed or controlled by Aboriginal communities should be encouraged. This will allow customary law processes, as well as other programs or services established within Aboriginal communities, to be used in the rehabilitation of young offenders.

The legislative provisions for juveniles in Western Australia are currently broad enough to allow a sentencing court to refer the young person to an Aboriginal diversionary scheme (such as one that might be established by a community justice group). The Commission suggests that pilot diversionary programs for Aboriginal offenders should be monitored and evaluated to determine whether any legislative changes are required in the long-term.

In relation to adults the Commission has proposed that the *Sentencing Act* be amended to allow a sentencing court to adjourn sentencing for up to 12 months (instead of the current six months). This should allow sufficient time for Aboriginal diversionary programs to be decided upon and completed. [Proposal 33, p 227]

Community-based sentencing options

The Commission recognises the need to increase the participation of Aboriginal people in the design and delivery of community-based sentencing options. Rather than focusing on trying to improve existing government-controlled sentencing options, the Commission has concentrated on the potential role for community justice groups [Proposal 18, p 140] or other Aboriginal community justice mechanisms to be involved in sentencing orders, such as:

- assisting with community education about the fines enforcement system and, with adequate resources, assisting with the collection of fines in remote areas;
- supervising community work and development orders;
- supervising community work tasks;
- supervising offenders while subject to court sentencing orders; and
- providing programs for offenders while subject to sentencing court orders.

The existing sentencing law in Western Australia could be used to facilitate the supervision of an offender by a member of a community justice group. For instance, an offender could be referred to a community justice group and be required to reappear in court at a later date. Alternatively, conditions could be attached to a conditional release order. If in time Aboriginal communities wish to play a more direct role in the supervision of offenders (by, for example, replacing community corrections officers from the Department of Justice) some legislative amendments may be required. [pp 227–230]

The Commission is of the view that if a court is considering making an order that requires an Aboriginal offender to be supervised by members of an Aboriginal community or a community justice group or diverting an offender to be dealt with in their community, it is vital that the court is properly informed of the views

of the community (or community justice group). There may be some instances where an Aboriginal offender may not be welcome back to their community for a period of time and there may be some communities who are not willing to supervise some offenders.

It is also important that courts are flexible and do not impose unnecessary restrictions upon the manner in which an Aboriginal community or community justice group may decide to supervise or support an offender. In other words, a court should not impose, as part of its order, that a particular community process or punishment should take place. That decision should be left to the Aboriginal community. Of course, the court can retain an overall monitoring role by requiring that the offender re-appear in court to determine the final outcome.

Under the Commission's proposals for sentencing, all courts will be required to consider the cultural background of an Aboriginal offender; any relevant customary law issues; and the submissions from a representative of a community justice group or other representative from the offender's community. The previously discussed proposal for pilot Aboriginal courts will facilitate the practical implementation of these proposals because all parties involved in Aboriginal courts are generally more aware of the relevant issues. [p 230]

Practice and procedure

As mentioned above, the Commission is of the view that for the protection of all Australians, including Aboriginal Australians, Aboriginal people must be bound by the criminal law. Nonetheless, practices and procedures within the criminal justice system can be improved and altered to accommodate Aboriginal customary law and recognise that many Aboriginal people have difficulties understanding the criminal justice process.

Juries

The fundamental principle underlying a jury trial is the right of an accused to be judged by his or her peers. Aboriginal people are under-represented as jurors. The Commission has considered some of the reasons why Aboriginal people do not often sit as jurors. [p 231] To prevent an Aboriginal accused from having a trial by jury because the jury may not include any Aboriginal people would be discriminatory. An Aboriginal person must be allowed to exercise his or her right to a trial by jury. In circumstances where there may be prejudice an Aboriginal person could apply for a trial by a judge alone or a change in the venue of the trial. [p 232]

One important issue concerning the composition of a jury and Aboriginal customary law is gender-restricted evidence. Under Aboriginal customary law some matters can only be heard by women and some can only be heard by men. The current procedures that allow a party to object to a certain number of jurors are not sufficient to obtain a jury of one gender. The Commission has therefore proposed that where gender-restricted evidence is relevant to the case, the court may allow a jury to be comprised of one gender. [Proposal 34, p 232]

Fitness to plead

An accused may be unfit to stand trial or enter a plea to the charge because of mental incapacity, physical incapacity or language difficulties. Aboriginal people who face cultural, language and communication barriers may be unable to understand the nature of the proceedings and the consequences of a plea. The Commission examines the law in relation to fitness to plead and notes its concern about the repeal of s 49 of the *Aboriginal Affairs Planning Authority Act 1972* (WA). This provision operated as a protective measure for those Aboriginal people who may have had difficulties understanding criminal proceedings.

The relevant law is now contained in the *Criminal Procedure Act 2004* (WA). The Commission has found that this legislation is deficient because it hinges upon whether the accused is represented by a lawyer. In other words if the accused is legally represented the court will assume that there are no language or communication issues that may affect the accused's understanding. It is proposed that s 129 of the *Criminal Procedure Act* be amended to provide that a court must not accept a plea of guilty unless, having considered whether there are any language, cultural or communication difficulties, the court is satisfied that the accused understands the nature of the plea and its consequences. The benefit of this proposal is that it applies to all people. The previous provision under the *Aboriginal Affairs Planning Authority Act* was potentially offensive as it implied that only Aboriginal people lacked understanding of the criminal justice system. Anyone who does not fully understand English may have difficulties in understanding the Western Australian legal system.

[Proposal 35, pp 232–234]

Police

In its Discussion Paper the Commission has examined the relationship between Aboriginal people and police and has found that over-policing remains an issue in Aboriginal communities. Nonetheless, in order to maintain law and order in Aboriginal communities, cooperation between Aboriginal communities and the police is essential.

Police and Aboriginal customary law

Police officers are faced with a dilemma if traditional physical punishment which constitutes an offence against Australian law is to occur: should they 'allow' the punishment to take place or should they intervene to prevent it? Police also have to determine whether to charge those involved in the infliction of traditional punishment. The policy of the Western Australia Police Service provides that, where there is violent punishment under Aboriginal customary law, police officers will pursue charges against those who inflicted the punishment. However, in practice this is not always the case and in some instances police officers may actually be present while the punishment takes place.

While the Commission understands that many Aboriginal people resent any intervention by police that prevents traditional punishment from taking place, it

does not consider that it is appropriate to recommend that police officers should in any way facilitate the infliction of unlawful violent traditional punishment.

[pp 236–238]

The decision to charge or prosecute an Aboriginal person for a criminal offence that occurred because the conduct giving rise to the offence was required under Aboriginal customary law is a different matter. Just as Aboriginal customary law issues may justify a more lenient sentence, those issues may also justify no action by the police or prosecuting agencies. The Commission examined the guidelines of the Western Australia Police Service and the Director of Public Prosecutions that govern decisions to charge and prosecute offenders. One of these guidelines requires that a prosecution must be in the 'public interest'. The ability of prosecutorial guidelines to cover cases involving customary law is constrained by the express directive that when considering the question of what is in the public interest, the 'race, colour, ethnic origin, sex, religious beliefs, social position, marital status, sexual preference, political opinions or cultural views of the alleged offender' are not to be taken into account. [pp 238–239]

The Commission is of the view that police or prosecuting agencies should be required to take into account any relevant Aboriginal customary law considerations when deciding whether to charge or continue a prosecution against an Aboriginal person. It is imperative that Aboriginal customary law be considered in this context if there is to be effective diversion to Aboriginal community justice mechanisms. The Commission has proposed that the Western Australia Police Service *COPs Manual* OP-28 be amended to require consideration of any relevant Aboriginal customary law issues in the decision to charge or prosecute an alleged offender. It is also proposed that the Director of Public Prosecutions consider making a similar amendment to the *Statement of Prosecution Policy and Guidelines 2005*.

[Proposal 36, p 239]

Diversion

The Commission has considered methods of diversion of Aboriginal people (in particular Aboriginal youth) from the criminal justice system. Because police primarily decide who enters the criminal justice system and because Aboriginal juveniles have generally been referred by police to diversionary options less often than non-Aboriginal juveniles, the Commission focused on ways of achieving greater diversion for Aboriginal people. It is well known that the best way to enhance community safety in the long-term is to prevent young offenders from coming into contact with the formal criminal justice system.

Cautions

The Commission examined the current cautioning scheme for juveniles in Western Australia. A caution is a warning to the young person about allegedly unlawful behaviour. In this state only a police officer is permitted to give a caution. Given the level of animosity felt by many Aboriginal children towards police it is unlikely that a caution issued by a police officer would be as effective as a caution given by an Aboriginal person with cultural authority. The Commission has proposed that police officers must consider, in relation to an Aboriginal young person,

whether it would be more appropriate for the caution to be administered by a respected member of the young person's community or a member of a community justice group. [Proposal 37, p 241]

Because a caution does not require an admission of guilt or the consent of the young person, the Commission has expressed its concerns about the practice of police referring in court to previous cautions as part of the young person's history of offending. It is proposed that the *Young Offenders Act* be amended to provide that any previous cautions issued cannot be used in court against the young person. [Proposal 38, p 241]

Juvenile justice teams

Under the *Young Offenders Act* police may refer a young person to a juvenile justice team provided that the offence is not listed in either Schedules 1 or 2 of the Act. The young person must accept responsibility for the offence and consent to the referral. Although the Act suggests that first offenders should generally be referred to a juvenile justice team, the Commission proposes that the *Young Offenders Act* be amended to provide that a police officer must, unless there are exceptional circumstances, refer a young person to a juvenile justice team for a non-scheduled offence if the young person has not previously offended against the law. Exceptional circumstances in this context may include that the young person has committed a large number of offences at one time or that the circumstances of the offence are very serious. In determining whether a young person has previously offended against the law prior cautions cannot be taken into account. [Proposal 39, p 242] The Commission is also of the view that the categories of offences listed in Schedules 1 and 2 should be reviewed in order to enhance the availability of diversion to juvenile justice teams. In some cases the circumstances of the offence may be less serious than others and a referral to a juvenile justice team would be appropriate. [Proposal 40, p 242]

Even though the young person has to accept responsibility for the offence and consent before being referred to a juvenile justice team, the Commission does not believe that it is appropriate that such referrals can later be used in court against the young person. Acceptance of responsibility is not the same as proof of guilt. A young Aboriginal person may accept responsibility for an offence because they did not appreciate that there was a defence to the charge. Bearing in mind Aboriginal customary law notions of collective responsibility, a young Aboriginal person may accept responsibility merely because they were present when others committed the offence. Therefore, the Commission has proposed that previous referrals to a juvenile justice team cannot later be used in court against the young person unless it is for the purpose of deciding whether the young person should again be referred to a juvenile justice team. [Proposal 41, p 242]

Attending court without arrest

Instead of arresting a young person and taking the young person into custody police officers can choose to issue a notice to attend court. The Western Australia Police Service *COPs Manual* provides that a police officer may arrest a

young person for a scheduled offence if the offence is serious; if destruction of evidence is likely if the young person is not arrested; if it will prevent further offending; or if there is no other appropriate course of action. The Commission has proposed that the relevant criteria for arrest should be set out in legislation.

[Proposal 42, p 243]

Diversion to a community justice group

The Commission strongly supports the development of Aboriginal-controlled diversionary programs and, in particular, programs or processes determined by a community justice group. It has proposed the establishment of a pilot diversionary scheme for young Aboriginal offenders that involves referral by the police to community justice groups.

[Proposal 43, pp 243–244]

When an Aboriginal person engages in conduct that is unlawful under Australian law and the police are unaware of such conduct, then members of a community justice group as well as the parties involved can determine how to deal with the matter. If necessary, a community justice group can refer the matter to police. When a criminal matter does come to the attention of the police, the relevant police officer should have the option of referring it to the community justice group. The Commission does not wish to impose unnecessary restrictions upon diversionary processes developed by a community justice group. The only safeguard considered necessary is that an offender must first consent to being dealt with by the community justice group. A community justice group could also refuse to deal with a particular matter. Also, if the group was not satisfied with the outcome the young person could be referred back to police to be charged in the usual manner.

Just as the Commission has proposed that previous cautions and referrals to juvenile justice teams should not be later used against the young person, it is also proposed that a referral by police to a community justice group should only be mentioned in court if it is for the purpose of deciding whether the young person should again be referred to the community justice group.

Police interrogations

When Aboriginal people are being questioned about suspected involvement in an offence, they may be particularly vulnerable because of language, communication and cultural barriers, and the long-standing fear and mistrust of police. Miscommunication may result in an unreliable admission or confession by the person being questioned. The Commission emphasised it is vital that police ensure interviews are conducted fairly otherwise an innocent person may be convicted or a guilty person could be acquitted because the admission or confession cannot be used in court.

The Commission examined in detail the law throughout Australia in relation to the questioning of suspects by police. [pp 245–248] In particular, it considered the Criminal Investigation Bill 2005 which is currently before the Western Australian Parliament. The Commission concluded that Aboriginal people are disadvantaged in police interrogations and proposed that there should be legislative provisions setting out the minimum requirements for police questioning. The Criminal

Investigation Bill 2005, although covering some of the important issues does not, in the Commission's opinion, go far enough.

The Commission proposed that the following four matters be provided in legislation:

- The requirement that a caution must be issued (that is, suspects do not have to answer any questions but, if they do the answers may be used as evidence in court against them). Further, that questioning cannot commence until the interviewing police officer is satisfied that the suspect understands the meaning of the caution. In order to be satisfied the interviewing police officer must ask the suspect to explain the caution in their own words.
- Where the suspect does not speak English with reasonable fluency, the interviewing police officer must ensure that the caution is given or translated in a language that the suspect does speak with reasonable fluency and that an interpreter is available before the interview commences. The Commission has also proposed that the Western Australia Police Service and relevant Aboriginal interpreter services develop a set of protocols for the purpose of determining whether an Aboriginal person requires the services of an interpreter.

[Proposal 44, p 249]

- That all suspects are to be informed that they may speak to a lawyer prior to the interview commencing and must be provided with a reasonable opportunity to speak to a lawyer in private. In the case of an Aboriginal suspect (unless the suspect expressly denies a legal representative from the Aboriginal Legal Service or has another lawyer) the interviewing police officer is to notify the Aboriginal Legal Service and provide an opportunity for a representative of the Aboriginal Legal Service to speak with the suspect prior to the commencement of the interview.
- That where a suspect who does not wish for a representative of the Aboriginal Legal Service to attend or where there is no representative available, the interviewing police officer must allow a reasonable opportunity for an interview friend to attend prior to the commencement of the interview (unless this requirement is waived by the suspect).

It is proposed that, unless there are exceptional circumstances, failure to comply with these provisions will cause the interview to be inadmissible in court. It is suggested that there should be appropriate exceptions. For example, the interviewing officer would not be required to delay questioning if to do so would potentially jeopardise the safety of any person. [Proposal 45, pp 248–250]

Policing Aboriginal communities and Aboriginal involvement in policing

The Commission discussed the lack of police presence in many Aboriginal communities and the various options that exist for these communities, such as Aboriginal wardens and Aboriginal Police Liaison Officers (APLOs). In its earlier discussion of community justice mechanisms the Commission concluded that the best approach is to allow Aboriginal communities to develop their own informal self-policing strategies and at the same time ensure that there is a greater police presence where it is required. The Commission supports the government's

response to the Gordon Inquiry to establish a permanent police presence in nine remote locations. [pp 250–251]

The role of APLOs was the subject of mixed views during the consultations. Aboriginal people were concerned that their role had changed over time and it was now more about enforcement with less emphasis on community liaison. Some people mentioned that APLOs were not always from the local community and therefore they did not understand local cultural issues. The Commission also noted that some APLOs may be placed in a conflict of interest between their duty as police officers and their kinship obligations. The Western Australia Police Service has implemented a voluntary transition program for APLOs. Under this program APLOs can make the transition to mainstream police officers. The Commission supports this approach provided that there is a strategy in place to ensure that the original community liaison role is addressed. It is suggested that members of a community justice group, wardens or patrol members could potentially take on this role. Therefore, Aboriginal police officers will be responsible to the Police Service and Aboriginal community members can undertake a liaison role while still maintaining accountability to their community.

Cultural awareness training

The Commission considered the current arrangements for cultural awareness training for police officers. While acknowledging that the Western Australia Police Service does provide cultural awareness training programs for its officers, many Aboriginal people expressed the view that better cultural awareness training for police is required. It is proposed that the government provide adequate resources to ensure that every police officer who is stationed at a police station that services an Aboriginal community participates in relevant cultural awareness training. [Proposal 46, p 253]

The future of police and Aboriginal relations

The Commission noted that the Aboriginal and Policy Services Unit was amalgamated with the Strategic Policy and Development Unit in November 2005. While the Commission understands that this amalgamation is designed to improve the effectiveness of policy and services concerning Aboriginal people, it is noted that the failure to maintain a separate Aboriginal unit within the police service is contrary to the recommendations of the RCIADIC. The incorporation of Aboriginal policy into a mainstream policy unit runs the risk that the momentum to improve Aboriginal police relations will be lost. The Aboriginal policy unit could have otherwise been improved by increasing its resources. Bearing in mind that the amalgamated unit is relatively new, it is difficult to understand its capacity to take a more active role in improving Aboriginal and police relations. The Commission has noted, in particular, that its proposal for community justice groups will be far more effective if there is a good working relationship between community justice group members and police. Therefore, the Commission has invited submissions as to whether the Western Australia Police Service's former Aboriginal Policy and Services Unit should be reinstated and provided with additional resources.

[Invitation to Submit 8, pp 253–254]

Prisons

Aboriginal people in Western Australia are disproportionately over-represented in prison and detention centres. Underlying many of the Commission's proposals is the objective of reducing the number of Aboriginal people in custody. Therefore, the management of custodial facilities must acknowledge the detrimental impact of custody upon Aboriginal people and provide culturally appropriate programs, activities and services.

Since June 2000 the Western Australian Office of the Inspector of Custodial Services has been responsible for examining and reporting on conditions within Western Australian custodial facilities. The Inspector has made numerous recommendations concerning the adequacy of facilities and services for Aboriginal prisoners. The Commission has therefore confined its examination of prison issues primarily to those matters raised during its consultations with Aboriginal people. [p 255]

Prisoner attendance at funerals

During the Commission's consultations the most important issue expressed in relation to prisons and Aboriginal customary law was attendance by prisoners at funerals. If attendance is required at a funeral because of the prisoner's relationship to the deceased, failure to attend will cause distress and shame and will not be excused simply because the person is in prison. In this regard it is important to understand that responsibility under Aboriginal customary law is often strict and if an Aboriginal person fails to attend certain funerals he or she may be liable to punishment.

Specific concerns expressed to the Commission during the consultations were that the criteria for approval for prisoner funeral attendance do not adequately recognise family and kin relationships; that the application process is difficult; and that the use of restraints during funeral attendance (such as handcuffs and shackles) is inappropriate and unnecessary. [p 256]

Application process and defining family relationships

The Commission has examined the application process under policies governing prisoner funeral attendance. It has found that the policies reflect Western lineal relationships (such as parents, grandparents and children) and do not take sufficient account of important kinship relationships in Aboriginal culture. [pp 256–257] The Commission has proposed that these policies be revised to include recognition of Aboriginal kinship and other important cultural relationships. [Proposal 48, p 259]

Aboriginal communities consulted by the Commission also complained that the application procedures were too complex. It was suggested that the forms should be more culturally appropriate and that prison officers who assist prisoners in completing the application form need to be more culturally aware. The Commission understands that Roebourne Regional Prison has produced a staff resource manual to advise prison officers of relevant cultural considerations and suggest appropriate ways of confirming information provided by prisoners in

their application. The Commission supports this initiative and has proposed that the Department of Justice, in conjunction with Aboriginal communities, develop culturally appropriate policy and procedure manuals for all prisons to assist prison officers and prisoners with application for attendance at funerals. The Commission further proposes that consideration be given to the potential role for community justice groups to assist prisoners in the process and to provide advice to prison authorities about the cultural significance of a prisoner's relationship with a deceased. [Proposal 47, p 258]

Use of restraints on prisoners and detainees during funerals

Prisoners and juvenile detainees attending funerals may be subject to the use of restraints including handcuffs and shackles. Aboriginal people consider that the use of physical restraints at funerals is disrespectful and causes immense shame to the prisoner and their family. While acknowledging that community safety and the prevention of escapes is of paramount importance, the Commission considers that the current policy and practice regarding the use of physical restraints during funeral attendances should be reviewed. Certain prisoners, in particular those who are classified as minimum-security, should not generally be restrained at funerals. The policy should acknowledge Aboriginal customary law and cultural obligations and keep in mind that Aboriginal prisoners are less likely to escape during such an important ceremony. While there may be situations that require restraints the presumption should be that restraints are generally not to be used at funerals. The Commission has therefore proposed that the Department of Justice review its policy relating to the use of physical restraints and direct that they be used as a last resort and, if necessary, be as unobtrusive as possible. [Proposal 49, p 260]

Escorting prisoners and detainees to funerals

Although the Commission's consultations did not directly refer to problems with escorting prisoners and detainees to funerals, the appropriateness of staff escorting prisoners to funerals has been raised by the Inspector of Custodial Services. Taking into account the comments of the Inspector and initiatives in this area in other parts of Australia, the Commission has proposed that the policy and practice concerning the escort of prisoners and detainees to funerals should be re-examined, paying particular attention to ensuring that any escort arrangements are culturally sensitive and do not intrude unnecessarily on the grieving process of the prisoner and the community. [Proposal 50, p 260]

Parole and post release options for Aboriginal prisoners

Parole and Aboriginal customary law

When an offender is sentenced to imprisonment a court will decide whether the offender is eligible to be released on parole or, in the case of juvenile offenders, on a supervised release order. The decision whether to allow the offender to be released is made by the Parole Board (for adults) or by the Supervised Release Board (for juveniles). Aboriginal customary law may be relevant to the decision

to grant or deny parole or release on a supervised release order; and currently reports prepared for the Parole Board by community corrections officers do not contain sufficient information about cultural issues. In order to encourage more information about Aboriginal customary law and cultural issues the Commission is of the view that the Parole Board and the Supervised Release Board should be able to receive information from Elders or members of a community justice group. [Proposal 51, p 261]

Lack of programs and services

The extent to which a prisoner has engaged in programs while in prison is a consideration for the Parole Board in its determinations. The lack of Aboriginal-specific programs and services in prisons may therefore cause delays in being released on parole. The Parole Board has suggested that Aboriginal Elders could become more involved in supervising offenders while subject to parole. Many Aboriginal people consulted by the Commission supported the involvement of Aboriginal people in the provision of programs for offenders with a focus on Aboriginal culture and community responsibility. The Commission is of the view that its proposal for community justice groups will provide one method whereby Aboriginal communities can become more directly involved in the provision of programs and services to Aboriginal prisoners and detainees. [pp 261–262]

Aboriginal community-based alternatives to prison

A large number of Aboriginal prisoners are sent to prisons which are not the closest available prison to their home and community. Many Aboriginal people consulted by the Commission suggested the need for community-based alternatives to prison. Underlying these suggestions was the need to keep Aboriginal offenders near their communities, families and country, and utilise Aboriginal customary law processes in rehabilitating offenders. Aboriginal people consulted by the Kimberley Aboriginal Reference Group have also indicated strong support for alternatives such as work camps, 'healing places' and specific pre-release facilities for female prisoners.

The establishment of additional and improved custodial facilities (whether community-based or government-controlled) will assist in reducing the numbers of Aboriginal prisoners that are accommodated long distances from their families and communities. It may also assist with other problems experienced by Aboriginal prisoners. The Commission supports initiatives to develop Aboriginal community-based custodial facilities in regional areas. This approach is consistent with the Commission's overall aim to increase the involvement of Aboriginal people in criminal justice issues as well as providing opportunities for Aboriginal customary law processes to rehabilitate Aboriginal offenders. Community justice groups proposed by the Commission could undertake a direct role in the design and implementation of alternative community-based custodial facilities. [p 262]

Aboriginal Customary Law and the Civil Law System

The role of kinship in Aboriginal society

Before exploring how Aboriginal customary law interacts with the civil law system it is necessary to understand something of the role of kinship in Aboriginal society. Kinship is at the heart of Aboriginal society: it underpins customary law rules and norms; it governs all aspects of a person's social behaviour; and it prescribes the obligations or duties a person has toward others as well as the activities or individuals that a person must avoid.

In *MarduJarra Kinship*, Robert Tonkinson explains that in Australian Aboriginal society kinship follows a 'classificatory' system where terms used among blood relatives (such as 'mother', 'brother', 'daughter' and 'cousin') are also used to describe more distantly related (and even unrelated) people. The notion of kinship in Aboriginal society is therefore quite different to the linear norm that features in non-Aboriginal society. As a result of the classificatory kinship system, individuals in Aboriginal society will have significant obligations to people who are classified as their son or sister but who would not necessarily register as someone to whom that person owed a duty in non-Aboriginal society. The Commission found that the notion of kinship and the obligations it imposes remain strong in contemporary Aboriginal society, including among urban Aboriginals.

[pp 267–268]

Tortious acts and omissions

Australian tort law

In Australian law the legal branch of torts has developed to provide redress for wrongful acts or omissions that have caused injury (physical or economic) to another person. The principal objects of tort law are to deter wrongdoing and to compensate losses arising from conduct contravening socially accepted values. Legal liability in tort generally arises where an act done or omission made has caused a party identifiable damage in circumstances where a duty of care exists between the tortfeasor (the wrongdoer) and the party that is wronged, and that duty is breached. Whether a duty of care exists under Australian law will generally depend upon whether the damage was reasonably foreseeable and whether there is a sufficient degree of proximity (or factual closeness of relationship) between the tortfeasor and the injured party. The fundamental principle underlying tort law is liability based on individual fault.

Aboriginal customary law

The position under Aboriginal law differs markedly to that under Australian law. In Aboriginal society the notion of kinship governs duties owed to others and many duties which may appear to Western eyes to be unenforceable social obligations will carry significant consequences under customary law. [p 269]

These duties include the duty to care for and support kin; to protect certain kin; and duties arising in relation to accidents or negligent acts or omissions. In respect of the latter the Commission heard of many examples where a whole range of people were held liable under customary law – not because of responsibility for a direct act causing harm, but because they stood in a special kin relationship with the person harmed or with the wrongdoer. [pp 270–271] The Commission also found that the liability attaching to breach of kinship obligations or tortious offences is generally a strict liability without opportunity for defence. [p 271]

In regard to remedies or responses for breach of duty, the Commission's research revealed that customary law responses to the breach of kinship duties can vary and are not always commensurate with the harm caused. Responses can range from social penalties (such as ridicule, shaming or ostracism) to physical penalties (such as battery or wounding). The characterisation of a particular customary law response as 'social' rather than 'physical' should not necessarily be taken to indicate a less serious breach of obligation: social penalties are likely to be far more seriously regarded in Aboriginal society where the notion of kinship and community underpins a person's entire existence than in non-Aboriginal society which is generally predicated on the concept of the nuclear family underwritten by individualism.

What emerges from the Commission's consultations and from relevant anthropological research is that the object of responses at customary law to the breach of kinship obligations is generally punishment rather than compensation. There is, in this regard, an apparent difference between Aboriginal law and Australian law, which is based on the compensatory principle of returning the injured party to the position (as far as is possible) that they were in before the wrong occurred. However, it could compellingly be argued that responses for tortious wrongs under Aboriginal customary law are compensatory in the sense that their primary purpose is to restore harmony to a family or community rather than exact 'revenge' for the harm suffered. [pp 271–272]

Recognition of Aboriginal kinship obligations

It is the Commission's opinion that the content of Aboriginal kinship obligations and remedies in response to their breach is a matter for Aboriginal people alone and should not be subjected to unnecessary interference by Australian law. As noted above, in many cases the kinship duties owed by Aboriginal people under customary law are in the nature of social obligations (at least in the eyes of Australian law) and are therefore not the proper subject of state control. [p 272]

In reaching its conclusion on this matter, the Commission has taken into account the fact that Australian law does recognise the special position of Aboriginal people in relation to torts committed against them. In particular, loss of cultural fulfilment, loss of tribal standing and consequent loss of ceremonial function have been significant factors in the awarding of damages for loss of amenities where an Aboriginal plaintiff is involved. [pp 272–273]

Contractual arrangements

The existence of a customary law of contract

Anthropological research has revealed evidence of extensive trade routes and regulated trade or supply agreements between individuals and groups in traditional Aboriginal society. The enforceability of obligations under these agreements and sanctions consequent upon breach together with the elements of promise exchange, bargain and the sophisticated nature of rules governing transactions indicate that, in a very broad sense, a customary law of contract did exist in traditional Aboriginal society. However, a strong social dimension, not mirrored in Australian law, can also be discerned in the various types of contractual arrangements in traditional Aboriginal society. For example, kinship obligation, reciprocity and social status appear to have played a central role in Aboriginal contractual arrangements and sometimes the social relationship between trading partners may be as important as the trade itself. The question for the Commission was whether there is a need for Australian law to functionally recognise Aboriginal customary laws in this area. [pp 274–276]

A need for recognition?

The Commission's research (and that of the ALRC before it) revealed no evidence of conflict between Aboriginal customary law and Australian law in relation to contract. The common law has developed various rules to regulate verbal agreements and unconscionability – two areas that have the potential to induce conflict or cause problems for Aboriginal people. The Commission is of the opinion that, in the absence of any evidence of current conflict between Aboriginal customary law and Australian law in this area, the potential for development of the common law to recognise customary rules of contract should remain a matter for the judiciary. The Commission does not believe that any statutory intervention is required to direct courts to have regard to customary law in this area. [pp 276–277]

Protecting Indigenous consumers

In arriving at this conclusion the Commission was influenced by the fact that the majority of contracts entered into by Indigenous Australians (and indeed all Australians) are consumer and credit contracts. These contracts are generally governed by legislation aimed at protecting the consumer and disputes surrounding such contracts are often settled without judicial intervention. Western Australia's consumer protection regime would therefore appear to provide a more practical focus in efforts to reduce any disadvantage that Aboriginal people may experience as a result of the different expectations traditionally placed upon Aboriginal contractual relations.

The Commission has examined relevant consumer legislation and has looked at some of the specific issues facing Aboriginal consumers in Western Australia. The Commission found that there is a clear case for more accessible consumer protection services and an urgent need for consumer education that is specifically targeted at Aboriginal people to increase knowledge of their rights and

responsibilities as consumers. The Department of Consumer and Employment Protection has sought to address the special needs of Indigenous consumers in Western Australia by the employment of Indigenous educators, who are currently working closely with regional offices and Indigenous advocates and Elders to create a framework for the appropriate delivery of consumer protection advice and services to Aboriginal communities. The Commission is hopeful that this measure, along with the implementation of a comprehensive national Indigenous consumer strategy, will make significant inroads into the consumer issues identified in its Discussion Paper. Given the attention that these issues are currently receiving from government, the Commission has not felt it necessary to make any proposal in this regard. [pp 277–280]

Succession: Distribution of property upon death

Succession laws govern the distribution of property upon death and include laws relating to wills, intestacy (where a person dies without leaving a will), administration of the estates of deceased persons and family provision. In traditional Aboriginal society the ownership of property and the right to trade, exchange, pass on, will or gift such property were governed by certain rules. These rules or laws varied from tribe to tribe (or group to group); however, in most cases the range of things that could be personally owned in traditional Aboriginal society (and therefore passed on after death) was restricted under Aboriginal customary law. For example, land and permanent natural resources were inalienable and belonged communally to the tribe or clan. Songs, sacred emblems, designs and dances were also generally communally owned and apart from the necessary hunting and gathering implements, people had few personal possessions. [pp 281–282]

Customary law distribution of property upon death

While communal ownership remains the dominant paradigm in Aboriginal society in relation to cultural property and to land the subject of claim under native title, contemporary Aboriginal people have, for the most part, accepted the cash economy and there would appear to be greater opportunities for the accumulation of material possessions. According to the Commission's consultations, the distribution of these possessions upon death may follow traditional customary laws (or a modified version of them). Relevant customary laws which are still practised today include distribution of property to designated kin; destruction of a deceased's property (usually by fire); disposal of property to distant tribes or groups; and determination of property distribution by family Elders. [pp 282–283]

Aboriginal intestacy laws in Western Australia

The *Aboriginal Affairs Planning Authority Act 1972* (WA) (the AAPA Act) governs the distribution of the estate of an Aboriginal intestate deceased in Western Australia. The AAPA Act (and associated Regulations) provides for the deceased's property to be immediately vested in the Public Trustee and for distribution to be undertaken according to the general intestacy provisions of the *Administration Act 1903* (WA). If no persons entitled under the general provisions can be found then the property may be distributed to a customary law spouse, the

children of a traditional marriage or a parent 'by reason of tribal marriage'. The AAPA Regulations further provide that a moral claim may be made against an Aboriginal deceased estate within two years of the date of death if no other valid claim is made on the estate. [pp 284–285]

Although the AAPA scheme purports to recognise Aboriginal customary laws, it has been subject to substantial criticism. In particular, the emphasis remains on lineal relationships (reflecting a non-Aboriginal notion of kinship) rather than collateral or classificatory relationships. Another important criticism is that by automatic vesting of the intestate estate in the Public Trustee, the deceased's family are discriminated against in that they have no right to administer the estate themselves. The Public Trustee has also reported some special difficulties faced by Aboriginal people in proving their entitlements under the *Administration Act* (the first step of distribution under the AAPA scheme) and under the AAPA Regulations. [pp 285–288]

Reform of Aboriginal intestacy laws

In considering reform of the law in this area, the Commission has investigated statutory schemes for the administration of Aboriginal intestate estates in Queensland and the Northern Territory. A full discussion of the advantages and disadvantages of these schemes may be found in the Discussion Paper. [pp 288–291] The Commission has proposed changes to the current scheme to rectify the problems observed in the Discussion Paper and to import positive aspects of schemes operating in other jurisdictions. Among other things the Commission has proposed that:

- Aboriginal deceased estates no longer be automatically vested in the Public Trustee;
- amendments be made to the *Administration Act* to simplify the procedure for grant of letters of administration in relation to Aboriginal intestate estates;
- persons who enjoy a classificatory relationship under the deceased's customary law may apply to succeed to the estate if no person of entitlement can be found under the *Administration Act*;
- the existing bias toward male relatives be removed from the AAPA Regulations; and
- the offensive definition of 'Aboriginal person' in the AAPA Act be replaced.

[Proposal 52, p 291–292]

In recognition of the fact that, prior to 1970, the births of many Aboriginal people were unregistered, the Commission has also invited submissions on whether a relaxed standard of proof should apply to the determination of the entitlement of a person of unregistered birth. [Invitation to Submit 9, p 293]

In making its proposals for reform, the Commission was mindful of the fact that the application of the Western Australian Aboriginal intestacy scheme is limited in practice by the need for intestate Aboriginal estates to be brought to the notice of authorities. In most cases there is capacity for kin to apply customary law to

the distribution of a deceased's personal property without legislative or government interference. There is also scope under the *Administration Act* for kin to claim cash held in financial institutions without formal letters of administration and the Commission has proposed that this amount be increased.

[Proposal 53, p 293]

In relation to small estates consisting of cash, this proposal may effectively avoid the need for invoking the formal distribution scheme. [p 285] While distribution of real property and stocks or shares will generally require formal administration, it is acknowledged that such things were never a part of customary law—land, for example, was inalienable under traditional law—and would therefore not be likely to create conflict between customary law and the general law.

The Commission also acknowledged the claims of some commentators that Aboriginal people are not so much concerned about inheritance of commodities but are deeply concerned about the inheritance of intellectual property, kinship obligations, sacred objects and cultural custodianship. Such sentiments were confirmed by some Aboriginal communities during the Commission's consultations. The Commission recognises that such things should not be governed by the laws of Western Australia and that customary law alone will determine succession in these matters. The Commission's proposals are therefore confined to the distribution of personal and real property in the estate of an Aboriginal person who dies intestate and for which letters of administration are sought.

[pp 291–292]

The importance of wills

One way to ensure that relevant Aboriginal customary laws of distribution are observed upon death by Western Australian law is to make a will. Such a measure can provide Aboriginal people the opportunity to express their customary law in terms of their own knowledge and beliefs. As well as recording a testator's wishes regarding the distribution of his or her property upon death, wills have the advantage of being able to record the testator's wishes in relation to location of burial and necessary burial rites to be applied upon death and can deal with a range of customary obligations.

The Commission believes that more could be done by government to encourage Aboriginal people to make wills to ensure that their wishes (be they customary law related or otherwise) are observed by the general law upon death. The Commission has proposed that the Department of Indigenous Affairs and the Public Trustee be jointly funded to establish a program aimed at educating Aboriginal people about the value of wills and also about their entitlements, rights and responsibilities under Western Australian laws of succession.

[Proposal 54, p 294]

Family Provision

Entitlement to distribution of both testate and intestate estates in Western Australia is qualified by claims made for family provision under the *Inheritance (Family and Dependents Provision) Act 1972* (WA). Under this Act a person

may make a claim against an estate if, by the deceased's will or by virtue of the rules governing intestacy, adequate provision has not been made from the estate for the proper maintenance, support, education or advancement in life of that person.

It is the Commission's opinion that the provisions of the Act do not provide adequately for the extended kin relationships recognised in Aboriginal society. Aboriginal people take their kinship obligations at customary law very seriously and these obligations may include the provision of housing, financial assistance, education or general support of persons in a classificatory kin relationship. In particular, child-rearing in Aboriginal society is often shared and the responsibility for provision for a child may fall with different kin throughout that child's life. In these circumstances there is scope for a person in a customary law kin relationship with a deceased at the time of his or her death, who is wholly or partly dependant upon the deceased, to be inadequately provided for in the distribution of an Aboriginal deceased estate. The Commission has therefore proposed amendment to the list of persons who may claim for family provision against a testate or intestate Aboriginal estate to include a person who is in a kinship relationship with the deceased which is recognised under the customary law of the deceased and who, at the time of death, was being wholly or partly maintained by the deceased.

[Proposal 55, p 295]

Guardianship and administration

The *Guardianship and Administration Act 1990* (WA) establishes a system to protect the rights of people with decision-making disabilities. In particular, it enables a substitute decision-maker to be appointed to make decisions in the best interests of the represented person. There are two types of substitute decision-makers that can be appointed:

- a guardian who makes lifestyle decisions for the represented person; and
- an administrator who makes financial and legal decisions for the represented person.

In cases where a suitable person cannot be found the Public Advocate will act as a guardian and the Public Trustee as administrator. Concerns have been raised about the application and accessibility of the guardianship and administration system to Aboriginal people in Western Australia.

[pp 296–298]

Improving guardianship and administration services to Aboriginal people

In 2001 the Public Advocate commissioned a study into the needs of Aboriginal people within the guardianship and administration system in Western Australia. Since that time the Public Advocate has implemented a number of changes to increase awareness of its services among Aboriginal people and to establish formal partnerships and protocols with Aboriginal and non-Aboriginal service providers to improve delivery of guardianship services to Aboriginal people.

[p 298]

The State Administrative Tribunal, established in January 2005, hears applications for guardianship and administration. The Commission is not aware of any enhancements to the hearing or review processes in relation to guardianship and administration applications in respect of Aboriginal people. Although there are presently very few applications being heard by the tribunal, the education strategies currently being undertaken by the Public Advocate and the need for guardianship and administration services among the Aboriginal population could result in a rapid increase in this figure. In these circumstances the Commission has proposed that the tribunal assess the cultural appropriateness of its procedures and consider the development of a set of protocols and guidelines for members in relation to the management of hearings involving Aboriginal people. [\[Proposal 56, p 298\]](#)

The report commissioned by the Public Advocate found that there were instances of unnecessary delay in the release of trust funds and, in some cases, culturally inappropriate management of financial affairs of Aboriginal people by the Public Trustee. The Commission supports the observation in the report that there is a need to find culturally appropriate alternatives to the Public Trustee for the management of administration orders under the *Guardianship and Administration Act*. However, it is noted that the management of the financial affairs of Aboriginal people by the Public Trustee is not limited to people who are the subject of orders under the Act. Anecdotal evidence suggests that many Aboriginal people who have come into a significant sum of money as a beneficiary of an intestate Aboriginal deceased will place that money in trust with the Office of the Public Trustee. Because the current statutory regime in Western Australia automatically vests the estate of an intestate Aboriginal deceased in the Public Trustee, there is the potential for conflict of interest where a beneficiary subsequently appoints the Public Trustee to administer his or her financial affairs (in particular, the money claimed from the deceased estate). In these circumstances the Commission is concerned that Aboriginal beneficiaries of deceased estates administered by the Public Trustee are made aware of all alternatives for the financial management of their inheritance (including management by family members or private financial managers) and that these alternatives are appropriately communicated with the assistance of an independent legal or financial advisor and, if required, an interpreter. [\[Proposal 57, p 299\]](#)

The Commission has invited further submissions on the capacity of the guardianship and administration system to adequately meet the needs of Aboriginal people and its interaction with Aboriginal customary laws and cultural beliefs. [\[Invitation to Submit 10, p 299\]](#)

Coronial inquests

The interaction between Australian law and Aboriginal customary law in relation to coronial inquiries was cited as a cause for concern and frustration in the Commission's consultations with Aboriginal people. The Commission heard of a number of cases where Aboriginal people felt that their customary law was misunderstood or ignored when white authorities became involved in investigating the death of an Aboriginal person.

Anthropological studies have shown that various forms of inquiries into the cause of a death were performed in traditional Aboriginal societies. Aboriginal people are therefore somewhat familiar with the notion of coronial inquiry and understand the benefit gained by processes that seek to explain a death. Nonetheless, there are certain known conflicts between contemporary coronial processes and Aboriginal cultural beliefs that can be eased by practical changes to the current system of coronial inquiry. [pp 300–303]

Cultural objections to autopsy

A pertinent issue that has arisen in certain cases is the objection to the performance of an autopsy on an Aboriginal deceased on cultural grounds. Currently coronial guidelines in Western Australia direct coroners to consider the views of the 'senior next of kin' and to 'take account of any known views of any other relatives of the deceased and any person who, immediately before death, was living with the deceased' when making a decision whether or not to order a post-mortem examination. However, it must be noted that while these views must be taken into account if they are 'known' to the coroner, there is no requirement that coroners consult with family (other than the senior next of kin) to obtain these views. [pp 304–305] In such circumstances the effectiveness of this guideline is heavily reliant upon the cultural awareness of the relevant coroner and his or her industry in ensuring that the views and cultural beliefs of extended family are considered. The Commission believes that it is desirable to make this consideration explicit in the *Coroners Regulations 1997* (WA). [Proposal 58, p 306]

Definition of 'senior next of kin'

The senior next of kin of a deceased has certain rights in the coronial process. These rights include the right to object to autopsy and the right to be notified at certain stages of the process. The definition of senior next of kin in the *Coroners Act 1996* (WA) allows a Western family construct and does not allow for the broader notion of Aboriginal kinship or for recognition of senior kin under Aboriginal customary law. [pp 306–307] Although conflicts arising from the different understandings of kin in Western and Aboriginal cultures were reported to the Commission in relation to other areas of law, the Commission has limited submissions on this matter in regard to coronial issues. The Commission would therefore like to hear from interested parties on whether there is a need to amend the definition of senior next of kin in the *Coroners Act* to recognise Aboriginal customary law. [Invitation to Submit 11, p 307]

Accessibility of coronial guidelines and findings

The Commission noted that, while coronial guidelines played a large part in reducing the potential of cultural conflict in the coronial process, access to these guidelines was extremely difficult. This affects the public transparency of coronial processes which, especially in relation to deaths in custody, is of utmost importance. The Commission has therefore proposed that the Department of Justice establish, at the earliest opportunity, a dedicated internet site for the Coroner's Court of Western Australia to enable public access to coronial guidelines, procedures, protocols and findings. [Proposal 59, p 308]

Funerary practices

Aboriginal funerary rites and the laws of Western Australia

Death is a regrettably frequent event in contemporary Aboriginal society and the funerary rites that are customarily performed upon death remain important to Aboriginal culture. In its Discussion Paper the Commission has examined Aboriginal funerary practices and has found that the current Western Australian laws are sufficiently flexible to accommodate the performance of certain customary rites upon death, including preparation of the deceased's bodily remains for final disposal. The Commission has also found that the by-laws and rules relating to the performance of graveside ceremonies would not unduly interfere with customary law in the burial process. [pp 310–313]

Aboriginal burial rights and the laws of Western Australia

Burial was (and remains) the most common traditional Aboriginal mortuary practice in Western Australia. Under Aboriginal customary law, the right to dispose of a deceased's body usually rests with the family or blood relatives of a deceased. The family's wishes will therefore prevail over those of the deceased's spouse. [pp 311–314]

The position under Aboriginal customary law is at odds with Australian law which holds that the right to bury the deceased will lie with the person who has the highest entitlement to the deceased's estate. In Western Australia, the highest entitlement lies with the surviving spouse (or de facto partner) followed by the children of the deceased, the deceased's parents, the deceased's siblings, then other specified family members. Courts have routinely rejected cultural arguments as irrelevant when deciding who has the right to bury a deceased. [pp 314–315]

Because of the marked difference between the position at customary law and under Australian law, disputes over rights to dispose of an Aboriginal deceased arise regularly. Often conflicts result from the wishes of family to bury a deceased family member in their traditional homelands pursuant to the relevant customary laws and the competing wishes of the deceased's spouse to have his or her loved one buried elsewhere. In some cases there have been competing cultural beliefs about who has the right to bury an Aboriginal deceased. In its Discussion Paper the Commission has discussed in some detail the various problems arising in this area and has examined the laws of other jurisdictions. The Commission has concluded that without further submissions on this matter it is not in a position to offer a firm proposal. The Commission therefore invites submissions on the following:

- whether Aboriginal cultural and spiritual beliefs should be considered relevant to a court's decision in resolving a dispute over the right to burial of an Aboriginal deceased;
- what would be the appropriate protocol to apply in cases where there are genuinely held but competing cultural beliefs;

- whether significance should be placed on the deceased's wishes regarding burial if embodied in a signed document (not necessarily a will); and
- what is the appropriate forum for the determination of burial disputes.

[Invitation to Submit 12, p 317]

Indigenous cultural and intellectual property rights

Intellectual property is a generic term for the various rights or bundles of rights which the law accords for the protection of creative effort or, more especially, for the protection of economic investment in creative effort. Australian intellectual property regimes are established and governed primarily through Commonwealth legislation. The ability of the Western Australian government to recognise Aboriginal customary laws in relation to Indigenous cultural and intellectual property rights is therefore limited to the development of protocols and to the support of relevant amendment to Commonwealth legislation. [Proposal 62, p 328]

In its Discussion Paper the Commission has examined the potential of conflict between Aboriginal customary law and Australian intellectual property laws in the areas of copyright in artistic works and Indigenous intellectual property in the regulation of resources. [pp 320–327] The Commission acknowledges the significance of culture to Aboriginal communities and the communal nature of the ownership of Indigenous cultural and intellectual property. The Commission has proposed that protocols relating to the use, sale and protection of Indigenous cultural and intellectual property be developed and promoted in Western Australia to inform government agencies, educational and cultural institutions, and private industries in their dealings with Aboriginal artists. [Proposal 60, p 325] The Commission has further proposed that the Western Australian government develop protocols aimed at those issues arising from the 'bioprospecting' of Aboriginal medical knowledge in the exploration of biodiversity for commercially valuable genetic and biochemical resources. [Proposal 61, p 327]

Aboriginal Customary Law and the Family

Family law

Jurisdictional limitations

Under the Australian Constitution, the Commonwealth Parliament has exclusive power to make laws regarding marriage, nullity and divorce, matrimonial causes (property, child support and spousal maintenance disputes) and the custody of children the subject of a marriage. The Western Australian Parliament therefore has no power to effect recognition of Aboriginal customary law in these areas. However, unlike the other Australian states and territories (which have conceded certain powers to the Commonwealth), Western Australia chose to retain legislative power to deal with family law matters not covered by the Australian Constitution (that is, not concerning a legal marriage). These include:

- parenting disputes involving ex-nuptial children;
- de facto marriage financial and property disputes; and
- child support for ex-nuptial children.

For these purposes Western Australia established its own discrete Family Court exercising combined state and federal jurisdiction in family law matters. [p 331]

Traditional Aboriginal marriage

In its Discussion Paper the Commission has examined the concept of traditional Aboriginal marriage and marriage rules that exist under Aboriginal customary law. These rules differ across Aboriginal Australia, but generally the notion of kinship dictates who an Aboriginal person may marry under customary law. Marriage rules served various purposes in traditional Aboriginal societies including the maintenance of genetic integrity; the assurance of continuing inheritance and performance of ritual (spiritual) obligations to land; the creation of alliances and reciprocal obligations between individuals, families and groups; and the maintenance of traditional economies trading on these familial obligations. [p 332]

Promised marriages

The issue of 'promised marriages' (usually involving a young girl betrothed to an older man) has been the subject of recent controversy in the Northern Territory and is discussed at length in the Commission's Discussion Paper in both the criminal and family law chapters. The Commission's consultations revealed that the practice of promised marriage has declined in Western Australia and, although it is still practised in some remote communities, promised marriage contracts are not always strictly adhered to. For example, a promised marriage can sometimes be avoided where the girl wishes to marry another and the promised husband consents to the match. There have also been cases where a promised bride has eloped with another man and the promised husband has conceded his right to marriage upon payment of compensation. However, it appears that

matches other than the promised marriage will generally only be accepted if they adhere strictly to kinship rules. [p 333]

In relation to the recognition of promised marriage contracts in Western Australia the Commission has concluded that Australia's international obligations preclude recognition of non-consensual or underage customary law marriage. However, the Commission notes that the mere denial of recognition does little to practically enhance the rights of young Aboriginal girls, who may be the subject of a customary law promise to marry. The Commission has therefore proposed that the government include, in educative initiatives planned in response to the Gordon Inquiry, information about the freedom of choice in marriage partners under Australian and international law. These initiatives should also include education about the criminality of acts of sexual relations with children under the age of 16 regardless of marriage status under Aboriginal customary law. [Proposal 63, p 334]

Recognition of traditional Aboriginal marriage

The decline of promised marriages in Aboriginal society (in particular, child betrothals) has undoubtedly resulted in more freedom for Aboriginal people to choose their marriage partner. While this freedom can have negative implications for the maintenance of Aboriginal culture (because marriages more often occur without regard for traditional skin groupings or other marriage rules of relevant clans), there are still a number of Aboriginal adults who marry traditionally and with regard for customary marriage rules. [pp 334–335]

As mentioned above, all matters having a connection to marriage (including the dissolution of a marriage) are within the Commonwealth's legislative jurisdiction. However, there are ways in which traditional Aboriginal marriages can be recognised in Western Australia. The Commission has considered two methods of recognition of traditional Aboriginal marriages in the context of Western Australian legislative powers:

- equating a traditional marriage to a de facto relationship under Western Australian law; and
- functional recognition of traditional marriage for particular purposes.

Although in Western Australia the legal benefits of marriage are almost mirrored under laws dealing with de facto relationships, the Commission has discounted this method of recognition of traditional Aboriginal marriages. Where such an approach has been investigated in the past, Aboriginal people have expressed the fundamental objection that to treat a traditional marriage as a de facto relationship would significantly degrade the traditional status and dignity of the union. The Commission has therefore pursued the course of 'functional recognition' recommended by the ALRC.

Functional recognition of traditional Aboriginal marriage

Functional recognition involves an examination of the specific legal and social problems that can arise from the failure to recognise traditional Aboriginal marriage

as a lawful marriage to ensure that, wherever possible, the benefits, obligations or protections that lawful marriage attracts under Western Australian law are also extended to traditional Aboriginal marriage. The concept of functional recognition has the advantage that it can avoid the recognition or enforcement of aspects of traditional marriage (such as underage marriage) that may infringe basic human rights or international obligations. Another benefit is that functional recognition can recognise traditional marriages that are actually or potentially polygamous, providing protection for all partners of a traditional marriage.

[p 336]

It is not known to what extent polygamy is practised in Western Australian Aboriginal communities today and the Commission did not receive any submissions on this issue during its community consultations. However, it is noted that in its recent report on Aboriginal customary law the NTLRC saw fit to suggest the review of legislation and administrative policy and procedure to take account of traditional Aboriginal polygamous marriages. The Commission therefore invites submissions on this matter.

[Invitation to Submit 13, p 337]

Defining traditional Aboriginal marriage for the purposes of legislative recognition in Western Australia

The Commission has considered the potential of legal and social problems that may arise from the failure to recognise traditional Aboriginal marriage for the purpose of Western Australian laws. It has concluded that explicit recognition of Aboriginal traditional marriage would be desirable for the purposes of all written laws in Western Australia. The Commission has proposed that a definition of traditional Aboriginal marriage be inserted into s 5 of the *Interpretation Act 1984* (WA) to the following effect:

'Traditional Aboriginal marriage' means a relationship between two Aboriginal persons, over the age of 18 years, who are married according to the customs and traditions of the particular community of Aboriginals with which either person identifies.

[Proposal 64, p 337]

The Commission has also proposed that a new section be inserted into the *Interpretation Act* to ensure that a reference in any Western Australian written law to 'spouse', 'husband', 'wife', 'widow' and 'widower' is taken to include the corresponding partner of a traditional Aboriginal marriage.

[Proposal 65, p 337]

Spousal maintenance and property settlement

Because the Commonwealth has already legislated on matters of spousal maintenance and property settlement in relation to lawful marriage, Western Australia has no jurisdiction to effect change in this area to accommodate Aboriginal traditional marriages. However, Western Australia does possess jurisdiction to deal with spousal maintenance and division of property upon the breakdown of a de facto relationship. In this respect, the 2002 amendments to the *Family Court Act 1997* (WA) have provided for the availability of remedies to separating de facto couples that are of a very similar nature to those provided for married couples.

The Commission is mindful that because traditional Aboriginal marriage is not explicitly recognised in s 13A of the *Interpretation Act* (which deals with de facto relationships), a traditionally married couple might, in rare circumstances, be denied the remedies available to separating de facto couples under the *Family Court Act*. This is because the *Family Court Act* only applies to de facto unions which have been in existence for at least two years (unless there is a child of the union or other specified circumstances exist). The Commission has sought to address this by proposing that the *Family Court Act* be amended to recognise traditional Aboriginal marriage for the purposes of spousal maintenance and property distribution under Part 5A of the Act. [Proposal 66, p 338]

Care and custody of Aboriginal children

Perhaps more than any other area dealt with in this reference, the policies of governments in relation to the care and custody of Aboriginal children have the potential to negatively impact across generations of Aboriginal Western Australians. Recent amendments made to child welfare legislation in Western Australia demonstrate that government is today more sensitive to the cultural needs of Aboriginal children; however, certain assumptions reflecting the dominant Western paradigm of family structure and child-rearing practices remain.

As mentioned earlier, kinship systems in Australian Aboriginal societies are constructed differently to those in Western (or European) societies. An important difference can be seen in the structure of the basic family unit. In Western societies the model of the 'nuclear' family unit with parental responsibility resting primarily with the biological parents is the dominant norm. In contrast, the family unit in Aboriginal societies is extended with many relatives, and often whole communities, sharing child-rearing responsibilities with the biological parents. As a result of this, child-rearing practices in Aboriginal Australia are not underwritten by the permanence and stability of a single home that is typical of non-Aboriginal Australian families. It is the Commission's opinion that the unique kinship obligations and child-rearing practices of Aboriginal culture should be recognised in Western Australian legislation dealing with the care and custody of Aboriginal children. [pp 339–340]

Aboriginal child custody issues: guiding principles

Aboriginal child custody issues may arise in relation to adoption, foster care or short-term placement, and custody or parenting disputes upon the dissolution of a marriage or de facto relationship. The guiding principles which ideally should inform all custody issues in relation to Aboriginal children are the Aboriginal Child Placement Principle and the 'best interests of the child' principle.

The Aboriginal Child Placement Principle

The Aboriginal Child Placement Principle outlines an order of preference for the placement of Aboriginal children outside of their immediate family. The order of preference is generally expressed to be: within the child's extended family; within the child's Aboriginal community; and, failing that, with other Aboriginal people.

The Aboriginal Child Placement Principle was first adopted as Commonwealth government policy in 1980 and has drawn broad support from Aboriginal communities. In its 1986 report on Aboriginal customary laws the ALRC recommended that state and territory legislation dealing with the placement of children should expressly reflect the Principle. Western Australia was the last state to legislatively implement the Principle in its child custody legislation in 2002–2004. [p 341]

The 'best interests of the child' principle

The 'best interests of the child' principle is the guiding principle of the United Nations *Convention on the Rights of the Child*. It requires that in all actions concerning children (and in all child welfare and custody legislation) the child's best interests are the primary consideration. However, the best interests of an Aboriginal child may be quite different to those of a non-Aboriginal child and the application of the principle must be informed by relevant cultural considerations.

Because the best interests principle is subjectively applied by administrative decision-makers (and, in relation to court custody proceedings, judges) attention must be paid to the process of application to avoid ethnocentrism. The Commission believes that the involvement of Aboriginal people and Aboriginal organisations in cases involving the placement of an Aboriginal child is imperative to avoid ethnocentric assumptions unnecessarily colouring the decision-making process. [p 342]

Adoption

Adoption is the absolute transfer of legal rights to parenting and usually severs all ties with a child's natural family. Adoption is said to be alien to Aboriginal societies, primarily because the extended nature of Aboriginal families precludes the need for adoption. Despite the very few adoptions of Aboriginal children recorded each year, the recent legislative enactment of the Aboriginal Child Placement Principle within the *Adoption Act 1994* (WA) is considered by the Commission to be an important advance.

The legislative form of the Principle in schedule 2A of the *Adoption Act* provides that the first preference for placement of an Aboriginal child is with an Aboriginal person in the child's community 'in accordance with local customary practice'. The *Adoption Act* also provides in s 16A that the Director-General must consult with an Aboriginal child welfare agency regarding the prospective adoption of an Aboriginal child and for an Aboriginal officer of the Department to be 'involved at all relevant times in the adoption process' of an Aboriginal child.

The importance of such consultation in regard to the placement of an Aboriginal child, particularly in determining the best interests of such a child, is emphasised in the Commission's Discussion Paper. However, the Commission considers it equally important that consultation be had with the child's extended family or community, especially in light of the need to establish 'local customary practice' in application of the Aboriginal Child Placement Principle under the *Adoption Act*. The Commission therefore proposes that schedule 2A of the *Adoption Act* be amended to ensure that all reasonable efforts are made to establish the

customary practice of the child's community in regard to child placement and that the child's extended family and community are consulted to ensure that, where possible, a placement is made with Aboriginal people who have the correct kin relationship with the child in accordance with Aboriginal customary law.

[Proposal 67, p 343]

Foster care and alternative child welfare placement

The recently enacted *Children and Community Services Act 2004* (WA) (the CCS Act), which provides for the protection and care of children, was established partly in response to the findings of the Gordon Inquiry which reported serious abuse and neglect of children in some Aboriginal communities. The CCS Act embraces the Aboriginal Child Placement Principle in relation to arrangements made for the care and protection of Aboriginal children; however, the relevant provisions have not yet been proclaimed. The care and protection of children in Western Australia therefore continues to be governed by the *Child Welfare Act 1947* (WA). While the *Child Welfare Act* does not make legislative reference to the Aboriginal Child Placement Principle, it is embraced in departmental policy.

[p 344]

The Commission's consultations revealed that despite this departmental policy there were still significant practical issues with the placement of Aboriginal children. In particular, there were complaints that the Department of Community Development did not sufficiently understand Aboriginal family networks and did not necessarily appreciate the cultural obligations which require that a family member accept care of a child if approached, even where they may not have the financial, physical or emotional resources to care for the child. Further, it was said that laws relating to care arrangements 'involve too much paperwork and insufficient support [including financial support] for Aboriginal people'.

[p 345]

The Commission notes that placement of Aboriginal children with extended family may be the result of private family intervention and in such cases will not always have been overseen by the Department of Community Development. In those cases, carers will not necessarily be aware of support services available to them. The Commission has proposed that the Department of Community Development ensure that information is made readily available to Aboriginal communities so that all primary carers (regardless of whether the care arrangements are made by the Department or privately) are aware of the government services and benefits in place to assist them in caring for children.

[Proposal 68, p 345]

Family Court custody disputes

Family Court processes

In 2001 the Commonwealth's Family Law Pathways Advisory Group recommended various ways of expanding culturally appropriate service delivery in the family law system, including enhanced cultural awareness training for all staff; the development of an Indigenous employment strategy; the provision of interpreters; the sponsoring of local level Indigenous community networks; the development

of an Indigenous family law database and facilitation of research into Aboriginal customary law and family issues; and the development—in partnership with Indigenous communities—of narrative therapy and Indigenous family law conferencing to enhance family dispute resolution. The focus on alternative dispute resolution is particularly crucial in Western Australia where the new *Family Law Rules 2004 (WA)* compel families to participate in primary dispute resolution. In these circumstances, the lack of culturally appropriate dispute resolution services for Aboriginal clients represents a significant problem.

The Commission considers that the government can do more to meet the needs of Aboriginal clients in the Family Court of Western Australia. In this regard the Commission supports the recommendation of the Family Law Pathways Advisory Group and proposes that the Western Australian government seek federal funding in whole or in part for its immediate implementation in the Family Court of Western Australia. [Proposal 69, p 346]

Parenting disputes

The Commission found that, where parenting disputes arise and orders are sought to legally transfer parental responsibility for a child (as opposed to an informal arrangement where the care of a child may be given to a family or community member but legal parental responsibility for that child remains with the birth-parents), Aboriginal people may find themselves at a disadvantage. This is because the system does not explicitly recognise the customary practice of extended family placement; instead the Commonwealth and state family law Acts are premised upon the concept of the ‘nuclear’ family where one or both of the child’s parents have parental responsibility for the child.

The Family Law Council has recently examined this issue. It highlighted the importance of legal recognition of persons with ‘primary parental responsibility’ for a child to ascertain whether that person (rather than the biological parents) is entitled to receive applicable tax benefits or child support and to be able to give consent for medical treatment or to enrol a child in school. The Council recommended that governments (state and federal) create a special legislative procedure for recognition and registration of persons with primary parental responsibility (in particular under relevant customary law) in order to avoid the costly court processes that are currently required to obtain a parenting order.

The Commission strongly supports this recommendation; however, in the interests of maintaining equality in relation to ex-nuptial and nuptial children in Western Australia, the Commission is unwilling to propose that Western Australia unilaterally amend the *Family Court Act 1997 (WA)* to establish this procedure unless and until similar amendments are made to its Commonwealth counterpart. Nevertheless, the Commission notes that the state’s implementation of Proposal 69 (discussed above) will go some way to reducing the disadvantage faced by Aboriginal people in securing court orders for the legal transfer of parental responsibilities to members of a child’s extended family or kinship group.

[pp 347–348]

Family violence and the protection of women and children

Family violence in Western Australian Aboriginal communities

During consultations for this reference, the Commission received a great number of submissions suggesting that family violence was of considerable concern to Aboriginal communities, and particularly to Aboriginal women. Over the past two decades the escalating problem of interpersonal or family violence in Aboriginal communities has become increasingly apparent. In 2002 the Gordon Inquiry in Western Australia declared that ‘the statistics paint a frightening picture of what could only be termed an “epidemic” of family violence and child abuse in Aboriginal communities’.

[pp 349–350]

The causes of Aboriginal family violence are examined in the Commission’s Discussion Paper and include the breakdown of community kinship systems and customary law; alcohol and drug abuse; the effects of institutionalisation and previous government removal policies; and entrenched poverty. The problem of overcrowding in many Aboriginal households (discussed at length in Part II of the Discussion Paper) has been recognised as a significant contributing factor to problems of family or interpersonal violence. Overcrowded housing creates the context for such violence because, apart from the obvious stresses such living conditions invite, women and children are unable to remove themselves from contact with violent family members. The Commission is of the opinion that government strategies to prevent Aboriginal family violence may be significantly enhanced by addressing the issue of overcrowding in Aboriginal households.

[pp 350–351]

Child abuse and child sexual assault in Western Australian Aboriginal communities

The Gordon Inquiry

The Gordon Inquiry, led by Magistrate Sue Gordon, was set up by the Western Australian government in 2001 to inquire into the response by government agencies into complaints of family violence and child abuse in Aboriginal communities. The Gordon Inquiry report described an endemic situation of child abuse in Aboriginal communities and found that the responses to family violence and child abuse were inadequate and in need of urgent reform. The findings of the Gordon Inquiry have met with a very positive response from government, which has moved quickly to introduce means to implement the recommendations of the report.

[p 351]

The Commission applauds the state government’s willingness to respond to the issue of family violence and child abuse in Aboriginal communities; however, the Commission notes the observation of Neil Morgan and Joanne Motteram that there is often, in the case of Aboriginal affairs, a significant ‘gap between the promises of paper policies and what is happening on the ground’. This is both a product of substantive inequality in service provision between the Aboriginal and non-Aboriginal communities and previous government focus on policy processes

rather than policy outcomes. The Commission has proposed that evaluation of government initiatives to address family violence and child abuse in Aboriginal communities be ongoing with an emphasis on positive practical outcomes. The Commission considers it imperative that the government regularly consult with those responsible for frontline service delivery and with those receiving the benefits of such service to genuinely assess the effectiveness of programs and monitor the changing needs of communities. In addition, programs and government service delivery must be flexible and dynamic on a local level to accommodate cultural differences, to involve established local Aboriginal-run services, and to ensure that the best result is achieved for each community.

[Proposal 71, p 355]

The need for culturally appropriate responses to family violence and child abuse

Many women experiencing family violence avoid seeking assistance from authorities for fear that their children might be removed from them. This is particularly a concern amongst Aboriginal women who may view this issue in the context of past government policies supporting the removal of Aboriginal children from their families. Other factors such as fear of community reprisal or shame, the relationship and kinship obligations between the victim and the perpetrator of family violence and the complex (and sometimes alien) nature of Western legal processes to deal with family violence can also impact upon an Aboriginal woman's decision not to report family violence. These factors indicate the need for more culturally appropriate processes for responding to, intervening in and preventing family violence in Aboriginal communities.

[p 352]

The Commission's research found that the success of family violence intervention programs will often depend upon whether there is significant local Aboriginal involvement in delivery of the program. The Commission has therefore proposed that the Western Australian government actively encourage and resource the development of community-based and community-owned Aboriginal family violence intervention programs that are designed to respond to the particular conditions and cultural dynamics of the host community.

[Proposal 70, p 353]

The Commission has also commented on the cultural appropriateness of women's refuges in Western Australia and the need for the development of men's shelters so that women and children are not always forced to leave the family home to escape violence or abuse.

[p 357]

Restraining orders

During consultations for this reference the appropriateness of the restraining order regime in Western Australia was criticised in relation to its application to Aboriginal people. It was said that many Aboriginal women do not support the removal of men from the family home pursuant to a restraining order because of strong cultural and social obligations to maintain family relationships. A preference was indicated for temporary measures that would deal immediately with family violence by removal of the perpetrator from the home accompanied by ongoing programs that emphasise family healing and behavioural reform.

[p 355]

In 2004 amendments were made to the *Restraining Orders Act 1997* (WA) to address, among other things, the operational inappropriateness of the restraining order regime in Aboriginal communities. Under the new Division 3A of the Act, police may issue a 24- or 72-hour police order imposing

such restraints on the lawful activities and behaviour of a person as the officer considers appropriate to prevent a person —

- (a) committing an act of family and domestic violence; or
- (b) behaving in a manner that could reasonably be expected to cause a person to fear that such an act could be committed.

It is hoped that the powers extended to police by these amendments will assist authorities to take a more positive role in combating family violence by initiating immediate action to separate perpetrators of family violence from their victims in situations where there is evidence of family violence or a reasonably perceived threat of such violence. Because the police order regime is in its infancy the Commission has invited submissions on its effectiveness in relation to controlling family violence in Aboriginal communities. The Commission intends to review these submissions before making any proposals for reform in this area.

[Invitation to Submit 14, p 357]

Customary law is no excuse for family violence or child sexual abuse

It has been noted that Aboriginal men sometimes excuse violent domestic behaviour by reference to their role of authority under Aboriginal customary law or in their traditional culture. Recent events in the Northern Territory have also indicated that customary law may be raised in relation to offences of sexual relations with a child where the child was ‘promised’ to the offender. However, as the consultations for this reference and other studies have revealed, Aboriginal women in general do not support these claims and do not consider interpersonal violence or child abuse to be justified under customary law. In particular, the Commission heard that Aboriginal women are concerned that the next generation of young men and women may be persuaded by these claims that acts of violence against women and children are culturally sanctioned within their communities.

[pp 357–360]

It is the Commission’s position that family, interpersonal and sexual violence against women and children cannot be condoned or excused by reference to traditional cultural relationships under Aboriginal customary law. The Commission accepts that there will be circumstances where such arguments may legitimately be raised in mitigation of sentence; however, without substantive anthropological evidence and/or Aboriginal women Elders’ evidence in support of this proposition, the Commission suggests that courts should view such arguments with caution. In Parts V and IX of the Discussion Paper the Commission makes practical proposals about how courts can deal with evidence of Aboriginal customary law to ensure that there is less potential for male-dominated bias.

The need for the protection of Australian law

Despite criticism of the effectiveness and cultural appropriateness of available measures for protection against family violence, it is widely recognised by Australian governments and Aboriginal communities that Aboriginal women and children need to be able to rely upon the protection of Australian law. However, the Commission acknowledges that there may be some role for culturally sanctioned, non-violent Aboriginal customary law strategies for dealing with perpetrators of family violence and that such customary law responses could, in certain circumstances, work in tandem with prevention and protection strategies provided for under Australian law. Such customary law responses might include community 'shaming' of perpetrators of family violence or, in respect of repeat or serious offenders, banishment from the community.

It is important that any customary law responses to family violence do not deprive Aboriginal women of their ability to seek protection or initiate criminal proceedings under Australian law. However, many Aboriginal women consulted by the Commission sought alternative responses to family violence that would not see their men imprisoned (the rehabilitative value of which is, at best, tenuous). An Aboriginal customary law response at first instance, and in less serious cases of family violence, might assist in diverting Aboriginal men from the criminal justice system while allowing for increased opportunities for family and community healing. In some cases, as argued by respondents to the Commission's community consultations, it may also be more effective in addressing violent behaviour and rehabilitating offenders than measures under the criminal law. The Commission has invited submissions on this subject.

[Invitation to Submit 15, p 361]

Customary Hunting, Fishing and Gathering Rights

Under customary law, a person's entitlement to fish, hunt animals, gather vegetable foods or exploit natural resources (such as water, firewood or minerals) is consequent upon their degree of connection to 'country'. Those who possess the right to harvest resources are also vested with obligations to conserve resources and respect the land. For this reason (and others), restrictions will sometimes be placed on entitlements to harvest natural resources. These restrictions define:

- whether permission must be obtained in order to hunt or gather on certain land;
- who may harvest certain resources, in particular plants with medicinal properties or those used for making ceremonial items;
- how much of a resource (especially a non-renewable resource) may be taken;
- whether a resource may only be taken at a certain time or day or a certain time of year;
- whether hunting or gathering on certain land is forbidden;
- whether rituals are required to be performed prior to harvesting certain resources; and
- whether a person may consume certain harvested foods. [pp 365–367]

Although few Aboriginal people today would depend exclusively on hunting and gathering of natural food resources for subsistence, these activities continue to define Aboriginal peoples' fundamental connection to the land. Harvesting can also be seen as a manifestation of self-determination and importantly, in relation to the current reference, harvesting has a strong connection with the maintenance of Aboriginal customary law in contemporary society.

Recognising Aboriginal customary laws in relation to harvesting natural food resources

The call for recognition of Aboriginal customary law rights to hunt, fish and gather is clearly grounded in the status of Aboriginal people as 'first Australians'. The continuing existence of these rights has been recognised at common law as an incident of native title; although there has been little success in gaining common law recognition of hunting and fishing rights as rights distinct from any recognised title in land. Indeed the very onerous requirements for proof of a common law customary harvesting right means that very few Aboriginal people would be able to successfully rely on such rights in defence of a charge of illegal harvesting. In these circumstances it is desirable that recognition of customary law harvesting rights includes legislative recognition. [pp 369, 371–372]

In fact, Aboriginal rights to hunt, fish and forage have been recognised by statute since the early days of colonial government in Western Australia. The

Acts that deal with wildlife conservation (including hunting of animals and taking of bush flora) and the management of fish resources currently provide exemptions to Aboriginal people in regard to customary harvesting activities that might otherwise constitute an offence. The Commission has examined the nature and operation of these exemptions in considering whether there is a need for further recognition of Aboriginal customary rights in these areas.

The Commission has also considered a number of issues typically raised in relation to the legislative recognition of Aboriginal customary harvesting rights including whether foods harvested by Aboriginal people under a legislative exemption are used for subsistence or for commercial purposes and whether recognition of customary harvesting should be restricted to traditional methods. [pp 369–371] The Commission’s examination of these issues has informed its conclusions in relation to improving recognition of Aboriginal customary harvesting rights in Western Australia.

Improving recognition of Aboriginal customary harvesting rights in Western Australia

Priorities of recognition

There is no doubt that customary harvesting activities remain important to Aboriginal people and in many cases would be considered vital to the maintenance of Aboriginal culture. Further, as discussed in Part IV, there are international conventions that support the recognition of the rights of indigenous peoples to be free to enjoy their culture and practise their customs, including customary use of land and resources. Nonetheless, with encroaching threats to Australia’s biodiverse regions, the conservation of native species and habitats must now be regarded as having priority over all other interests in land, including the interests of indigenous peoples. In its 1986 report *The Recognition of Aboriginal Customary Laws*, the ALRC considered the following hierarchy of priorities as justified:

- conservation and other identifiable overriding interests (such as safety, rights of innocent passage, shelter and safety at sea);
- traditional hunting and fishing; and
- commercial and recreational hunting and fishing.

The Commission supports this hierarchy of priorities and has proposed that the recognition of Aboriginal customary laws relating to hunting, fishing and gathering be subject to the genuine interests of conservation of Western Australia’s diverse biological resources, but that they take a higher priority than commercial and recreational interests in the same resources. [Proposal 72, p 374]

The Commission considers it unlikely that Aboriginal people would object to the prioritisation of conservation in regard to land and natural resources – Aboriginal people employed (and in some cases continue to employ) traditional methods to conserve species and resources, thereby managing the continent in a sustainable way. The Commission considers that Western Australia can learn from its Aboriginal people in this regard. To that end, the Commission has also

proposed that in the application of conservation programs and decision-making in respect of conservation of land and resources in Western Australia, the government and its conservation bodies actively consult, engage with and involve Aboriginal people. [Proposal 72, p 374]

The need for clarity in the legislative recognition of customary harvesting

As mentioned earlier, Aboriginal people can rely on customary harvesting exemptions under the Acts controlling hunting, gathering and fishing in Western Australia. These exemptions (described in more detail below) are limited and may be subject to restriction by relevant authorities. During the Commission's consultations it became clear that many Aboriginal people were unaware of the nature and extent of statutory exemptions in relation to customary harvesting and that some Aboriginal people believed that they had an absolute right to hunt, fish and gather. [p 375] The Commission has proposed that relevant government authorities enhance communication of harvesting exemptions available to Aboriginal people and of any restrictions placed from time-to-time upon those exemptions. [Proposal 73, p 376]

Improving recognition – hunting and gathering

Section 23 of the *Wildlife Conservation Act 1950* (WA) permits persons of Aboriginal descent to hunt fauna and gather flora on Crown land and other land (with the occupier's consent) for the purposes of food. Currently the Act does not provide exemption for fauna, flora or natural products taken for other purposes. The Commission has proposed that the exemption be expanded to include the taking of fauna and flora (subject to conservation restrictions placed on certain species from time-to-time) for non-commercial purposes including for food, artistic, cultural, therapeutic and ceremonial purposes according to Aboriginal customary law. [Proposal 74, p 377]

Despite its clear foundation in traditional harvesting rights, Aboriginal people are not restricted to the taking of native fauna under the s 23 exemption. The Commission sees no reason why recognition of customary harvesting rights should be limited to native animals and acknowledges that Aboriginal hunters may have an important role in reducing the number of feral animals in Western Australia. The Commission has therefore proposed that the exemption (and any successor in future legislation) remain applicable to all flora and fauna, including introduced species. [Proposal 75, p 377]

The *Conservation and Land Management Act 1984* (WA) (the CALM Act) prohibits the taking of flora and fauna from nature reserves, state forests or other land designated under the CALM Act, and from marine parks without lawful authority. Currently there is nothing in the CALM Act that exempts Aboriginal people from its provisions or recognises Aboriginal interests in relation to the harvesting of natural resources on CALM Act land. The Commission has examined this issue and has proposed that the above expanded exemption also apply to CALM Act land, subject to the provisions of conservation management plans over such land. [Proposal 74, p 377]

Barter and exchange

Currently s 23 of the *Wildlife Conservation Act* permits harvesting for the purpose of providing sufficient food for family, but not for sale. 'Family' is not defined in the Act but, in the context of Aboriginal persons, should be more broadly defined than a person's immediate 'nuclear' family. It is the Commission's tentative view that the taking of fauna and flora for non-commercial purposes under the customary harvesting exemption should include taking sufficient for the purpose of satisfying kin obligations *within, but not outside, the local community*. There have, however, been suggestions that non-commercial barter or exchange *within or between Aboriginal communities* should also be permitted. The Commission has invited submissions on whether the non-commercial barter or exchange of fauna or flora harvested under the s 23 exemption should be permitted and, if so, whether any restrictions should be placed upon such exchange.

[Invitation to Submit 16, p 378]

Commercial use

The Commission believes that Aboriginal people should be encouraged to commercially exploit their traditional knowledge of the land and its natural resources by undertaking commercial harvesting of fauna and flora in their traditional lands. However, taking conservation as its priority, it is the Commission's view that any commercial harvesting of natural resources (whether for food or other purposes) by Aboriginal people must be subject to government-controlled licensing. The Commission has suggested that the state explore its current licensing regime and investigate ways that it can be improved to assist Aboriginal people to develop commercial harvesting opportunities in Western Australia. [p 378]

Improving recognition – fishing

Section 6 of the *Fish Resources Management Act 1994* (WA) exempts Aboriginal people from the need to obtain a recreational fishing licence when fishing for a non-commercial purpose and in accordance with 'continuing Aboriginal tradition'. However, Aboriginal people remain subject to the normal fishing rules and regulations regarding such things as size restrictions, bag limits, protected species, conservation areas and seasonal closure of fishing areas.

A recent report into the development of an Aboriginal fishing strategy in Western Australia found that there were a number of ways in which the recognition of Aboriginal customary fishing rights could be improved in Western Australia. These are examined in the Commission's Discussion Paper. The report made a number of recommendations which reflect the Commission's hierarchy of priorities (conservation, Aboriginal customary harvesting, recreational and commercial) and answer the Commission's concerns about limitations placed upon the s 6 exemption. The Commission has encouraged the Western Australian government to implement the recognition strategies contained in the report of the Aboriginal Fishing Strategy Working Group. [pp 378–381]

Improving recognition – access to land for customary harvesting purposes

As mentioned above, s 23 of the *Wildlife Conservation Act* permits access to unalienated Crown land and, with the permission of the occupier, to private land for the purposes of customary harvesting activities. The Commission has proposed that this access and harvesting exemption be extended to nature reserves and other land designated under the CALM Act.

Access to pastoral lease land for the purposes of customary harvesting is governed by s 104 of the *Land Administration Act 1997* (WA) which provides that Aboriginal persons may enter upon unenclosed and unimproved pastoral leasehold land to 'seek their sustenance in their accustomed manner'. A 2003 report of the Aboriginal Access and Living Areas Working Group has recommended that s 104 be amended to provide that access to land be limited to those Aboriginal people with a traditional and/or historical association with the relevant land and that, in future, all pastoral leases include conditions requiring the leaseholder to reach an access agreement with traditional owners. The Commission supports such amendment. [pp 381–382]

Use of firearms for customary harvesting

Under s 267 of the *Land Administration Act* it is an offence to discharge a firearm on Crown land without the permission of the Minister or 'reasonable excuse'. The penalty for this offence is a \$10,000 fine. Although Aboriginal people exercising their customary harvesting rights under the *Wildlife Conservation Act* are exempted from the regulations regarding methods of taking fauna (which prohibit use of firearms), they may nevertheless be subject to prosecution under s 267 if they employ firearms in their customary hunting activities on Crown land. Although the Commission is not aware of any cases coming before the courts on this matter it considers that the issue would benefit from legislative clarification. [Proposal 76, p 382]

Aboriginal Customary Law in the Courtroom: Evidence and Procedure

If Aboriginal customary law is to be recognised by the courts in Western Australia Aboriginal people must be able to attend court as witnesses and be able to explain their customary law in an effective way. Part IX of the Commission's Discussion Paper examines the issues confronting Aboriginal witnesses in two sections: evidence and procedure. The first of these sections examines the rules that govern the kind of information that a court can rely on in making its decisions and proposes amendments to the *Evidence Act 1906* (WA) to enable information about customary law to be reliably presented to the courts. The second section considers the difficulties faced by many Aboriginal people who appear as witnesses in court and suggests some practical changes to court procedure to assist them in overcoming these difficulties.

Evidence

Evidence is the term used to describe the information upon which a court bases its decision. In Western Australia the common law (or judge-made) rules of evidence and the *Evidence Act* establish who can give evidence about a particular matter and what form it may take. These rules can make it difficult for Aboriginal people to give information to courts about matters of customary law because Aboriginal customary law is not a written system of laws but is based on knowledge handed down through generations and passed on orally. [pp 385–387]

Information of this kind does not fit easily within the principal rules of evidence recognised by courts in Western Australia for a number of reasons including, the preference for written over oral records, the refusal to rely on evidence that consists of what someone else has told the witness (the hearsay rule), and the strict rules about who can give expert evidence. [pp 388–392]

The Commission has proposed that the *Evidence Act* be amended to allow for evidence about customary law to be given in such a way that it does not have to fit within these rules. Proposal 77 relaxes the rules of evidence by:

- excluding the hearsay rule in relation to statements which go to prove the existence or non-existence of Aboriginal customary law; and
- providing that a person may be qualified to give expert evidence about Aboriginal customary law based on his or her experience of that law.

[Proposal 77, p 395]

In making this proposal the Commission has been informed by the recommendations of the ALRC (in both its 1986 report *The Recognition of Aboriginal Customary Laws* and its recent *Review of the Uniform Evidence Acts*) and has also considered recent attempts by judges to provide greater recognition of evidence from cultures with a tradition of oral history. [pp 393–395]

Procedure

The best witnesses to provide evidence to the courts about Aboriginal customary law are Aboriginal people themselves. However, for many Aboriginal people, appearing in court as witnesses and telling the court about their customary law is an extremely difficult thing to do. During the Commission's consultations, Aboriginal people reported a number of problems that they faced when appearing in court and when dealing with the court system generally. The comments focused on two broad areas: the difficulties Aboriginal people experienced in understanding the court process; and the fact that the requirements of the court sometimes clashed with obligations under customary law. The Commission has given careful consideration to the various problems that fall within these two broad areas and to possible ways of resolving these issues.

Difficulty with the court process

The difficulties Aboriginal people experience in understanding (and being understood in) the court process are primarily caused by the language used in court and the manner in which Aboriginal people are required to give evidence.

[p 396]

Problems associated with language

It was repeatedly stressed in the consultations that Aboriginal people have problems understanding the language used in court. It is important to recognise that in some parts of Western Australia Aboriginal people are bilingual or multilingual. Despite this fact, there are very few Aboriginal language interpreters working in Western Australian courts. The need for interpreters has been largely unnoticed because even where English is not the first or second language of many (particularly remote) Aboriginal people, they have enough English to 'get by'. The problem is not that they do not speak English, but that they do not speak English well enough to understand the complex version spoken in courts.

In addition, recent studies have given attention to the use of Aboriginal English, a rule-governed variety of non-standard English used by both rural and urban Aboriginal people. Studies by experts such as Diana Eades and Michael Cooke have explained that speakers of Aboriginal English can have considerable trouble understanding Standard English. Moreover, the vocabulary shared by Aboriginal English and Standard English has allowed courts to misunderstand the English language competency of some Aboriginal witnesses. [pp 396–398] Importantly, the need for an interpreter is not always apparent where a witness shows some understanding of English.

The Commission has made a number of proposals directed to this issue, including the fundamental step of providing a right to an interpreter in the *Evidence Act* [Proposal 79, p 402] and the formulation of tests to assist the court in determining when a witness requires the services of an interpreter. [Proposal 80, p 403]

In his background paper to this reference—*Caught in the Middle: Indigenous interpreters and customary law*—Michael Cooke described the way in which considerations of customary law can impact upon the role of the interpreter and

made a number of suggestions to address this problem. The key change needed is for both the courts and interpreters to be aware of, and be able to deal with, problems related to customary law. To this end, the Commission has proposed that guidelines be developed for the use by the Department of Justice in dealing with Aboriginal language interpreters. [Proposal 82, p 405] The proposed guidelines would require that only trained interpreters be used and that sufficient information is provided to interpreters to enable them to determine whether they might have a conflict under customary law in a particular matter. [pp 401–405] The Commission also has invited submissions about methods of use of interpreters in court proceedings to aid in the development of protocols to assist courts, lawyers and witnesses when using the services of an interpreter. [Invitation to Submit 17, p 405]

Problems caused by advocacy techniques

The way in which witnesses are asked questions can be problematic for some Aboriginal people. The Discussion Paper examines the difficulties experienced by Aboriginal people caused by techniques used by lawyers; in particular, leading questions, questions demanding quantitative speculation and repetitious questions. [pp 398–400] Overcoming these problems is not simple: it is important that the court hears all relevant evidence, but it is undesirable to place undue restrictions on the manner in which questions are asked in court. One effective way of dealing with this issue is to depart entirely from the question-and-answer format and for the witness to tell his or her story uninterrupted by questioning: this is known as ‘evidence in narrative form’. The Commission is of the preliminary view that no reform to the law is needed to enable Aboriginal witnesses to give evidence in this way. However, as the Commission is unaware of the extent to which the courts presently allow Aboriginal witnesses to present their evidence in narrative form, it seeks submissions as to whether it is desirable for amendments to be made to the *Evidence Act* to set out guidelines for narrative evidence. [Invitation to Submit 18, p 406]

The Commission has made other suggestions designed to assist with these issues including: the development of protocols for lawyers dealing with Aboriginal witnesses [p 414], the employment of facilitators to assist Aboriginal witnesses [Proposal 89, p 415], and cultural awareness training to help judges to understand the problems faced by Aboriginal witnesses. [Proposal 90, p 416]

The impact of customary law upon witnesses’ evidence

The Commission gave consideration to the fact that for some Aboriginal witnesses their obligations under customary law have at times clashed with the requirements of the court. For example, Aboriginal customary law can affect the ability of witnesses to give evidence where:

- witnesses do not have authority to speak on the subject they are being asked about (either because they are not entitled to the knowledge, or because they cannot speak about it in the circumstances of the hearing);
- there is a speech ban or taboo in place;

- information which may be relevant to the proceedings is secret, or cannot be publicly disseminated; or
- information that may be relevant to the proceedings is restricted to one gender only.

The above list is not exhaustive but is a representative sample of the kinds of issues that can arise. [pp 407–408]

Aboriginal witnesses will face difficult decisions if their evidence is in conflict with their obligations under customary law. They can choose not to give evidence (in which case the court would fail to hear material that is relevant to the matter), or they can choose to comply with Australian law. In the latter case witnesses may breach customary law and possibly face punishment. Studies have shown that Aboriginal witnesses may also self-censor, with the result that the court is unaware that all relevant evidence has not been provided. [pp 408–409]

The problems faced by Aboriginal witnesses are difficult to resolve. To restrict evidence to people of one gender, or to make evidence secret, potentially undermines the principles of openness and public access upon which the Australian legal system is founded. For these reasons, the Commission has taken a pragmatic approach and has proposed some practical procedural steps that should assist Aboriginal witnesses without compromising the values on which the Australian legal system is based. [pp 409–410]

The Commission's proposals include:

- Extending vulnerable witness provisions to witnesses not able to give evidence in the normal way for reasons of customary law. [Proposal 83, p 410]
- Allowing evidence about customary law to be given by witnesses in groups. [Proposal 84, p 411]
- Allowing evidence about customary law to be taken 'on country'. [Proposal 85, p 411]
- Providing that a court may order that certain information not be referred to in proceedings if the court is satisfied that reference to the information would be offensive for reasons of customary law. [Proposal 87, p 413]
- Providing that a court may suppress certain information from publication on the grounds of customary law considerations. [Proposal 88, p 414]

One of the tasks foreseen for proposed facilitators [Proposal 89, p 415] would be to ensure that customary law considerations are brought to the attention of the court so that the above measures can be used if necessary. In addition, the protocols for lawyers [p 414] and cultural awareness training for judges [Proposal 90, p 416] would include explanation of the issues that can be created by customary law for Aboriginal witnesses and ways of dealing with them.

Aboriginal Community Governance in Western Australia

It is recognised that the effects of colonisation have largely undermined the traditional Aboriginal power structures and relationships that give customary law its vitality, legitimacy and authority. The Commission's consultations revealed that many Aboriginal people see reclaiming traditional values through recognition of customary law as an important way to address these deficits. However, it is arguable that the Commission's proposals for the recognition of Aboriginal customary law and the accommodation of cultural beliefs (set out earlier) will be meaningless if more is not done to advance the broader objective of empowering Aboriginal communities to reclaim control over their own destinies. The Commission has therefore examined the existing status of Aboriginal community governance in Western Australia and looked at what is being done (and what more can be done) to maximise opportunities for greater Aboriginal participation in decision-making, and to encourage more effective and appropriate community governance processes.

Indigenous self-determination in the Western Australian context

Self-determination is considered a fundamental human right at international law and is recognised in a number of international instruments. Although these instruments do not identify the forms that self-determination may take, there is nothing to suggest that self-determination includes the right to secede from the nation state or claim sovereignty over territory. Aboriginal organisations in Australia have historically indicated that they do not seek to push a separatist agenda, but rather seek to renegotiate their relationship with governments and their political status within the nation.

These sentiments were confirmed by Aboriginal people during the Commission's community consultations where, although the concept of self-determination was raised, at no stage was a desire for a separate state or political system expressed. In fact the opposite was the case, with most communities indicating a strong desire to cooperate, and work in partnership, with government. Within the Commission's Terms of Reference it is noted that the aspirations of Aboriginal people in Western Australia are focused on, but not confined to, the pursuit of self-determination in relation to economic, social and cultural development. For Western Australia to effectively engage with Aboriginal people in pursuing these aspirations it is necessary to consider ways of giving Aboriginal people greater control over, and substantive power within, the decision-making processes that affect their lives.

Aboriginal governance in Western Australia

Community governance

The *Aboriginal Communities Act 1979* (WA) defines the current system of Aboriginal community governance in Western Australia. Although the preamble to the Act is expressed in broad terms that might support the Act's extension to wider governance matters, in practice the Act has only ever been used as a tool for addressing criminal justice issues. Problems with the current community by-laws scheme under the Act are canvassed in detail in Part V of the Discussion Paper, but in summary there have been significant issues with:

- the enforcement of by-laws by police and wardens;
- the capacity for breach of by-laws to contribute to the over-representation of Aboriginal people in the mainstream criminal justice system;
- the fact that by-laws have been established by communities (and approved by the Governor) that go beyond the delegated law-making powers contained in the enabling Act;
- that the by-law scheme creates an additional layer of law applicable only to Aboriginal communities;
- that community councils empowered under the Act are not always representative and are in some instances dysfunctional; and
- that by-laws are not always, as the Act envisaged, established in consultation with the community and are not necessarily reflective of traditional authority structures or customary law. [pp 430–431]

The Commission has proposed that the *Aboriginal Communities Act* be repealed and replaced with a new Act – the 'Aboriginal Communities and Community Justice Groups Act'. [Proposal 11, p 120] The Commission considers that this new Act may be a suitable vehicle for reform of Aboriginal community governance.

Regional governance

The abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC) in March 2005 has created a new imperative for Aboriginal governance at all levels. Under the new Commonwealth arrangements for Aboriginal affairs the Australian government has introduced a new 'whole-of-government' approach to delivering services to Aboriginal people. Part of this new approach involves the establishment of multi-agency Indigenous Coordinating Centres in former ATSIC regions to oversee partnership agreements between communities and the Commonwealth government and to integrate services provided by all levels of government to Aboriginal communities. Key to the ultimate success of the new arrangements is the establishment of a network of regional representative organisations 'to ensure that local needs and priorities are understood'. [p 433]

In Western Australia the west Kimberley's Kullarri Regional Indigenous Body (KRIB) is one of the first regional representative structures established since ATSIC's demise. The Commission has examined the KRIB model and considers

it an exemplar because it is a 'self-identifying' and 'self-organising' structure that has emerged from within the community itself. The Commission believes that regional governance models of this nature will have a significant role to play in ensuring the accountability of government for service provision to Aboriginal communities.

Reform of Aboriginal community governance in Western Australia

There is no doubt that a pressing need exists for Aboriginal community governance reform in Western Australia. The impetus for such reform primarily arises from the state of entrenched Indigenous disadvantage discussed in Part II of the Discussion Paper and the law and order issues discussed at length in Part V. In considering the possibilities for reform of Aboriginal community governance in Western Australia, the Commission was mindful of the need to address the problems identified (and examined in some detail) in its Discussion Paper; in particular:

- inequality of government service provision to Aboriginal communities (as compared to non-Aboriginal communities in similar geographic regions);
- lack of Aboriginal participation in community governance and the need to build the governing capacity of Aboriginal communities;
- lack of community economic base and consequent lack of employment;
- over-reliance on non-Aboriginal staff in community governing organisations and problems with recruitment and retention of these staff;
- intra-community (family) feuding;
- community dysfunction and law and order issues;
- breakdown of cultural authority of Elders caused by, amongst other things, the emergence of alternative authority structures imposed by the current scheme of community governance in Western Australia; and
- inappropriate or externally imposed governing structures.

The Commission has acknowledged the potential of newly emerging regional Aboriginal governing structures to address many of these issues; however, there is still a need for effective governance at the community level. Indeed, the effectiveness of regional bodies will ultimately rely upon the 'health' and capacity of their constituent communities and their ability to interact with the relevant regional body. [pp 422–435]

Funding for autonomy

The Commission has considered the funding options available to Aboriginal local governing bodies under the *Local Government Assistance Act 1995* (Cth). Broadly these include establishment as a separate local governing body under state law (the Ngaanyatjarraku Shire Council in the Gibson Desert (Warburton) region is an example), and bodies 'declared' by the state to be local governing bodies.

[pp 431–432] The latter option has been used by other jurisdictions, notably the Northern Territory, to secure discrete federal funding for Aboriginal communities without the stringent reporting and service provision responsibilities required of local governments under state law.

The Commission has noted that to date there has been no attempt in Western Australia to exploit federal funding options for discrete Aboriginal communities as ‘declared’ local governing bodies. The Commission believes that this option may offer Aboriginal communities (in particular communities that are not being adequately provided for by current local governments) the opportunity to fund or negotiate their own service provision in a broadly autonomous environment. In some cases, such funding may offer Aboriginal communities the prospect of enhancing their economic base by bringing employment to the community and its members. Of course, it must be acknowledged that such an option could only work in the most functional communities and will require significant initial support by government and preparatory programs to build local governing capacity. Nonetheless, it is an option that the Commission considers should be further explored in Western Australia. [Proposal 92, p 436]

Currently local governments receive state and federal funding according to a formula that specifically recognises Aboriginal population, remoteness and disadvantage factors. However, because this funding is ‘untied’ (that is, the funding authority cannot dictate the way in which the money is spent), there is no direct accountability of local governments to ensure that Aboriginal-specific funding reaches Aboriginal communities. The Commission has therefore proposed that, where local governments continue to be responsible for service provision in Western Australian Aboriginal communities, the Western Australian government should investigate ways of improving the accountability of local governments for funding provided for the benefit of Aboriginal people in the local government area. [Proposal 91, p 423]

Some guiding principles for Aboriginal community governance reform

From its examination of the issues (see Part X of the Discussion Paper), the Commission has identified six guiding principles to be applied by government in furthering the object of governance reform in Aboriginal communities.

- 1. Voluntariness:** The process of establishing a new governance structure must be voluntarily undertaken by each Aboriginal community. Where significant underlying issues of feuding and consequent dysfunction exist in a community, governance structures formed as a result of external pressure will inevitably fail. In these cases the process of healing and building communities must be given priority.
- 2. Empowerment of communities by building capacity and devolving decision-making power:** A significant problem with past approaches to facilitating community governance and government service delivery is that the communities themselves have generally not been involved in identifying and implementing local solutions and do not have the freedom to spend money in ways that will benefit them. Aboriginal communities have come to consider

themselves, and be considered by governments, as passive recipients of government programs. As a consequence the ability of Aboriginal people to make decisions affecting their own community has been considerably eroded. In order that communities are genuinely empowered, capacity building for good governance must be focused not only on leaders and organisations, but also on the community.

3. **'Downwards accountability' and flexible funding:** Regardless of past attempts to deliver tailored service provision to Aboriginal communities one thing has remained constant: services have been delivered almost exclusively by white bureaucracy with policy goals and implementation strategies set by government. Even representative structures such as ATSIC, which put Indigenous people into key decision-making roles, were required to account to government through institutions and practices that reflected values and beliefs of mainstream 'white' Australia. This has resulted in 'upwards accountability' to government in the expenditure of funding for service provision and an emphasis on process. The Commission notes that a significant amount of any funding received to deliver services may be spent on complying with government accounting practices and audit requirements. In contrast, 'downwards accountability' involves accounting to the community for the expenditure of government money allocated for their benefit and emphasises outcomes for the people receiving the services.
4. **Recognition of diversity and the need for flexibility:** Just as Aboriginal communities are different, the method or structure of governance that works for each community will vary. A mistake that governments have made in the past in attempting to bring 'self-government' to Aboriginal communities is to impose a single inflexible governing structure upon all communities, regardless of capacity, community conflict, community aspirations, cultural considerations or geographic location. A diversity of models that are flexible enough to be responsive to local community needs and ways of self-organisation or decision-making must be offered to Aboriginal communities seeking to reform their governing structures. Preferably, the type of governing structure ultimately chosen will self-emerge and may be unique to that community.
5. **Need for true community representation:** Perhaps partly as a result of the colonial practice of moving disparate Aboriginal groups into reserves or designated areas, some Aboriginal communities are debilitated by feuding and this has adversely affected their governing institutions. In order to guard against factionalisation of governing institutions, it is the Commission's opinion that representation of all clan or family groups and a balance of gender representation should be considered as the starting point for new governing structures. The Commission also considers that traditional owner groups should be represented on community governing councils.
6. **Recognition that this process will take time:** No matter what type of governing structure is ultimately determined for a community, the self-government experiment will fail if the community has chronic social problems that remain unaddressed. Issues such as family feuding, alcohol and solvent abuse, family violence and general dysfunction must be independently addressed as

part of the capacity building process before true community governance can succeed. Both the government and Aboriginal people must therefore recognise that the process of delivering greater governing autonomy to Aboriginal communities will, in some cases, take a significant amount of time.

[pp 436–437]

A basic framework for reform

The Commission is impressed by the self-identifying and self-organising governance structures emerging at the regional level and considers that the starting point for reform of community governance in Western Australia should be limited to a basic framework that can facilitate this approach at a community level. Although the guiding principles set out above should inform the process of reform, it is the Commission's opinion that the most important rule to observe in community governance reform is that the model of governance be developed *by* the community, rather than be imposed *on* the community.

As noted earlier, the Commission has proposed in Part V of the Discussion Paper that the *Aboriginal Communities Act 1979* (WA), which provides the current community governance structure, be abolished and that a new statute (the 'Aboriginal Communities and Community Justice Groups Act') be enacted to enable the establishment of Aboriginal community justice groups. The Commission believes that these representative, gender-balanced groups will answer many of the law and order issues in communities and assist in healing community dysfunction, and enhancing cultural authority and governing capacity. Importantly, the groups allow discrete communities to establish their own community rules and sanctions and enhance the opportunity for recognition of Aboriginal customary law. The groups will also have a broader role to play in informing courts and justice bodies and in diverting Aboriginal people away from the criminal justice system.

[pp 437–438]

The Commission believes that the proposed 'Aboriginal Communities and Community Justice Groups Act' may also be a suitable vehicle for establishing the basic framework for reform and recognition of community governance in Western Australia. However, after considering the available research, governance studies and legislative review presently underway the Commission has decided that it should not prescribe a governance structure but should confine itself to proposing a basic framework for reform based on the facilitation of self-identifying and self-organising governance structures informed by the guiding principles set out above.

[Proposal 93, p 438]

Summary of Proposals

Aboriginal peoples in Western Australia

Proposal 1

[p 43]

That the Western Australian government adopt a genuine whole-of-government approach to the delivery of services to Aboriginal people in Western Australia requiring the constructive communication between agencies at the state, regional and local levels and the consideration of cooperative multi-agency joint-funded programs to achieve real outcomes that effectively address the current state of Indigenous disadvantage in Western Australia.

Proposal 2

[p 44]

That employees of Western Australian government agencies who work directly, or have regular dealings, with Aboriginal people be required to undertake cultural awareness training. Such training should include presentations by Aboriginal people and be delivered at the regional level to allow programs to be appropriately adapted to take account of regional cultural differences and customs and concerns of local Aboriginal communities.

That consideration be given to agency-arranged cultural awareness training being a condition of the contract where contractors or sub-contractors to any Western Australian government agency are required to work directly, or have regular dealings, with Aboriginal people.

Recognition of Aboriginal customary law

Proposal 3

[p 49]

That s 5 of the *Interpretation Act 1984* (WA) be amended to include the following standard definitions of 'Aboriginal person' and 'Torres Strait Islander person' for all written laws of Western Australia:

5. Definitions applicable to written laws

'Aboriginal person' means any person who is wholly or partly descended from the original inhabitants of Australia.

In determining whether a person is an Aboriginal person the following factors are of probative value:

- (a) genealogical evidence;
- (b) evidence of genetic descent from a person who is an Aboriginal person;
- (c) evidence that the person self-identifies as an Aboriginal person; or
- (d) evidence that the person is accepted as an Aboriginal person in the community in which he or she lives.

'Torres Strait Islander person' means any person who is wholly or partly descended from the original inhabitants of the Torres Strait Islands.

In determining whether a person is a Torres Strait Islander person the following factors are of probative value:

- (a) genealogical evidence;
- (b) evidence of genetic descent from a person who is a Torres Strait Islander person;
- (c) evidence that the person self-identifies as a Torres Strait Islander person; or
- (d) evidence that the person is accepted as a Torres Strait Islander person in the community in which he or she lives.

For the purposes of Western Australian written laws the term 'Aboriginal person' is taken to include a Torres Strait Islander person.

Proposal 4 [p 60]

That, at the earliest opportunity, the Western Australian government introduce into Parliament a Bill to amend the Constitution to effect, in s 1, the recognition of the unique status of Aboriginal peoples as the descendants of the original inhabitants of Western Australia. The provision should also acknowledge Aboriginal peoples as the original custodians of the land, acknowledge their continuing spiritual, social, cultural and economic relationship with lands and waters in Western Australia, and acknowledge the special contribution that Aboriginal peoples have made to Western Australia.

The Commission commends the provisions of s 1A of the *Victorian Constitution Act 1975* as precedent for the drafting of a similar provision for Western Australia's Constitution.

Aboriginal customary law in the international law context

Proposal 5 [p 76]

Recognition of Aboriginal customary laws and practices in Western Australia must be consistent with international human rights standards and should be determined on a case-by-case basis.

Aboriginal customary law and the criminal justice system

Proposal 6 [p 101]

That the mandatory sentencing laws for home burglary in Western Australia be repealed.

Proposal 7 [p 103]

That the Western Australian government provide adequate resources for the development of cultural awareness training programs for legal practitioners.

Proposal 8 [p 104]

That employees of the Department of Justice who work directly with Aboriginal people (such as community corrections officers, prison officers and court staff) be required to undertake cultural awareness training.

That cultural awareness training be made available to volunteer workers.

That cultural awareness training be specific to local Aboriginal communities and include programs presented by Aboriginal people.

Proposal 9

[p 106]

That the relevant criteria for an application for an extraordinary drivers licence as set out in s 76 of the *Road Traffic Act 1976* (WA) be amended to include:

- That where there are no other feasible transport options, Aboriginal customary law obligations be taken into account when determining the degree of hardship and inconvenience which would otherwise result to the applicant, the applicant's family or a member of the applicant's community.
- In making its decision whether to grant an extraordinary drivers licence the court should be required to consider the cultural obligations under Aboriginal customary law to attend funerals and the need to assist others to travel to and from a court as required by a bail undertaking or other order of the court.

Proposal 10

[p 106]

That the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) be amended to provide that an Aboriginal person may apply to the registrar of the Fines Enforcement Registry for the cancellation of a licence suspension order on the additional grounds that it would deprive the person or a member of his or her Aboriginal community of the means of obtaining urgent medical attention, travelling to a funeral or travelling to court.

Proposal 11

[p 120]

That the *Aboriginal Communities Act 1979* (WA) be repealed. As an alternative, Aboriginal communities should be empowered to establish community justice groups and decide their own community rules and sanctions. For this purpose the Commission has proposed the 'Aboriginal Communities and Community Justice Groups Act' – see Proposal 18.

Proposal 12

[p 121]

That the definition of public place in s 1 of the *Criminal Code* (WA) be amended to include a discrete Aboriginal community declared under the proposed 'Aboriginal Communities and Community Justice Groups Act' other than an area of that community which is used for private residential purposes.

Proposal 13

[p 122]

That s 73 of the *Road Traffic Act 1974* (WA) be amended to bring lands of an Aboriginal community declared under the proposed 'Aboriginal Communities and Community Justice Groups Act' within the definition of 'driving'.

Proposal 14

[p 123]

That the proposed 'Aboriginal Communities and Community Justice Groups Act' include a provision relating to the prohibition and restriction of people on community

lands. This provision should state that the community council of a discrete community which has been declared under the Act has the right, subject to the laws of Australia, to refuse the entry of any person into their community and, if permission for entry is granted, to determine on what conditions the person may remain on the community. It is an offence, without lawful excuse, to fail to comply with the conditions or enter without permission. This offence has the same penalty as the offence of trespass under the *Criminal Code* (WA).

Further, that a specific provision in relation to community members provide that the community council can, by giving reasonable notice, ask a member of the community to leave the community or part of the community for a specified period of time. Failure to leave the community, or returning to the community during the specified period, without lawful excuse constitutes an offence of trespass. Where a community has established a community justice group the community council can only ask a member of the community to leave if it has been recommended by the community justice group.

That these provisions expressly state that a member of the police force can remove a person who has not complied, within a reasonable time, with the request of the community council to leave the community.

Proposal 15

[p 124]

That the definition of 'public place' in the *Protective Custody Act 2000* (WA) be amended to include discrete Aboriginal communities which have been declared under the proposed 'Aboriginal Communities and Community Justice Groups Act'.

That the Commissioner of Police seeks nominations from Aboriginal community councils for the appointment of persons as community officers under s 27 of the *Protective Custody Act 2000* (WA).

Proposal 16

[p 126]

That the Director-General of the Department of Indigenous Affairs be given the power to apply to the liquor licensing authority for regulations in relation to the restriction or prohibition of alcohol on behalf of a discrete Aboriginal community which has been declared under the proposed 'Aboriginal Communities and Community Justice Groups Act'. An application should only be made after it has been established that the majority of the community members support the application. The regulations should provide that breaching the restrictions or prohibition imposed is an offence.

Proposal 17

[p 127]

That the *Liquor Licensing Act 1988* (WA) be amended to provide that it is an offence to sell or supply liquor to a person in circumstances where the person selling or supplying the liquor knows, or where it is reasonable to suspect, that the liquor will be taken into an Aboriginal community which has prohibited the consumption of liquor under the *Liquor Licensing Regulations 1989* (WA).

That legislation, the 'Aboriginal Communities and Community Justice Groups Act' be enacted to provide for the establishment of Aboriginal community justice groups upon the application, approved by the Minister for Indigenous Affairs, of an Aboriginal community.

That the Minister must approve a community justice group if satisfied that the membership of the community justice group is representative of all relevant family, social or skin groups in the community (to be defined in the Act); that there is provision for the equal representation of men and women; and that a majority of the members of the community support the establishment of a community justice group.

That the proposed 'Aboriginal Communities and Community Justice Groups Act' distinguish between the two types of Aboriginal communities which are covered by the legislation:

- Discrete Aboriginal communities which have been declared by the Minister for Indigenous Affairs to be a community to which the legislation applies.
- All other Aboriginal (non-discrete) communities.

That the Minister for Indigenous Affairs is to declare that an Aboriginal community is a discrete Aboriginal community to which the Act applies, if satisfied, that there are structures or provisions which require that the proposed community justice group consult with the members of the community in relation to the nature of the community rules and community sanctions.

That those communities that are currently declared to be a community to which the *Aboriginal Communities Act 1979* (WA) applies be deemed to be an Aboriginal community to which the proposed 'Aboriginal Communities and Community Justice Groups Act' applies.

That the proposed 'Aboriginal Communities and Community Justice Groups Act' include a definition of what constitutes community lands. For communities with a crown reserve lease or pastoral lease the definition should state that the community lands are the entire area covered by the reserve or pastoral lease. For other communities the Minister is to declare the boundaries of the community lands in consultation with the community.

That the proposed 'Aboriginal Communities and Community Justice Groups Act' provide that the functions of a community justice group in a discrete Aboriginal community include setting community rules and community sanctions subject to the laws of Australia. For all community justice groups the functions would include the establishment of local justice strategies and crime prevention programs; the provision of diversionary options for offenders; the supervision of offenders subject to community-based orders, bail or parole; and the provision of information to courts.

That the legislation include an indemnity provision for members of a community justice group to the effect that such members are relieved of civil liability for any act or omission in the performance of their functions within the criminal justice system.

That an Aboriginal Justice Advisory Council be established to oversee the consultation process with Aboriginal communities and to provide advice and support to communities who wish to establish a community justice group. The membership of the Aboriginal Justice Advisory Council should be predominantly Aboriginal people from both regional and metropolitan areas as well as representatives from relevant government departments including the Department of Indigenous Affairs, the Department of Justice and the Department for Community Development. This council is to be established within a framework that provides that its role is to advise and support Aboriginal communities and that government representatives are involved to provide support based upon their particular expertise.

Proposal 19

[p 157]

That the Western Australian government establish as a matter of priority pilot Aboriginal Courts for adults and children in the metropolitan area and, subject to the views of the relevant Aboriginal communities, in other locations across the state. This pilot project must ensure adequate consultation with Aboriginal communities and other stakeholders and be sufficiently resourced and supported by government departments.

Proposal 20

[p 175]

That relevant Western Australian government departments provide culturally appropriate information about changes to the criminal law that may significantly affect Aboriginal people. For the purposes of improving the communication of specific laws to Aboriginal people, government departments should consider engaging Aboriginal organisations and groups to assist with the design and delivery of any legal education program.

Proposal 21

[p 183]

That s 31(4) of the *Criminal Code* (WA) be amended to remove the requirement that there must be a threat of *immediate death or grievous bodily harm*.

That s 31(4) be amended to provide that the threat may be directed towards the accused or to some other person.

That the defence be based on the defence in Australian Capital Territory and the Commonwealth.

Proposal 22

[p 189]

That the Western Australian government continue to introduce strategies to educate Aboriginal communities about effective methods of discipline and inform Aboriginal communities of their right under Australian law to use physical correction that is reasonable in the circumstances. In doing this the focus should be on providing advice about the most effective methods of discipline. Aboriginal communities, in particular Elders and other respected members, including members of a community justice group, should be involved in the design and delivery of these education programs.

Proposal 23

[p 193]

That Clause 1 of Part D to the Schedule of the *Bail Act 1982* (WA) be amended to include, as a possible condition of bail,

- (f) that before the release of the accused on bail a responsible person undertakes in writing in the prescribed form to ensure that the accused complies with any requirement of his bail undertaking. The authorised officer or judicial officer must be satisfied that the proposed responsible person is suitable.

Proposal 24

[p 193]

That the *Bail Act 1982* (WA) be amended to provide that when setting the amount of a surety undertaking the financial means of any proposed surety should be taken into account.

Proposal 25

[p 194]

That the *Bail Act 1982* (WA) be amended to provide that where an adult or juvenile accused has been refused bail or is unable to meet the conditions of bail that have been set by an authorised police officer, justice of the peace or authorised community services officer, the accused is entitled to apply to a magistrate for bail by telephone application if he or she could not otherwise be brought before a court by 4.00 pm the following day.

Proposal 26

[p 195]

That the Department of Justice continue to develop, in partnership with Aboriginal communities, non-custodial bail facilities for Aboriginal children in remote and rural locations. In developing these facilities the Department of Justice should work in conjunction with any local community justice group.

Proposal 27

[p 197]

That Clause 3 of Part C in Schedule 1 of the *Bail Act 1982* (WA) be amended to provide that the judicial officer or authorised officer shall have regard to:

- (e) Where the accused is an Aboriginal person, any cultural or Aboriginal customary law issues that are relevant to bail.

Without limiting the manner by which information about cultural or Aboriginal customary law issues can be received by an authorised officer or judicial officer, the authorised officer or judicial officer shall take into account any submissions received from a representative of a community justice group from the accused's community.

Proposal 28

[p 198]

That bail forms and notices (including the bail renewal notice handed to an accused after each court appearance) be amended to include culturally appropriate educational material in relation to the obligations of bail including what an accused person can do if he or she is unable to attend court for a legitimate reason.

Proposal 29

[p 208]

That the *Sentencing Act 1995* (WA) include as a relevant sentencing factor the cultural background of the offender.

Proposal 30

[p 212]

That the *Sentencing Act 1995 (WA)* and the *Young Offenders Act 1994 (WA)* be amended by including a provision that:

When considering whether a term of imprisonment is appropriate the court is to have regard to the particular circumstances of Aboriginal people.

Proposal 31

[p 220]

That the *Sentencing Act 1995 (WA)* and the *Young Offenders Act 1994 (WA)* be amended to provide that when sentencing an Aboriginal offender a sentencing court must consider:

- any aspect of Aboriginal customary law that is relevant to the offence;
- whether the offender has been or will be dealt with under Aboriginal customary law; and
- the views of the Aboriginal community of the offender and the victim in relation to the offence or the appropriate sentence.

Proposal 32

[p 224]

That the *Sentencing Act 1995 (WA)* and the *Young Offenders Act 1994 (WA)* should be amended by inserting the following provision:

That when sentencing an Aboriginal person the court must have regard to any submissions made by a representative of a community justice group or by an Elder or respected member of the Aboriginal community of the offender or the victim.

Submissions for the purpose of this section may be made orally or in writing on the application of the accused, the prosecution or a community justice group. The court sentencing the offender must allow the other party a reasonable opportunity to respond to the submissions if requested.

Proposal 33

[p 227]

That s 16 of the *Sentencing Act 1995 (WA)* be amended to provide that:

The sentencing of an offender must not be adjourned for more than 12 months after the offender is convicted.

Proposal 34

[p 232]

That the *Criminal Procedure Act 2004 (WA)* be amended by inserting s 104A as follows:

- (1) A court may order, upon an application by the accused or the prosecution, that the jury be comprised of one gender.
- (2) The court may only make an order under s 104A (1) if satisfied that evidence that is gender-restricted under Aboriginal customary law is relevant to the determination of the case and necessary in the interests of justice.

Proposal 35

[p 234]

That s 129 of the *Criminal Procedure Act 2004 (WA)* be amended by providing that for all accused persons:

The court must not accept a plea of guilty unless, having considered whether there are any language, cultural or communication difficulties, the court is satisfied that the accused understands the nature of the plea and its consequences.

Proposal 36

[p 239]

That the Western Australia Police Service *COPs Manual* OP-28 be amended to require relevant Aboriginal customary law issues to be taken into account in the decision to charge or prosecute an offender.

That the Director of Public Prosecutions consider amending the *Statement of Prosecution Policy and Guidelines 2005* to include that any relevant Aboriginal customary law issues should be taken into account in the decision to prosecute an offender.

Proposal 37

[p 241]

That Part 5, Division 1 of the *Young Offenders Act 1994* (WA) be amended to provide that police officers must consider, in relation to an Aboriginal young person, whether it would be more appropriate for the caution to be administered by a respected member of the young person's community or a member of a community justice group.

Proposal 38

[p 241]

That the *Young Offenders Act 1994* (WA) be amended to provide that any previous cautions issued under this Act cannot be used in court against the young person.

Proposal 39

[p 242]

That Part 5, Division 2 of the *Young Offenders Act 1994* (WA) be amended to provide that, subject to the young person's consent and acceptance of responsibility for the offence, a police officer must refer a young person to a juvenile justice team for a non-scheduled offence if the young person has not previously offended against the law, unless there are exceptional circumstances that justify not doing so.

In determining whether a young person has previously offended against the law, previous cautions cannot be taken into account.

Proposal 40

[p 242]

That the categories of offences listed in Schedule 1 and Schedule 2 of the *Young Offenders Act 1994* (WA) be immediately reviewed to enhance the availability of diversion to the juvenile justice teams for offences committed in circumstances considered less serious.

Proposal 41

[p 242]

That the *Young Offenders Act 1994* (WA) be amended to provide that any previous referrals by the police to a juvenile justice team cannot be used in court against the young person unless it is necessary to determine whether the young person should again be referred to a juvenile justice team.

Proposal 42

[p 243]

That the *Young Offenders Act 1994* (WA) include the relevant criteria (as set out in the *COPs Manual*) for the decision whether to arrest a young person or alternatively to issue a notice to attend court.

Proposal 43

[p 244]

That a diversionary scheme for young Aboriginal people be established to involve the referral by the police of young offenders to community justice groups. Initially, this scheme should be introduced via pilot programs in at least one metropolitan and one remote or regional location. After a suitable period the effectiveness of the scheme should be evaluated and the need for any legislative or policy changes should be considered. The scheme should ensure that:

- Aboriginal community justice groups are adequately resourced to institute diversionary programs.
- The scheme is flexible enough to allow different communities to develop their own processes and procedures.
- As an overriding safeguard the alleged offender must consent to being referred by the police to the community justice group.
- If the young person does not consent, if the community justice group does not agree to deal with the matter, or if the community justice group is not satisfied with the outcome, the matter can be referred back to police to be dealt with in the normal manner.
- A previous referral to a community justice group does not count as a conviction against the young person and is not to be referred to in a court unless, and only for the purpose of, considering whether the young person should again be referred to a community justice group.

Proposal 44

[p 249]

That the Western Australia Police Service and relevant Aboriginal interpreter services develop a set of protocols for the purpose of considering whether an Aboriginal person requires an interpreter during an interview.

Proposal 45

[p 250]

That the following rights be protected in legislation so as to render inadmissible any confessional evidence obtained contrary to them save in exceptional circumstances:

- That an interviewing police officer must caution a suspect and must not question the suspect until satisfied that the suspect understands the caution. In order to be satisfied that the suspect understands the caution the interviewing officer must ask the suspect to explain the caution in his or her own words.
- If the suspect does not speak English with reasonable fluency the officer shall ensure that the caution is given or translated in a language that the suspect does speak with reasonable fluency and that an interpreter is available before any interview commences.

- That before commencing an interview the interviewing police officer must advise the suspect that he or she has the right to contact a lawyer and provide a reasonable opportunity for the suspect to communicate (in private) with a lawyer.
- In the case of a suspect who is an Aboriginal person the police must notify the Aboriginal Legal Service prior to the interview commencing and advise that the suspect is about to be interviewed in relation to an offence and provide an opportunity for a representative of the Aboriginal Legal Service to communicate with the suspect. The interviewing officer does not have to comply with this requirement if the suspect has already indicated that he or she is legally represented by another lawyer or if the suspect states that he or she does not want the Aboriginal Legal Service to be notified.
- If the suspect does not wish for a representative of the Aboriginal Legal Service to attend or there is no representative available the interviewing officer must allow a reasonable opportunity for an interview friend to attend prior to commencing the interview. The interviewing officer does not have to comply with this requirement if it has been expressly waived by the suspect.
- That appropriate exceptions be included, such as an interviewing officer is not required to delay the questioning in order to comply with this provision if to do so would potentially jeopardise the safety of any person.

Proposal 46

[p 253]

That the Western Australian government provide adequate resources to ensure that every police officer who is stationed at a police station that services an Aboriginal community participates in relevant Aboriginal cultural awareness training.

This cultural awareness training should be presented by local Aboriginal people including, if appropriate, members of a community justice group.

Proposal 47

[p 258]

That the Department of Justice, in conjunction with Aboriginal communities, develop culturally appropriate policy and procedure manuals for all prisons to assist prisoners and prison officers with applications for attendance at funerals.

In drafting these manuals consideration be given to the potential role for community justice groups in assisting prisoners with the application process. Community justice group members could provide advice to prison authorities about the significance of the prisoner's relationship with the deceased and the importance of the prisoner's attendance at the funeral for the community.

Proposal 48

[p 259]

That the Department of Justice immediately revise Policy Directive 9 and Juvenile Custodial Rule 802 in relation to attendance at funerals. The eligibility criteria should include recognition of Aboriginal kinship and other important cultural relationships.

Proposal 49

[p 260]

That the Department of Justice should review and revise its current policy in relation to the use of physical restraints on prisoners and detainees during funeral attendances. The revised policy should recognise the importance of Aboriginal prisoners attending funerals in a dignified and respectful manner. Physical restraints should only be used as a last resort and, if required, they should be as unobtrusive as possible.

Proposal 50

[p 260]

That the Department of Justice revise, in conjunction with Aboriginal communities, its policy concerning the escorting of Aboriginal prisoners and detainees to funerals.

Proposal 51

[p 261]

That the *Sentence Administration Act 2003* (WA) and the *Young Offenders Act 1994* (WA) be amended to provide that the Parole Board and the Supervised Release Board can request to be provided with information or reports from a respected Elder in the offender's community or a member of a community justice group.

Aboriginal customary law and the civil law system

Proposal 52

[pp 291–92]

That the present definition of 'person of Aboriginal descent' contained in s 33 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) be deleted.

That the requirement in s 35(1) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) that all property of an intestate Aboriginal deceased be automatically vested in the Public Trustee be removed so that the family or next of kin of such deceased may have the choice to administer the estate of the deceased by grant of formal letters of administration under the *Administration Act 1903* (WA).

That s 25 of the *Administration Act 1903* (WA) be amended to state that in the case of intestate Aboriginal estates, the Supreme Court need not know who is entitled in distribution to them, nor whether they wish to apply for a grant of letters of administration themselves.

That traditional Aboriginal marriage be recognised as a marriage and that children of a traditional Aboriginal marriage be recognised as issue of a marriage for the purposes of the *Administration Act 1903* (WA).

That s 35(2) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) be repealed and replaced with a provision directing that distribution of an estate of an intestate Aboriginal person shall follow the order of distribution contained in s 14 of the *Administration Act 1903* (WA); however, where a person or persons of entitlement cannot be ascertained under s 14, a person or persons who enjoy a classificatory kin relationship under the deceased's customary law may apply to succeed to the estate.

That a new s 35(2A) be inserted into the *Aboriginal Affairs Planning Authority Act 1972* (WA) directing that proof of entitlement to an intestate Aboriginal estate as classificatory kin under s 35(2) of that Act shall be determined upon application to the Supreme Court and that such application may be made after one year of the date of death of the deceased.

That s 35(3) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) dealing with moral claims be retained in its current form and that the regulations associated with moral claims (sub-regs 9(5) and (6) of the *Aboriginal Affairs Planning Authority Act Regulations*) also be retained.

That sub-regs 9(1)–(4) of the *Aboriginal Affairs Planning Authority Act Regulations 1972* (WA) be repealed.

Proposal 53

[p 293]

That the prescribed amount declared by proclamation pursuant to s 139(1) of the *Administration Act 1903* (WA) be reviewed and updated to an amount appropriate at the date of proclamation.

Proposal 54

[p 294]

That the Department of Indigenous Affairs and the Public Trustee be jointly funded to establish a program aimed at educating Aboriginal people about the value of wills and also about their entitlements, rights and responsibilities under Western Australian laws of succession.

Proposal 55

[p 295]

That the list of persons entitled to claim against a testate or intestate estate of an Aboriginal person under s 7 of the *Inheritance (Family and Dependants Provision) Act 1972* (WA) be extended to include a person who is in a kinship relationship with the deceased which is recognised under the customary law of the deceased and who at the time of death of the deceased was being wholly or partly maintained by the deceased.

That traditional Aboriginal marriage be recognised as having the same rights as a marriage and that children of a traditional Aboriginal marriage be recognised as having the same rights as issue of a marriage for the purposes of the *Inheritance (Family and Dependants Provision) Act 1972* (WA).

Proposal 56

[p 298]

That the State Administrative Tribunal assess the cultural appropriateness of its guardianship and administration procedures and consider the development of a set of protocols and guidelines for tribunal members in relation to the management of hearings involving Aboriginal people.

Proposal 57

[p 299]

That, in the absence of appointment under an administration order by the State Administrative Tribunal or other judicial body, the Public Trustee ensure that Aboriginal beneficiaries of deceased estates administered by the Public Trustee

are made aware of alternatives for the financial management of their inheritance before accepting the administration of the financial and/or legal affairs of those beneficiaries. And, that these alternatives are communicated in a culturally appropriate way with the assistance of an independent legal or financial advisor and, if required, an interpreter.

Proposal 58 [p 306]

That the *Coroners Regulations 1997* (WA) be amended to include a direction that in making a decision whether or not to order a post-mortem examination on an Aboriginal deceased person, a coroner must have regard to the desirability of minimising the causing of distress or offence to relatives and extended family (including classificatory kin) of the deceased who, because of their cultural attitudes or spiritual beliefs, could reasonably be expected to be distressed or offended by the making of that decision.

Proposal 59 [p 308]

That the Department of Justice establish, at the earliest opportunity, a dedicated internet site for the Coroner's Court of Western Australia to enable public access to coronial guidelines, procedures, protocols and findings.

Proposal 60 [p 325]

That protocols relating to the use, sale and protection of Indigenous cultural and intellectual property be developed and promoted in Western Australia. Such protocols should inform Western Australian government agencies and educational and cultural institutions in their dealings with Aboriginal artists and the observance of these protocols by all Western Australian industries, companies and individuals should be actively encouraged by government.

Proposal 61 [p 327]

That the Western Australian government develop protocols aimed at addressing those issues that arise from the 'bioprospecting' of Aboriginal medical knowledge; that is, the exploration of biodiversity for commercially valuable genetic and biochemical resources. These protocols should aim to safeguard Indigenous cultural and intellectual property by ensuring that those who seek to benefit from traditional cultural knowledge:

- undertake direct consultation with Aboriginal people as to their customary law and other requirements;
- ensure compliance with Aboriginal peoples' customary law and other requirements;
- seek prior informed consent for the use of any Aboriginal knowledge from the custodians of that traditional knowledge;
- seek prior informed consent for access to Aboriginal land for any purposes including collection;
- ensure ethical conduct in any consultation, collection or other processes;
- ensure the use of agreements on mutually agreed terms with Aboriginal people for all parts of the process; and
- devise equitable benefit-sharing arrangements for Aboriginal people.

Proposal 62

[p 328]

That the Western Australian government support and encourage the review of Commonwealth intellectual property laws and the institution of special measures to provide better protection for Indigenous cultural and intellectual property.

Aboriginal customary law and the family

Proposal 63

[p 334]

That the Western Australian government include in the educative initiatives planned in response to the Gordon Inquiry, relevant information relating to the requirements under Australian law (and international law) of freedom of choice in marriage partners and the criminality of acts of sexual relations with children under the age of 16 regardless of marriage status under Aboriginal customary law.

Proposal 64

[p 337]

That the following term be added to the *Interpretation Act 1984* (WA):

5. 'Definitions applicable to written laws'

'Traditional Aboriginal marriage' means a relationship between two Aboriginal persons, over the age of 18 years, who are married according to the customs and traditions of the particular community of Aboriginals with which either person identifies.

Proposal 65

[p 337]

That the following section be inserted into the *Interpretation Act 1984* (WA):

13B. Definitions of certain domestic relationships

- (1) A reference in a written law to 'spouse', 'husband', 'wife', 'widow' and 'widower' will be taken to include the corresponding partner of a traditional Aboriginal marriage.
- (2) Section 13B(1) does not apply to the *Family Court Act 1997* (WA).

Proposal 66

[p 338]

That s 205U of the *Family Court Act 1997* (WA) be amended to read:

205U. Application of Part generally

- (1) This Part applies to de facto relationships and traditional Aboriginal marriages.
- (2) However, this Part does not apply to a de facto relationship or traditional Aboriginal marriage that ended before the commencement of this Part.
- (3) This Part does not authorise anything that would otherwise be unlawful.

Proposal 67

[p 343]

That following clause 3 of Schedule 2A of the *Adoption Act 1994* (WA) a new paragraph be added:

In applying this principle all reasonable efforts must be made to establish the customary practice of the child's community in regard to child placement. In particular, consultations should be had with the child's extended family and community to ensure that, where possible, a placement is made with Aboriginal people who have the correct kin relationship with the child in accordance with Aboriginal customary law.

Proposal 68

[p 345]

Recognising the custom in Aboriginal communities of making private arrangements to place a child in the care of members of the child's extended family where necessary for the proper care and protection of the child, the Department of Community Development should make available to Aboriginal communities information regarding support services and government benefits (whether Commonwealth or state) to assist extended family carers.

Proposal 69

[p 346]

That the Western Australian government take immediate steps to implement Recommendation 23 of the Family Law Pathways Advisory Group's Report *Out of the Maze – Pathways to the Future for Families Experiencing Separation* to enhance culturally appropriate service delivery to Aboriginal clients of the Family Court of Western Australia.

Proposal 70

[p 353]

That the Western Australian government actively encourage and resource the development of community-based and community-owned Aboriginal family violence intervention programs that are designed to respond to the particular conditions and cultural dynamics of the host community.

Proposal 71

[p 355]

That progress reporting and evaluation of programs and initiatives dealing with family violence and child abuse in Aboriginal communities be ongoing with an emphasis on positive, practical outcomes and demonstrate genuine consultation with those responsible for frontline service delivery and adaptation of programs to suit the changing needs and cultural differences of client communities.

Customary hunting, fishing and gathering rights

Proposal 72

[p 374]

That the recognition of Aboriginal customary laws relating to hunting, fishing and gathering be subject to the genuine interests of conservation of Western Australia's diverse biological resources, but that they take a higher priority than commercial and recreational interests in the same resources.

That, in the application of conservation programs and decision-making in respect of conservation of land and resources in Western Australia, the Western Australian government and its conservation bodies actively consult, engage with and involve Aboriginal people.

Proposal 73

[p 376]

That relevant Western Australian government authorities take all reasonable steps to enhance communication of harvesting exemptions available to Aboriginal people and of any restrictions placed from time-to-time upon those exemptions.

Proposal 74

[p 377]

That the exemption currently provided by s 23 of the *Wildlife Conservation Act 1950* (WA) be subsumed into future wildlife and biological resource conservation legislation and be expanded to include the taking of flora and fauna (subject to conservation restrictions placed on certain species from time-to-time) for non-commercial purposes including for food, artistic, cultural, therapeutic and ceremonial purposes according to Aboriginal customary law.

That the exemption described above also apply to land designated under the *Conservation and Land Management Act 1984* (WA) subject to the provisions of conservation management plans over such land.

Proposal 75

[p 377]

That the exemption currently provided by s 23 of the *Wildlife Conservation Act 1950* (WA)—and its successor in future conservation legislation—remain applicable to all fauna and flora (subject to conservation restrictions), including introduced species.

Proposal 76

[p 382]

That s 267 of the *Land Administration Act 1997* (WA) be amended to make clear the legislative intention in relation to the use of firearms for customary hunting on Crown land pursuant to exemptions contained in s 104 of the *Land Administration Act 1997* (WA) and s 23 of the *Wildlife Conservation Act 1950* (WA).

Aboriginal customary law in the courtroom: evidence and procedure

Proposal 77

[p 395]

That the *Evidence Act 1906* (WA) be amended to provide that:

- The hearsay rule be excluded in relation to out of court statements which go to prove the existence or non-existence, or the content, of Aboriginal customary law.
- If a person has specialised knowledge, whether based on experience or otherwise, of Aboriginal customary law, then that person may give opinion evidence in relation to that matter where the opinion is wholly or substantially based on that knowledge.

Proposal 78

[p 402]

That adequate funding be provided for the training of Aboriginal interpreters.

That consideration be given to an accreditation system for Aboriginal language interpreters, in particular to a structure that enables more Aboriginal people to attain the requisite accreditation.

Proposal 79

[pp 402–03]

That the *Evidence Act 1906* (WA) provide that a person has the right to give evidence through an interpreter, unless it can be established that they are sufficiently able to understand and speak English.

A defendant in criminal proceedings who cannot sufficiently understand English shall be entitled to the services of an interpreter throughout the proceedings, whether or not they elect to give evidence.

That where the court has any reason to doubt the proficiency of a witness to either understand or speak English then the proceedings should not continue until an interpreter is provided.

That funding be made available to cover the cost of interpreters where required for witnesses and defendants in criminal proceedings.

Proposal 80

[p 403]

That a qualified linguist be engaged by the Department of Justice to formulate tests to assist courts to determine when a particular witness or defendant requires the services of an interpreter.

Proposal 81

[p 404]

That the Department of Justice, in conjunction with Aboriginal communities, provide education about the role of interpreters through:

- community education broadcasts; and
- the development of information videos to be distributed in communities and accessible at police stations, prisons and courts.

Proposal 82

[p 405]

That guidelines be developed for the use by the Department of Justice in dealing with interpreters of Aboriginal languages, including:

- Using only trained interpreters.
- Establishing a pool of male and female interpreters from different family or skin groups and different communities.
- Providing information (such as the name of the parties and witnesses in a case and a brief outline of the subject matter) to the interpreter prior to the hearing to enable them to assess if there is a conflict under customary law.

Proposal 83

[p 410]

That the *Evidence Act 1906* (WA) be amended to include a provision that if for reasons of customary law a witness is not able to give evidence in the normal

manner then the witness may be declared a special witness and be able to give evidence using the protective measures set out in ss 106A to 106T on the application of the witness, or on the initiative of the court.

Proposal 84

[p 411]

That the *Evidence Act 1906* (WA) be amended to provide that the court in the exercise of its discretion can allow evidence about customary law to be given by witnesses in groups.

Proposal 85

[p 411]

That the *Evidence Act 1906* (WA) be amended to provide that the court in the exercise of its discretion can allow evidence about customary law to be taken on country.

Proposal 86

[p 413]

That amendments be made to the rules governing procedure to allow an application to be made to the Chief Justice of the Supreme Court, the Chief Justice of Family Court, the Chief Judge of the District Court or the Chief Magistrate for a judge or magistrate of a particular gender to be assigned to a matter in which gender restricted evidence is likely to be heard.

Proposal 87

[p 413]

That the *Criminal Procedure Act 2004* (WA) be amended to provide that a court may order that certain information not be referred to in proceedings if the court is satisfied that reference to that information would be offensive to an Aboriginal person or community because of Aboriginal customary law, provided that to do so is not contrary to the administration of justice.

Proposal 88

[p 414]

That the following sub-sections be added to s 171(4) of the *Criminal Procedure Act 2004* (WA):

- (d) On an application by a party or on its own initiative, a court may make an order that prohibits the publication of any evidence if the court is satisfied that publication of, or reference to, the evidence would be offensive to an Aboriginal person or community by reason of matters concerned with Aboriginal customary law.
- (e) The court must not make such an order if it is satisfied that publication of, or reference to, the evidence is required in the interests of justice.

Proposal 89

[p 415]

That the Department of Justice employ court facilitators to work with the Aboriginal Liaison Officer to the Courts to provide assistance to Aboriginal people giving evidence in court and to ensure that regard is given to issues of customary law in court proceedings.

Proposal 90

[p 416]

That all Western Australian courts (including the State Administrative Tribunal) implement Aboriginal cultural awareness training.

That the Western Australian government provide adequate resources to implement this proposal by ensuring that there are sufficient funds to develop programs, engage Aboriginal presenters without adversely affecting the work of the courts.

Where a judicial officer is required to regularly sit at a particular location, *local* cultural awareness should be encouraged.

The Commission encourages members of a community justice group to participate in cultural awareness training.

Aboriginal community governance in Western Australia

Proposal 91

[p 423]

That the Western Australian government investigate ways of improving accountability of local governments for funding provided for the benefit of Aboriginal people in each local government area.

Proposal 92

[p 436]

That the Western Australian government explore the possibility of accessing federal funding for discrete Aboriginal communities under s 4(1)(b) of the *Local Government (Financial Assistance) Act 1995* (Cth) with a view to offering this autonomous option to functional Aboriginal communities that are not currently well-served by their local governments.

Proposal 93

[p 438]

That the starting point for reform of Aboriginal community governance in Western Australia be limited to a basic framework that can facilitate self-identifying and self-organising governance structures to emerge at a community level.

That reform of Aboriginal community governance in Western Australia be informed by the guiding principles of voluntariness; community empowerment and devolved decision-making power; 'downwards accountability'; flexibility in funding and institutional structure; and balanced clan and gender representation.

That Aboriginal communities be free to develop or choose a model of governance that is appropriate for their needs rather than have such model imposed on them by government.

Summary of Invitations to Submit

Aboriginal peoples in Western Australia

Invitation to Submit 1 [p 31]

The Commission invites submissions on the problems faced by Aboriginal people in Western Australia in proving their Aboriginality, particularly for the purposes of accessing programs and benefits offered by Western Australian government agencies for the exclusive benefit of Aboriginal people.

Aboriginal customary law and the criminal justice system

Invitation to Submit 2 [p 116]

The Commission invites submissions on the extent to which the defence of acting under a custom of the community has been relied upon by Aboriginal people accused of breaching a by-law enacted under the *Aboriginal Communities Act 1979* (WA) and whether the defence was successful.

Invitation to Submit 3 [p 123]

The Commission invites submissions as to whether (and if so, on what terms) there should be a customary law defence to the offence of trespass in the proposed 'Aboriginal Communities and Community Justice Groups Act'.

Invitation to Submit 4 [p 161]

The Commission invites submissions as to whether there should be a partial defence of Aboriginal customary law that would have the effect, if proved, that a person charged with wilful murder or murder would instead be convicted of manslaughter.

In the alternative the Commission invites submissions as to whether the mandatory penalty of life imprisonment for the offences of wilful murder and murder should be abolished and replaced with a maximum sentence of life imprisonment so that issues concerning Aboriginal customary law can be taken into account in mitigation of sentence where appropriate.

Invitation to Submit 5 [p 172]

The Commission invites submissions as to whether the *Criminal Code* (WA) should be amended to remove the distinction between assault occasioning bodily harm and unlawful wounding and, if so, whether:

- the *Criminal Code* (WA) should provide that consent is an element of an offence of unlawful wounding; or
- the offence of unlawful wounding should be removed; or
- the various categories of violence should be redefined as harm or serious harm and to provide that a person can consent to harm but not to serious harm unless in pursuance of a socially acceptable function or activity.

Invitation to Submit 6

[p 187]

The Commission invites submissions as to whether the ordinary person should be defined as an ordinary person of the same cultural background as the accused for the purposes of assessing both the gravity of the provocation and determining whether an ordinary person could have lost self-control.

Invitation to Submit 7

[p 189]

The Commission invites submissions in relation to the most appropriate agency to coordinate education strategies for Aboriginal people about effective methods of parental discipline.

Invitation to Submit 8

[p 254]

The Commission invites submissions as to whether, in light of the Commission's proposals in relation to criminal justice (or for any other reason), the Western Australia Police Service's former Aboriginal Policy and Services Unit should be reinstated and provided with additional resources.

Aboriginal customary law and the civil law system

Invitation to Submit 9

[p 293]

The Commission invites submissions on whether, in circumstances where an Aboriginal person claims entitlement to distribution of an intestate Aboriginal estate but has no proof of relationship to the deceased (because his or her birth was not registered under Australian law or because the claimant was removed from his or her family pursuant to previous government policies in Western Australia), a recommendation of the Minister of Indigenous Affairs as approved by the Governor should be taken as conclusive evidence of entitlement to succeed to that estate.

The Commission also invites submissions on the appropriate body to conduct investigations to support recommendations to the Governor in this respect.

Invitation to Submit 10

[p 299]

The Commission invites submissions from interested parties on the capacity of the guardianship and administration system in Western Australia to adequately meet the needs of Aboriginal people. In particular, the Commission invites submissions on the cultural appropriateness of the guardianship and administration system and its interaction with Aboriginal customary laws and cultural beliefs.

Invitation to Submit 11

[p 307]

The Commission invites submissions on whether s 35(7) of the *Coroners Act 1996* (WA) should be amended to include a provision granting any person, or a specified class of persons, the right to apply to the State Coroner seeking an order that he or she should be regarded as the senior next of kin, having regard to the customary law of the deceased person, and granting the State Coroner a discretion to make such an order having regard to the totality of the available evidence.

Invitation to Submit 12

[p 317]

The Commission invites submissions on:

- Whether cultural and spiritual beliefs genuinely held under Aboriginal customary law should be considered by the court where there is a dispute in relation to the disposal of a body of an Aboriginal deceased. And if so, what significance should be attached to such cultural and spiritual beliefs?
- What would be the appropriate protocol to apply in cases where there are genuinely held but competing cultural and spiritual beliefs?
- What, if any, significance should be placed on the deceased's wishes regarding burial if embodied in a signed document (not necessarily a will)?
- Whether the Supreme Court of Western Australia is the appropriate forum for the determination of burial disputes and, if not, what would be the appropriate forum?

Aboriginal customary law and the family

Invitation to Submit 13

[p 337]

The Commission invites submissions on the extent to which polygamy is practised in Western Australian Aboriginal communities and the need for recognition of traditional Aboriginal polygamous marriages for particular purposes under Western Australian law.

Invitation to Submit 14

[p 357]

The Commission invites submissions on the effectiveness of the new police order regime in Aboriginal communities in the control of family violence and in securing the immediate protection of Aboriginal women and children.

Invitation to Submit 15

[p 361]

The Commission invites submissions on the possibility of introducing non-violent customary law strategies to address family violence in Aboriginal communities and the potential for such strategies to operate in tandem with protection and prevention strategies under Australian law.

Customary hunting, fishing and gathering rights

Invitation to Submit 16

[p 378]

The Commission invites submissions as to whether the non-commercial barter or exchange of fauna or flora taken by Aboriginal persons pursuant to the exemption currently provided by s 23 of the *Wildlife Conservation Act 1950* (WA) be permitted and, if so, what, if any, restrictions should be placed upon such exchange.

Aboriginal customary law in the courtroom: evidence and procedure

Invitation to Submit 17

[p 405]

The Commission invites submissions to inform the development of protocols to assist witnesses, lawyers, parties and court officers when using the services of an interpreter.

Invitation to Submit 18

[p 406]

The Commission invites submissions as to whether it is necessary for amendments to be made to the *Evidence Act 1906 (WA)* to allow for evidence to be given in narrative form, and to provide for regulation of that form of evidence.

Terms of reference

Recognising that all persons in Western Australia are subject to and protected by this state's legal system; and there may be a need to recognise the existence of, and take into account within this legal system, Aboriginal customary laws:

The Law Reform Commission of Western Australia is to enquire into and report upon Aboriginal customary laws in Western Australia other than in relation to Native Title and matters addressed under the *Aboriginal Heritage Act 1972 (WA)*.

Particular reference will be given to:

1. how those laws are ascertained, recognised, made, applied and altered in Western Australia;
2. who is bound by those laws and how they cease to be bound; and
3. whether those laws should be recognised and given effect to; and, if so, to what extent, in what manner and on what basis, and in particular whether:
 - (a) the laws of Western Australia should give express recognition to Aboriginal customary laws, cultures and practices in the administration or enforcement of Western Australian law;
 - (b) the practices and procedures of the Western Australian courts should be modified to recognise Aboriginal customary laws;
 - (c) the laws of Western Australia relating to the enforcement of criminal or civil law should be amended to recognise Aboriginal customary laws; and
 - (d) whether other provisions should be made for the identification and application of Aboriginal customary laws.

For the purposes of carrying out this inquiry, the Commission is to have regard to:

- matters of Aboriginal customary law falling within state legislative jurisdiction including matters performing the function of or corresponding to criminal law (including domestic violence); civil law (including personal property law, contractual arrangements and torts); local government law; the law of domestic relations; inheritance law; law relating to spiritual matters; and the laws of evidence and procedure;
- relevant Commonwealth legislation and international obligations;
- relevant Aboriginal culture, spiritual, sacred and gender concerns and sensitivities;
- the views, aspirations and welfare of Aboriginal persons in Western Australia.

Peter Foss QC MLC
2 December 2000