

Law Reform Commission of Western Australia

Aboriginal Customary Laws

The interaction of Western Australian
law with Aboriginal law and culture

FINAL REPORT

Project 94

September 2006

Introduction

For the purposes of this Report, and unless otherwise stated, reference to Aboriginal people¹ includes Torres Strait Islander people.²

The Aboriginal Customary Laws Reference

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).

Methodology and Consultation Process

The Commission was concerned to ensure Aboriginal involvement in this reference from its outset. A five-member Aboriginal advisory panel oversaw the tender evaluation process, while a larger Aboriginal Research Reference Council³ assisted the Commission in

establishing culturally appropriate methods of managing the reference.⁴ The Commission also appointed two respected Aboriginal Special Commissioners, Professor Michael Dodson and Mrs Beth Woods, to advise and assist the Commission in its conduct of consultations throughout Western Australia.

From November 2002 to August 2003 the Commission undertook an extensive consultative process in the metropolitan, regional and remote areas of Western Australia. The Commission met with Aboriginal communities, individuals, Aboriginal and non-Aboriginal organisations and government agencies. 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 research and information collected during these consultations assisted the Commission in determining the areas of law upon which to concentrate its research efforts and its proposals for reform.⁵

As part of the research gathering phase of the project 15 background papers on different areas of interaction

1. It is noted that the Disability Services Commission of Western Australia found that in their consultations with Aboriginal peoples in Western Australia, most preferred the term ‘Aboriginal’ (or otherwise the name of their specific language group) to the term ‘Indigenous’. Likewise the Law Reform Commission of Western Australia found that in its own consultations and dealings with Aboriginal peoples in this state the term ‘Aboriginal people/s’ was widely accepted. Disability Services Commission (WA), *Access for Aboriginal and Torres Strait Islander People with Disabilities: Policy and practice plan* (April 2006) 5.
2. The 2001 Australian Census recorded that ‘the vast majority of Indigenous persons in Western Australia stated that they were of Aboriginal origin (96%) [or 56,292 people], 1.5% [874 people] were of Torres Strait Islander origin, while those with dual Aboriginal and Torres Strait Islander origin comprised 2.3% [1,330 people]’: Department of Indigenous Affairs (WA), *Overcoming Indigenous Disadvantage in Western Australia* (2005) 25. The latest available estimate of the resident Aboriginal population of Western Australia is 65,931. This figure will be revised following the 2006 Census.
3. A list of members of the Aboriginal Research Reference Council and the initial project team is provided at Appendix G to this Report.
4. This included negotiation of a Memorandum of Commitment ensuring respect for cultural protocols, practices and information. A copy of the Memorandum was presented to each Aboriginal community consulted by the Commission. For details, see Law Reform Commission of Western Australia (LRCWA), *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 10–11 and Appendix F of this Report.
5. A detailed review of the Commission’s research methodology and management of the reference can be found in the Discussion Paper: LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 7–14.

between Australian law and Aboriginal law and culture were also commissioned. These were published individually over the period December 2003 to June 2005 and were released as a single volume in January 2006 to complement the Discussion Paper and this Final Report.⁶

The Commission's Discussion Paper

In December 2005, the Commission published a lengthy Discussion Paper which examined in detail the opportunities for recognition of Aboriginal customary laws in the Western Australian legal system.⁷ The Discussion Paper was presented in ten parts.

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

Part II provided background and statistical information about Aboriginal peoples in Western Australia and

introduced some general findings from the Commission's consultative visits to Western Australian Aboriginal communities.

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

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

Part V dealt with the Commission's substantive investigation into the interaction of Aboriginal people and the criminal justice system. It discussed 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.

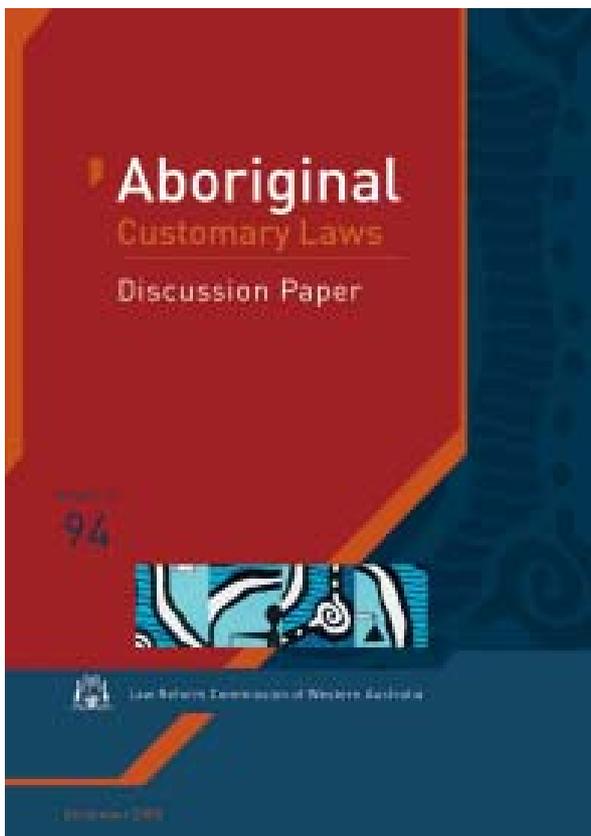
Part VI dealt with Aboriginal customary law and the civil law system including tortious acts and omissions; distribution of property upon death; contractual arrangements and protection of Indigenous consumers; Indigenous cultural and intellectual property rights; coronial matters; funerary practices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

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

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

Part X explored Aboriginal community governance and discussed 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.



6. LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No 94 (January 2006).

7. The Discussion Paper was officially launched by the Attorney General of Western Australia, the Hon. Jim McGinty MLA, on 6 February 2006.



of law and criminology at the University of Western Australia. In addition, the Commission's Principal Project Writer, Dr Tatum Hands, published a number of articles in relevant journals (including an Indigenous law journal) explaining the Commission's research methodology, findings and proposals.⁸

Because the proposals contained in the Discussion Paper affect the way that Aboriginal law and culture is understood and recognised in the Western Australian legal system, the Commission

A total of 93 proposals for reform of laws, procedures and practices in Western Australia were made in the Discussion Paper. The Commission also identified 18 matters in which it felt unable, at that time, to make a firm proposal for reform. These were generally in areas where strong conflicting views were expressed by Aboriginal people during the Commission's initial consultations or where the Commission felt that it had received insufficient input from Aboriginal people or other stakeholders to reach a conclusion.

The Submissions Process

The Commission invited interested parties to make submissions in respect of the proposals for reform, invitations to submit or on any other matter contained in the Discussion Paper. To assist in the submissions process, the Commission published a concise overview of the Discussion Paper and the Commission's proposals. A series of plain English brochures outlining key proposals for reform in different areas were also created and circulated widely throughout Western Australian Aboriginal organisations and government agencies. The Commission held focus groups, one-on-one meetings and agency briefings to assist in the understanding of relevant proposals. These included detailed briefings to Aboriginal organisations such as the Indigenous Women's Congress and the Aboriginal Legal Service. Members of the Commission also made presentations at a national law reform conference and to students

appreciated the importance of maximising submissions from Aboriginal people. The Commission recognised that language, remoteness, education and cultural difference may unduly obstruct Aboriginal people from making formal written submissions. To this end the Commission invited informal submissions by means of email or telephone. The Commission also conducted return consultation visits to the Goldfields, Western Desert, Kimberley, South West and Mid West regions to discuss its proposals for reform with Aboriginal communities and to take verbal submissions. All submissions were considered by the Commission in formulating the recommendations to Parliament contained in this Final Report.⁹



8. Hands TL, 'Teaching a New Dog Old Tricks: Recognition of Aboriginal customary law in Western Australia' (2006) 6(17) *Indigenous Law Bulletin* 12–15; 'Recognition of Aboriginal Customary Laws in Western Australia' (2006) 33(2) *Brief: Journal of the Law Society of Western Australia* 25–29; 'Recognising Aboriginal Law' (2006) 31(1) *Alternative Law Journal* 49.
9. A list of submissions may be found at Appendix C to this report.



About the Final Report

This Final Report is intended to be read in conjunction with the Commission's earlier Discussion Paper which provides greater detail in respect of the Commission's initial consultation findings, its research and analysis. Departing somewhat from the Discussion Paper structure, the first four chapters of the Final Report are of a general nature. Chapter One addresses some of the misconceptions about the reference, and about Aboriginal customary law generally, that have featured in media debates since the release of the Commission's Discussion Paper; Chapter Two outlines some guiding principles for reform that are applicable across all areas of the reference; Chapter Three summarises issues raised in the Discussion Paper about the state of Aboriginal disadvantage in Western Australia and the Commission's consultation findings; and Chapter Four discusses methods of and barriers to recognition of Aboriginal customary laws in this state.

These chapters are followed by specific chapters which address the interaction between Aboriginal law and culture and Western Australian law in defined areas: Chapter Five deals with the criminal justice system; Chapter Six with the civil law system; Chapter Seven with family law and family violence; Chapter Eight with

customary harvesting of natural resources; Chapter Nine with evidence and court procedure; and Chapter Ten with Aboriginal community governance in Western Australia.

The Commission's final recommendations to Parliament follow a brief discussion of the issues within each section and also feature in Appendix A to this Report. Where submissions¹⁰ received overwhelmingly supported the Commission's original proposals, discussion of the issues is limited. Those wishing to read a more detailed explanation of the arguments or research supporting the Commission's conclusions may do so by turning to the page of the Discussion Paper indicated in accompanying footnotes. Where submissions have disputed the Commission's original proposals, where new research has come to light or where new issues have arisen, a more detailed explanation for the Commission's final recommendations or findings is provided.

For the purposes of assisting the Western Australian government in the timely implementation of the 131 recommendations contained in this Final Report, the Commission has identified departmental and/or agency responsibility for the implementation of each recommendation. This important information is provided in Appendix B to this Report.

10. The Commission expresses its gratitude to those that made submissions on the Discussion Paper and those who were consulted or advised on aspects of this reference. A list of these individuals, communities and organisations may be found in Appendix C to this Report.

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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

Foreword

This Final Report is the culmination of the Law Reform Commission of Western Australia's six-year inquiry into the recognition of Aboriginal customary laws in this state. Over these six years the Commission has conducted wide-ranging research and has consulted not only with the Aboriginal peoples of Western Australia, but also with many Aboriginal and non-Aboriginal organisations, government agencies and individuals.

In its Discussion Paper, published in December 2005, the Commission made 93 proposals which it considered could lead to the principled recognition of Aboriginal customary laws and culture in such a manner as would also address Aboriginal disadvantage in many areas of life in Western Australia. The Commission's proposals have received an overwhelmingly positive response. Many submissions have focused on practical issues likely to arise in the implementation of the proposals. Changes have been made to some proposals to reflect these submissions where necessary.

This Report contains a total of 131 recommendations for reform. The Commission has not confined itself to legislative amendment, but has also recommended change to the procedures of government agencies and to government policy relating to Aboriginal people. Two important recommendations relate to the recognition of the unique status of Aboriginal peoples in the Western Australian Constitution and the creation of an Office of the Commissioner for Indigenous Affairs.

The Commission is concerned that the recommendations contained in this Report have a life after the close of this inquiry. For this reason, an important function of the Commissioner for Indigenous Affairs will be monitoring the implementation of the Commission's recommendations. The Commission has



also, in Appendix B, indicated the agencies likely to be responsible for the implementation of each recommendation. The breadth of the actions required to give effect to the Commission's recommendations can be seen from this summary as can the need for a coordinated response.

There are many individuals and organisations to whom the Commission is indebted in relation to its work on this inquiry. These people are listed in Appendix D to this Report. However, the greatest thanks is due to the Aboriginal peoples of Western Australia without whose assistance, contribution and encouragement this inquiry would not have been possible.

The Commission hopes that the results flowing from this Report will benefit the Aboriginal peoples of Western Australia and their culture, enhance the integrity of the legal system of this state and have a positive influence in other states and territories where Aboriginal culture and laws extend.

Gillian Braddock SC
Chairperson
September 2006

Chapter One

Challenging Customary Law Myths and Misconceptions

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Challenging Customary Law Myths and Misconceptions

Following the public release in February 2006 of the Commission's Discussion Paper on Aboriginal customary laws, there were a number of media reports that revealed certain misconceptions about the reference and the nature of the proposals contained in the Discussion Paper. These included concerns about equal application of the law and claims that the Commission's proposals would result in two systems of law: one for Aboriginal people and another for non-Aboriginal people.

More recently, and somewhat unrelated to the Commission's reference, the national media has

entertained specious claims that Aboriginal customary law condones violence against women and sexual abuse of children and that Aboriginal people use their cultural traditions as an 'excuse' or 'defence' for such behaviour. These claims are misconceived. Each of these issues was addressed at relevant points in the Discussion Paper; however, in light of the recent media attention the Commission addresses in this chapter these and other issues in order to challenge the myths surrounding Aboriginal customary law and to quash any misconceptions about the Commission's final recommendations.



Non-Discrimination and Equality Before the Law

In its 8 February 2006 editorial, the *West Australian* newspaper claimed that the Commission's proposals 'would create one legal system for Aboriginals and another for others'.¹ The editorial continued:

The law would be fragmented on the basis of race, which implies inbuilt biases that deny equal treatment in contradiction of the doctrine of the rule of law.²

This is a reference to the principle of equality before the law – a pervasive principle of international human rights law and something the Commission addressed in Part IV of its Discussion Paper and in various background papers to the reference.³ At international law the principle of equality (which is inextricably linked with the principle of non-discrimination) is expressed in the *Universal Declaration of Human Rights*⁴ and the *International Covenant on Civil and Political Rights* (ICCPR).⁵ Article 26 of the ICCPR provides that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Does Recognition of Aboriginal Customary Law Breach the Principle of Equality?

By acknowledging difference on the basis of race, recognition of Aboriginal customary law may appear to violate the principle of equality and non-discrimination

articulated by this provision. But this is not the case. The International Court of Justice has held that the principle of equality before the law does not mean that everyone must be treated equally without regard to individual circumstances.⁶ There are some cases where concrete conditions of inequality require nation-states to take affirmative action and discriminate in favour of a minority so that genuine equality may be achieved.⁷ In the past, affirmative action measures have been applied to improve access to individuals' human rights, in particular women, ethnic minorities, indigenous peoples, people with disabilities, and the socially and economically disadvantaged. In each case measures of positive discrimination have been accepted as necessary and legitimate means to justify the ends of substantive or 'actual' equality. Indeed, every Australian government has a suite of agencies, commissions or other bodies tasked with implementing legitimate positive discrimination measures to achieve substantive equality for minority groups or groups that are traditionally disadvantaged.

Formal equality vs substantive equality

The first step to reconciling recognition of Aboriginal customary law with the principle of equality before the law is to understand the difference between 'formal equality' (treating everyone the same regardless of individual circumstances) and 'substantive equality' (treating people differently to achieve *actual* equality). Equality is premised on the concept of fairness, yet an emphasis on formal equality can in practice serve to create or perpetuate *inequality* before the law. The

1. For a detailed discussion of this argument, see 'Two Separate Systems of Law?', below pp 13–17.
2. Editorial, 'Race-based Law Reform Ideas are Fraught with Hazards', *The West Australian*, 8 February 2006, 16. The rule of law is a jurisprudential concept that insists that the law be posited (or made known) and apply equally to all people.
3. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) Pt 4; McIntyre G, 'Aboriginal Customary Law: Can it be recognised?' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 341, 363–66; Davis M & McGlade H, 'International Human Rights Law and the Recognition of Aboriginal Customary Law' in LRCWA, *Aboriginal Customary Laws: Background Papers*, ibid 381, 415–19.
4. Article 7.
5. Article 26. The principle of equality before the law can also be found (in the guise of non-discrimination) in the *Convention on the Elimination of all Forms of Discrimination Against Women* (Articles 1 & 2) and the *International Convention on the Elimination of all Forms of Racial Discrimination* (Article 1(1) as reflected domestically in the *Racial Discrimination Act 1975* (Cth) s 10).
6. *South West Africa Cases (Second Phase)* [1966] ICJ Rep 305 (Tanaka J) as cited in Davis M & McGlade H, 'International Human Rights Law and the Recognition of Aboriginal Customary Law' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 381, 416.
7. Davis & McGlade, ibid 416–17.

following example is helpful in conceptualising the difference between formal and substantive equality.

[I]f there are two people stuck down two different wells, one of them is 5m deep and the other is 10m deep, throwing them both 5m of rope would only accord formal equality. Clearly, formal equality does not achieve fairness. The concept of substantive equality recognises that each person requires a different amount of rope to put them both on a level playing field.⁸

As evidenced by innumerable reports published in the past two decades,⁹ the conditions of disadvantage faced by Aboriginal Australians are appalling and insidious. In 1992, the Council of Australian Governments jointly committed to overcoming entrenched disadvantage in Aboriginal communities and to raising the standards of service delivery and quality of life of Aboriginal Australians.¹⁰ Australian governments therefore accept that Aboriginal Australians are not currently on a level playing field with non-Aboriginal Australians. There are many reasons for this, but most commentators believe that historical factors such as dispossession and exclusion from traditional lands, the impact of past government policies of assimilation and child removal, and the breakdown of cultural authority and traditional law largely explain the present dysfunctional state of many Aboriginal communities.¹¹ Raising the living conditions of

Aboriginal people may therefore not be enough to achieve substantive equality among all Western Australians. For many Aboriginal Australians substantive equality cannot be reached if the underlying causes—that is, the injustices of the past—are not also addressed.

Legitimate differential treatment

In Australia, unequal treatment on the basis of race is permitted under s 8 of the *Racial Discrimination Act 1975* (Cth) where special (remedial) measures are required to address substantive inequality or give individuals or groups equality of access to fundamental human rights and freedoms.¹² For example, this exemption gives Australian governments the authority to provide special services or benefits that are only available to Aboriginal people¹³ or, contrarily, to enact laws that fetter the rights of Aboriginal people in certain



8. Tom Calma, Acting Race Discrimination Commissioner and Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Implications of the *Racial Discrimination Act 1975* with Reference to State and Territory Liquor Licensing Legislation' (Paper presented at the 34th Australasian Liquor Licensing Authorities Conference, Hobart, Tasmania, 26–29 October 2004).
9. See, for example, the regular *Overcoming Indigenous Disadvantage: Key Indicators* reports of the Council of Australian Governments' Steering Committee for the Review of Government Service Provision; the annual *Social Justice Reports* of the Federal Commissioner for Aboriginal and Torres Strait Islander Social Justice; and the report of the Royal Commission into Aboriginal Deaths in Custody among many others.
10. Australian Local Government Association, *National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders* (1992), <<http://www.alga.asn.au/policy/indigenous/nationalCommitment.php>>. As part of this, the Western Australian government has committed to entrenching a policy framework for substantive equality across all government agencies. The policy takes into account the effects of past discrimination against Indigenous peoples, recognises that rights, entitlements, opportunities and access are not equally distributed throughout society and acknowledges that the equal application of rules to unequal groups can have unequal results. Equal Opportunity Commission (WA), Substantive Equality Unit, *The Public Sector Anti-Racism and Equality Program* (undated) 7.
11. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) Parts II and X.
12. This provision reflects Article 1(4) of the *International Convention on the Elimination of All Forms of Racial Discrimination*. For further discussion of this issue, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) Part IV.
13. As discussed in more detail below, such services are required because Aboriginal people in Australia do not access mainstream services and benefits at the same rate as other Australians.

circumstances.¹⁴ However, because special measures are only temporary and the differentiation of rights cannot be maintained once the objectives of substantive equality are achieved,¹⁵ the long-term recognition of Aboriginal customary law on this basis would be difficult to sustain.

International law does nonetheless support the concept of long-term differential treatment based on race. As John Chesterman explains:

[D]iffering treatment of individuals based on racial grounds will not constitute illegal discrimination where that discriminatory treatment is not 'invidious'. The 'reasonable differentiation' principle holds that the treatment of one racial group will not necessarily be discriminatory just because that treatment is different from the treatment received by another racial group.¹⁶

In the words of the United Nations Committee on the Elimination of Racial Discrimination 'a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate'.¹⁷ Essentially, the objectives of the Convention are the removal of racial barriers to the full enjoyment of human rights, the promotion of racial harmony among and within nations, and the achievement of equality, particularly in relation to minorities. In fact, 'the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when states without objective and reasonable justification, fail to treat differently persons whose situations are significantly different'.¹⁸

Why Should We Treat Aboriginal People Differently to All Other Australians?

There are a number of arguments that support the legitimacy of differential treatment for Australia's Aboriginal and Torres Strait Islander peoples. The imperative of substantive equality, discussed above, is a significant reason for differential treatment and one that can stand alone under both international and Australian law. Other compelling reasons are that Aboriginal people, as members of a distinct indigenous culture, have the right to the legal protection necessary to allow their culture to survive and flourish;¹⁹ that the bias and disadvantage experienced by Aboriginal people makes them more unequal than any other social or cultural group in Australia;²⁰ that Aboriginal Australians do not access mainstream services at the same rate as other Australians therefore requiring targeted service provision;²¹ that Aboriginal people are often subject to two laws and may be punished twice for the same offence;²² and that Aboriginal people suffer such underlying systemic discrimination in the criminal justice system that they have become the most disproportionately imprisoned culture in Australia.²³

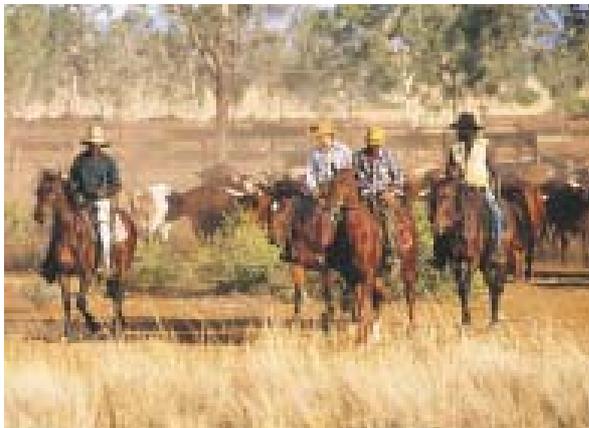
Perhaps the most persuasive argument supporting differential treatment of Aboriginal people by recognition of certain customary laws and practices is found in Aboriginal peoples' unique status as the original inhabitants of Australia. As one commentator has said:

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14. For example, the by-laws of certain Aboriginal communities in Western Australia restrict or prohibit the consumption of alcohol on community lands, including in a person's place of residence. Although they fetter rights that non-Aboriginal people enjoy, these special measures are understood to benefit an Aboriginal minority by securing advancement of the beneficiaries so that they may enjoy and exercise equally with others their human rights and fundamental freedoms. It should be noted that the wishes and will of the members of the class of people to whom the special measure applies are relevant. See Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 16–17.
 15. Article 1(4) of the *International Convention for the Elimination of all Forms of Racial Discrimination* domestically incorporated by the *Racial Discrimination Act 1975* (Cth) s 8.
 16. Chesterman J, 'Balancing Civil Rights and Indigenous Rights: Is there a problem?' (2002) 8 *Australian Journal of Human Rights* 125, 134.
 17. Committee for the Elimination of Racial Discrimination, General Recommendation XIV, as cited in McIntyre G 'Aboriginal Customary Law: Can it be recognised?' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 341, 365.
 18. *Thlimmenos v Greece* (European Court of Human Rights, 6 April 2000).
 19. Lokan A, 'From Recognition to Reconciliation: The functions of Aboriginal rights law (1999) 23 *Melbourne University Law Review* 65.
 20. There are clear disparities between Aboriginal and non-Aboriginal people across all socio-economic indicators. See the Council of Australian Governments' Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2005* (2005). For a full discussion of Indigenous disadvantage in Western Australia, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) Part II.
 21. It should be noted that Aboriginal people generally receive the same benefits as non-Aboriginal people: however 'specific government programs, not additional income, have been introduced' to better target the needs of Aboriginal people who, because of geographical remoteness or disadvantage, do not have the same access to the mainstream services that other Australians enjoy. See Human Rights and Equal Opportunity Commission, *Face the Facts: Some questions and answers about refugees, migrants and Indigenous peoples in Australia* (August 2005) 30.
 22. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 214.
 23. Hands TL, 'Teaching a New Dog Old Tricks: Recognition of Aboriginal customary law in Western Australia' (2006) 6(17) *Indigenous Law Bulletin* 12–15.

Aboriginal people, as members of a distinct indigenous culture, have the right to the legal protection necessary to allow their culture to survive and flourish.

Recognition of customary law as an original part of the Australian legal system is not equivalent to being sensitive to or making allowances in the Australian legal process for the cultural differences of the various ethnic groups now making up multicultural Australia. In the post-*Mabo* era it is important to understand that legislative and community recognition of customary laws is because those laws are the laws of Aborigines and Torres Strait Islanders as the first people of this country.²⁴

This argument has both legal and moral force. Its legal force stems from Aboriginal peoples' prior possession of the land on which Australia was established and its moral force stems from the way in which this land was unjustly acquired.²⁵ The fact of Aboriginal peoples' prior possession of Australia and the existence of complex Indigenous systems of laws, traditions and customs



were deciding factors in the High Court's recognition of native title in *Mabo v Queensland [No. 2]*.²⁶ Although prior possession cannot be argued as a sole rationale for the recognition of Aboriginal customary law, it does have significant force when combined with the right to substantive equality discussed above. Importantly, the recognition by courts and governments of Indigenous rights to native title over land demonstrates that those aspects of Aboriginal customary law that have survived colonisation and continue in some form to be exercised today are capable of recognition by Australian law.²⁷

Conclusion

As outlined in Chapter Four below, the Commission has proceeded from the starting point that recognition of Aboriginal customary law must work within the framework of existing Western Australian law and also be consistent with international human rights standards.²⁸ In doing so the Commission acknowledges that to a certain extent the recognition of Aboriginal law must be subjugated to the dominant interests of the state and the international community. Some of the recommendations contained in this Report allow for a high degree of internal autonomy in Aboriginal communities.²⁹ Others seek—whether by recognition of difference or by removal of discrimination—to put Aboriginal Western Australians on a level playing field with their non-Aboriginal counterparts.³⁰ Significantly,

24. Rose A, 'Recognition on Indigenous Customary Law: The way ahead' (Speech delivered at the forum on Indigenous Customary Law, Canberra, 18 October 1995) as cited in Davis M & McGlade H, 'International Human Rights Law and the Recognition of Aboriginal Customary Law' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006).
25. Lokan A, 'From Recognition to Reconciliation: The functions of Aboriginal rights law (1999) 23 *Melbourne University Law Review* 65, 71.
26. (1992) 175 CLR 1.
27. Human Rights and Equal Opportunity Commission, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (14 May 2003) 2.
28. For example, recognition of Aboriginal customary law cannot breach the individual rights of women, the right to be free from torture, cruel, inhuman or degrading punishment or treatment or the right to free and informed consent for marriage. Each of these is a right protected under international law and recognised as such throughout the Commission's Discussion Paper and this Report.
29. For example, the Commission's recommendations for substantially self-determining community justice groups (Recommendation 17); for the declaration of discrete functional Aboriginal communities as self-governing bodies under the *Local Government (Financial Assistance) Act 1995* (Cth) (Recommendation 130); and for the reform of Aboriginal community governance mechanisms in Western Australia (Recommendation 131).
30. For example, the Commission's recommendations for compulsory cultural awareness training (Recommendations 2, 11, 12, 56 & 128); the establishment of an independent Commissioner for Indigenous Affairs in Western Australia (Recommendation 3); constitutional recognition of Aboriginal peoples as first Australians (Recommendation 6); recognition of the different circumstances of Aboriginal people living in remote communities by extending the criteria for an extraordinary drivers licence or cancellation of a licence suspension order (Recommendations 13 & 14); the evaluation of diversionary options to ensure Aboriginal people are diverted at the same rate as non-Aboriginal people (Recommendation 51); the removal of discriminatory provisions currently governing the distribution of Aboriginal intestate estates (Recommendation 65); the right to an interpreter in court proceedings (Recommendation 120); and improving local government accountability for expenditure of funds designated for Aboriginal people (Recommendation 129).

every recommendation advanced by the Commission asserts the human rights of Aboriginal Australians to be treated fairly and with due regard to Australia's international obligations.³¹

It should also be pointed out that a considerable number of the Commission's recommendations are applicable to all Western Australians – whether Aboriginal or non-Aboriginal. For example, the Commission's recommendations for improvements to the *Bail Act 1982* (WA) to permit telephone applications for bail, to take into account the financial means of a proposed surety, or to be released on bail to a responsible person will improve the interactions of financially disadvantaged people and juveniles with the criminal justice system; the recommendation that the

written burial instructions of a deceased be observed will allow everyone to stipulate during life the method of disposal of his or her bodily remains after death; the introduction of a right to an interpreter will assist all people who have English as a second language; and the recommendation to permit evidence to be given in narrative form and to upgrade special witness facilities in regional courts will assist people to give evidence in difficult circumstances. These are but a few of the many recommendations contained in this Report that will benefit all Western Australians.³² If implemented, these recommendations will assist in making the legal system in Western Australia more just and accessible and, as a consequence, will allow all Western Australians to enjoy and exercise their human rights and fundamental freedoms equally with others.



31. Australia has ratified almost 900 treaties and is considered bound by the terms of these treaties at international law. However, this does not mean that Australia must observe these treaties at home. Fortunately, the primary international human rights instruments such as the *International Covenant on Civil and Political Rights*, the *International Convention for the Elimination of all Forms of Racial Discrimination* and some provisions of the *International Covenant on Economic, Social and Cultural Rights* have been incorporated into Australian laws such as the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *Disability Discrimination Act 1992* (Cth) and are therefore binding upon Australia. The precepts of the *Universal Declaration of Human Rights*, although not officially binding, have become generally accepted as rules of customary international law; that is, rules that are accepted as binding by a majority of civilised nations. For more detailed discussion in the context of Aboriginal customary law, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 67–76.
32. Recommendations contained in this report that will benefit all Western Australians include: repeal of mandatory sentencing for burglary offences (Recommendation 8); repeal of the offence of unlawful wounding (Recommendation 25); amendments to the defence of duress (Recommendation 27), changes to bail requirements (Recommendations 29, 30, 31 and 33); more readily understandable bail forms and notices (Recommendation 35); culturally sensitive sentencing (Recommendation 36); more flexible sentencing (Recommendation 40); requirements that the accused understand the nature of a guilty plea and its consequences (Recommendation 42); amendment of prosecutorial guidelines (Recommendation 43); restrictions on the use of prior cautions in subsequent court proceedings (Recommendation 45); enhancement of diversion to juvenile justice teams for children (Recommendations 46, 47 and 48); legislative recognition of police criteria for the decision arrest a juvenile (Recommendation 49); more stringent legislative restrictions on interviewing suspects and admissibility of confessions (Recommendation 52); review of move-on laws and the Northbridge Curfew (Recommendations 54 and 55); police recording of ethnicity of victims and alleged offenders (Recommendation 57); update of the Western Australia Police website (Recommendation 58); use of physical restraints on prisoners attending funerals (Recommendation 61); improved transport arrangements for prisoners released from custody (Recommendation 64); faster and less formal proceedings for intestate estates valued at less than \$100,000 (Recommendations 68 and 71); improved means by which objection can be made to a post-mortem examination (Recommendations 75 and 76); expansion of the coronial counselling service to rural areas (Recommendation 77); legislative recognition that the burial instructions of deceased persons be observed (Recommendation 78); improved methods for dealing with burial disputes (Recommendation 79); functional recognition of non-biological primary carers of children (Recommendation 88); funding to upgrade special witness facilities in regional areas (Recommendation 109); improved access to interpreters in court proceedings (Recommendations 119, 120 and 121); legislative recognition that witness' evidence may be given in narrative form (Recommendation 124); and disallowing questions put to witnesses who are vulnerable by reason of their cultural background (Recommendation 125).

Two Separate Systems of Law?

It has been asserted that the Commission's proposals for recognition of Aboriginal customary law will create two separate legal systems in Western Australia: one for Aboriginal people and one for non-Aboriginal people.¹ Following the launch of the Discussion Paper an article in the *West Australian* speculated that:

WA may soon have one legal system for Aboriginals and another for non-Aboriginals after a five-year law reform study called for an overhaul of Aboriginal sentencing.²

This observation is incorrect. The Commission emphasised in its Discussion Paper that any recognition of Aboriginal customary law must occur 'within the existing framework of the Western Australian legal system'³ and that it did not support the establishment of a separate formal legal system for Aboriginal people to the exclusion of Australian law.⁴ Aboriginal people consulted for this reference also did not support a separate state or political system or a separate system of law.⁵ Rather, they sought the right to negotiate their relationship with the governments that represent them, to be involved in decision-making relating to their interests, and to work in partnership with governments to improve the invidious and entrenched conditions of disadvantage that they experience in this country.⁶ These are the rights of every Australian citizen.

In order to dispel any misunderstanding that the recommendations contained in this report will create a separate legal system for Aboriginal people the Commission examines a number of specific areas below.

The Commission's recommendations enable Aboriginal customary law and culture to be recognised *within* the Western Australian legal system because recognition is demanded under general principles of fairness and justice and in order to achieve substantive equality for Indigenous Western Australians.⁷

Sentencing

The Commission has recommended that the *Sentencing Act 1995 (WA)* be amended to provide that the cultural background of an offender is a relevant sentencing factor and further, that when sentencing an Aboriginal person, the court must consider any relevant and known Aboriginal customary law or cultural issues.⁸

On 26 June 2006 the federal Minister for Indigenous Affairs, Mal Brough, announced plans to provide funding to states and territories for the purpose of addressing child abuse and violence in Indigenous communities. This funding was offered on condition that the states and territories legislate to remove any reference in sentencing legislation to the cultural background of an offender and legislate to prevent any consideration of arguments that a crime was 'justified, authorised or required under customary law or cultural practice'.⁹ This announcement occurred in the wake of numerous media reports about the extent of sexual abuse and violence against children and women in Aboriginal communities. The relevance of Aboriginal customary law and culture to these issues is discussed separately

1. Editorial, 'Race-based Law Reform Ideas are Fraught with Hazards', *The West Australian*, 8 February 2006, 16. The Commission received only one submission arguing that its proposals would create separate legal systems, see Marsh B, Submission No. 5 (8 February 2006).
2. Spencer B, 'Courts to Recognise Tribal Punishment', *The West Australian*, 7 February 2006, 1.
3. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 64.
4. The Law Council of Australia expressly supported this conclusion: see Law Council of Australia, Submission No. 41 (29 May 2006) 7.
5. This was made clear by the Commission in its Discussion Paper: LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 55 & 421. Moreover, in the face of the geographical dispersion and cultural diversity of Australian Aboriginal peoples, Indigenous leaders have recognised that while rights to land and resources are important, secession as an expression of self-determination is somewhat unrealistic in Australia. Dr William Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002 (2002)* ch 2, <<http://www.hreoc.gov.au/social%5Fjustice/sjreport%5F02/chapter2.html#2.3>>.
6. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 421.
7. For a detailed discussion of the principle of equality, see above pp 8–9.
8. See Recommendations 36, below p 173; Recommendation 38, below pp 183. These recommendations are also applicable to the *Young Offenders Act 1994 (WA)*.
9. Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities, *Safer Kids, Safer Communities* (26 June 2006) <http://www.atsia.gov.au/media/media06/4606-_attach.aspx>. It has also been stated that the Commonwealth will remove the reference to the cultural background of an offender under s 16A of the *Crimes Act 1914 (Cth)*. The Commission notes that this approach is contrary to the recommendations contained in the recently published Australian Law Reform Commission (ALRC) report that deals with the sentencing of federal offenders: see ALRC, *Same Crime, Same Time: Sentencing of federal offenders*, Final Report No. 103 (June 2006) [29.45] and Recommendation 29-1.

below. One justification for the federal government's approach is the view that there should be one law for all. Mal Brough reportedly stated that the consideration of Aboriginal customary law during sentencing means 'one group of Australians are treated unequally to everybody else'.¹⁰

The Commission strongly disagrees with this statement. As argued by the Law Council of Australia, preventing courts from taking into account Aboriginal customary law will not achieve equality: it will further disadvantage Aboriginal people.¹¹

General sentencing principles

In order to fully appreciate the nature and effect of the Commission's recommendations in relation to sentencing it is necessary to understand general sentencing law and principles. Sentencing occurs at the stage of the criminal justice process when an offender has been convicted of a crime. Therefore, the offender has either been found by the court to be criminally responsible or admitted to being criminally responsible for the relevant offence.¹² At the end of the sentencing process the court is required to impose a penalty.

In general terms, when determining the appropriate penalty, a sentencing court is required to take into account the statutory penalty for the offence, various sentencing principles and any relevant factors.¹³ Included among the relevant factors are the personal circumstances and background of the offender. Every offender is different and therefore in any given case different matters may be relevant to the determination of the appropriate sentence. Factors that may be connected to an offender's personal circumstances and background include loss of employment, mental or physical health problems, family situation, prior sexual or physical abuse, drug addiction, loss of reputation and financial position. The list is potentially endless. In some cases these factors may explain why the offence took place or they may be relevant to assist the court in determining the most appropriate penalty.

The Australian Law Reform Commission (ALRC) has recently reaffirmed the importance of 'individualised justice' in its report dealing with the sentencing of federal offenders:

The principle of individualised justice requires the court to impose a sentence that is just and appropriate in all the circumstances of the particular case. Courts have consistently recognised the importance of this sentencing principle. For example, in *Kable v Director of Public Prosecutions*, Mahoney ACJ stated that 'if justice is not individual, it is nothing'. Individualised justice can be attained only if a judicial officer possesses a broad sentencing discretion that enables him or her to consider and balance multiple facts and circumstances when sentencing an offender.¹⁴

The ALRC recommended that federal legislation should include as one of the 'fundamental principles' of sentencing that 'a sentence should take into consideration all circumstances of the individual case, in so far as they are relevant and known to the court'.¹⁵

The relevance of Aboriginal customary law and culture

The mere fact that an offender belongs to a particular ethnic group or race is *not* a relevant sentencing factor. As stated by the Commission in its Discussion Paper, 'an Aboriginal person cannot be sentenced more leniently or more harshly just because he or she is Aboriginal'.¹⁶ For the purpose of comparison, a sentencing court cannot sentence an offender differently just because the offender is female. However, there are some facts or circumstances that may arise because an offender is Aboriginal in the same way that there are facts that arise because an offender is female.¹⁷ For example, courts may legitimately take into account the fact that a female offender is pregnant or breastfeeding.

For a number of years courts have taken into account relevant Aboriginal customary law or cultural considerations during sentencing.¹⁸ Customary law or other cultural issues may be relevant to explain why

10. Karvelas P, 'Excuse of Tribal Law to be Axed', *The Australian*, 23 May 2006, 1.

11. Law Council of Australia, *Recognition of Cultural Factors in Sentencing*, Submission to Council of Australian Governments (10 July 2006) 16–17.

12. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 202.

13. For a more detailed discussion of sentencing principles, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 202; ALRC, *Same Crime, Same Time: Sentencing of federal offenders*, Final Report No. 103 (June 2006) Chapters 5 & 6.

14. ALRC, *ibid* [5.21].

15. *Ibid* [5.28], Recommendation 5-1.

16. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 203.

17. The ALRC observed that the circumstances of a female offender may well be different to those of a male offender: see ALRC, *Same Crime, Same Time: Sentencing of federal offenders*, Final Report No. 103 (June 2006) [29.17].

18. For a detailed discussion of the types of factors that have been taken into account see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 204–208.

the offender committed the offence, to mitigate punishment because the offender has already been punished under customary law, or to provide information to the court about the best way to rehabilitate an offender. Non-Aboriginal offenders are equally permitted to explain why they committed the offence, to explain that they have already suffered some form of punishment,¹⁹ or to provide relevant information about their prospects of rehabilitation.

The Commission is of the view that permitting Aboriginal people to have reference to relevant customary law or other cultural issues is necessary in order to achieve justice. This conclusion is best demonstrated by a practical example. Assume that a non-Aboriginal man has been charged with driving under suspension. This offender informs the court that he drove in order to take his sick child to hospital. This circumstance would be taken into account when deciding the appropriate penalty. In comparison, assume that an Aboriginal man who lives in a remote area drove while under suspension in order to attend a funeral. The funeral was for a woman who was considered to be his 'mother' under kinship structures. From a non-Aboriginal perspective the deceased would be seen as a more distant relative. Failure to attend this funeral could constitute a violation of the man's customary law and cultural obligations. If customary law and cultural issues could not be taken into account during sentencing then this Aboriginal accused would only be able to explain that he drove because he had to go to a funeral of a relative. He would not be able to rely on the significance of attending the funeral under customary law or the consequences of not attending. Therefore, the non-Aboriginal offender is able to put forward his reason for committing an offence but the Aboriginal offender is restricted to a diluted version of the true circumstances.



Permitting Aboriginal people to present evidence of any relevant Aboriginal customary law or other cultural factor does not discriminate against non-Aboriginal people because non-Aboriginal people are also entitled to present their full social, religious and family background during sentencing proceedings. As stated recently by Senator Chris Evans:

All Australians, when convicted of a crime, are entitled to make a plea on the basis of mitigating factors to be considered in sentencing. To remove reference to Aboriginal customary law as a factor to be considered in mitigation would simply limit [sic] Indigenous Australians the rights that other Australians enjoy.²⁰

It has been observed that the rule that all people should be treated equally before the law does not mean that all people, irrespective of the individual circumstances of the case, must receive the same punishment.²¹ The Commission is of the view that any legislative changes preventing Aboriginal people from relying on cultural or customary law factors could be discriminatory against Aboriginal people and would not provide Aboriginal people will 'equal' treatment before the law.²²

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19. See for example *R v Daezt; R v Wilson* [2003] NSWCCA 216, [62] (James J; Tobias JA and Hulme J concurring) where it was stated that 'a sentencing court, in determining what sentence it should impose on an offender, can properly take into account that the offender has already suffered some serious loss or detriment as a result of having committed the offence. This is so, even where the detriment the offender has suffered has taken the form of extra-curial punishment by private persons exacting retribution or revenge for the commission of the offence. In sentencing the offender the court takes into account what extra-curial punishment the offender has suffered, because the court is required to take into account all material facts and is required to ensure that the punishment the offender receives is what in all the circumstances is an appropriate punishment and not an excessive punishment'.
20. Evans C, 'Time to Bust Brough's Myths' (Address to the Canberra South Branch of the Australian Labor Party, 19 June 2006) 5.
21. Chesterman J, 'Balancing Civil Rights and Indigenous Rights: Is there a problem?' (2002) 8 *Australian Journal of Human Rights* 125, 142. As Chesterman points out, mandatory sentencing regimes in fact challenge the rule of law because they do not allow individual differences to be taken into account.
22. This view is supported by the Law Council of Australia: see The Law Council of Australia, Submission No. 41 (29 May 2006) 20. The Commission understands that the Human Rights and Equal Opportunity Commission will monitor the Commonwealth's proposal and any changes made to determine if they breach the *Racial Discrimination Act 1975* (Cth). See 'Rights Body Monitors Indigenous Package', *ABC News Online*, 27 June 2006, <<http://www.abc.net.au/news/newsitems/200606/s1672761.htm>>.

Aboriginal Courts

The Commission has recommended that Aboriginal courts be established in Western Australia.²³ The various models of Aboriginal courts currently operating in Australia involve Aboriginal Elders or other respected Aboriginal persons in the sentencing process. At first glance the establishment of Aboriginal courts may appear to create two separate criminal justice systems. However, in reality this is not the case because Aboriginal courts apply the same laws and sentencing principles as any other court.²⁴

Aboriginal courts do not impose customary law punishments

In Western Australia an adult Aboriginal offender who is being dealt with by an Aboriginal court will be subject to the *Sentencing Act 1995* (WA) and a juvenile Aboriginal offender will be subject to the *Young Offenders Act 1994* (WA). Although an Aboriginal court may take into account customary law or other cultural issues (in the same way that other courts are able to do so) an Aboriginal court cannot impose customary law punishments. The penalty imposed by an Aboriginal court can only be a sentence that is available under the relevant legislation.²⁵

Aboriginal courts are not controlled by Aboriginal Elders

The essential difference between an Aboriginal court and any other court is the involvement of Aboriginal Elders and other respected Aboriginal persons. 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. In some cases Elders may advise the court about the most appropriate penalty but Aboriginal courts are still presided over by a judicial officer and it is the judicial officer who has the final say about what sentence is imposed.²⁶ Further, both the

defence and the prosecution have the same right to appeal against the sentence as in any other sentencing court.

As the Commission observed in its Discussion Paper, many Aboriginal people are alienated from the criminal justice system. The reasons for this alienation include language and communication barriers;²⁷ distrust resulting from past mistreatment and discrimination by criminal justice agencies;²⁸ and the lack of Aboriginal people working in the criminal justice system.²⁹ Recently, a magistrate in Queensland observed that the Murri Aboriginal Court in Townsville

does not provide any benefit to an indigenous defendant over a white defendant. It provides many of the benefits that non-indigenous people have had over a period of time and recognises that the indigenous defendant, in many respects, deserves more time and input from their own people.³⁰

Aboriginal courts have the potential to reduce the barriers between Aboriginal people and criminal justice agencies. The involvement of Aboriginal people in the process in addition to changes to court procedures (such as the language used and the physical layout of the court) creates a more meaningful and effective court process.

Criminal Responsibility

In its Discussion Paper the Commission considered whether there should be a separate general defence of customary law for Aboriginal people. Such a defence could relieve an Aboriginal person from criminal responsibility if it could be shown that the conduct giving rise to the offence was required or permitted under customary law. The Commission rejected the introduction of a general customary law defence because it would apply to all offences. The Commission concluded that a general customary law defence would create two different notions of criminal responsibility and would not provide equal protection under the law for Aboriginal people.³¹

23. See Recommendation 24, below p 136.

24. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 155.

25. For example, under s 39 of the *Sentencing Act 1995* (WA) the penalty could be a conditional release order, fine, community based order, intensive supervision order, suspended imprisonment, conditional suspended imprisonment or imprisonment.

26. The Commission rejected the introduction of Aboriginal-controlled courts where Aboriginal Elders could decide the punishment: see discussion under 'Aboriginal-Controlled Courts', below p 124.

27. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 99.

28. *Ibid* 94 & 99.

29. *Ibid* 104.

30. Opening of the Murri Court at Townsville, Transcript of Proceedings, 2 March 2006, 3.

31. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 158–59. The Commission also concluded that there should not be a partial defence of customary law applicable to homicide offences: see discussion under 'Criminal Responsibility – Partial defence to homicide', below p 138. The Commission has concluded that specific defences may be appropriate in certain circumstances: see for example, exemptions from customary harvesting and a specific defence for trespass, below p 139.

Road Traffic Offences

The Commission has recommended that the criteria for an application for an extraordinary drivers licence and for an application to cancel a licence suspension order be extended to take into account customary law and cultural obligations.³² The Commission believes that these recommendations are justified because the existing legislative criteria do not reflect the circumstances of many Aboriginal people in this state. In general terms, a person who is disqualified from driving can apply for an extraordinary licence on the grounds that it is necessary for the applicant or a member of the applicant's family to attend to medical treatment or employment. As mentioned earlier, some Aboriginal people (especially those living in remote areas where there are no other feasible transport options) may need to drive for the purpose of attending a funeral or other cultural ceremonies. Kinship obligations may also require Aboriginal people to drive other people for these purposes.³³ Rather than creating a separate defence for Aboriginal people who drive without a licence,³⁴ the Commission has concluded that it is more appropriate to extend the general provisions in order that they are reflective of the circumstances of Aboriginal people and not just the circumstances of non-Aboriginal people. This is consistent with the



principle of substantive equality: to recognise relevant differences in order to provide equal treatment.

Community Justice Groups

The Commission has recommended the establishment of community justice groups.³⁵ One possible role for community justice groups in a discrete Aboriginal community³⁶ would be to set community rules and community sanctions. In its submission the Office of the Director of Public Prosecutions (DPP) argued that enabling community justice groups to set community rules and sanctions would create 'two coexistent legitimate systems of criminal law'.³⁷ The Commission rejects this argument: community rules and sanctions are not laws. There is only one system of criminal law in Western Australia and the Commission's recommendations in relation to community justice groups do not provide for separate rules or laws that operate to the exclusion of Western Australian criminal law. Under the Commission's recommendations, relevant criminal justice agencies (such as the police, the DPP and the courts) will have the same ability to deal with breaches of the criminal law as they do now.

Conclusion

The Commission strongly rejects the argument that its recommendations for recognition of Aboriginal customary law and culture within the Western Australian legal system will create two separate systems of law. This argument is misconceived because it is based on the assumption that the principle of equality before the law requires everyone to be treated in exactly the same manner. As has been explained above, that is not the way that the legal system operates; it permits, at appropriate stages and within the strict framework of the law, the consideration of individual circumstances and matters relevant to the commission of an offence. If the legal system was to ignore individual circumstances, injustice for many more Australians would be the result.

32. See Recommendations 13 & 14, below pp 95–96.

33. For a discussion of Aboriginal kinship, see 'The role of kinship in Aboriginal society', Chapter Four, below p 66.

34. This was suggested by the Aboriginal Legal Service in their submission: see Aboriginal Legal Service, Submission No. 35 (12 May 2006) 10. For further discussion, see below p 95.

35. See Recommendation 17, below pp 112–113.

36. That is, an Aboriginal community with identifiable physical boundaries.

37. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 3.

Family Violence and Sexual Abuse

In May 2006 Nanette Rogers, a Northern Territory prosecutor, publicised the details of a number of cases involving sexual abuse against children in Indigenous communities in central Australia. The shocking nature of these cases, in particular the age of the victims, sparked a frenzied media and political debate about the link between Aboriginal customary law and sexual and violent offending in Aboriginal communities.¹ As an example of the theme in many newspaper articles, it was reported in *The Australian* that 'Aboriginal culture was to blame for endemic levels of sexual violence against children in central Australia'.²

Comments made in the media and by politicians have revealed a number of misconceptions about the relationship between Aboriginal customary law and violence and sexual abuse. These misconceptions include: that Aboriginal customary law condones or authorises sexual abuse or violence; that Aboriginal male Elders and other leaders are the main perpetrators of abuse; that courts allow Aboriginal men to use customary law as an excuse for violent or sexual offences; that customary law is the principal reason for under-reporting of offences against Aboriginal victims; and that Aboriginal men and women do not do enough about this abuse and are therefore complicit in it because of their silence.

Because of the intense media and political attention, the Commission considers that it is essential here to address some of the misinformation surrounding the relationship between Aboriginal customary law and issues of violence and sexual abuse. The federal government's response to this debate has made clarification of these misconceptions more urgent and important.

The Federal Government's Response

It is apparent from the response by the federal Minister for Indigenous Affairs that he subscribes to the view that family violence and sexual abuse in Aboriginal communities can be blamed on Aboriginal customary law.³ During the media debate, Mal Brough revealed the Commonwealth government's proposal to provide funding to states and territories for Indigenous communities on condition that state and territory laws were amended to prevent sentencing courts from considering Aboriginal customary law. He stated that:

Aboriginal offenders would no longer be able to 'hide behind' customary law to get reduced sentences for violent crimes under a proposal to crack down on rampant physical and sexual abuse in indigenous communities.⁴

The federal Minister also convened a national summit to deal with the crisis. At this summit there was consensus among Australian leaders that 'customary law in no way justifies, authorises or requires violence or sexual abuse against women and children'.⁵ At a meeting of the Council of Australian Governments (COAG) on 14 July 2006 all state and territory governments agreed to ensure, if necessary by legislative amendment, that Aboriginal customary law or cultural practices cannot be used to excuse, justify, authorise, require or lessen the seriousness of violence or sexual abuse.⁶

Bearing in mind the response of the Commonwealth government and given the recent focus on the level of violence and abuse in Aboriginal communities, some

1. Jones T, 'Crown Prosecutor Speaks Out About Abuse in Central Australia' *Lateline*, Transcript of Interview, 15 May 2006.
2. Kearney S & Wilson A, 'Raping Children Part of Men's Business', *The Australian*, 16 May 2006.
3. In contrast, the Western Australian Attorney General, Jim McGinty, has stated that 'Aboriginal customary law has never been used to excuse or condone serious criminal offending such as assaults on women and children ... It is simply not part of Aboriginal law nor is it part of European law': see 'Brough "Desperate" on Indigenous Issues: McGinty' *National Indigenous Times*, 5 July 2006.
4. Karvelas P, 'Excuse of Tribal Law to be Axed', *The Australian*, 23 May 2006, 1.
5. Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities, *Safer Kids, Safer Communities* (26 June 2006) see <http://www.atsia.gov.au/media/media06/4606_attach.aspx>.
6. COAG meeting, 14 July 2006: see <<http://www.coag.gov.au/meetings/140706/index.htm#indigenous>>.

The Commission strongly supports measures to reduce the unacceptable level of violence and abuse in Aboriginal communities.

may consider that the extent of the problem has only just been discovered.⁷ It has been well documented that Aboriginal women and children are victims of violence and sexual abuse at a much higher rate than non-Aboriginal women and children.⁸ In its Discussion Paper the Commission observed that Aboriginal women are 45 times more likely than non-Aboriginal women to be the victim of family violence committed by a spouse or partner.⁹ In 2002 the Gordon Inquiry in Western Australia concluded that the 'statistics paint a frightening picture of what could only be termed an "epidemic" of family violence and child abuse in Aboriginal communities'.¹⁰ Since at least the 1980s there have been numerous reports about the extent, causes and possible solutions to violence and sexual abuse in Aboriginal communities.¹¹

When commenting on the federal Minister's response of calling a national summit, Senator Chris Evans revealed there was a national 'crisis summit' in 2003 and at this summit \$37 million was earmarked for Aboriginal family violence programs.¹² As recently as 2004 COAG stated that all 'governments agree that preventing family violence and child abuse in indigenous families is a priority for action that requires a national effort'.¹³ The *National Framework on Indigenous Family Violence and Child Protection* was launched and underlined the need for *partnerships* between governments and Aboriginal communities to achieve its objectives.¹⁴

The Commission strongly supports measures to reduce the unacceptable level of violence and abuse in Aboriginal communities. However, the Commission's approach to this issue differs from that recently expressed by the federal government and the COAG resolution. It is the Commission's belief that permitting the criminal justice system to have regard to relevant aspects of Aboriginal customary law has the potential to reduce rates of violent and sexual offences.

Customary Law Does Not Condone Family Violence or Sexual Abuse

In its Discussion Paper, the Commission concluded that Aboriginal customary law should be viewed in its broadest sense and should not be limited to only those traditional laws that have remained unaltered since colonisation.¹⁵ Aboriginal customary law governs all aspects of Aboriginal life and continues to evolve and adapt to changing circumstances. While evidence concerning sexual assault and violence in traditional Aboriginal societies may shed some light on the acceptability or otherwise of sexual abuse and violence under Aboriginal customary law, the Commission considers that it is far more important to take into account customary law and culture in its contemporary context.

7. The *National Indigenous Times* reported that although it was implied that the issues raised by Dr Nanette Rogers were 'new and shocking' these issues are not new and 'Aboriginal people have been screaming about family violence for decades. They have been ignored': see 'Aboriginal Culture on Trial', *National Indigenous Times*, 1 June 2006.
8. See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001–2006* (June 2006) 6; Keel M, *Family Violence and Sexual Assault in Indigenous Communities: Walking the talk*, Australian Institute of Family Studies, Briefing Paper No. 4 (2004) 2 & 5; Stanley J, Tomison A & Pocock J, 'Child Abuse and Neglect in Indigenous Australian Communities', National Child Protection Clearinghouse, Issues Paper No. 19 (2003), 1; Fitzgerald T, *Cape York Justice Study Report* (November 2001) 88.
9. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 349.
10. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (July 2002) xxii. For a discussion of the findings and recommendations of the Gordon Inquiry and the governments response, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 351–52 and discussion under 'Addressing Family Violence and Sexual Abuse in Aboriginal Communities – Ongoing monitoring and evaluation of initiatives', Chapter Seven, below p 292.
11. Evans C, 'Time to Bust Brough's Myths' (Address to the Canberra South Branch of the Australian Labor Party, 19 June 2006) 1.
12. Evans, *ibid*. According to Senator Evans only five million dollars of that money has been spent. It has also been reported that the federal Department of Family and Community Services and Indigenous Affairs have not provided any funding for programs that 'target family violence on the ground' since 2004: see 'Aboriginal Culture on Trial', *National Indigenous Times*, 1 June 2006.
13. COAG communiqué, 25 June 2004.
14. *Ibid*.
15. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 49–54. See also the discussion under 'What Constitutes Customary Law', Chapter Four', below pp 64–65.

The historical position

The Gordon Inquiry commissioned an independent literature review to determine the extent, if any, that customary law excused or condoned child abuse or family violence in traditional Aboriginal societies. The review concluded that family violence and child abuse is not traditionally sanctioned in Aboriginal communities. Rather, examples of customary law sanctioned violence were limited to punishment which is 'governed by strict rules and regulations'.¹⁶ Similarly, Memmott et al have observed that:

Prior to colonial contact, most fighting was structured in traditional Aboriginal societies and occurred at special places. Fighting behaviour was controlled by elders and senior adults, and was carried out according to social rules in response to specified offences.¹⁷

The Commission has discussed in detail in its Discussion Paper and in this Report the nature and extent of traditional physical punishments.¹⁸ While some traditional punishments may be characterised as violent, it is necessary in the context of the current debate to distinguish family violence and sexual abuse from traditional punishments.¹⁹

In relation to the traditional practice of promised brides, the Commission observed in its Discussion Paper that there are few reported instances of this practice continuing in Western Australia.²⁰ The Gordon Inquiry observed that in the past Aboriginal girls may be promised at a young age but that sexual intercourse was not permitted until the girl had reached puberty.²¹ The Commission has also been informed that customary law 'actively prohibits adult men from having any sexual

contact with pre-pubescent girls'.²² In addition, it has been reported that under Aboriginal law if a man engaged in sexual relations with a young girl who was not his promised wife then he would be punished severely.²³ At the same time the Commission acknowledges that there is anthropological research suggesting that in some traditional Aboriginal societies sexual conduct with young people during initiation may have taken place.²⁴

When considering traditional practices it is important to understand that childhood in traditional Aboriginal societies ended at puberty or initiation.²⁵ Thus, the term 'child' from an Aboriginal perspective may be used to refer to a person who has not yet reached puberty or undergone initiation.²⁶ In the context of promised brides in traditional Aboriginal societies, a girl was considered to be a woman after puberty. It has been observed that the system of promised brides is

not a system aimed at providing young women for the sexual gratification of old men. It is a very complex system that has many practical aspects. The obvious ones are to prevent 'inbreeding', to provide a system of custodianship to land, information and ceremonies and to ensure that women and children are cared for by a mature man who can protect and provide for them. It is one of the most common systems of social organisation in the world.²⁷

While acknowledging that sexual relationships with post-pubescent girls was permitted under traditional law as part of the promised bride system, the Commission is not aware of any anthropological evidence suggesting that sexual abuse of very young children and infants was ever condoned under traditional law. To the contrary, it has been stated that sexual assault against

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16. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (2002) 70.
 17. Memmott P, Stacey R, Chambers Commission and Keys C, *Violence in Indigenous Communities* (Canberra: Crime Prevention Branch Commonwealth Attorney General, 2001) 23. The Australian Law Reform Commission also observed that under Aboriginal customary law if there was violence by a husband against his wife, her family may intervene to protect her, see ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [318].
 18. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 163–172, and see discussion under 'Consent – Traditional Aboriginal punishments', Chapter Five, below pp 141–43.
 19. For further discussion about traditional punishment, see below p 28.
 20. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 360.
 21. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (2002) 69.
 22. Stewart O'Connell, Submission No. 54 (10 July 2006) 2.
 23. Including being speared or put to death: Sex Discrimination Commissioner of the Human Rights and Equal Opportunity Commission, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (May 2003) [4.3].
 24. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal Traditional Life Past and Present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 181. It has recently been reported that anthropological studies indicate that initiation practices may involve sexual abuse of male children: see also Pearson C, 'Law of Diminishing Abuse', *The Australian*, 27 May 2006. For further discussion about initiation practices under customary law, see 'Criminal Responsibility – Traditional initiation practices', Chapter Five, below pp 143–45.
 25. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 187.
 26. For example, during the Commission's return consultation visit to Geraldton on 7 March 2006 it was told that even at 60 years of age an Aboriginal man could be referred to as a 'boy' if he had not undergone initiation.
 27. Stewart O'Connell, Submission No. 54 (10 July 2006) 3.

children was virtually unheard of in traditional Aboriginal society.²⁸

In relation to sexual assault generally there has been reference in anthropological studies to sexual behaviour in traditional Aboriginal societies that would today be considered sexual assault.²⁹ But it has also been observed that there were strict rules governing sexual relationships, in particular, the prohibition of sexual relations with particular relatives or kin.³⁰ In a recent letter to the editor of *The Australian*, a 70-year-old Aboriginal woman from the Western Desert explained that:

Sexual relationships were strictly regulated and could occur only in the context of prescribed kinship and generational relations. There never was a sexual free-for-all whereby initiated men could abuse or molest women, much less children and infants.³¹

It is also apparent that, under Aboriginal customary law, sanctions were imposed for certain forms of sexual abuse and violence. The Australian Law Reform Commission has observed that under Aboriginal customary law if there was violence by a husband against his wife, her family may intervene to protect her.³² Anthropological accounts also reveal that in traditional societies a person would be punished for hurting a child and that it was rare for a child to be physically abused.³³ It has been reported that accounts from

traditional Aboriginal women indicate that incestuous sexual assaults were contrary to customary law and that a man could be 'put to death for rape or speared in the thigh'.³⁴ Similarly, in her background paper for this reference, Kathryn Trees was told by Aboriginal people in Roebourne that, in the past, if an Aboriginal man had abused a child he would have been speared by the Elders.³⁵

The contemporary position

Numerous studies have concluded that family violence and sexual abuse within Aboriginal communities is caused by a multitude of factors. These factors include dispossession; an accumulation of inter-generational violence and trauma; the effects of past policies removing Aboriginal children from their families; institutionalisation; poor self-esteem resulting from racism and discrimination; social and economic disadvantages, such as overcrowded housing, unemployment, poor health, lack of education and poverty; alcohol and substance abuse; the influx of pornography into remote Indigenous communities; the loss of traditional status for Aboriginal men; and the breakdown of customary law and traditional authority structures.³⁶ The need to address these underlying factors has been recognised by all Australian governments at a recent COAG meeting.³⁷

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28. Stanley J, Kovacs K, Tomison A & Cripps K, 'Child Abuse and Family Violence in Aboriginal Communities – Exploring Child Sexual Abuse in Western Australia' (Paper prepared by the National Child Protection Clearinghouse for the Western Australian Government Inquiry into Responses by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities, May 2002) 31.
 29. See Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal Traditional Life Past and Present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 189–90 where it was noted that there was a practice of 'wife swapping' which technically did not require the consent of the wife but that in practice the issue of consent was not always significant because the wife would have been brought up to expect this to happen and to consider that it was her duty.
 30. Berndt & Berndt, *ibid* 336–37; Elkin AP, *The Australian Aborigines*, (Sydney: Angus and Robertson, 5th ed., 1976) 144.
 31. Mona Ngitji Ngitji Tur, Letter to the Editor, 'I'm a Western Desert Woman and I Want to be Heard', *The Australian*, 20–21 May 2006, 16.
 32. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [318]. Diane Bell has observed that under Aboriginal customary law there were 'customary punishments that women could apply to violent men': see Bell D, 'Intraracial Rape Revisited: On forging a feminist future beyond factions and frightening politics' (1991) 14 *Women's Studies International Forum* 385, 389.
 33. Queensland Government, Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (March 2000) [4.8.3].
 34. Lloyd J & Rogers N, 'Crossing the Last Frontier: Problems facing Aboriginal women victims of rape in central Australia' in Easta P (ed.), *Without Consent: Confronting adult sexual violence*, Australian Institute of Criminology Conference Proceedings No. 20 (1993)150–51. Similarly, during the recent interview Dr Nanette Rogers referred to a case where a young Aboriginal girl had been sexually abused. The victim's grandmother told the police that under traditional Aboriginal law the perpetrator would have been punished: Jones T, 'Crown Prosecutor Speaks Out About Abuse in Central Australia' *Lateline*, Transcript of Interview, 15 May 2006.
 35. Trees K, 'Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – A Case Study' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 213, 225.
 36. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 350–51; Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal Communities* (2002) 56 and Chapter 4. See also, for a selection of reports and articles that deal with one or more of these underlying causes, Stanley J, Tomison A & Pocock J, 'Child Abuse and Neglect in Indigenous Australian Communities', National Child Protection Clearinghouse, Issues Paper No. 19 (2003) 5, 12, 13, 14; Carney L, 'Indigenous Family Violence – Australia's Business' (2004) 6(1) *Indigenous Law Bulletin* 15. Atkinson J, 'Violence Against Aboriginal Women: Reconstitution of community law – the way forward' (2001) 5(11) *Indigenous Law Bulletin* 19, 21; Keel M, *Family Violence and Sexual Assault in Indigenous Communities: Walking the talk*, Australian Institute of Family Studies, Briefing Paper No. 4 (2004), 7; Blagg H, *Crisis Intervention in Aboriginal Family Violence: Summary Report* (Perth: Domestic Violence Prevention Unit, 2000) 5–6; Memmott P, Stacey R, Chambers Commission & Keys C, *Violence in Indigenous Communities* (Canberra: Crime Prevention Branch Commonwealth Attorney General, 2001) 10–31; Fitzgerald T, *Cape York Justice Study Report* (November 2001) 88–105; Queensland Government, Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (March 2000) Chapter 2 and [3.5].
 37. COAG meeting, 14 July 2006, <<http://www.coag.gov.au/meetings/140706/index.htm#indigenous>>.

It is abundantly clear that the majority of these causes are not linked to Aboriginal customary law. The relevance of Aboriginal customary law is not that it contributes to the abuse, but rather that it is the destruction of Aboriginal customary law and the breakdown of traditional forms of maintaining order and control that has impacted upon the extent of violence and sexual abuse in Aboriginal communities.³⁸ It has been observed that in response to the recent public debate Aboriginal women and men have clearly condemned any suggestion that violence, child abuse and sexual assault are part of Indigenous culture.³⁹ The Aboriginal and Torres Strait Islander Social Justice Commissioner has emphatically stated that

Aboriginal customary law does not condone family violence and abuse, and cannot be relied upon to excuse such behaviour. Perpetrators of violence and abuse do not respect customary law and are not behaving in accordance with it.⁴⁰

Following consultations with Aboriginal people in Western Australia and extensive research, the Commission found that family violence and sexual abuse cannot be condoned or excused by reference to customary law.⁴¹ Importantly, the Commission emphasised that there has never been a customary law or cultural defence (that would exonerate an accused from criminal responsibility) in Western Australia.⁴²

Responding to the Commission's Discussion Paper, the Office of the Director of Public Prosecutions (DPP) argued that because there is no evidence of any case where traditional Aboriginal law has responded to sexual abuse, customary law should not be recognised and

relied upon as part of the solution to family violence and sexual abuse.⁴³ The Commission is not aware of any case in contemporary Aboriginal society where the perpetrator of sexual abuse has been punished under customary law but this does not mean that such cases do not exist.⁴⁴ It should also be acknowledged that traditional Aboriginal law may not have developed adequate responses to family violence and sexual abuse because this type of behaviour did not occur or did not occur to the same extent in traditional Aboriginal societies as it does now.⁴⁵ The Sex Discrimination Commissioner of the Human Rights and Equal Opportunity Commission has argued that it is necessary to strengthen both Aboriginal customary law and mainstream responses to family violence.⁴⁶ The Commission agrees: Aboriginal people should be encouraged to develop cultural or customary law responses to family violence and sexual abuse. At the same time, Aboriginal victims of family violence and sexual abuse should have full access to mainstream criminal justice responses.

Aboriginal Elders Should Not Be Stereotyped as Offenders

It has been suggested during the recent media debate that child sexual abuse in Aboriginal communities is largely committed by Aboriginal male Elders and other male leaders.⁴⁷ In response to this Senator Evans has stated that:

Indigenous women's voices have been prominent in the recent debate but we should also be careful not to forget about Indigenous men: most Aboriginal men

38. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001–2006* (June 2006) 109. See also Evans C, 'Time to Bust Brough's Myths' (Address to the Canberra South Branch, Australian Labor Party, 19 June 2006) 4.

39. Evans, *ibid* 1.

40. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001–2006* (June 2006) 10. A similar statement was made by Professor Michael Dodson in a speech in 2003: see Dodson M, 'Violence Dysfunction Aboriginality' (National Press Club, 11 June 2003) 2. See also Sex Discrimination Commissioner of the Human Rights and Equal Opportunity Commission, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal customary law in the Northern Territory* (May 2003) [4.2.]

41. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 356–57 & 359.

42. *Ibid* 158 & 218.

43. The Office of the Director of Public Prosecutions, Submission No. 40B (13 July 2006) 5. The Western Australia Police have also suggested to the Commission that customary law does not protect women and children from violence and sexual abuse: Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 3.

44. For examples of customary law responses to sexual assault and violence in traditional Aboriginal societies, see discussion under 'The historical position', above pp 20–21.

45. Sex Discrimination Commissioner of the Human Rights and Equal Opportunity Commission, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (May 2003) [4.2.]

46. *Ibid* [6]. In its Discussion Paper the Commission invited submissions on the possibility of introducing non-violent customary law strategies to address family violence: see Invitation to Submit 15, LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 361.

47. Sproull R, 'Local Leaders Accused of Abuse', *The Australian*, 18 May 2006, 4. Despite the heading of this article the story goes on to say that the alleged perpetrators of the abuse 'include local leaders'.

abhor violence and child abuse. It is important not to stereotype Indigenous men as perpetrators.⁴⁸

Without reference to any statistical or other evidence, the DPP has claimed that it is often Aboriginal Elders and leaders who perpetrate the abuse.⁴⁹ The Commission does not accept that this argument is valid. During the Commission's consultations with Aboriginal people across the state there were only a few observations by Aboriginal people that Elders or leaders were sometimes responsible for sexual abuse.⁵⁰ In the report *Violence in Indigenous Communities* Memmott et al referred to research that suggested sexual abuse of young children in some remote communities was being largely committed by adolescent boys.⁵¹ Of course, just as there are examples of 'respected' members of the non-Aboriginal community being responsible for family violence and sexual abuse there will also be examples where Elders or leaders are responsible for this type of offending.

The Aboriginal and Torres Strait Islander Social Justice Commissioner has observed that the recent public debate is 'demonising Indigenous men and typecasting us all as violent and abusive and as perpetrators of abuse'.⁵² He also argued that stereotyping Aboriginal men as the perpetrators of abuse may actually increase their sense of disempowerment and lack of self-esteem.⁵³ These are matters that may negatively impact on Aboriginal offending and will further undermine efforts to enhance appropriate governance measures in Aboriginal communities. Given the negative effect that these stereotypes may have (and in the absence of any concrete evidence to support them) the Commission warns against assuming that the perpetrators of abuse are primarily Aboriginal Elders and leaders.

Customary Law as an Excuse for Violence and Abuse

It has been suggested during the recent debate that courts allow Aboriginal men to rely on customary law to excuse family violence and sexual abuse. The Northern Territory case *R v GJ*⁵⁴ has been repeatedly relied on to 'prove' this claim. In *R v GJ* a 55-year-old Aboriginal male Elder pleaded guilty to an offence of having sexual intercourse with a child and an offence of aggravated assault. The accused contended that he was entitled to have sex with the 14-year-old child because she was his promised wife and similarly that he was entitled to assault her as punishment for allegedly having sex with a young boy in the community.⁵⁵ The inflammatory claims in the media that this man was charged with rape are not correct.⁵⁶ The offence required proof that the accused engaged in the relevant sexual conduct with a child under the age of 16 years. The prosecution did not charge the accused with an offence that required proof that the victim did not consent.

In the context of this discussion it is very important to recognise that the accused pleaded guilty. He did not rely on any type of 'cultural defence'. A successful defence results in an acquittal. This man admitted that he was criminally responsible for his actions against the victim. The only issue in this case was determining the appropriate sentence. Martin CJ sentenced the accused to two years' imprisonment to be suspended after serving one month. Martin CJ took into account that the accused believed his actions were justified (although not required) under Aboriginal law and, importantly, that the accused did not know that his actions were contrary to Northern Territory law. The

48. Evans C, 'Time to Bust Brough's Myths' (Address to the Canberra South Branch of the Australian Labor Party, 19 June 2006) 4.

49. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 4–5.

50. The Commission was told by one community member in Geraldton that Elders were the main problem in relation to violence and sexual abuse in that area: see submissions received at LRCWA, Discussion Paper community consultation – Geraldton, 7 March 2006. See also LRCWA, Project No. 94, *Thematic Summary of Consultations – Midland*, 16 December 2002, 40; *Broome*, 17–19 August 2003, 30; *Wiluna*, 27 August 2003, 26.

51. Memmott P, Stacey R, Chambers C & Keys C, *Violence in Indigenous Communities* (Canberra: Crime Prevention Branch Commonwealth Attorney General, 2001) 41. This was also mentioned by Kathryn Trees in her background paper for this reference. During her research in Roebourne several people told her that children are sometimes responsible for the sexual abuse of other children: see Trees K, 'Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – A Case Study' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 213, 226.

52. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001–2006* (June 2006) 27–28 (emphasis omitted).

53. *Ibid.*

54. (Unreported, Supreme Court of the Northern Territory (Yarralin) SCC 20418849, Martin CJ, 11 August 2005).

55. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 217.

56. Merritt C, 'I Got it Wrong on Tribal Rape Sentence', *The Australian*, 24 May 2006, 1. In addition to the use of the word 'rape' in the title, this article also quotes Mal Brough using the word 'rape'. Even an article in the *National Indigenous Times* reported that the accused was convicted of raping his promised wife: see 'Black Law Breakdown', *National Indigenous Times*, Issue 106, 1 June 2006.



lawyer who represented the accused has presented an interesting perspective on this case. He explained that the sentencing judge convened the court at the Yarralin community and listened to evidence from Elders, through a female Indigenous interpreter and that:

The sight of the old man being carted away in a police wagon was more powerful to the community than any time he actually served. They got the message. The men understood that they would have to consider their responses to the breakdown of traditional law more carefully and in a way that did not conflict with NT law.⁵⁷

The prosecution appealed to the Northern Territory Court of Criminal Appeal on the basis that the sentence imposed was manifestly inadequate.⁵⁸ The prosecution did not argue that the sentencing judge had made an error when he took into account customary law issues.

Rather, it was argued that the sentence was so inadequate that the judge either failed to give sufficient weight to the seriousness of the offences or gave too much weight to the customary law issues.⁵⁹ Mildren J stated that 'there is no doubt that an Aboriginal person who commits a crime because he is acting in accordance with traditional Aboriginal law is less morally culpable because of that fact'.⁶⁰ In the circumstances of this case Mildren J held that because the offender was not actually required to have sex with the child under customary law less weight should be given to the fact that the conduct was seen by the offender to be acceptable.⁶¹ The sentence was increased to three years and 11 months' imprisonment to be suspended after serving 18 months' imprisonment.⁶² The original sentencing judge, Martin CJ, subsequently admitted that he made an error in imposing a sentence which required only one month in jail.⁶³ He did not say that he made an error in considering Aboriginal customary law. The mistake related to the actual sentence imposed and therefore the weight that was given to cultural considerations.⁶⁴ The lawyer who represented the accused in *R v GJ* (and who worked at an Aboriginal Legal Service in the Northern Territory for over 10 years) has stated that as far as he is aware Aboriginal customary law has only been relied upon in the Northern Territory as mitigation for an offence of having sexual relations with a child in two cases.⁶⁵ The Commission is not aware of any such case in Western Australia.

In a *Lateline* interview, Nanette Rogers referred to a number of horrific cases where very young Aboriginal children have been sexually abused.⁶⁶ One case apparently involved the sexual assault of a two-year-old child and in another case the victim was only seven months old. While the Commission does not know the

57. Stewart O'Connell, Submission No. 54 (10 July 2006) 5–6.

58. *R v GJ* [2005] NTCCA 20, [4].

59. *Ibid* [5] (Mildren J; Riley J and Southwood J concurring).

60. *Ibid* [30] (Mildren J; Riley J and Southwood J concurring).

61. *Ibid*.

62. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 217–18.

63. Merritt C, 'I Got it Wrong on Tribal Rape Sentence', *The Australian*, 24 May 2006, 1.

64. Since the publication of the Commission's Discussion Paper the accused sought leave to appeal against this sentence to the High Court. Leave to appeal was refused because the High Court did not consider that an appeal would succeed in reducing the sentence imposed. Kirby J did, however, state that relevant Aboriginal customary law issues, if proved, are important in the context of the general criminal law: see *GJ v The Queen* [2006] HCATrans 252 (19 May 2006) 15.

65. Stewart O'Connell, Submission No. 54 (10 July 2006) 3. The Commission assumes that the other case is *Hales v Jamilmira* [2003] NTCA 9 which is referred to in the Commission's Discussion Paper: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 218. Although the accused in this case pleaded guilty to an offence of having sexual relations with a child, at the time it was a defence under the *Criminal Code* (NT) if the parties were traditionally married. Following this case, in 2003, Northern Territory government amended the *Criminal Code* to remove the defence based upon a traditional marriage and to increase the maximum penalty for the offence. In *R v GJ* [2005] NTCCA 20, [33], Mildren J observed that the changes to the law in this regard were a response to the outcome in *Hales v Jamilmira*. The removal of this defence in the Northern Territory has been welcomed by Aboriginal women: see Lloyd J, Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Welcomes State and Territory Legislation that will Protect Aboriginal Children from Abuse' (2004) 6(1) *Indigenous Law Bulletin* 28; Anderson A, 'Women's Rights and Culture: An Indigenous woman's perspective on the removal of traditional marriage as a defence under Northern Territory law' (2004) 6(1) *Indigenous Law Bulletin* 30, 31.

66. Jones T, 'Crown Prosecutor Speaks Out About Abuse in Central Australia' *Lateline*, Transcript of Interview, 15 May 2006.

It is vital that courts are properly informed about what is acceptable under customary law and that this information is presented by both men and women.

details of the parties involved in these examples, it is aware of two very similar cases dealt with by the Northern Territory Court of Criminal Appeal. In *R v Riley*⁶⁷ the court heard an appeal against the leniency of the sentence imposed upon an Aboriginal man for sexual offences against a two-year-old victim. The court increased the sentence from six years' imprisonment to a sentence of eight years' imprisonment.⁶⁸ In this case Martin CJ stated that there 'is no suggestion that the respondent's crimes are in any way related to traditional Aboriginal law or culture'.⁶⁹ He also stated that:

In many Aboriginal communities crimes of violence, including sexual violence, against women and children are prevalent. The victims frequently live in deprived and dysfunctional circumstances without significant support. They are particularly vulnerable. Such victims are entitled to look to the courts for protection against these types of crimes.⁷⁰

In *R v Inkamala*⁷¹ the Northern Territory Court of Criminal Appeal heard an appeal against the leniency of a sentence of four years' imprisonment given to an 18-year-old Aboriginal male for committing sexual offences against a seven-month-old baby. It was also stated in this case that there was no link between the crime and traditional Aboriginal law or culture.⁷² Martin CJ held that the sentence imposed was 'so manifestly inadequate as to shock the public conscience and demonstrate error'.⁷³ The sentence was increased to nine years' imprisonment.

It was acknowledged by the Commission in its Discussion Paper that at times some Aboriginal men (or their defence counsel) have argued that certain violent or sexual behaviour is condoned under Aboriginal customary law.⁷⁴ Michael Dodson has observed that '[s]ome of our perpetrators of abuse and their apologists corrupt these ties and our culture in a blatant and desperate attempt to excuse their abusive behaviour'.⁷⁵ The Commission concluded that today, especially in Western Australia, courts are far less inclined to accept these types of arguments.⁷⁶ Although some Aboriginal offenders have argued that customary law excuses family violence and sexual abuse, this does not mean that it is culturally sanctioned and nor does it mean that courts have generally accepted these arguments.

Even if there are still isolated cases where Aboriginal people or their defence counsel argue that violence or sexual abuse of women and children is culturally sanctioned, a blanket ban on the reception of evidence about customary law is not the solution. Instead, it is vital that courts are properly informed about what is acceptable under customary law and that this information is presented by both men and women. As Catherine Wohlan stated in her background paper for this reference, when Aboriginal customary law has been argued as an excuse for violence against women it has been rare for the views of Aboriginal women to be considered by the courts.⁷⁷ As highlighted by Lloyd and Rogers, in these types of situations the prosecution

67. [2006] NTCCA 10.

68. Ibid [27] (Martin CJ; Thomas J concurring).

69. Ibid [15].

70. Ibid [17].

71. [2006] NTCCA 11.

72. Ibid [5] (Martin CJ).

73. Ibid [18].

74. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 221. The Gordon Inquiry was also informed during its community consultations that some Aboriginal men who had been charged with family violence and child abuse have argued that their behaviour was sanctioned under Aboriginal customary law. Yet it was noted by the Gordon Inquiry that no actual criminal cases in Western Australia were found that supported these claims: see Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (2002) 68.

75. Dodson M, 'Violence Dysfunction Aboriginality' (National Press Club, 11 June 2003) 3.

76. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 217. Recently, the Law Council of Australia has argued that there is 'no evidence that courts have permitted manipulation of 'cultural background' or customary law': see Law Council of Australia, *Recognition of Cultural Factors in Sentencing*, Submission to Council of Australian Governments (10 July 2006) 17.

77. Wohlan C, 'Aboriginal Women's Interests in Customary Law Recognition' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94, Background Paper No. 13 (April 2005) 507, 528.

has not called evidence to ensure that Aboriginal women's views about customary law are heard. They claimed that:

The prosecution's inaction makes them complicit in distorting the notions of Aboriginal culture and reinforces the commonly-held belief that sexual assault within the Aboriginal community is not a serious offence.⁷⁸

The Commission also observed in its Discussion Paper that in many cases the information presented to courts about Aboriginal customary law has been adduced by the accused person's lawyer without corroboration.⁷⁹ The Commission concluded that it is inappropriate for a court sentencing an Aboriginal offender to be informed about relevant customary law issues solely from defence counsel.⁸⁰ The Commission was told repeatedly by Aboriginal people during its consultations that it was vital that Aboriginal people were directly involved in advising courts in order to dispel any myths that customary law condones violence and sexual abuse of women and children.⁸¹ For this reason, the Commission has recommended that courts must consider any relevant information presented by members of an Aboriginal community justice group.⁸² Because these groups will require gender balance and equal representation from all relevant groups within the Aboriginal community, courts or other agencies within the criminal justice system (such as police and the DPP) will have access to the views of Aboriginal women about customary law and other cultural issues.

The Under-Reporting of Family Violence and Sexual Abuse

In its Discussion Paper the Commission acknowledged the high level of non-reporting of family violence and sexual abuse in Aboriginal communities.⁸³ The under-

reporting of sexual abuse and family violence is not confined to Aboriginal people,⁸⁴ although the level of under-reporting by Aboriginal victims may be more pronounced. Many of the reasons that Aboriginal victims do not report sexual or violent offences are common to all cultures and communities. Certainly there are explanations for under-reporting that are closely linked to the life circumstances of Aboriginal people; however, few of these explanations are specifically related to Aboriginal culture or customary law. During the recent media debate it has been implied that one of the main reasons that Aboriginal victims do not speak out about abuse is because of the fear of customary law payback or retaliation from the perpetrator and/or the perpetrator's family.⁸⁵ In the Commission's view the focus on customary law in this context is unjustified because any victim of sexual abuse or violence, whether Aboriginal or not, may be fearful of the consequences if he or she reports the incident.⁸⁶

In Chapter Seven the Commission considers in detail the reasons for the reluctance of many Aboriginal victims to report family violence and sexual abuse. These reasons include fear and distrust of the police, the criminal justice system and other government agencies; lack of police presence in many remote communities; language and communication barriers; lack of knowledge about legal rights and services available; lack of appropriate services for Aboriginal victims; and certain aspects of Aboriginal culture that may discourage some Aboriginal people from disclosing abuse. While the Commission acknowledges that cultural issues may play a part in the under-reporting of sexual and violent offences against Aboriginal women and children, it is clear that there are numerous other and arguably more compelling reasons why Aboriginal women and children do not speak out about the abuse to government justice and welfare agencies.

78. Lloyd J & Rogers N, 'Crossing the Last Frontier: Problems facing Aboriginal women victims of rape in central Australia', in Eastale P (ed), *Without Consent: Confronting adult sexual violence*, Australian Institute of Criminology Conference Proceedings No. 20 (1993)155. Diane Bell has similarly criticised the prosecution for failing to call evidence from Aboriginal women: see Bell D, 'Intraracial Rape Revisited: On forging a feminist future beyond factions and frightening politics' (1991) 14 *Women's Studies International Forum* 385, 403.

79. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 222.

80. *Ibid.*

81. *Ibid* 221.

82. See Recommendation 39, below p 184.

83. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 351. The Commission notes that *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* estimated that in Queensland 88 per cent of rape cases were unreported in Aboriginal communities: see Queensland Government, Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (March 2000) [3.4].

84. Keel M, *Family Violence and Sexual Assault in Indigenous Communities: Walking the talk*, Australian Institute of Family Studies, Briefing Paper No. 4 (2004) 7.

85. Jones, T, 'Crown Prosecutor Speaks Out About Abuse in Central Australia' *Lateline*, Transcript of Interview, 15 May 2006, 1

86. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001–2006* (June 2006) 108.

The Role of Aboriginal Women

The Commission accepts that there is an element of 'silence' within some Indigenous communities about the issue of violence and, in particular, sexual abuse.⁸⁷ It has been interpreted that this silence means that Aboriginal women do not protect their children and are incapable of appropriately responding to abuse.⁸⁸ This view is unjustified. As Chris Evans has argued, the recent public debate has 'been completely lopsided: it would have you believe that Indigenous people are standing idly by while the violence and abuse unfolds around them'.⁸⁹

Aboriginal people, in particular women, have for some time increasingly been bringing the issue of abuse out in the open and seeking support from governments. In 2004 Monique Keel observed that:

Over the past 15 years, the voices of Indigenous and non-Indigenous activists and academics have been far from silent. Indigenous women in particular have been raising their voices in solidarity to demand that governments no longer turn a blind eye to family violence.⁹⁰

In 2000 the Department of Indigenous Affairs commenced the project *Breaking the Silence on Sexual Abuse: My body belongs to me*.⁹¹ This project culminated in a video presented by Aboriginal actors and awareness-raising sessions with Aboriginal people, community organisations and government workers. What is important to acknowledge in the context of this chapter is that the project was a response to 'calls for assistance' from Aboriginal communities, in particular Aboriginal women concerned about the extent of sexual abuse in their communities and the 'apparent

lack of government action'.⁹² The Gordon Inquiry in Western Australia was also initiated by Aboriginal people.⁹³ In 2002 Aboriginal women Elders from Broome held a bush meeting as a result of increasing concern about child abuse in their communities. They formed the Peninsula Women's Group and developed strategies to respond to child abuse. These strategies included educating women about how to recognise signs of child abuse, designing literature for children and considering options for offenders such as removal from the community.⁹⁴ Recently, the media has reported the appalling extent of social disadvantage, violence and child abuse in Halls Creek. In many of these reports it was noted that Aboriginal Elders and leaders from that area were seeking assistance and disclosing the extent of the abuse.⁹⁵ Even during the interview with Nanette Rogers, which ignited this debate, it was observed that when the grandmother of a young victim became aware of the abuse she took the young girl to the police and reported the incident.⁹⁶

There are many examples of Aboriginal people working in their communities to address violence and abuse.⁹⁷



87. Stanley J, Tomison A & Pocock J, 'Child Abuse and Neglect in Indigenous Australian Communities', National Child Protection Clearinghouse, Issues Paper No. 19 (2003) 2.
88. Office of the Director of Public Prosecutions, Submission No. 40B (13 July 2006) 3.
89. Evans C, 'Time to Bust Brough's Myths' (Address to the Canberra South Branch of the Australian Labor Party, 19 June 2006) 7.
90. See Keel M, *Family Violence and Sexual Assault in Indigenous Communities: Walking the talk*, Australian Institute of Family Studies, Briefing Paper No. 4 (2004) 2. It was observed in the Cape York Justice Study that for many years Aboriginal women and more recently Aboriginal men have been speaking out about violence and abuse in their communities: see Fitzgerald T, *Cape York Justice Study Report* (November 2001) 95.
91. Department of Indigenous Affairs, *Breaking the Silence on Sexual Abuse: My body belongs to me* (August 2002).
92. Ibid 2–3. It was observed that this project has encouraged non-Aboriginal people to talk about the issue with Aboriginal communities.
93. WA Social Justice Network Forum, *Enough is Enough! In Defence of Aboriginal Culture* (Curtin University, Bentley, 17 July 2006).
94. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 114.
95. See for example Pennells S, 'Push to Create New "Stolen Generation"', *The West Australian*, 11 March 2006, 1; Strutt J, 'Remove Children at Risk: ALS Chief', *The West Australian*, 13 March 2006, 1; Pennells S, 'We Ignore Shame on our Doorstep', *The West Australian*, 3 April 2006, 9; Pennells S, 'Plan to Take Halls Creek Kids', *The West Australian*, 20 April 2006, 3; Strutt J, 'Build Halls Creek Hostel Now: MLC', *The West Australian*, 6 July 2006, 12.
96. Jones T, 'Crown Prosecutor Speaks Out About Abuse in Central Australia' *Lateline*, Transcript of Interview, 15 May 2006.
97. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 114 & 353. See also Mugford J & Nelson D, 'Violence Prevention in Practice: Australian award-winning programs' Australian Institute of Criminology (1996) 26 which refers to *Atunypa Wiru Minyma Uwankaraku Good Protection for All Women* project in the Northern Territory. This project commenced in 1994 in response to concerns about a lack of response to violence against women and it was stated that this project had, among other things, led to an increase in the number of reports to police; Stewart O'Connell, Submission No. 54 (10 July 2006) 14; New South Wales Aboriginal Justice Advisory Council, *Holistic Community Justice: A proposed response to Aboriginal family violence* (2001) 3–4.

The Commission believes that these people should be acknowledged and encouraged. As argued above, Aboriginal Elders and leaders should not be stereotyped as the perpetrators of the abuse. Similarly, Aboriginal women (and other Aboriginal men) should not be considered solely responsible for any silence or inaction that surrounds the issue.

The Commission's Recommendations Do Not Condone Violence

Recognition of traditional punishments

Separately from family violence and sexual abuse there are instances where Aboriginal women (as well as Aboriginal men) may be subject to traditional physical punishment and, further, both Aboriginal women and men may be responsible for the administration of that punishment.⁹⁸ Traditional punishments can be distinguished from family violence and sexual abuse: traditional punishment is sanctioned under Aboriginal law whereas family violence and sexual abuse is not.

A typical argument against recognition of Aboriginal customary law is that traditional punishments, such as spearing and other ritual forms of punishment, may contravene prohibitions against torture or cruel, inhuman and degrading treatment or punishment under Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR) and the provisions of *International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (ICAT). The Commission observed in its Discussion Paper

that tribal punishments will not always meet the standard of intention to inflict cruelty and humiliation required by ICAT and that what is cruel, inhuman or degrading treatment or punishment can be determined from a cultural perspective.⁹⁹ Traditional punishments, in particular when they are imposed with the consent of the person being punished, may not necessarily breach international human rights standards.

As a threshold test for the recognition of Aboriginal customary law the Commission has repeatedly emphasised the need to consider international human rights standards. Where Aboriginal customary laws conflict with these standards the human rights of the individual, including women and children, must prevail.¹⁰⁰ This is made indisputably clear in Recommendation 5 of this Report.¹⁰¹

Recognition of customary law in sentencing

In its submission on the Commission's Discussion Paper the Indigenous Women's Congress asserted that in order to protect the rights of Aboriginal women and children 'customary law should not be used as a defence or mitigating factor in relation to violent crimes'.¹⁰² There has never been a defence in this state based on customary law. The Commission has rejected the inclusion of any general defence or partial defence of customary law that could be used to argue that a person was not criminally responsible for a violent or sexual crime.¹⁰³

Nonetheless, the Commission has recommended that sentencing courts must consider any relevant and known Aboriginal customary law or cultural issues when

98. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 218.

99. *Ibid* 74 & 170–71.

100. Women and children have the right under international law to be free from violence: see Sex Discrimination Commissioner of the Human Rights and Equal Opportunity Commission, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (May 2003) [2.1] and Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001–2006* (June 2006) 11. Both these reports state that the right to freedom from violence is implicit in the right to freedom from discrimination.

101. In Chapter Four the Commission has recommended that the recognition of Aboriginal customary law must be consistent with international human rights standards and should be determined on a case-by-case basis. Further, the Commission recommends that particular attention should be paid to the rights of women and children: see Recommendation 5, below p 69. This approach has been supported in various submissions: see p 69. See also Sex Discrimination Commissioner of the Human Rights and Equal Opportunity Commission, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (May 2003) [4.2]; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001–2006* (June 2006) 10.

102. Indigenous Women's Congress, Submission No. 49 (15 June 2006) 1.

103. See discussion under 'Defences Based on Aboriginal Customary Law', Chapter Five, below pp 137–39. The Commission also rejected any defence based on ignorance of the law because it concluded that such a defence could enable the argument by an Aboriginal person that they were unaware of committing an offence against Australian law because the relevant conduct was considered acceptable under customary law. For example, if such a defence existed then this could have been relied upon to excuse the accused in *R v GJ* from full criminal responsibility: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 217–18; 'Ignorance of the Law', below p 149.

deciding the appropriate penalty to be imposed upon an Aboriginal offender.¹⁰⁴ The Aboriginal and Torres Strait Islander Social Justice Commissioner has argued that the case-by-case approach (as recommended by the Commission) is preferable to 'imposing a legislative uniform ban'.¹⁰⁵ Similarly, the Commission concluded in its Discussion Paper that because of the discretionary nature of sentencing, courts are able to balance Aboriginal customary law and international human rights standards that require the protection of women and children.

The Commission's recommendation in respect of sentencing does not permit a court or any other criminal justice agency (such as the police) to order, encourage or facilitate the infliction of unlawful violence.¹⁰⁶ Courts have consistently held that when taking into account the fact that an Aboriginal person has been or will be subject to physical punishment under traditional law the court is not condoning the behaviour. Instead, courts do and should recognise that if traditional punishment is not taken into account then injustice may result because the offender receives 'double' or excessive punishment for the offence.¹⁰⁷ Any blanket ban on courts considering Aboriginal customary law will mean that the very real issue of double punishment will be overlooked. Further, Aboriginal women have been subject to traditional punishments such as spearing¹⁰⁸ and, therefore, an absolute ban on taking customary law into account during sentencing will mean that they will be prevented from relying on any argument concerning double punishment. This will only serve to further disadvantage some Aboriginal women.

It has also been asserted that if Aboriginal customary law cannot be taken into account during sentencing proceedings the criminal justice system will be precluded from considering the positive aspects of customary law and the potential for customary law to be utilised to rehabilitate and heal Aboriginal offenders and communities.¹⁰⁹ This approach is endorsed by the Western Australian Indigenous Women's Congress which highlighted in its submission that where Aboriginal customary law 'is sensitively applied it can have a healing influence on the Indigenous participants and families involved'.¹¹⁰

The Commission's Approach to Family Violence and Sexual Abuse

The need to empower Aboriginal women and strengthen their cultural authority (as well as that of Aboriginal men) is central to any holistic approach to Indigenous violent and sexual offending.¹¹¹ Many commentators have argued that Aboriginal people must be given the opportunity to develop their own solutions to family violence and sexual abuse.¹¹² A literature review of the best practice models to reduce child abuse and family violence has observed that:

The underlying theme of the majority of programs considered in the literature is the importance for greater involvement and ownership by Indigenous community members in child protection and anti-violence policy, program design and implementation, and the importance of working within existing family and community networks, and respecting and utilising traditional belief systems.¹¹³

104. See Recommendation 38, below p 183.

105. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001–2006* (June 2006) 12.

106. As to what constitutes unlawful violence, see discussion under 'Consent', below pp 139–48.

107. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 213–14.

108. For examples in Western Australia, see *R v Friday* (Unreported, Supreme Court of Western Australia, SC No. 146/1999, Templeman J, 11 & 13 October 1999); *R v Thompson* (Unreported, Supreme Court of Western Australia, SC No. 199/2000, Roberts-Smith J, 19 & 20 February 2001); *R v Jackman* (Unreported, Supreme Court of Western Australia, SC No. 250/2002, Murray J, 15 May 2003) as referred to in Williams V, 'The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 1, 15–19.

109. Evans C, 'Time to Bust Brough's Myths' (Address to the Canberra South Branch of the Australian Labor Party, 19 June 2006) 6.

110. Indigenous Women's Congress, Submission No. 49 (15 June 2006) 1.

111. See Lloyd J & Rogers N, 'Crossing the Last Frontier: Problems facing Aboriginal women victims of rape in central Australia', in Eastale P (ed), *Without Consent: Confronting adult sexual violence*, Australian Institute of Criminology Conference Proceedings No. 20 (1993) 162; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001–2006* (June 2006) 10.

112. See for example Atkinson J, 'Violence Against Aboriginal Women: Reconstitution of community law – the way forward' 5(11) *Indigenous Law Bulletin* 19, 21; Carney L, 'Indigenous Family Violence – Australia's Business' (2004) 6(1) *Indigenous Law Bulletin* 15, 16; Wright H, 'Hand in Hand to a Safer Future: Indigenous family violence and community justice groups' (2004) 6(1) *Indigenous Law Bulletin* 17, 18; Memmott P, Stacey R, Chambers Commission & Keys C, *Violence in Indigenous Communities* (Canberra: Crime Prevention Branch Commonwealth Attorney General, 2001) 80; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001–2006* (June 2006) 7; Stanley J, Tomison A & Pocock J, 'Child Abuse and Neglect in Indigenous Australian Communities', National Child Protection Clearinghouse, Issues Paper No. 19 (2003), 24.

113. Queensland Government, *Meeting Challenges, Making Choices: Evaluation report* (September 2005) 52.

The Commission is of the view that the Western Australian government should provide assistance to Aboriginal communities to develop their own responses and solutions to family violence and sexual abuse. That is not to say that Aboriginal communities should do it alone. The government must provide ongoing resources and support for community-based initiatives. One of the Commission's central recommendations is the establishment of community justice groups.¹¹⁴ A potential role for community justice groups is to develop crime prevention initiatives and rehabilitative programs. In Queensland it has been observed that community justice groups are 'playing an increasingly important role in reducing Indigenous family violence, through supporting women and their families, and working with the offenders'.¹¹⁵ Examples of strategies employed by community justice groups include the provision of support to women when dealing with the criminal justice system; education and awareness initiatives within their communities about the rights of Aboriginal women and any relevant support services; and the use of traditional sanctions such as banishment to an outstation and shaming.¹¹⁶ In order to ensure that the

views and needs of Aboriginal women are considered the Commission has recommended that community justice groups must have an equal number of men and women.¹¹⁷

Many of the Commission's recommendations have the potential to reduce the level of sexual and violent offending within Aboriginal communities and assist the criminal justice system to bring the perpetrators of this abuse to justice. However, the Commission's reference is not about sexual abuse and violence; it is about Aboriginal customary law and culture. The difficult issues surrounding sexual abuse and violence and the failure of the criminal justice system to adequately protect Aboriginal women and children must be addressed. To this end the Commission has made a number of recommendations that assist Aboriginal victims in the criminal justice system.¹¹⁸ The recent debate has ignored the positive and the many non-contentious aspects of Aboriginal law and culture. It has also ignored the importance of recognising Aboriginal customary law for the wellbeing and enhancement of Aboriginal people in this state.

114. See Recommendation 17, pp 112–113.

115. Wright H, 'Hand in Hand to a Safer Future: Indigenous family violence and community justice groups' (2004) 6(1) *Indigenous Law Bulletin* 17, 17.

116. *Ibid.*

117. The Sex Discrimination Commissioner of the Human Rights and Equal Opportunity Commission has previously emphasised the importance of ensuring when considering the recognition of Aboriginal customary law the views of Aboriginal women are taken into account: see Sex Discrimination Commissioner of the Human Rights and Equal Opportunity Commission, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal customary law in the Northern Territory* (May 2003) [3.3].

118. See discussion under 'Other Recommendations that Will Assist in Addressing Family Violence and Child Abuse in Aboriginal Communities', Chapter Seven, below p 297.

Chapter Two

Guiding Principles for Reform

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Guiding Principles for Reform

This Final Report makes a total of 131 recommendations to improve the interaction of Western Australian law with Aboriginal law and culture. For the reasons elucidated in Part II of its Discussion Paper, the Commission has not confined itself to statutory reform; instead, the Commission makes recommendations that impact not only on Western Australian legislation, but also the policies, practices and procedures of government entities such as departments, agencies, correctional services and courts. During its six-year study of Aboriginal customary laws and culture in Western Australia the Commission has distilled a number of principles that should, in its opinion, guide future reform in each of the areas discussed in this Report.

The principles discussed below may appear obvious and many government departments and individual officers undoubtedly already strive to apply these principles in practice. The Commission's Final Report and recommendations in no way seek to detract from the excellent initiatives that are already in place or the efforts of individuals who are at the frontline of reform in various areas. However, in its research the Commission has found that, even with the best intentions, in the rush to address a perceived issue the process of ethical reform may sometimes be neglected. This can impact upon the effectiveness of the reform and can reflect negatively in outcomes for Aboriginal people. The following principles are by no means exhaustive and should not be understood as strict rules: they are simply intended to guide government in its application of reform and in its consideration of the recognition of Aboriginal law and culture in Western Australia.

PRINCIPLE ONE

Improve government service provision to Aboriginal people

Many people believe that Aboriginal people receive more public benefits than other Australians, but this is not the case. As the Human Rights and Equal Opportunity Commission has pointed out, it has been necessary for governments to develop special programs to meet the needs of Aboriginal people because they are the most economically and socially disadvantaged group in Australia.¹ This is most profoundly reflected by the fact that Aboriginal people have 20 years less life expectancy than the rest of the population.² They also do not access mainstream government services at the same rate as non-Aboriginal Australians.³

The extent of entrenched disadvantage suffered by Aboriginal Western Australians is described in Part II of the Commission's Discussion Paper.⁴ Much of this disadvantage stems from a lack of infrastructure and essential government services to Aboriginal communities⁵ and includes the provision of suitable housing, education, law enforcement and healthcare, as well as clean water, waste disposal and power. The Commission found that part of the reason for problems of service provision to Aboriginal communities lay in the complicated nature of relationships between the three levels of government—local, state and federal—responsible for the delivery of services.⁶ There are, of course, other factors such as remoteness⁷ that impact upon the provision of services to Aboriginal

1. The level of disadvantage suffered by Aboriginal persons has been said by the Commonwealth Productivity Commission Chairman Gary Banks to be 'disproportionately high, despite longstanding policy attention': Banks, G, *Indigenous Disadvantage: Assessing policy impacts* (Address to the Pursuing Opportunity and Prosperity Conference, Institute of Applied Economic and Social Research, Melbourne, 13 November 2003) 1, <<http://www.pc.gov.au/speeches/cs20031113/index.html>>.
2. As Gary Banks has reflected, 20 years 'is just short of the standard measure of a generation': *ibid* 4. See also discussion in LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) Part II.
3. Human Rights and Equal Opportunity Commission, *Face the Facts: Some questions and answers about refugees, migrants and Indigenous peoples in Australia* (August 2005) 31.
4. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 20–44.
5. Cooper has observed that '[c]ommunities are relatively powerless and vulnerable and unable to challenge the Government as ATSIC did. They are so starved of services, infrastructure and expertise that they are easy to interest or pressure to agree to [Shared Responsibility Agreements] and are unlikely to complain or resist for fear of repercussion': Cooper D, 'Shared Responsibility Agreements: Whitewashing Indigenous service delivery' (2005) 6(15) *Indigenous Law Bulletin* 6, 7.
6. The shared responsibility for services to Aboriginal communities in Western Australia is discussed in some detail in LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 422–25.
7. Remoteness is particularly relevant for Aboriginal people. When compared to the general population, Aboriginal people are far more regionally based. This is particularly so in the Kimberley where Aboriginal people make up one-third of the population. See Department of Indigenous Affairs, *Consulting Citizens: Engaging with Aboriginal Western Australians* (2005) 9–10.

communities,⁸ but it has been conclusively found that government service delivery is an area where Aboriginal communities in Western Australia are disadvantaged relative to non-Aboriginal communities in comparable geographic regions.⁹

An attitude that seems to be prevalent in government circles is that Aboriginal people should perform community service work or assist government agencies in the delivery of services on a voluntary basis.¹⁰ This is something that is not expected of the non-Aboriginal community.¹¹ Indeed, adequate service provision and

necessary infrastructure is generally taken for granted by non-Aboriginal people, even in remote areas. In the Commission's experience Aboriginal people are often willing to assist in addressing the social problems and gaps in service delivery that they perceive in their communities; however, they should not be expected to do so without reward and support from agencies (or local governments) that would otherwise be responsible for delivery of those services.

Some of the recommendations contained in this Report propose the institution of specific programs and services for Aboriginal people to address particular needs identified by the Commission's inquiry or to redress discrimination against Aboriginal people in current government service provision.¹² The Commission has also recommended that local governments be made accountable for expenditure of the money received for the particular benefit of their Aboriginal constituents, particularly in remote communities.¹³ As discussed in Chapter One, the Commission believes that it is important to put Aboriginal Australians on a level playing field with non-Aboriginal Australians. Therefore, it is the Commission's opinion that the processes of reform identified in this Report should begin with genuine government commitment to the improvement of service provision to Aboriginal communities.



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8. A list of factors impacting upon service provision to Aboriginal communities in Western Australia, particularly at the basic infrastructure level, may be found in LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 423. This is discussed further in Chapter Ten of this Report.
 9. Department of Indigenous Affairs (DIA), *The Provision of Local Government Services to Aboriginal Communities: A focus paper*, (November 1999) 2–3. More recently DIA has stated that: 'Government reports have shown that, in relation to access to social services, [Aboriginal] people living in communities of between 5,000 and 10,000 face what they describe as "considerable" disadvantage, while those living in communities of below 5,000 people face "extreme" disadvantage. Those living in isolated areas are especially affected. They face a "lack of information" about what is available; the absence or inaccessibility of many services; poorer quality services; higher costs associated with accessing services; inappropriate urban service and funding models and poorly motivated staff'. See DIA, *Services to Indigenous People in the Town of Derby – West Kimberly: Mapping and gap analysis* (2004) 4.
 10. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues* (June 2006) 65; Sex Discrimination Commissioner, Human Rights and Equal Opportunity Commission, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (May 2003).
 11. The federal government's new shared responsibility agreements are a good example of this point. They require Aboriginal people to take on behavioural change and other commitments in order to receive essential government services. These commitments are not generally required by non-Aboriginal communities: Cooper, D, 'Shared Responsibility Agreements: Whitewashing Indigenous service delivery' (2005) 6(15) *Indigenous Law Bulletin* 6, 8.
 12. See, for example, programs and services for Aboriginal people within the criminal justice system (Recommendation 7); educational strategies for Aboriginal people about the criminal justice system and parenting (Recommendations 26 & 28); diversionary strategies for young Aboriginal people (recommendation 50); wills education and will-making initiative (Recommendations 69 & 70); enhanced culturally appropriate service delivery in the Family Court of Western Australia (Recommendation 88); provision of enhanced services for men in regional areas (Recommendation 92); establishment of a statewide Aboriginal language interpreter service (Recommendation 117); and the employment of Aboriginal liaison officers in courts (Recommendation 127). The adoption of a whole-of-government approach to Aboriginal service and program provision (Recommendation 1); and the institution of cultural awareness training for government employees, contractors, service providers, courts and lawyers (Recommendations 2, 11, 12, 56 & 128) should also assist in improving service and program provision to Aboriginal communities in Western Australia.
 13. See discussion under 'Accountability of Local Governments for "Aboriginal" Funding', Chapter Ten, below p 352, and Recommendation 129, below p 354.
Also see Department of Indigenous Affairs, *Services to Indigenous People in the Shire of Wiluna: Mapping and gap Analysis* (2004) 30, where it was noted that public houses in the town of Wiluna were funded through Aboriginal-specific funding given for the purpose of *remote* communities in the shire, not the mainstream town.

PRINCIPLE TWO

Collaboration, cooperation and consultation

As argued in the Commission's Discussion Paper (and in Chapter Three below),¹⁴ the Commission believes that a whole-of-government approach to the design, development and delivery of services and programs to Aboriginal people is required for success. This must involve not only cooperation and collaboration between governments (local, state and federal) and government departments, but also the ongoing involvement of Aboriginal people. The Aboriginal and Torres Strait Islander Social Justice Commissioner has forcefully argued that Aboriginal people have the right to be involved in decisions affecting their own interests.¹⁵ This principle is reflected in international human rights law¹⁶ and is strongly supported by the Commission.¹⁷ The Department of Premier and Cabinet and the Department of Indigenous Affairs has produced a strategy for effectively engaging with Aboriginal people which the Commission commends to all Western Australian government agencies and non-government organisations.¹⁸

Since the demise of the Aboriginal and Torres Strait Islander Commission there is no national body that is representative of Aboriginal interests and therefore no clear focal point for collaboration and consultation with Aboriginal people. The Commission is concerned to ensure that this is not used as an excuse for lack of consultation or failure¹⁹ to seek the active participation

of Aboriginal people in government processes.²⁰ In the Commission's experience there are many representative organisations at the community and regional levels that can assist agencies to ensure that Aboriginal voices are heard in relation to the establishment of programs and processes affecting Aboriginal people. The Commission strongly recommends a collaborative approach that involves, at all stages, the effective participation of the Aboriginal people to whom specific programs and services are addressed. This principle is reflected in the Commission's recommendations throughout this Final Report.²¹

PRINCIPLE THREE

Voluntariness and consent

Somewhat aligned to Principle Two (which recognises that the success of government policies and programs directed at Aboriginal people requires their active involvement in the decision-making process) is the principle of voluntariness and consent. The imposition on Aboriginal communities of structures, processes and programs without due consideration of the consent of the people who are affected or expected to participate has been a particular failure of past governments at the state and national level.²² Free, prior and informed consent is a principle underlying the United Nations' *Declaration of the Rights of Indigenous Peoples* and is recognised by the Western Australian government as a key factor underpinning effective engagement with Aboriginal people.²³

14. See discussion under 'A whole-of-government approach', Chapter Three, below pp 46–48.

15. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Social Justice Report 2005* (2005) 99.

16. See, for example, Article 19 of the revised draft of the international *Declaration on the Rights of Indigenous Peoples*.

17. The need to actively engage Aboriginal people in decision-making and reform is reiterated throughout this report and included in many of the Commission's recommendations.

18. Department of Premier and Cabinet & Department of Indigenous Affairs (WA), *Consulting Citizens: Engaging with Aboriginal Western Australians* (undated), <<http://www.dia.wa.gov.au/Policies/Communities/Files/ConsultingCitizensSept2005.pdf>>.

19. The failure to adequately consult with Aboriginal people, particularly in remote communities, has been observed by the Department of Indigenous Affairs (DIA) in Western Australia: see DIA, *Services to Indigenous People in the Town of Port Hedland: Mapping and gap analysis* (2004) 25, where it was noted that '[n]o attempt has been made to visit these [remote] communities or to consult with community members'.

20. It has been noted by HREOC that the '[c]urrent arrangements [in indigenous affairs] are not sufficient to ensure the full and effective participation of indigenous peoples in decision making that affects them at any level – international, national or regional': Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Social Justice Report 2005* (2005) 219.

21. See, for example, the Commission's requirements for Aboriginal collaboration and participation in: the design and delivery of cultural awareness training (Recommendation 2); the establishment of community justice groups (Recommendation 17); the appointment of community officers under the *Protective Custody act 2000* (Recommendation 21); the establishment of Aboriginal courts (Recommendation 24); the development of educational strategies for Aboriginal people about criminal law and the criminal justice system (Recommendation 26); the development of protocols for police in establishing whether an Aboriginal person requires an interpreter (Recommendation 53); improvements to the prison application process for funeral attendance (Recommendation 60); determination of the appropriate policy regarding escort of Aboriginal prisoners to funerals (Recommendation 62); Indigenous cultural and intellectual property respect protocols (Recommendations 80 & 81); the review of the police order regime (Recommendation 95); the development and application of conservation programs (Recommendation 97); the review of the commercial harvesting licensing regime under the *Wildlife Conservation Act 1950* (Recommendation 103); and the reform of Aboriginal community governance in Western Australia (Recommendation 131).

22. Even the new arrangements in Indigenous affairs have been harshly criticised for being simply imposed on Aboriginal people. As Aden Ridgeway has said: '[T]he government's rhetoric in recent times regarding these so-called new arrangements has been at best illusory and at worst nothing short of deceitful, because the disingenuous repetition of the phrases about "bottom up" and "community control" cannot change the reality of the policy. That is, that it is top down, it is paternalistic and it is essentially just a veiled—a very thinly veiled—policy of assimilation': Commonwealth Parliament, Senate, *Parliamentary Debates*, 10 March 2005, 30 (Senator Aden Ridgeway).

23. Department of Premier and Cabinet & Department of Indigenous Affairs (WA), *Consulting Citizens: Engaging with Aboriginal Western Australians* (undated), <<http://www.dia.wa.gov.au/Policies/Communities/Files/ConsultingCitizensSept2005.pdf>> 18.

The principle of voluntariness and consent is respected throughout the Commission's recommendations in this Report. As made clear in Chapter Four, it is the Commission's view that voluntariness should be the guiding principle in determining who is bound by Aboriginal customary law.²⁴ Free and informed consent underpins the Commission's approach to the lawfulness of some physical traditional punishments.²⁵ Chapter Ten asserts voluntariness as the key principle underlying the reform of governance structures in Aboriginal communities.²⁶ Participation in Aboriginal courts²⁷ and community justice groups²⁸ is also dictated by the principle of voluntariness and consent at both individual and community levels.

PRINCIPLE FOUR

Local focus and recognition of diversity

As emphasised in the Commission's Discussion Paper, Aboriginal people in Western Australia are not homogenous.²⁹ Rather, they are culturally diverse peoples made up of over one hundred language groups or tribes.³⁰ Recognition of this diversity demands that government initiatives have a local focus and that generic programs have sufficient flexibility to adapt to the cultural dynamics of individual Aboriginal communities. For this reason the Commission's recommendations require that consultation, design, development and delivery of government programs and services be done on a local or regional basis to ensure the correct protocols are observed and cultural diversity is adequately acknowledged and reflected in programs and services to Aboriginal people.

The rejection of a one-size-fits-all approach is clear in the Commission's recommendations in matters such as cultural awareness training;³¹ the establishment of Aboriginal courts;³² the reform of community governance structures;³³ the establishment of community justice groups;³⁴ and the institution of initiatives to address family violence and child abuse in Aboriginal communities.³⁵

PRINCIPLE FIVE

Community-based and community-owned initiatives

Linked to the local focus principle discussed above is the requirement that, where possible, government initiatives addressed to Aboriginal people are community-based and, more importantly, community-owned. There is now sufficient evidence to show that well-resourced programs that are owned and run by the community are more successful than generic, inflexible programs imposed on communities.³⁶ Undoubtedly this is because community-based and community-owned initiatives are inherently responsive to the problems faced by the community and are culturally appropriate to that community. They are driven by real community need rather than divorced governmental ideology.³⁷ As noted in a Background Paper to this reference, the Commission's community consultations, particularly in remote areas, 'revealed a number of instances where community-defined priorities differed significantly' from those of government agencies.³⁸ The importance of the community-owned and community-based approach is highlighted in the context of family violence programs in Chapter Seven of this Report.³⁹ It is also reflected in the Commission's

24. See discussion under 'Who is bound (and who should be bound) by Aboriginal customary law?', Chapter Four, below pp 65–66.

25. See discussion under 'Criminal Responsibility – Consent', Chapter Five, below pp 139–47.

26. See discussion under 'Some key principles for Aboriginal community governance reform', Chapter Ten, below pp 357–58.

27. See discussion under 'Aboriginal Courts – Voluntariness', Chapter Five, below p 133.

28. See discussion under 'Aboriginal Community Justice Groups', Chapter Five, below pp 97–123.

29. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) Part II.

30. Indeed, the Commission has been told that today there are over 300 discrete Aboriginal communities in Western Australia: Denis Callaghan, Department of Indigenous Affairs, telephone consultation (6 September 2006).

31. See Recommendations 2, 11, 12, 56, 60 & 128.

32. See Recommendation 24, below p 136.

33. See Recommendation 131, below p 359.

34. See Recommendation 17, below pp 112–13.

35. See Recommendation 91, below p 290.

36. See, for example, Commonwealth Standing Committee on Aboriginal and Torres Strait Islander Affairs, *We Can Do It! The needs of urban dwelling Aboriginal and Torres Strait Islander Peoples* (2001) 29–31; *Many Ways Forward: Report of the inquiry into capacity building and service delivery in Indigenous communities* (2004) 169, 243 & 252; Commonwealth Grants Commission, *Report on Indigenous Funding 2001* (2001) xvi.

37. Evans C, *Time to Bust Brough's Myths* (Address to the Canberra South branch of the Australian Labor Party, 19 June 2006) 7.

38. Blagg H, 'A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 317, 318.

39. A full discussion of submissions, research and consultations supporting this approach in respect of family violence may be found under 'The need for culturally appropriate responses to family violence and child abuse', Chapter Seven, below pp 289–90. The approach is also discussed in detail in relation to the Commission's proposal for community justice groups: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 107 ff.

recommendations⁴⁰ and supported by submissions to the Commission's inquiry, including by the Human Rights and Equal Opportunity Commission.⁴¹

PRINCIPLE SIX

Respect and empowerment of Aboriginal people

As the Commission's principal project writer has elsewhere observed, 'many of the problems experienced by Aboriginal communities in Western Australia today—including community dysfunction, alcohol and substance abuse, feuding and youth issues—are symptomatic of a decline in cultural authority'.⁴² The Commission's consultations with Aboriginal people yielded many references of concern about diminishing regard for Elders, particularly among Aboriginal young people.⁴³ This breakdown of cultural authority is undoubtedly a continuing consequence of colonial dislocation of Aboriginal peoples from their traditional land, past government policies of removal of Aboriginal children from their cultural context, and the forced unification of different Aboriginal tribes on reserves and missions. However, there are also a number of contemporary factors that contribute to this problem.⁴⁴ The Commission's recommendations emphasise an approach to recognition of Aboriginal customary law and culture that seeks to enhance the cultural authority of Elders and respect and empower Aboriginal people. This is achieved in a number of ways:

- by acknowledging that Aboriginal people were ruled by a complex system of laws at the time of

colonisation and by giving appropriate respect and recognition to those laws within the Western Australian legal system;

- by encouraging the institution of community-based and community-owned processes and programs that can more effectively respond to local cultural dynamics and needs;
- by the institution of substantially self-determining governance structures such as community justice groups that are empowered to play an active role in the justice system in Western Australia, as well as create community rules and sanctions to deal with law and order problems on communities;
- by the establishment of Aboriginal courts which encourage respect for Elders by involving them in the justice process;
- by encouraging the involvement of Aboriginal people in decision-making on matters that affect their lives and livelihoods;
- by the amendment of the Western Australian Constitution to accord Aboriginal people respect at the very foundation of Western Australian law; and



40. See, for example, establishment of programs and services for Aboriginal people within the criminal justice system (Recommendation 7); establishment of community justice groups (Recommendation 17); development of non-custodial bail facilities for juveniles in remote and regional locations (Recommendation 32); diversion of young Aboriginal people to a community justice group (Recommendation 50); development of family violence treatment and education programs (Recommendation 91); and reform of Aboriginal community governance (Recommendation 131).

41. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006); Sex Discrimination Commissioner, Human Rights and Equal Opportunity Commission, Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory (May 2003) 23–24 (as referenced by Submission No. 53).

42. Hands TL, 'Teaching a New Dog Old Tricks: Recognition of Aboriginal customary law in Western Australia' (2006) 6(17) *Indigenous Law Bulletin* 12, 13.

43. Such sentiments were repeated throughout the Commission's consultations with communities, including with the more remote Western Australian communities: See generally the Commission's *Thematic Summaries of Consultations*. See also the comments of community members in Roebourne recorded in Kathy Trees' case study: Trees K, *Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – A case study*, in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 213. In relation to children and youth, these matters are discussed in more detail in Part II and in relation to community law and order these matters are addressed in Part V.

44. These include the imposition of white governance structures on Aboriginal communities; the lack of education and a suitable economic base to provide employment and create self-supporting communities (thereby raising self-esteem and creating Aboriginal role models); and the failure of governments to actively involve Aboriginal people, especially Elders and those with traditional authority in decision-making.

- by removing bias and cultural disadvantage within the Western Australian legal system.⁴⁵

As Senator Chris Evans recently observed, '[t]he language of empowerment has disappeared' and Aboriginal people 'have been positioned as either victims, or perpetrators, hostage to a culture that locks them in disadvantage'.⁴⁶ The Commission rejects attempts to stereotype Aboriginal people and Aboriginal culture.⁴⁷ The recommendations contained in this Report seek not only to empower Aboriginal people by creating an environment where Aboriginal people can build and exercise their capacity to make decisions that affect their everyday lives, but also to bring respect to Aboriginal people, law and culture. It is the Commission's opinion that sustainable improvement in Aboriginal peoples' living conditions and quality of life can only be achieved by government supporting the empowerment of Aboriginal people and championing the cause of reconciliation in the wider community.⁴⁸



social or skin groups should be considered as the starting point for new governing structures, including community justice groups.⁴⁹ In addition, the Commission is concerned that the voices of Aboriginal women must be heard by government. The Commission notes that women are often the driving force behind positive change in many Aboriginal communities.⁵⁰ For this reason the Commission has recommended equal gender representation on community justice groups and in any reform of Aboriginal community governance. Lack of balanced gender and family, social or skin group representation will impinge upon the operational legitimacy of governing structures and community initiatives, and further contribute to breakdown of cultural authority, especially in remote Aboriginal communities.

In the Commission's opinion, the principle of balanced gender and family, social or skin group representation is something that government agencies should also strive to achieve in their consultations with Aboriginal communities, and in encouraging input and participation in decision-making.

PRINCIPLE SEVEN

Balanced gender and family, social or skin group 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 family,

45. For discussion of cultural disadvantage within the Western Australian legal system and the Commission's findings in this regard, see Hands TL, 'Teaching a New Dog Old Tricks: Recognition of Aboriginal customary law in Western Australia' (2006) 6(17) *Indigenous Law Bulletin* 12, 13–14.

46. Evans C, *Time to Bust Brough's Myths* (Address to the Canberra South branch of the Australian Labor Party, 19 June 2006) 9.

47. Stereotyping of Aboriginal people is evident not only in the media (as discussed in Chapter One above), but also in politics and policy. Cooper has observed that the federal government's current Shared Responsibility Agreements 'reinforce negative stereotypes about Aboriginal people. By implying a need for measures by the Government to force Indigenous communities and families to act responsibly, they conceal Indigenous initiative and success in taking responsibility for community problems. Instead, the Government claims the credit': Cooper D, 'Shared Responsibility Agreements: Whitewashing Indigenous service delivery' (2005) 6(15) *Indigenous Law Bulletin* 6, 8.

48. As Arabena has observed: '[Aboriginal people] must resist being defined by governments as 'disadvantaged citizens' and co-opted into simplistic debates that mask the structural and systemic barriers that have contributed to the situation in which we now find ourselves. A failure to recognise and embrace the cultural characteristics and the cultural capital of Aboriginal and Torres Strait Islander people is one of the major barriers that excludes us'. See Arabena K, *Not Fit for Modern Australian Society: Aboriginal and Torres Strait Islander people and the new arrangements for the administration of Indigenous affairs*, Research Discussion Paper No. 16 (AIATSIS Native Title Research Unit, 2005) 7.

49. See discussion under 'Aboriginal Community justice groups', Chapter Five, below pp 97–123; and 'Reform of Aboriginal community governance', Chapter Ten, below pp 356–59.

50. See, for example, Commonwealth Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Many Ways Forward: Report of the inquiry into capacity building and service delivery in Indigenous communities* (2004) 214–15. See also, the discussion of the role of women in Aboriginal communities and their determination to overcome problems of family violence and child abuse in Chapter One, above pp 27–28. See also initiatives of Aboriginal women described in Blagg H, 'A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 317; Wohlan K, 'Aboriginal Women's Interests in Customary Law Recognition' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 507.

PRINCIPLE EIGHT

Adequate and ongoing resourcing

A major obstacle to the success of Aboriginal community initiatives is ongoing, adequate resourcing.⁵¹ As observed in the Commission's Discussion Paper, complex government accountability requirements placed on funding and grants can consume an enormous amount of an organisation's human and financial resources.⁵² In regard to community-run programs and initiatives, the constant need to secure funding by application for grants or tenders is an obvious drain on the limited resources of community groups.⁵³ The more time a community organisation must spend in applying for funding, the more the organisation's attention is diverted away from the needs of the community.⁵⁴ This inevitably impacts upon the outcomes of the program which may, in the eyes of funding authorities, justify the withdrawal of funding. The Commonwealth Grants Commission has acknowledged that the failure of mainstream programs to address Aboriginal needs means that Aboriginal-specific programs have to do more than they were designed or funded to achieve.⁵⁵

The Commission believes that there is a strong case for enhancing the flexibility of government funding for Aboriginal-owned community programs and for provision of support to assist in management of funding, compliance with accountability standards and application for continued or further funding.⁵⁶ Such support will

also assist in building capacity in individuals and provide experience that can assist Aboriginal people to seek long-term employment in the public or private sector.

PRINCIPLE NINE

Ongoing monitoring and evaluation

In order to ensure the success of the reform process, policies and programs must be evaluated to determine their effectiveness and the agencies responsible for implementing them must be monitored to ensure that they are established in a timely manner. The principal responsibility for implementing (and subsequently evaluating) the programs and policies recommended in this Report rests with the government agencies, the subject of each recommendation.⁵⁷ However, experience shows that it is also important for government to put in place a system of ensuring that agencies pursue implementation of the recommendations and are properly resourced and supported to do so.⁵⁸

If the process of monitoring and evaluation is to be properly executed it is necessary for government agencies and independent reviewers to have access to reliable data and statistical information to establish appropriate benchmarks.⁵⁹ The Commission notes that the monitoring of the implementation of recommendations of past reports in the area of Aboriginal affairs has been marred by 'self-assessment'⁶⁰

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51. This is addressed in more detail under 'The need for culturally appropriate responses to family violence and child abuse', Chapter Seven, pp 389–90; and in the context of community governance in LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 427.
 52. LRCWA, *ibid*.
 53. As observed by Senator Chris Evans, 'There are too many examples of fantastic programs getting funding for a year or two and not receiving any more money once the grant runs out. Governments need to be more constructive and creative with the financial levers at their disposal to support Indigenous communities in tackling the problems.' Evans C, *Time to Bust Brough's Myths* (Address to the Canberra South branch of the Australian Labor Party, 19 June 2006) 13–14.
 54. The short timeframe within which grants are often given means community organisations may also have great difficulty attracting and retaining staff: see Commonwealth Grants Commission, *Report on Indigenous Funding 2001* (2001) 68.
 55. *Ibid* 65.
 56. Providing support to Aboriginal community programs should be considered a long term commitment by government. See NCOSS Sector Development, *Providing Capacity Building Support to Indigenous Organisations: Report on models utilised by the Illawarra Forum Inc* (2006) 9, <<http://www.ncoss.org.au/projects/cba/IForumfinalreport.pdf>>.
 57. For a list of relevant responsible agencies by recommendation, see Appendix B, below pp 397–408.
 58. The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) provides an appropriate example. The RCIADIC made 339 recommendations in 1991, but it was not until 2000 that the Western Australian government published a comprehensive review of the implementation of those recommendations. In that review it was noted that the Aboriginal Affairs Department would provide annual reports to Parliament on further implementation: see Aboriginal Affairs Department, *Government of Western Australia 2000 Implementation Report: Royal Commission into Aboriginal Deaths in Custody* (June 2001). This has never been done. The Aboriginal Justice Council was established to monitor the implementation of the RCIADIC recommendations, but was abolished in 2002. A new monitoring body has not been established: see Morgan N & Motteram J, 'Aboriginal People and Justice Services: Plans, programs and delivery' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 235, 315.
 59. Deficiencies in data collection in relation to Aboriginal people and programs in Australia were highlighted in Background Papers prepared for this reference by experts in benchmarking and program evaluation: see Morgan & Motteram, *ibid*; Marks G, 'The Value of a Benchmarking Framework to the Reduction of Indigenous Disadvantage in the Law and Justice Area' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 121. Data limitations have also been identified by the Council of Australian Governments' Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage in Western Australia Report* (2005).
 60. The report of the Victorian Department of Justice on the implementation of the RCIADIC recommendations noted: 'the reported situation with regard to Victoria's implementation of Royal Commission's Recommendations remains largely what government departments say it is'. Victorian Department of Justice, *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody*, Review Report (Vol. 1, October 2005) 703.

and delay in establishing a framework for proper evaluation.⁶¹ In addition, the recent move toward a whole-of-government approach to service provision to Aboriginal people provides a particular challenge to traditional systems of government accountability.⁶² In order to address these issues the Commission has proposed in Chapter Three the appointment of a Commissioner for Indigenous Affairs to, among other things, provide Parliament with a regular, independent evaluation of the progress made by government agencies in implementing the recommendations of this Report.⁶³

It is the Commission's opinion that Aboriginal people must be involved in the evaluation of programs and

services that seek to meet their needs.⁶⁴ However, the Commission warns that a balance must be struck between ensuring the participation of Aboriginal people in this process and overburdening Aboriginal communities and community-owned programs with administrative requirements.⁶⁵ The Commission endorses the partnership approach of the Statement of Commitment that the Western Australian government has entered into with Aboriginal Western Australians,⁶⁶ and suggests that accountability processes should be agreed between Aboriginal communities and government agencies to monitor the outcomes from the agreements to be made at regional and local levels.

61. The Gordon Inquiry reported to Parliament on 31 July 2002. In November 2002 the Western Australian Government published its response *Putting People First: The Western Australian state government's action plan for addressing family violence and child abuse in Aboriginal communities* (November 2002). This response included an Action Plan containing over 120 initiatives. In November 2005 the Auditor General reported on the effectiveness of the monitoring of the implementation of the Action Plan. The Auditor General was critical of the fact that no evaluation framework had been finalised to determine the effectiveness of the Action Plan and that the delay of three years was significant as the 'opportunity may have been lost to collect some baseline data.' See Auditor General for Western Australia, *Progress with Implementing the Response to the Gordon Inquiry* (November 2002) 10.

62. In its submission to this reference the Human Rights and Equal Opportunity Commission noted that to make a whole-of-government approach accountable in the reform process it is necessary to identify a lead agency to coordinate the practical implementation of recommendations: Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 19. In light of this comment the Commission has prepared Appendix B which sets out the lead agency responsible for each of the recommendations.

63. See Recommendation 3, below p 58.

64. See Principle Two and Principle Six in this chapter.

65. Marks noted in his Background Paper that 'externally driven monitoring and evaluation can in fact increase the marginalisation and alienation of those who are disadvantaged (even though the programs are designed to assist them) and can fail to provide valid and reliable data... When it comes to law and justice issues the legacy of a focus on Indigenous offending and heavy policing adds to the difficulty, given the resentment and distrust that may be present.' See Marks G, 'The Value of a Benchmarking Framework to the Reduction of Indigenous Disadvantage in the Law and Justice Area' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 121, 135.

66. Government of Western Australia, *Statement of Commitment to a New and Just Relationship between the Government of Western Australia and Aboriginal Western Australians* (2002).

Chapter Three

Aboriginal Peoples and Disadvantage in Western Australia

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Aboriginal Peoples in Western Australia

The Impact of Colonial Occupation

Western Australia was founded as a British colony in 1829, some 40 years after the east coast of Australia was first colonised. Despite evidence that the colonial governing authority was instructed by the British monarch only to 'grant unoccupied lands',¹ the Aboriginal people of Western Australia were gradually dispossessed of their traditional tribal lands as more and more land was granted to pastoralists and graziers. These dispossessed peoples were sometimes taken into service (often unpaid) by European 'settlers'; many others, forced to kill cattle for survival, were taken into custody by police and removed to the nearest major settlement for trial.² Various legislative and administrative measures for the protection of Aboriginal people,³ the segregation of Aboriginal people into missions away from town sites,⁴ and the removal of 'half-caste' children⁵ were in place from the early days of colonial occupation of Western Australia.

In 1904 a Royal Commission was called to inquire into the 'condition of the natives' in Western Australia.⁶ The Commissioner found that most Aboriginal people lived in poor conditions, that Aboriginal prisoners were ill-treated,⁷ and that there were 'grave irregularities in the distribution of [government] rations'⁸ to Aboriginal people. The Commissioner's primary recommendation was for the establishment of large hunting reserves 'for the exclusive use of the natives'.⁹ He warned that

dire consequences would follow if the existing system of 'land-grabbing' was to remain.

If the natives continue to be dispossessed of the country upon which they are dependant for their food and water supplies, by their lands being rented for grazing rights at a nominal figure—lands from which the lessees naturally desire to drive them—bloodshed and retribution will be certain to ensue, and the Executive, in its efforts to restore law and order, and in the cost of rations to make up deficiencies in the natural food supplies, will be ultimately put to an expenditure considerably in excess of the total rents received. Carrying the present practice of Might against Right to a logical conclusion, it would simply mean that, were all the land in the northern areas of this State to be thus leased, all the blacks would be hunted into the sea. The poor wretches must be allowed the wherewithal to live – their main hunting grounds and water supplies. They dare not voluntarily migrate elsewhere, as such action, according to tribal law, would constitute a trespass, punishable by death.¹⁰

The 1904 Royal Commission resulted in the enactment of the *Aborigines Protection Act 1905* (colloquially referred to as 'the 1905 Act'). This statute prohibited Aboriginal people who were not in lawful employment from entering town sites; provided for the establishment of new reserves and missions; allowed the Minister of Aboriginal Affairs to 'remove' Aboriginal people from one reserve or district to another; and required the permission of the Chief Protector of Aborigines for a marriage between an Aboriginal woman and a non-Aboriginal man.¹¹ Section 8 of the 1905 Act gave the

1. Australians for Reconciliation (WA), *Western Australia's Other History: A short guide* (undated).
2. Royal Commission into the Condition of the Natives (WA), *Report of the Royal Commission on the Condition of the Natives* (1905) 13–17.
3. 'Protectors' were appointed by executive order in Western Australia from the early days of settlement to protect Aboriginals against abuse; however, protectors were often powerless or without legal status. At various times during the state's history, the idea of Aboriginal protectors was abandoned or otherwise the office was vested *ex officio* in regional police constables (whose position as officers of the law often contradicted their responsibilities of protection when dealing with Aboriginal suspects). See ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [25]; Royal Commission into the Condition of the Natives (WA), *ibid* 5.
4. According to the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), certain government directives dating from the 1840s forbade any Aboriginal to reside near town sites. By the 1920s it is reported that Aboriginals were forbidden to enter towns: see RCIADIC, *Regional Report of Inquiry into Underlying Issues in Western Australia* (Vol. 1, 1991) Ch 2.
5. *Ibid*. During the early to mid-1800s few European women resided in the Swan River colony and miscegenetic progeny were often the result of the sexual exploitation of Aboriginal women by European men.
6. The Royal Commission into the Condition of the Natives was headed by Dr WE Roth, an ethnographer and Chief Protector of Aboriginals in Queensland.
7. Royal Commission into the Condition of the Natives (WA), *Report of the Royal Commission on the Condition of the Natives* (1905) 15–17.
8. *Ibid* 23.
9. *Ibid* 28.
10. *Ibid*.
11. Human Rights and Equal Opportunity Commission (HREOC), *Bringing Them Home*, Report (1997) Appendix 5 'Western Australia'.

Chief Protector of Aborigines legal guardianship of all Aboriginal and 'half-caste' children under 16 years of age and the authority to remove them from their natural parents.

In 1937, the Western Australian Chief Protector of Aborigines, AO Neville made a speech to the Conference of Commonwealth and State Protectors of Aborigines in Perth explaining the rationale behind the practice of removing Aboriginal children from their families and placing them in state institutions in non-Aboriginal communities. He believed that full-blooded Aboriginals would soon be extinct and that 'half-caste' children could usefully be employed in domestic service and thereby 'absorbed into the general community'.¹² This policy of assimilation was formalised and practised in Western Australia and other states over the following three decades. The children taken from their parents pursuant to the policy ultimately became known as the 'stolen generation'. A 1995 national inquiry into the separation of Aboriginal and Torres Strait Islander children from their families (the 'Bringing Them Home Inquiry') concluded that 'the forcible removal of Indigenous children was an act of genocide contrary to the Convention on Genocide, ratified by Australia in 1949'.¹³

The impact of the official integration and protection policies followed in Western Australia since settlement has been profound. The unsanitary and cramped living conditions on Aboriginal reserves have had an ongoing negative effect on the health of Western Australia's Indigenous population.¹⁴ Today, Aboriginal people have a life expectancy that is 15–20 years less than non-Aboriginal Australians and the mortality rate of Aboriginal infants in Western Australia is more than 2.5 times higher than that of non-Aboriginal infants.¹⁵ The effects of removal on the social and emotional wellbeing of members of the stolen generation and their families are still being revealed today. In his *Regional Report of Inquiry into Underlying Issues in Western Australia*, undertaken for the Royal Commission into Aboriginal



Deaths in Custody (RCIADIC), Commissioner Patrick Dodson remarked:

[The 1905 Act], and the particularly oppressive measures it invoked, caused profound anguish, and the policies it introduced are still remembered with bitterness and repugnance by many Aboriginal people today.¹⁶

In its 1986 report on *The Recognition of Aboriginal Customary Laws* the ALRC also noted the continuing impact of historical government policy:

Changes in policy, even when addressed to problems created by the past, do not erase the past. The history of forced resettlement on reserves, the placing of many thousands of children in institutions, and the loss of land and culture are evident in the disadvantages still experienced by many Aboriginal people today.¹⁷

As outlined in the Commission's Discussion Paper, the challenge of overcoming the legacies of Australia's past treatment of its Indigenous population is substantial. The Commission has welcomed the challenge to devise pragmatic recommendations that will assist the government to significantly reduce the conditions of disadvantage facing Aboriginal people in this state. The Commission's recommendations also seek to address past government actions by creating an environment within Western Australian law where Aboriginal law and culture can thrive.

12. Neville AO, as cited in McRae H, Nettheim G & Beacroft L, *Indigenous Legal Issues* (LBC Information Services: Sydney, 2nd ed., 1997) 412.

13. Gardiner-Garden J, 'From Dispossession to Reconciliation', Parliament of Australia Research Paper No. 27 (1999) 16, referencing HREOCs *Bringing Them Home* report.

14. Australians for Reconciliation (WA), *Western Australia's Other History: A short guide* (undated) 50–51.

15. Thomson N & Briscoe N, *Overview of Aboriginal Health Status in Western Australia* (Canberra: Australian Institute of Health, 1991) [5].

16. Royal Commission into Aboriginal Deaths in Custody (RCIADIC), *Regional Report of Inquiry into Underlying Issues in Western Australia* (Vol. 1, 1991) Ch 2. Commissioner Dodson's concluding observation in this extract was echoed by participants in the Commission's community consultations.

17. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [29].

The impact on Aboriginal people of the official integration and protection policies followed in Western Australia since settlement has been profound.

Geographical and Cultural Diversity of Aboriginal Peoples Today

Today, Western Australia has the third largest Indigenous population in Australia.¹⁸ 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, particularly in 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-20th century.¹⁹ Even after contact, some groups of Aboriginal people in Western Australia continued their nomadic lifestyles for a significant period of time, remaining 'outside the orbit of European influence'.²⁰

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.²¹ 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 descended from different language groups and who may have integrated their traditional cultural practices over a period of many years.²² The fact that today there are over 300 discrete Aboriginal communities in Western Australia²³ is a clear illustration of the contemporary diversity of Aboriginal peoples in this state.



18. Following the Northern Territory with 28.8 per cent of total population and Tasmania with 3.7 per cent of total population. Queensland has the same percentage of Indigenous residents as Western Australia at 3.5 per cent: see 'Geographic distribution of Indigenous Australians' in Australian Bureau of Statistics (ABS), *2004 Year Book Australia*, No. 86 (2004) 89.
19. Such as the Northern Ngatjatjarra (Ngaanyatjarra), Mangala, Mantjiltjarra and Walmatjarri peoples: see ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [34].
20. For example, the ALRC has noted that '[a] group of nine members of the Pintubi language group, remade contact with their relations at an outstation in Western Australia in October 1984 after living for more than twenty years in complete isolation near Lake Mackay': ALRC, *ibid* 27–28.
21. A map of 'Tindale's Tribal Boundaries – Western Australia' was appended to the Commission's Discussion Paper: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 467. It should be noted that the tribal boundaries of a number of language groups cross the arbitrarily drawn boundaries that designate the different states and territories of Australia.
22. For further discussion, see LRCWA, *ibid* 17–19.
23. Denis Callaghan, Department of Indigenous Affairs, telephone consultation (6 September 2006).

Overcoming Aboriginal Disadvantage in Western Australia

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.¹

The Commission's Discussion Paper addressed 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.² None of these issues are new – they have been recurrent themes in Australian Indigenous affairs for at least half a century. And yet, the grossly disproportionate levels of disadvantage and discrimination experienced by Aboriginal people in Western Australia (and confirmed by the Commission's consultations and research for this reference) remain. The gaps between the expectations, substance and recommendations of earlier reports³ and the achievement of actual positive outcomes for Aboriginal Australians are of considerable concern to the Commission.

Overcoming Aboriginal Disadvantage

Part II of the Commission's Discussion Paper painted a clear picture of the appalling state of entrenched and transgenerational disadvantage experienced by Aboriginal people in Western Australia. Clear disparities can be found across all indicators of quality of life. In the first world, Australia has the worst record of improving the life expectancy and infant mortality rates of its indigenous peoples.⁴ Australia also has a worse indigenous infant health record than developing countries such as Ethiopia, Tanzania, Mexico and Indonesia.⁵ In recent years these issues have come to the forefront of the political agenda in Australia, yet little progress has been made. Australian governments now recognise that improving the living conditions and quality of life of our indigenous peoples requires a long-term commitment. The Commission believes that this commitment must be more than mere resources; governments must show respect for Aboriginal cultural values and involve Aboriginal people in the decision-making processes that affect their everyday lives.

A whole-of-government approach

The current fragmentation of services to Aboriginal 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 Aboriginal people. For instance, there

1. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 20.

2. *Ibid* 20–42.

3. The Commission's Discussion Paper referred to a great number of previous reports, studies and recommendations of agencies and governments published over the past two decades; each aimed at the improvement of conditions of Aboriginal people, the redress of past wrongs or the factors underlying Aboriginal disadvantage. The following is a mere handful of reports for which real outcomes and implementation of widely accepted and acknowledged recommendations are still outstanding: RCIADIC, *Report of the Royal Commission* (1991); Human Rights and Equal Opportunity Commission, *Bringing Them Home*, Report (1997); Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into Responses by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (July 2002); Steering Committee for the Review of Government Service Provision (SCRGSP), *Overcoming Indigenous Disadvantage – Key Indicators 2003* (November 2003); Equal Opportunity Commission (WA), *Finding a Place: An inquiry into the existence of discriminatory practices in relation to the provision of public housing and related services to Aboriginal people in Western Australia* (December 2004).

4. For a comparison between Canada, New Zealand, Australia and the United States, see: HREOC, 'A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia', <http://www.hreoc.gov.au/social_justice/statistics/> 5.

5. Based on rates of low birth-weight babies: *ibid* 7.

The Commission believes it is vital that agencies work together to achieve real outcomes for Aboriginal people.

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 and coordination between each of these policy areas at all levels – federal, 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 Western Australian agency the responsibility to constructively communicate with other agencies regarding Aboriginal service delivery and to appreciate the potential capacity for input from other policy areas.⁶

The Commission therefore proposed that the state government adopt a genuine whole-of-government approach to the delivery of services to Aboriginal people in Western Australia.⁷ Noting that the term ‘whole-of-government’ is an over-used term in modern politico-speak and has the potential of lapsing into meaningless platitude,⁸ the Commission made clear that this approach would require meaningful multi-agency cooperative responses that deliver tangible outcomes which impact upon the problems of Aboriginal disadvantage currently existing in Western Australia.⁹

All submissions that commented on this proposal supported the whole-of-government approach.¹⁰ Several of the submissions from Western Australian government agencies detailed initiatives currently underway;¹¹ others stated that they were willing to be involved in a multi-agency approach to their policy area, but that promised funding was elusive.¹²

The Aboriginal Education and Training Council (AETC) of Western Australia’s Department of Education Services noted that the Commission’s proposal highlighted two realities: ‘the ineffectuality of past and present methods of service delivery to Aboriginal people’ and the failure to genuinely commit to addressing this ineffectiveness.

Aboriginal communities have called upon governments to overhaul this splintered approach in order to address the blatant disparity [between standards of service provision to Aboriginal people and to non-Aboriginal people]. These appeals were met by lack of will within each of the non-Indigenous bureaucracies to break down their own individual powerbases and review their ambiguously worded definitions of responsibility, so that cooperative, multi-agency, jointly funded models of service delivery could be examined for suitability and feasibility. In this context the AETC fully endorses the expeditious implementation of this proposal to bring about appropriate, sustainable, structural change.¹³

6. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 42–43.

7. *Ibid* 43, Proposal 1.

8. This sentiment was supported by the Pilbara Development Commission which stated in its submission that ‘[u]nless agencies embrace Indigenous disadvantage as part of their core functions and create a framework for cooperation, the whole-of-government approach will continue to be a term that is over-used, to describe a method that results in limited outcomes’: Pilbara Development Commission, Submission No. 39 (19 May 2006) 1.

9. This includes the causes of Indigenous disadvantage (such as loss of traditional culture and identity stemming from colonial practices, marginalisation, poverty and unemployment) and the effects of Indigenous disadvantage (including intergenerational violence, child abuse, entrenched substance abuse, reduced life-span and health problems). Indeed, the cyclical nature of Indigenous disadvantage means that many of the causes and effects may be interchangeable.

10. Michelle Scott, Office of the Public Advocate, Submission No. 13 (18 April 2006) 3; Kimberley Aboriginal Law and Culture Centre, Submission No. 17 (17 April 2006) 1; Aboriginal Education and Training Council, Department of Education Services (WA), Submission No. 20 (26 April 2006) 2; Dr Dawn Casey, Western Australian Museum, Submission No. 24 (1 May 2006) 1; Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2; Minister for Education and Training, Submission No. 27 (1 May 2006) 3; Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 2; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 2; Department of the Attorney General, Submission No. 34 (11 May 2006) 1; Gascoyne Development Commission, Submission No. 38 (11 May 2006) 3; Pilbara Development Commission, Submission No. 39 (19 May 2006) 1; Law Council of Australia, Submission No. 41 (29 May 2006) 7; Department of Fisheries, Submission No. 42 (25 May 2006) 1; Office of Commissioner of Police, Submission No. 46 (7 June 2006) 4; Department of Consumer and Employment Protection (WA), Submission No. 48 (14 June 2006) 2; Department for Community Development, Submission No. 51 (27 June 2006) 1; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 1.

11. Minister for Education and Training, Submission No. 27 (1 May 2006) 1–2; Western Australia Police, Submission No. 46 (7 June 2006) 4; Department of Consumer and Employment Protection (WA), Submission No. 48 (14 June 2006).

12. The Department of Corrective Services noted that the whole-of-government approach had also been recommended by the Gordon Inquiry, but that there had been ‘no satisfactory resolution to the issue of joint funding for multi-agency initiatives. The need for reform of public sector funding and resource flexibility needs to be addressed by the Government, in particular by Premier and Cabinet and Treasury.’ See Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 1.

13. Aboriginal Education and Training Council, Department of Education Services (WA), Submission No. 20 (26 April 2006).

The Commonwealth Aboriginal and Torres Strait Islander Social Justice Commissioner of the Human Rights and Equal Opportunity Commission submitted that, while a coordinated approach to policy development and program and service delivery had potential benefits (including recognition of Aboriginal customary law), these would be somewhat undermined without effective mechanisms for Aboriginal participation.¹⁴ The *Social Justice Report 2005* states:

From a human rights perspective, Aboriginal and Torres Strait Islander peoples must be assured the opportunity to participate effectively in all aspects of policy development and service delivery by governments that impact on their communities. This includes the design, delivery, monitoring and evaluation of programs and services delivered by governments.¹⁵

This sentiment is reflected in Article 19 of the revised draft of the international *Declaration on the Rights of Indigenous Peoples*¹⁶ which defends the right of indigenous peoples to participate in decision-making in matters which affect their rights. The Commission observes that this position is relatively uncontentious and that the decision-making right of indigenous peoples has the support of the Australian government in international forums.¹⁷ The Western Australian government has also publicly committed to developing democratic processes and inclusive governance structures for Aboriginal people.¹⁸ However, with the demise of the Aboriginal and Torres Strait Islander Commission (ATSIC) there is currently no organised representative mechanism in place for Aboriginal participation in decision-making across Western Australia. The Commission believes this is an important aspect of the whole-of-government approach and something that must be addressed if the reconciliatory gestures of the government's statement of commitment are to be practically realised. The Commission has therefore amended its recommendation accordingly.

Finally, the submissions of the Law Council of Australia and the Department of Indigenous Affairs noted that

the Commonwealth Government has a partnership role in the whole-of-government approach and that they should therefore be included in the recommendation. Of course the Commission agrees that the Commonwealth has an important role to play in facilitating this approach and providing bilateral funding to state-Commonwealth initiatives; however, it is not within this Commission's mandate to make recommendations at the federal level. Nonetheless the Commission acknowledges and stresses the need for the state government's effective cooperation with Commonwealth authorities if Western Australia is to have any real chance of significantly reducing Aboriginal disadvantage.

Recommendation 1

Whole-of-government approach to Aboriginal service and program provision

1. That the State of Western Australia adopt a genuine whole-of-government approach to the design, development and delivery of services and programs 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 Aboriginal disadvantage in Western Australia.
2. That, in recognition of the right of Aboriginal peoples to be involved in decision-making affecting their interests, the State of Western Australia put mechanisms in place to ensure the effective participation, consultation and consent of Aboriginal peoples in relation to the design and delivery of government services to Aboriginal communities in Western Australia.

14. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 2–4.

15. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Social Justice Report 2005* (2005) 99.

16. The draft declaration has been adopted by the United Nations Human Rights Council and has been referred for adoption to the General Assembly. For further discussion, see Chapter Four 'Recognition and the Relevance of International Law', below pp 67–69.

17. On 22 May 2006 at a meeting of the Permanent Forum on Indigenous Issues the Australian delegate stated that Australia supports 'efforts to increase indigenous peoples' participation in decisions that affect them, whether in the form of international processes ... or domestic arrangements designed to protect and advance indigenous interests': *Statement by Mr Peter Vaughan, Head of the Australian Delegation to the Permanent Forum on Indigenous Issues, on behalf of Australia, New Zealand and the United States of America On Free, Prior Informed Consent* (22 May 2006) <http://www.australiaun.org/unweb/content/statements/social/2006.05.17_soc_indigenous.pdf>.

18. Government of Western Australia, *Statement of Commitment to a New and Just Relationship between the Government of Western Australia and Aboriginal Western Australians* (2002).

It is crucial that cultural awareness programs ‘deliver real cultural respect outcomes for Aboriginal people’.

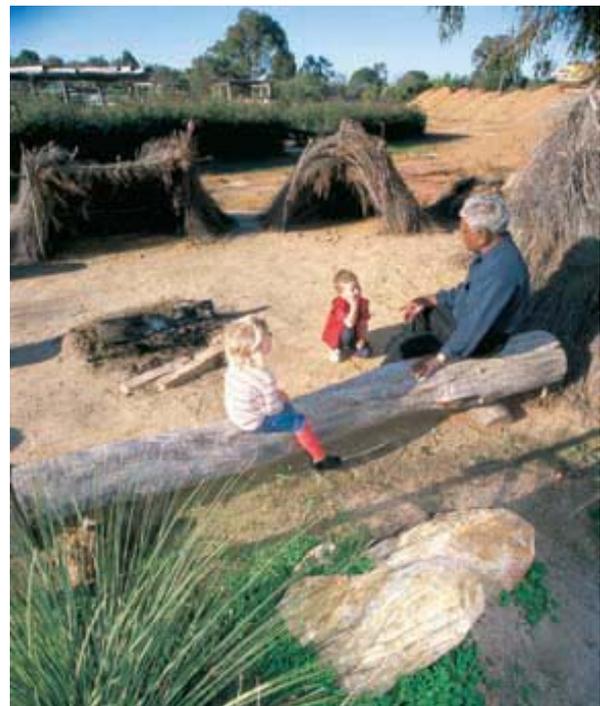
Cultural awareness

The success of the whole-of-government approach to addressing issues of Aboriginal disadvantage in Western Australia will depend, in part, on government’s awareness and appreciation of 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. This impacts negatively, not only on the delivery of services to Aboriginal people, but also on their design, development and evaluation. As observed in the Commission’s Discussion Paper, it is crucial that cultural awareness programs ‘deliver real cultural respect outcomes for Aboriginal people’.¹⁹ The Commission 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 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.²⁰

Submissions indicated considerable support for this proposal and this support was across-the-board from government departments to community organisations to individuals.²¹ Undoubtedly recognising the diversity of Aboriginal peoples and cultures in Western Australia,

most submissions acknowledged the importance of cultural awareness training that was appropriately adapted to reflect the cultural values, customs and expectations of Aboriginal people in the specific locality. This view was endorsed by the verbal submissions of Aboriginal people at community meetings conducted by the Commission around the state.

During the Commission’s return visit to Fitzroy Crossing to discuss its proposals, the Commission was shown an impressive cultural awareness booklet compiled by the



19. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 23. The Commission referred to the development in relation to health services of the concept of ‘cultural security’ which ‘is focused directly on practice, skills and behaviours. It is about efficacy ... doing not talking. It is about building the competence of practitioners and administrators to know, understand and incorporate Aboriginal cultural values in the design, delivery and evaluation of health services’: see Department of Health (WA), *Aboriginal Cultural Security*, Background Paper (undated) 13.

20. *Ibid* 44, Proposal 2.

21. Michelle Scott, Office of the Public Advocate, Submission No. 13 (18 April 2006) 3; Kimberley Aboriginal Law and Culture Centre, Submission No. 17 (17 April 2006) 1; Marian Lester, Submission No. 18 (27 April 2006) 1; Aboriginal Education and Training Council, Department of Education Services (WA), Submission No. 20 (26 April 2006) 2; Dr Dawn Casey, Western Australian Museum, Submission No. 24 (1 May 2006) 1; Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2; Minister for Education and Training, Submission No. 27 (1 May 2006) 3; Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 2; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 2; Department of the Attorney General, Submission No. 34 (11 May 2006) 1; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 3; Law Society of Western Australia, Submission No. 36 (16 May 2006) 1; Gascoyne Development Commission, Submission No. 38 (11 May 2006) 3; Pilbara Development Commission, Submission No. 39 (19 May 2006) 1; Law Council of Australia, Submission No. 41 (29 May 2006) 7; Department of Fisheries, Submission No. 42 (25 May 2006) 1–2; Office of Commissioner of Police, Submission No. 46 (7 June 2006) 4; Department of Consumer and Employment Protection (WA), Submission No. 48 (14 June 2006) 2; Indigenous Women’s Congress, Submission No. 49 (15 June 2006) 1; Department for Community Development, Submission No. 51 (27 June 2006) 1.



local Karrayili Adult Education Project and designed specifically for non-Aboriginal people working in the Fitzroy Valley.²² The booklet details the history of Aboriginal peoples in the region and discusses language, law and culture. It also contains helpful tips for appropriate communication and how to deal with certain issues, such as what cultural protocols must be observed in the event of a death. The Commission was told that there are written resources and experienced individuals in many Aboriginal communities that can assist in or undertake cultural awareness training for government employees and contractors. The Commission considers that drawing upon the networks and skills of local Aboriginal people is crucial to the success of cultural awareness training. This has been recognised by government and is made clear in the *Consulting Citizens: Engaging with Aboriginal Western Australians* document jointly published by the Department of Premier and Cabinet, ATSC and the Department of Indigenous Affairs.²³ The Department of Indigenous Affairs submitted that agencies should draw upon this document for assistance in the process of designing, developing and delivering cultural awareness training packages.²⁴

In its submission the Aboriginal Legal Service (ALS) made the pertinent point that the general community's lack of understanding or knowledge about Aboriginal people is often the foundation of prejudice toward them. On this basis the ALS submitted that all government employees, not just those who have regular dealings with Aboriginal people, should be required to undertake cultural awareness training.²⁵ While agreeing in principle with this submission, the Commission believes that it is not an imperative to mandate cultural awareness training for all employees. Nonetheless, the Commission has

expanded its recommendation to make clear that *all* employees of Western Australian government agencies should be offered and actively encouraged to participate in cultural awareness training programs regardless of their position or the frequency of their interaction with Aboriginal people.

Several submissions highlighted the need for ongoing cultural awareness training to ensure continuing effectiveness in delivery of services.²⁶ A very considered submission from the Aboriginal Education and Training Council of the Department of Education Services strongly recommended that a formal cultural awareness program with higher education credits and accreditation be developed and offered in Western Australia. The Council considered that the program should be multi-staged, commencing with 'fundamental knowledge and sequencing to more sophisticated understandings and protocols by the end'.²⁷ The Commission believes that this suggestion is worth pursuing, but it notes the advice of the Department of Indigenous Affairs that cultural awareness training should not be seen as a 'licence' for non-Aboriginal people working directly with Aboriginal people.²⁸ The Commission also warns against generic metropolitan-

22. Karrayili Adult Education Project, *Tell Me More About the People I Work With* (undated).

23. This document is available on the Department of Indigenous Affairs website: <<http://www.dia.wa.gov.au/Policies/Communities/Files/ConsultingCitizensSept2005.pdf>>.

24. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 2. The Department of Consumer and Employment Protection's *Guidelines for Working with Aboriginal Peoples and Torres Strait Islanders* (undated) is an excellent example of general protocols to observe and assumptions to avoid when dealing with Aboriginal people and clearly implements the *Consulting Citizens* guide.

25. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 3.

26. Marian Lester, Submission No. 18 (27 April 2006) 1; Aboriginal Education and Training Council, Department of Education Services (WA), Submission No. 20 (26 April 2006) 2; Minister for Education and Training, Submission No. 27 (1 May 2006) 3; Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 2. That training should be sufficiently long was also expressed by participants at the Commission's return consultation: see LRCWA, Discussion Paper community consultation – Geraldton, 3 March 2006.

27. Aboriginal Education and Training Council, Department of Education Services (WA), Submission No. 20 (26 April 2006) 2.

28. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 2.

The general community's lack of understanding or knowledge about Aboriginal people is often the foundation of prejudice toward them.

based programs and stresses that all cultural awareness programs must recognise the diversity of Aboriginal peoples in Western Australia, and emphasise regional and local customs and protocols.

In light of the supportive submissions on this matter the Commission has confirmed its recommendation but has expanded it by making clear what is expected of agencies in the design, development and delivery of

cultural awareness training to employees and contractors. It should be noted that this recommendation should be read together with Recommendations 11, 12, 56 and 128, which pertain to cultural awareness training for people in specific positions within the criminal justice system such as judicial officers, court staff, lawyers, police and corrective services officers.

Recommendation 2

Cultural awareness training for government employees and contractors

1. 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:
 - (a) be designed and/or developed in consultation with local Aboriginal people, in particular traditional owners;
 - (b) draw upon existing local Aboriginal resources, networks and skills;
 - (c) be conducted or include presentations by Aboriginal people;
 - (d) be delivered at the regional or local level to allow programs to be appropriately adapted to take account of regional cultural differences and customs and concerns of local Aboriginal communities;
 - (e) include protocols and information specific to the role or position of the individual undertaking the training;
 - (f) be sufficiently long and detailed to meaningfully inform participants of matters necessary to the delivery of programs and services to Aboriginal clients; and
 - (g) be evaluated, updated and reinforced on a regular basis.
2. That *all* employees of Western Australian government agencies be offered, and encouraged to participate in, cultural awareness training programs regardless of their position or the frequency of their interactions with Aboriginal people.
3. That participation in agency-arranged cultural awareness training be a contractual condition where contractors or sub-contractors to any Western Australian government agency are required to work directly or have regular dealings with Aboriginal people.

Office of the Commissioner for Indigenous Affairs

The Need for Ongoing Monitoring and Evaluation

During the Commission's consultations Aboriginal people expressed frustration about the amount of reports prepared and recommendations made by government that are never implemented.¹ As the Human Rights and Equal Opportunity Commission (HREOC) stated in its submission to this reference, it would be a 'tragedy given the breadth of consultation and considered discussion [which has occurred in] the inquiry process to date'² if action is not taken to implement the Commission's recommendations. HREOC commented that a process should be put in place to report on what action has been taken to implement the recommendations of this Final Report and to make follow up recommendations if necessary.³ The Commission's agreement with this approach is reflected in the guiding principles for reform in the previous chapter; in particular, the requirement for ongoing monitoring and evaluation.⁴

Methods of evaluation

Recommendation-by-recommendation review

The Commission has given careful consideration to the best method of evaluating the implementation of the recommendations of this Report. The implementation

of the recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) provides an interesting precedent. In 2000, nine years after the RCIADIC released its findings, the Western Australian government published a review of the implementation of the RCIADIC recommendations in Western Australia.⁵ In that review the relevant government departments reported on the implementation status of the RCIADIC's recommendations. The review is detailed, but does not contain any analysis or make any observations about the implementation process as a whole. Neither does it make any follow-up recommendations.⁶

In 2005 the Victorian government published its own review of the implementation status of RCIADIC recommendations in that state (the Victorian RCIADIC report).⁷ The report contained a similar description by each department about the progress of implementation, but also made observations about the implementation process in Victoria and made further recommendations for reform. The Victorian RCIADIC report highlights a number of problems with the recommendation-by-recommendation style of review: that the self-assessment by government 'is silent on what Aboriginal people themselves perceive and experience in terms of progress';⁸ and that it is neither ongoing nor independent.⁹

1. It was noted in the Commission's Discussion Paper that similar frustrations were expressed to RCIADIC 15 years ago: LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 42.
2. Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 19.
3. Ibid 18–19. HREOC also suggested that the Commission should identify a lead agency responsible for the implementation of each recommendation made in this report as 'experience tends to show that if such focal points are not identified, there will be little progress in implementing the recommendations'. For a list of recommendations and the lead agencies responsible for their implementation, see Appendix B, below pp 397–408.
4. See discussion under 'Principle Nine: Ongoing Monitoring and Evaluation', above pp 39–40.
5. Aboriginal Affairs Department, *Government of Western Australia 2000 Implementation Report: Royal Commission into Aboriginal Deaths in Custody* (June 2001).
6. The report states that the Aboriginal Affairs Department will report annually to Parliament on the progress of implementing the recommendations. This has never been done. The Department of Indigenous Affairs advised the Commission that it is no longer its responsibility to coordinate the reporting on the RCIADIC recommendations: Helen Stokes, Senior Policy Officer, Department of Indigenous Affairs, telephone consultation (31 August 2006). One of the recommendations of the RCIADIC was the establishment of Aboriginal-run organisations to monitor the implementation of the recommendations. The Aboriginal Justice Council of Western Australia was established for that purpose and provided statistical reports and reviews until it was abolished in 2002. At that time it was stated that ATSIC and other various state government departments would create a new monitoring body: see Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery* in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 235, 242 & 315.
7. Victorian Department of Justice, *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody*, Review Report (Vol. 1, October 2005).
8. Ibid 702. The report asks: 'Consultations may be engaged in, policies agreed, committees established and programs activated, but just what has been achieved in terms of the social, economic, cultural and legal position of Indigenous Victorians?'
9. Ibid. The report stated that 'the Review Team became aware of the complex multi-agency and multi-layered range of policy, administrative and program-related issues.'

Recommendation-by-recommendation reviews conducted at a fixed point in time are limited in their usefulness because programs and policies are not necessarily evaluated at their completion.¹⁰ Further, such reviews can present a huge task to the reviewing body,¹¹ and if they are not conducted promptly there is a chance that crucial information may be lost.¹² Additionally, the kind of recommendation-by-recommendation review conducted by Western Australia and Victoria is clearly not independent. As the Victorian review team observed, ‘the reported situation with regard to Victoria’s implementation of Royal Commission’s Recommendations remains largely what government departments say it is’.¹³ Reviews of this nature can be useful where it is desirable to focus on the efforts of specific agencies, but must be supplemented by independent, ongoing reviews that focus on outcomes for Aboriginal people.

Outcomes-based review

There has been a recent movement toward focusing on outcomes (rather than policy and process) in the delivery of government services to Aboriginal Australians.¹⁴ The background to this movement is the failure of many programs to deliver any real results to Aboriginal people and the fact that the policy promises of government have not always been rendered in reality ‘on the ground’.¹⁵ The response by both Commonwealth and state governments has been the development of key indicators and benchmarks¹⁶ with which to measure the effectiveness of programs and policies. The report prepared for the Council of Australian Governments’ Steering Committee into the Review of Government Service Provision—*Overcoming*



Indigenous Disadvantage – Key Indicators 2003—has led the way in establishing a means of benchmarking government programs for Aboriginal people throughout Australia.¹⁷ This was the basis for the *Overcoming Indigenous Disadvantage in Western Australia Report 2005*.¹⁸ This report brought together Western Australian specific information to assess indicators (such as life expectancy and home ownership) and benchmarks (such as substance use and misuse, and early school engagement and performance). This kind of outcomes-based review is clearly more appropriate to a whole-of-government framework to addressing Aboriginal disadvantage.¹⁹ Further, it is intended to be an ongoing coordinated process throughout Australia.

While there are some distinct benefits to the outcomes-based approach, concern has been expressed about the accountability of individual departments to implement policies and programs and the potential for the departments to become bogged down in discussion

10. Ibid. The Victorian Review Team found that ‘the inevitable outcome was that achieving finality, in the sense of an implementation snapshot that would accurately convey the current dynamic situation, became all but impossible.’

11. For example, the *Report of the Royal Commission into Aboriginal Deaths in Custody* made 339 recommendations.

12. The Auditor General for Western Australia made this point in its findings on the implementation of the initiatives of the Gordon Inquiry. The Gordon Inquiry reported to Parliament on 31 July 2002. In November 2002 the Western Australian Government published its response *Putting People First: The Western Australian state government’s action plan for addressing family violence and child abuse in Aboriginal communities* (November 2002). This response included an Action Plan containing over 120 initiatives. In November 2005 the Auditor General reported on the effectiveness of the monitoring of the implementation of the Action Plan. The Auditor General was critical of the fact that no evaluation framework had been finalised to determine the effectiveness of the Action Plan and that the delay of three years was significant as the ‘opportunity may have been lost to collect some baseline data’: see Auditor General for Western Australia, *Progress with Implementing the Response to the Gordon Inquiry* (November 2002) 10.

13. Victorian Department of Justice, *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody*, Review Report (Vol. 1, October 2005) 703.

14. Notably since the publication of the Council of Australian Government (COAG) *National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal and Torres Strait Islanders* (1992), <<http://www.alga.asn.au/policy/indigenous/nationalCommitment.php>>

15. See Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, Law Reform Commission of Western Australia, Project No. 94, Background Paper No. 7 (December 2004) 235, 312.

16. There is a distinction between indicators and benchmarks. As explained by Greg Marks in his background paper to this reference indicators are of a quantitative, statistical nature. By contrast benchmarks are targets established by government and partly quantitative and partly qualitative, linked to time frames and set with the participation of people whose rights are affected: for a fuller discussion. See Marks G, ‘The Value of a Benchmarking Framework to the Reduction of Indigenous Disadvantage in the Law and Justice Area’ in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 121.

17. SCRGS, *Overcoming Indigenous Disadvantage – Key Indicators 2003* (November 2003).

18. Department of Indigenous Affairs, *Overcoming Indigenous Disadvantage in Western Australia*, Report (2005).

19. See Recommendation 1, above p 48.



with each other.²⁰ The difficulty in managing a whole-of-government approach to the implementation of recommendations is apparent in the response of the Western Australian government to the Gordon Inquiry. As outlined in the Commission's Discussion Paper, the government responded to the Gordon Inquiry in December 2002 by releasing an Action Plan that detailed more than 120 initiatives to be implemented by 15 agencies and a whole-of-government approach to organising and delivering services.²¹ Groups were formed²² to enable the monitoring and evaluation of the progress of implementing the initiatives. In 2005 the Auditor General reported to Parliament on the progress that had been made towards implementing the initiatives and found that an evaluation framework for assessing whether the Action Plan was making a difference had not been finalised.²³ The Auditor General noted that because many of the initiatives are interlinked, delay in implementing one can delay progress in implementing others.²⁴ The Auditor General asserted that the delay in setting up an evaluation framework was important:

because a clear and shared sense of purpose is important during the planning and implementation phases and because the opportunity may have been lost to collect some important baseline data. In the medium and longer term the evaluation of information is needed to guide changes to the Action Plan to ensure that its key outcomes are best achieved.²⁵

It is clear that where a number of departments and agencies are involved in the process of reform it is difficult to ensure accountability. To address this issue the Gordon Inquiry recommended the establishment of a Children's Commission. In the government's response in 2002 it stated that 'having a Children's Commission in this State would duplicate existing accountability and advocacy processes'.²⁶ However, concern about the issues raised in the Gordon Inquiry (and problems with implementation of its recommendations) prompted the establishment of a select committee²⁷ to investigate the proposal and, as a result, the Commissioner for Children and Young People Bill 2005 (WA) is now before Parliament. The Select Committee found that one of the more important functions of the Commissioner would be to coordinate a joint agency response to issues concerning children.²⁸ Similarly, the Victorian RCIADIC report acknowledged the need for the whole-of-government approach to Aboriginal affairs to be overseen by an independent body and recommended the appointment of a Social Justice Commissioner.²⁹

The need for a body to oversee the reform in Aboriginal affairs was also recognised recently by Patrick Dodson:

We should consider the creation of a Responsibility, Rights and Opportunities Commission to oversee and guide the process of reform and reconstruction

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20. Since the demise of ATSIC the Commonwealth government has set up a commonwealth departmental secretaries group to oversee the new system of service provision to indigenous communities under its policy of 'mainstreaming'. It is reported in an article in *The Australian* (20 April 2006) that 'Secretaries from departments including Family and Community Services, Prime Minister and Cabinet, Health and Education have revealed to researchers from the Australian National University's Centre for Aboriginal Economic Policy Research that they are wasting time in meetings with each other rather than getting things done.'
 21. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 351–52.
 22. It was determined that the responsibility for overseeing and monitoring the implementation of the Action Plan would be with the State Government Human Services Directors-General Group through a Senior Officers' Group. A Secretariat was retained to support the Senior Officers' Group. The Department of Premier and Cabinet was initially responsible for the Secretariat, but in April 2005 that responsibility was transferred to the Department of Indigenous Affairs.
 23. The Commission has been advised that the Department for Indigenous Affairs is currently putting in place a monitoring and evaluation process: David Waters, Senior Policy Officer, Gordon Implementation Unit, Department of Indigenous Affairs, telephone consultation (27 July 2006).
 24. Auditor General for Western Australia, *Progress with Implementing the Response to the Gordon Inquiry* (November 2002) 11.
 25. *Ibid* 13–14.
 26. Government of Western Australia, *Putting People First: The Western Australian state government's action plan for addressing family violence and child abuse in Aboriginal communities* (November 2002) 30.
 27. Western Australia, *Parliamentary Debates*, Legislative Council, 14 May 2003, 7623b-7642a/1.
 28. Western Australia, *Parliamentary Debates*, Legislative Assembly, 1 June 2005, 2582b-2585a/1.
 29. Victorian Department of Justice, *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody*, Review Report (Vol. 1, October 2005) 703. Note also that Recommendation 1(a) and 9(b) of the RCIADIC call for regular reporting on the progress of the implementation of the recommendations of that report and for ATSIC to be given responsibility and funding to monitor that progress and report to the Indigenous community about it.

It is crucial to the success of the Office of the Commissioner for Indigenous Affairs that the position of Commissioner is independent.

necessary in Aboriginal affairs. Such a Commission would work to avoid the mistakes of the past, help clarify what Rights and Responsibilities are and can be exercised and what needs to be done to improve them as well as develop consensual strategies and policies while aiming to achieve true and lasting reconciliation as Australians.³⁰

The Proposed Office of the Commissioner for Indigenous Affairs

The Commission recognises the need for an ongoing flexible review process that facilitates the participation of Aboriginal people in the implementation of the recommendations of this Report. The Commission considers that this can best be achieved by the establishment of a 'watchdog' body for Aboriginal issues in Western Australia.³¹ This body would not be simply a further layer of government administration in the area of Aboriginal affairs: it would provide an independent audit of the information provided by government departments to avoid the problems associated with self-assessment. The Commission proposes that an independent, Aboriginal Commissioner (preferably Western Australian) should be appointed to head an Office of the Commissioner for Indigenous Affairs for Western Australia.³²

The importance of independence

It is crucial to the success of the Office of the Commissioner for Indigenous Affairs that the position of Commissioner is independent. For this reason, the Commission considers that the Office should be outside the public service and the Commissioner should not be regulated under the *Public Sector Management Act 1994* (WA). The Office of the Commissioner for Indigenous Affairs should be a statutory office with its own operating Act.³³ To preserve its independence, a standing committee of both Houses of Parliament should oversee its work to enable direct reporting to Parliament. The Commission suggests that the Commissioner be appointed by the Governor on the recommendation of the Premier in consultation with Aboriginal people. The term of the office should be five years (renewable by both Houses of Parliament) and the Commissioner should only be suspended or removed from office by the Governor on addresses from both Houses of Parliament.³⁴

Other key requirements: information and funding

In order for the Office of the Commissioner for Indigenous Affairs to properly perform its functions, it is necessary for it to have access to reliable information including statistics;³⁵ progress data from agencies;³⁶ and

30. Dodson P, 'The Role of Education in Reconciliation' Samuel Alexander Lecture (18 May 2006) 10.

31. It was suggested to the Commission at a meeting of male Elders in Fitzroy Crossing that what was needed was an independent Commissioner to hold government departments accountable: LRCWA, Discussion Paper community consultation – Fitzroy Crossing, 9 March 2006.

32. Although, as noted in the introduction to this Report, there are very few Torres Strait Islanders residing in Western Australia and most Aboriginal people in Western Australia apparently prefer the term 'Aboriginal' to 'Indigenous', the Commission has chosen the name Office of the Commissioner for Indigenous Affairs to ensure that the office is inclusive of Torres Strait Islanders and follows current state nomenclature (eg, the Department of Indigenous Affairs).

33. The Office of the Commissioner for Children and Young People has been established in the same way: see Commissioner for Children and Young People Bill 2005, Explanatory Memorandum, cl 6.

34. The Commission suggests that the scheme currently in place for the removal of the Corruption and Crime Commissioner ought to be adopted for the Commissioner for Indigenous Affairs: see *Corruption and Crime Commission Act 2003* (WA) s 12.

35. The Victorian RCIADIC report highlighted the need for improved and reliable data on Aboriginal people and noted: 'At least 15 Recommendations referring to this need are scattered throughout the Royal Commission Report ... The ABS has a key role to play and, as noted in the *Report on Government Service Provision: Indigenous compendium 2004*, work is currently underway to develop and improve Indigenous data flowing from the government administrative systems'. Victorian Department of Justice, *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody*, Review Report (Vol. 1, October 2005) 704. The Commission has also recognised the need for improved data in Western Australia and recommended improvements to the way in which the Western Australia Police collect information on Aboriginal people. See Recommendation 57, below p 213.

36. The inadequacy of the information provided to the Secretariat overseeing the implementation of the Gordon Inquiry initiatives was noted by the Auditor General for Western Australia. It provided the following example: the Department for Community Development (DCD) is responsible for implementing 30 initiatives, but the central reporting process contains DCD progress data on eight initiatives in 2003, 17 in 2004 and 18 in 2005. Of 17 initiatives led by the Western Australia Police only six are included on the reporting database: Auditor General for Western Australia, *Progress with Implementing the Response to the Gordon Inquiry* (November 2002) 11.



Role and functions

The Commission considers that the Office of the Commissioner for Indigenous Affairs should be tasked with reporting on the progress of the recommendations of both this Final Report and of the report of the RCIADIC. As noted above, there is presently no system for regular reporting of progress in Western Australia on the implementation of the Royal Commission's recommendations. The Commission also notes the recent cessation of funding to the Deaths in Custody Watch Committee (WA). One of the recommendations of the RCIADIC was the establishment of watch committees in each state to, among other things, advocate for the implementation of the recommendations of the RCIADIC. Since its inception in 1993 the Deaths in Custody Watch Committee (WA) was funded through ATSIC. With the demise of ATSIC the responsibility for funding fell to the federal Attorney General who decided⁴⁰ to tender for the monitoring role in Western Australia.⁴¹ Given the overlap in areas on which the RCIADIC and the Commission has made recommendations, the Commission considers that it would be an effective use of funding and resources to give one body responsibility for reporting on the implementation progress of both of sets of recommendations.

the perspective of Aboriginal people.³⁷ It is also necessary for the Office to be adequately funded to perform its functions³⁸ and that this funding is ongoing. In commenting on the need to adequately fund the proposed Commissioner for Children and Young People, Giz Watson MLC recognised that the provision of funding 'goes to the very heart of the question of independence. There are many ways in which to restrict independence. One of those is to place restrictions on the way in which funds can be used'.³⁹

The Commissioner for Indigenous Affairs will be required to report annually to the Western Australian Parliament⁴² and to the Aboriginal people of Western Australia on:

- departmental participation in the whole-of-government approach;
- progress on implementation of the recommendations of this Report⁴³ and the *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991);

37. In its submission HREOC noted the requirement for 'adequate and appropriate consultation with the Aboriginal community' in the implementation of the recommendations of this report: Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 18. The Commission noted the importance of the Commissioner for Indigenous Affairs consulting with the appropriate Aboriginal body in respect of each of the issues it considers.

38. This was recognised in the Victorian RCIADIC report in respect of the proposed Social Justice Commissioner: Victorian Department of Justice, *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody*, Review Report (Vol. 1, October 2005) 705.

39. Western Australia, *Parliamentary Debates*, Legislative Council, 13 April 2006, 1699b-1702a/1 (Ms Giz Watson).

40. See Deaths in Custody Watch Committee (WA) Inc., 'Deaths in Custody is Facing Its Own Demise', media release (25 November 2005), <http://www.deathsincustody.com/media_release.php?id=54>.

41. The Deaths in Custody Watch Committee (WA) failed to win the tender and so has no further government funding; however, it does intend to continue on a volunteer basis. The Commission has been advised that the Aboriginal Legal Service won the tender for Western Australia and is in the process of employing a person to carry out this role: Mark Newhouse, Trustee, Deaths in Custody Watch Committee (WA), telephone consultation (7 September 2006).

42. In order to ensure independence the Commissioner for Indigenous Affairs should not report through any Minister. The Commissioner for Indigenous Affairs should report directly to both Houses of Parliament in the same manner as the Corruption and Crime Commissioner.

43. This should include an analysis of departmental and agency reports to the Commissioner for Indigenous Affairs and a review of legislative amendments.

The Commissioner for Indigenous Affairs will be required to report annually to the Western Australian Parliament and to the Aboriginal people of Western Australia.

- outcomes achieved in regard to reducing Aboriginal disadvantage in Western Australia;⁴⁴ and
- progress in the reduction of over-representation of Aboriginal people in the criminal justice system in Western Australia.

The Office of the Commissioner for Indigenous Affairs will monitor and evaluate state government initiatives addressed to Aboriginal people in Western Australia, including Aboriginal courts,⁴⁵ community justice groups,⁴⁶ the proposed statewide Aboriginal language interpreter service,⁴⁷ the by-law scheme under the *Aboriginal Communities Act 1979* (WA)⁴⁸ and pilot diversionary programs.⁴⁹ The Commissioner's role will also include the promotion of reconciliation in Western Australia and advocating for the rights of Aboriginal people.

Powers

The Commissioner for Indigenous Affairs should have the power to do all things necessary or convenient to be done for, or in connection with, the performance of its functions⁵⁰ and must have sufficient powers to allow it to hold departments to account. In particular, the Commissioner should have the power to:

- require departments and agencies to provide information on request;⁵¹
- require departments and agencies to report annually

on outcomes achieved in respect of Aboriginal issues and policies;

- establish joint working parties or collaborate with state or federal agencies and/or research bodies on issues affecting or relating to Aboriginal people in Western Australia;⁵²
- review laws and policies, and provide advice to government;
- publish research, reports and information on issues relating to Aboriginal people in Western Australia;
- make findings and recommendations to Parliament or to any Western Australia government agency in relation to any matter within the Commissioner's remit; and
- undertake investigations on matters as directed by the Premier of Western Australia from time-to-time.⁵³

It is the Commission's firm opinion that the Commissioner for Indigenous Affairs should not receive or investigate complaints from individuals. There are other bodies in Western Australia that are experienced in dealing with individual complaints based on certain criteria; for example, the Ombudsman and the Corruption and Crime Commission (for government agencies and public officers) and the Equal Opportunity Commission (for discrimination).

44. The Commission suggests that the benchmarks established by the Steering Committee for the Review of Government Service Provision should be the starting point for the assessment of the outcomes achieved in the reduction of indigenous disadvantage: SCRGSP, *Overcoming Indigenous Disadvantage – Key Indicators 2003* (November 2003).

45. See Recommendation 24, below p 136.

46. See Recommendation 17, below pp 112–13.

47. See Recommendation 117, below p 337.

48. See Recommendation 18, below p 115.

49. See Recommendation 51, below p 205.

50. This is the expression used to grant powers to the Human Rights and Equal Opportunities Commissioners: see *Human Rights and Equal Opportunity Act 1986* (Cth) s 13(1).

51. The Commission proposes that the Commissioner for Indigenous Affairs use this power to conduct an ongoing review of each recommendation of this Final Report so that periodic recommendation-by-recommendation style reviews are made redundant.

52. For example, this could include collaboration with the Office of the Ombudsman; Equal Opportunity Commission; Office of the Inspector of Custodial Services; Department of Indigenous Affairs; Crime Research Centre (University of Western Australia); Centre for Aboriginal Studies (Curtin University); Commonwealth Aboriginal and Torres Strait Islander Social Justice Commissioner; and relevant parliamentary committees.

53. It is important that any directions for investigation be transparent and tabled in Parliament by the Premier. Adequate resourcing for extraordinary investigations must be provided.

Recommendation 3

Establish an Office of the Commissioner for Indigenous Affairs

1. That the Western Australian government establish, by statute, an independent and properly resourced Office of the Commissioner for Indigenous Affairs to report directly to Parliament on:
 - (a) progress on implementation of the recommendations of the Law Reform Commission of Western Australia's Final Report into Aboriginal Customary Laws (2006) and the Report of the Royal Commission into Aboriginal Deaths in Custody (1991);
 - (b) departmental and agency participation in the whole-of-government approach;
 - (c) outcomes achieved in regard to reducing Aboriginal disadvantage and achieving reconciliation in Western Australia; and
 - (d) progress in the reduction of over-representation of Aboriginal people in the criminal justice system in Western Australia.
2. That the Office of the Commissioner for Indigenous Affairs be responsible for independent monitoring and evaluation of government initiatives directed toward Aboriginal people in Western Australia.
3. That the Office of the Commissioner for Indigenous Affairs be headed by an independent Aboriginal Commissioner, preferably from Western Australia.
4. That the Commissioner for Indigenous Affairs have the power to:
 - (a) require departments and agencies to provide information on request;
 - (b) require departments and agencies to report annually to the Commissioner on outcomes achieved in respect of Aboriginal issues and policies;
 - (c) establish joint working parties or collaborate with state or federal agencies and/or research bodies on issues affecting or relating to Aboriginal people in Western Australia;
 - (d) review laws and policies and provide advice to government;
 - (e) publish research, reports and information on issues relating to Aboriginal people in Western Australia;
 - (f) make findings and recommendations to Parliament or to any Western Australia government agencies in relation to any matter within the Commissioner's remit; and
 - (g) undertake investigations on matters as directed by the Premier of Western Australia from time-to-time.
5. That the Commissioner for Indigenous Affairs be appointed by the Governor on the recommendation of the Premier in consultation with Aboriginal people.
6. That the Commissioner for Indigenous Affairs' term of office be five years, renewable by both Houses of Parliament. The Commissioner should only be suspended or removed from office by the Governor on addresses from both Houses of Parliament.

Chapter Four

Recognition of Aboriginal Customary Law

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What is Aboriginal Customary Law?

Definitional Matters

The Terms of Reference asked 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’.

These matters have been considered in the past by the Australian Law Reform Commission (ALRC) and the Northern Territory Law Reform Committee (NTLRC) in the context of similar references.¹ Rather than duplicating the work of these agencies, the Commission took their reports as a starting point to the consideration of these definitional matters in the Western Australian context.

‘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;² 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’ (that is, the child of a ‘full blood’ Aboriginal mother and a non-Aboriginal father) to ‘quadroon’ (the grandchild of a full-blood’ Aboriginal woman).³ It is now clear that as a consequence of past government policies, racial

integration and the passage of time there are now significantly varying degrees of biological descent among people who identify as Aboriginal. Perhaps for this reason, contemporary definitions of the term ‘Aboriginal’ are beginning to involve cultural factors which have the capacity to broaden the scope of those who may claim Aboriginality⁴ and which give Aboriginal people some degree of control over who is accepted as Aboriginal.⁵

In 1985, a comprehensive survey of definitions of ‘Aboriginal’ or derivative terms in some 700 examples of Australian legislation noted that there were

no less than 67 identifiable classifications, descriptions or definitions [which] have been used from the time of white settlement to the present. ... These classifications may be grouped under six broad headings: according to anthropometric or racial identification; territorial habituation, affiliation or attachment; blood or lineal grouping, including descent; subjective identification; exclusionary and other; and Torres Strait Islanders.⁶

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;⁷ while others still employ the potentially offensive protection era terminology of ‘full-blood’ and ‘quarter-blood’ descent.⁸ Another definition, favoured by Commonwealth and some Western Australian legislation, refers to membership of ‘the Aboriginal race’.⁹ This definition has been judicially interpreted to require satisfaction of the threefold test

1. For a fuller discussion of these previous inquiries, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 2–5. Reference to these inquiries can be found throughout the Commission’s Discussion Paper and this Final Report.
2. See, for instance, the *Aborigines Protection Act 1886 (WA)*.
3. The legislative history is laid out in some detail in: Western Australia, *Parliamentary Debates*, Legislative Council, 12 March 2003, 5206 ff (Mr Derrick Tomlinson).
4. The Commission acknowledges and agrees with the point made by Christopher Anderson that to claim or ‘assert “Aboriginality” is not to assume that Aborigines form a wholly coherent, unified body’: Anderson C, ‘On the Notion of Aboriginality’ (1985) 15 *Mankind* 41, 42.
5. Nettheim G, ‘Australian Aborigines and the Law’ in *Law and Anthropology 2* (Vienna: VWGO, 1987) 371, 375.
6. McCorquodale J, ‘The Legal Classification of Race in Australia’ (1986) 10(1) *Aboriginal History* 7, as cited in Nettheim, *ibid* 371, 373.
7. The threefold test was laid down by the High Court in *Commonwealth v Tasmania* (1983) 46 ALR 625, 817. The threefold definition was first proposed by the Department of Aboriginal Affairs, *Report on a Review of the Working Definition of Aboriginal and Torres Strait Islanders* (Canberra, 1981).
8. See, for example, the *Aboriginal Affairs Planning Authority Act 1972 (WA)*, discussed under ‘Criticisms of the AAPA Scheme’, Chapter Six, below p 233. Compare also s 4 of that Act which adopts a different definition based on the threefold test.
9. See, for example, *Family Court Act 1997 (WA)*; *Fish Resources Management Act 1994 (WA)*.

described above with the descent criterion being a 'quantum of Aboriginal genes'.¹⁰ In its Discussion Paper the Commission 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.¹¹ 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.¹²

In its 1986 report *The Recognition of Aboriginal Customary Laws* the 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.¹³ However, it is the Commission's opinion that the application of legislation by government departments and administrative authorities requires a clear definition.¹⁴ 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, the Commission proposed that a standard definition of 'Aboriginal person' in terms of descent should be inserted in the *Interpretation Act 1984* (WA) for the purposes of all Western Australian written laws. In order to ensure that the standard definition of 'Aboriginal person' was not unduly restrictive, the Commission proposed 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 identifies as an Aboriginal person; and
- evidence that the person is accepted as an Aboriginal person in the community in which he or she lives.

It should be noted that while the Commission's proposed definition stresses Aboriginal ancestry, no fixed proportion of Aboriginal descent is identified. Further, the weight to be given to each or any of the above factors is considered to be a matter for the decision-maker and may vary from case-to-case.¹⁵

The Commission received a number of submissions on this proposal, the overwhelming majority of which supported the more inclusive definition suggested by the Commission. Importantly, most submissions highlighted the need for a single definition to be applied consistently in Western Australia.¹⁶ Indeed, the Law Council of Australia argued that the Commission's definition should be adopted nationally in each of the state, territory and Commonwealth Interpretation Acts.¹⁷

Although the Commission provided a separate, similar definition for Torres Strait Islanders in its Discussion Paper, its original proposal also included the following shorthand:

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

While supporting the proposal, the Department of Indigenous Affairs noted that this shorthand form would introduce a 'blanket approach' that may be problematic in relation to legislation such as the *Aboriginal Heritage*

10. See detailed discussion in de Plevitz L & Croft L, 'Aboriginality Under the Microscope: The biological descent test in Australian law' (2003) 3 *Queensland University of Technology Law and Justice Journal* 1, 2. See also discussion in LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 30–31.

11. LRCWA, *ibid* 31.

12. For discussion of recent parliamentary changes, see Western Australia, *Parliamentary Debates*, Legislative Council, 12 March 2003, 5214 (Ms Giz Watson); 13 March 2003, 5308 (Ms Ljiljana Ravlich).

13. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [95].

14. 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 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. Submissions received indicated the need for support services to trace heritage and access relevant information, particularly for regional Aboriginal people: Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 2; Pilbara Development Commission, Submission No. 39 (19 May 2006) 6.

15. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 49, Proposal 3.

16. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 2–3; Department of Corrective Services, Submission No. 31 (4 May 2006) 2–3; Department of the Attorney General, Submission No. 34 (11 May 2006) 3.

17. Law Council of Australia, Submission No. 41 (29 May 2006) 3.

Act 1972 (WA) where rights may be accorded to Torres Strait Islanders in respect of Western Australian Aboriginal heritage.¹⁸ The Commission agrees with the Department's submission and has removed the shorthand. The Commission notes that this need not unduly complicate legislative provisions, since individual Acts may adopt the shorthand in the interpretation or definition sections of the Act where it is intended that references to Aboriginal people include Torres Strait Islander people.¹⁹

The Department of Indigenous Affairs further submitted that consideration should be given to providing guidelines to instruct decision-makers as to the weight to be given to the factors set out above. It suggested that recognition as Aboriginal by the relevant community should be given substantial weight by decision-makers.²⁰ The Commission understands that this may be a significant determining factor of Aboriginality in many cases; however, in order to protect those people who were removed from their Aboriginal families and those who have relocated and severed ties to their Aboriginal community, the Commission feels that the other factors listed in Recommendation 4 should also be taken into account. The Commission does not consider it appropriate to set out guidelines for decision-makers beyond the matters that may be considered in support of a claim of Aboriginal descent.

The Commission considers that the following inclusive definition of 'Aboriginal person' (and also of 'Torres Strait Islander person') will remove the difficulties experienced by some Aboriginal people of having to satisfy all three tiers of the threefold test while allowing cultural criteria to be considered by the decision-maker 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 acknowledges that identification as an Aboriginal person for social or cultural purposes must be determined by Aboriginal people alone.

Recommendation 4

Definition of Aboriginal person and Torres Strait Islander person

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:

'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 may be considered:

- (a) genealogical evidence;
- (b) evidence of genetic descent from a person who is an Aboriginal person;
- (c) evidence that the person identifies as an Aboriginal person; and
- (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 may be considered:

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

18. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 2–3.

19. Although less than 900 Torres Strait Islander people currently reside in Western Australia, the Commission recognises that Torres Strait Islanders are a distinct people with their own cultural identity, traditions and customs and that this may influence the way in which certain practices, processes or provisions consequent upon the Commission's recommendations apply. The Department of Indigenous Affairs (WA), *Overcoming Indigenous Disadvantage in Western Australia Report 2005* (2005) notes that the 2001 Australian Census recorded that 'the vast majority of Indigenous persons in Western Australia stated that they were of Aboriginal origin (96%), 1.5% were of Torres Strait Islander origin, while those with dual Aboriginal and Torres Strait Islander origin comprised 2.3%': 25. The total population of Indigenous people in Western Australia was estimated in 2002 at 65,931 persons or 3.5% of the total population of Western Australia. This estimate will be revised later this year following the 2006 Census.

20. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 3.

'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.²¹ 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.²² 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 of this order.²³

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, 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.²⁴

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. These comments were endorsed by Aboriginal people during return

consultation visits to present the Commission's proposals and Discussion Paper findings.

What Constitutes Customary Law?

Many non-Aboriginal people 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.



21. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 50.

22. See 'Aboriginal customary law: Is it "law"?', *ibid* 50–51.

23. See LRCWA, Project No. 94, *Thematic Summaries of Consultations – Manguri* (4 November 2002) 3.

24. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 51–52.

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.

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 took 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.²⁵

In this context the Commission also considered whether it was obliged under its Terms of Reference only to examine for potential recognition those Aboriginal laws that appeared unchanged by European contact.²⁶ The fact that many Aboriginal customary laws have developed and changed over time is noted throughout the Commission's Discussion Paper. It is the Commission's firm view that evolution—both in the substance of these laws and in their practice—is inevitable. Such dynamism is apparent even in the judicial interpretation of legislation in the 'codified' Western Australian legal system. With Aboriginal law change is unavoidable, both as a result of its oral tradition and the reality of over 200 years of colonial occupation. This issue was addressed in detail in John Toohey's Background Paper for this reference and does not need repeating here.²⁷ It is sufficient to say that the Commission agreed with Toohey's conclusion that there is 'nothing [in the Commission's Terms of Reference] that ties recognition only to customary laws that have remained unaltered since white settlement'.²⁸

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

The Terms of Reference required the Commission 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.²⁹

It is the Commission's view that voluntariness should be the guiding principle in application of customary law to individuals.³⁰ 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.³¹ It is, however, pertinent to note that the question 'Who is bound (and who should be bound) by Aboriginal customary law' becomes somewhat academic when discussed in terms of the Commission's recommendations. As explained in Chapter One, the Commission's recommendations do not create a

25. Ibid 52–53.

26. Ibid 52.

27. Toohey J, 'Aboriginal Customary Laws Reference – An Overview' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 173, 182.

28. Ibid.

29. For more in-depth discussion, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 53–54.

30. See discussion under 'Principle Three: Voluntariness and consent', Chapter Two, above pp 5–6.

The Commission's recommendations aim to make space within Western Australian law for recognition and respect of important aspects of Aboriginal customary law and culture.

separate system of law for Aboriginal people in Western Australia. Aboriginal people remain bound and protected by Australian and Western Australian law at all times. Whether individual Aboriginal people are also bound and protected by their relevant customary law is a matter for them and their communities. The Commission's recommendations aim to make space within Western Australian law for recognition and respect of important aspects of Aboriginal customary law and culture, but not all the Commission's recommendations will apply or be relevant to all Aboriginal people in Western Australia. This is not only in recognition of the diversity of Aboriginal peoples in Western Australia, but also in recognition that Aboriginal people have the right to control their own individual and collective destinies and to choose independently whether and how they are bound by Aboriginal law.

Role of kinship in Aboriginal society

Kinship is at the heart of Aboriginal society and underpins the customary law rules and norms associated with each of the areas to be discussed in this Report. Importantly, kinship governs all aspects of a person's social behaviour and prescribes the obligations or duties a person has toward others as well as the activities or individuals that a person must avoid.³² Robert Tonkinson explains the kinship system thus:

Social relationships in which people refer to each other using terms of biological relatedness such as 'mother', 'son', 'cousin' are called kinship systems. In Aboriginal society everybody with whom a person comes into contact is called by a kinship term, and social interaction is guided by patterns of behaviour considered appropriate to particular kin relationships. Although a person's sex and age are important in determining social status, the system of relatedness largely dictates the way people behave towards one another, prescribing dominance, deference, obligation or equality as the basis of the relationship.

Aborigines employ what is known as a 'classificatory' kinship system; that is, the terms used among blood relatives are also used to classify or group more distantly related and unrelated people. Classificatory systems are based on two principles. First, siblings of the same sex (a group of brothers or a group of sisters) are classed as equivalent in the reckoning of kin relationships. Thus my father's brothers are classed as one with my father and are called 'father' by me; likewise, all women my mother calls 'sister' are my 'mothers'. Following this logic, the children of all people I call 'father' or 'mother' will be classed as my 'brothers' and 'sisters'. Secondly, in theory this social web can be extended to embrace all other people with whom one comes into contact in a lifetime.³³

Not all Aboriginal kinship systems are the same but they do tend to share the basic principles addressed in the preceding extract.³⁴ Essentially, in Aboriginal society, kinship should be understood as a circular concept rather than a linear one as is the norm 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.

It is important to note at this stage that while the kinship system was an undeniable part of traditional Aboriginal society, the Commission found, during its community consultations, that it is also strongly instilled in contemporary Aboriginal society, including urban Aboriginals. Therefore, while there may be some utility in the distinction between the extent to which remote Aboriginal people and urban Aboriginal people engage with (and accept the authority of) Aboriginal customary law, there is less of a distinction between remote and urban Aboriginals in relation to conceptions of kinship and acknowledgement of the obligations imposed by the kinship system.³⁵

31. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 54.

32. Elkin AP, *The Australian Aborigines* (Sydney: Angus & Robertson, 4th ed., 1974) 144.

33. Tonkinson R, 'MarduJarra Kinship', as cited in McRae H, Nettheim G & Beacroft L (eds), *Indigenous Legal Issues* (Sydney: LBC Information Services, 2nd ed., 1997) 83.

34. Vines P, 'When Cultures Clash: Aborigines and inheritance in Australia' in Miller G (ed), *Frontiers of Family Law* (Dartmouth: Ashgate, 2003) 98, 108.

35. The extent to which these obligations are actually observed by more urbanised Aboriginal people will, of course, vary. However, it appears that certain kinship obligations, such as the duty to accommodate kin, are taken very seriously regardless of urban or remote location.

Recognition of Aboriginal Customary Law

The Commission's Starting Point

The Terms of Reference required the Commission to consider whether 'there may be a need to recognise the existence of, and take into account within [the Western Australian] legal system, Aboriginal customary laws'. This meant that the starting point for the Commission's consideration of the potential for recognition of Aboriginal customary law was the current Western Australian (and Australian) legal system. As John Toohey has aptly observed:

No doubt the language [of the Commission's Terms of Reference] was carefully chosen to make it clear that the framework within which the Commission is to operate does not include recognition of customary laws as a legal system operating independently of the State's legal system but rather as dependent upon recognition *within* that system.¹

While this may appear to curtail the Commission's investigation, this has not been the case. As discussed in Chapter One, the Commission's consultations with Aboriginal people in Western Australia showed a clear consensus against the operation of two separate systems of law – something that many considered would be an unnecessarily divisive outcome. Aboriginal people consulted for the reference emphasised the need for striking a balance between Aboriginal and non-Aboriginal law and facilitating a harmonious relationship between Aboriginal and non-Aboriginal Western Australians.

The Commission's Discussion Paper noted that the ALRC—which was ostensibly under no such restriction and considered the matter in detail—came to the conclusion that separate formal systems of law should be avoided.² This was a conclusion that the NTLRC also shared. Indeed, there are persuasive reasons why

Aboriginal customary law cannot be recognised to the exclusion of Australian law as a separate formal system. As the NTLRC observed:

Australian law deals with many things that traditional law does not (eg: consumer protection laws relating to unsafe toys or faulty motor vehicles; workers' compensation law; sale of goods, commercial contracts and so on) – so, for practical purposes, the option of *only* traditional law applying in an Aboriginal community denies some legal rights to Aboriginal people.³

The need to ensure that all Australian citizens enjoy the full protection of Australian law and the rights, and obligations that such law confers, is a matter that the Commission believed to be of paramount importance in formulating its recommendations for reform.

Recognition and the Relevance of International Law

In considering the potential of recognition of Aboriginal customary law in Western Australia the Commission was required by its Terms of Reference to have regard to relevant Commonwealth legislation and to Australia's international obligations. An entire chapter of the Commission's Discussion Paper was therefore devoted to discussion of Aboriginal customary law in the international context.⁴

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* and the *International Convention on the Elimination of All Forms of Racial Discrimination*.⁵ In response to growing international concern during the

1. Toohey J, 'Aboriginal Customary Laws Reference – An Overview' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 173, 174 (emphasis added).
2. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 55.
3. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 15.
4. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) Part IV.
5. *Ibid* 69–70. Although not ratified by Australia the *Convention Concerning Indigenous and Tribal Persons in Independent Countries* (ILO Convention 169) has been employed by the Australian judiciary in the interpretation of statutes and, it has been suggested, is becoming increasingly understood to be binding international customary law. See Anaya J, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996).



affairs);¹⁰ the right of indigenous peoples to participate in decision-making in matters that affect them;¹¹ the right to maintain and develop their political, economic and social institutions;¹² and the right to practise and revitalise cultural traditions and customs.¹³ Importantly, in Article 33 the Declaration contains the right of indigenous peoples to promote, develop and maintain their institutional structures and distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, *their juridical systems or customs, in accordance with international human rights standards.*¹⁴

past two decades about the marginalisation of the world's indigenous peoples, the United Nations established several mechanisms dedicated to indigenous issues and, as reported in the Commission's Discussion Paper, was working toward an international *Declaration on the Rights of Indigenous Peoples*.⁶ On 23 June 2006 in its first session, the United Nations Human Rights Council adopted a revised version⁷ of the Declaration which has now been formally recommended to the United Nations General Assembly for adoption in its September 2006 session.⁸

The revised Declaration contains, among other things, a limited right of indigenous self-determination⁹ (including self-government in matters of internal or local

It is pertinent at this juncture to note that, even if adopted by the United Nations General Assembly, the revised Declaration would have no immediate binding effect at international law. Nonetheless, it will stand as a statement of general principles that state parties such as Australia are expected to aspire to and implement so far as possible. Ideally the Declaration will lead to the future passage of a convention on the rights of indigenous peoples which has binding force at international law.¹⁵ Alternatively, with the passage of time and like the *Universal Declaration of Human Rights* before it, aspects of the Declaration could eventually become accepted as binding peremptory norms of customary international law.¹⁶

6. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 70–72.

7. Because, after 11 years' debate at the international level, the state-party members of the international working group were unable to reach consensus on the terms of the Draft Declaration the process was abandoned in February 2006. The Special Rapporteur, Mr Luis-Enrique Chavez, presented a revised text to the Commission on Human Rights which differs from the original draft in a number of important respects, including a weaker version of the right to self-determination of Indigenous peoples. It is this text that has been adopted by the new Human Rights Council and has been forwarded to the United Nations General Assembly. Australia is one of only four countries that have actively pursued rejection of the self-determination and collective rights aspects of the Declaration; the other countries being America, Canada and New Zealand (each with substantial minority Indigenous populations).

8. UN Doc A/HRC/1/L.3 (23 June 2006). The Commission has been advised that the Australian government is likely to oppose adoption of the revised *Declaration on the Rights of Indigenous Peoples* in its current form: Robert Meadows QC, Solicitor General for Western Australia, Submission No. 30 (2 May 2006) 2. According to Australia's UN delegate, while supporting a greater role for Australia's Indigenous peoples in decision-making, Australia opposes adoption because of uncertainty of the meaning of self-determination and the right of free, prior and informed consent: see *Statement by Mr Peter Vaughan, Head of the Australian delegation to the Permanent Forum on Indigenous Issues, on behalf of Australia, New Zealand and the United States of America On Free, Prior Informed Consent* (22 May 2006), <http://www.australiaun.org/unweb/content/statements/social/2006.05.17_soc_indigenous.pdf>. The nature and extent of the Indigenous right to self-determination is discussed in greater detail in the Commission's Discussion Paper: LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 419–22.

9. *United Nations Declaration on the Rights of Indigenous Peoples*, Article 3.

10. *Ibid* Article 3 *bis*.

11. *Ibid* Article 19.

12. *Ibid* Article 21.

13. *Ibid* Article 12.

14. *Ibid* Article 33 (emphasis added).

15. As outlined in the Commission's Discussion Paper, although considered bound at international law, the ratification of international conventions by Australia will not necessarily mean that Australia will observe their precepts at home. The treaty-making power is an executive power and treaties are not accepted as binding in Australia until incorporated into Australian law by the federal legislature. However, Australian courts are becoming more inclined to interpret statutes consistently with international law in circumstances of statutory ambiguity, particularly where the civil rights of individuals are threatened. For further discussion, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 67–69.

16. To become a rule of customary international law to which a state is bound, the rule must be consistently practised by the state and the state must have accepted its obligation to adhere to such rule. For further discussion of international law in this context, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) Part IV; and Davis M & McGlade H, 'International Human Rights Law and the Recognition of Aboriginal Customary Law' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 381.

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. In light of recent media claims to this effect this was chosen as a matter for detailed discussion in Chapter One of this Report. In that chapter it was shown that 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 or differential treatment 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* to which Australia is a signatory.

The other two areas of potential conflict involve the recognition of particular Aboriginal customary practices that may contravene international laws (such as spearing and non-consensual child marriage) and the recognition of collective rights of indigenous peoples as against the individual rights of women under international law. The Commission's research on 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. These conflicts are discussed at some length in the Commission's Discussion Paper¹⁷ and are canvassed in further detail in Chapter One of this Report.

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. In view of the potential for conflict described above, the Commission proposed, as its threshold test for recognition, the consistency of relevant Aboriginal customary laws or practices with international human rights standards.¹⁸ All submissions received in respect of this proposal endorsed the Commission's view;¹⁹ however, a number of submissions reinforced the need for explicit protection of Aboriginal women and children.²⁰ The Commission has therefore expanded its recommendation to make this important precondition to recognition clear.²¹

Recommendation 5

Recognition of customary law consistent with international human rights standards

That 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. In all aspects of the recognition process particular attention should be paid to the rights of women and children and the right not to be subject to inhuman, cruel or unusual treatment or punishment under international law.

17. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 74–76.

18. *Ibid* 76, Proposal 5.

19. Dr Dawn Casey, Submission No. 24 (1 May 2006); Department of Corrective Services (WA), Submission No. 31 (4 May 2006); Department of the Attorney General, Submission No. 34 (11 May 2006); Law Council of Australia, Submission No. 41 (29 May 2006); Indigenous Women's Congress, Submission No. 49 (15 June 2006); Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006).

20. Centre for Aboriginal Studies, Curtin University, Submission No. 22 (1 May 2006) 3; Dr Dawn Casey, Submission No. 24 (1 May 2006); Indigenous Women's Congress, Submission No. 49 (15 June 2006); Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006). The Commission also notes the new Article 22(2) *bis* of the *United Nations Declaration on the Rights of Indigenous Peoples* which directs state-parties to take measures in conjunction with Indigenous peoples to ensure that women and children are protected against violence and discrimination.

21. The Commission also recognised in its Discussion Paper 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 Aboriginal peoples in Western Australia can be measured. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 76.

How Should Aboriginal Customary Law be Recognised?

In its Discussion Paper the Commission weighed the arguments for and against the recognition of Aboriginal customary law and determined that the continuing existence and practice of Aboriginal customary law in Western Australia should be appropriately recognised.²² In doing so the Commission accepted that there are jurisdictional limitations to recognition of customary law in Western Australia; for example, 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.²³ The Commission also stressed that recognition of customary law must work within the existing framework of the Western Australian legal system.²⁴ However, 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 (among other things), the Commission rejected any attempt to comprehensively codify Aboriginal customary law.²⁵ This view endorsed previous recommendations of the ALRC and the NTLRC.²⁶

The overwhelming majority of submissions in response to the Commission's Discussion Paper supported recognition of Aboriginal customary laws in Western Australia of the kind advanced by the Commission's proposals.²⁷ Some submissions suggested that the Western Australian legal system should recognise some aspects of customary law, but not others. In particular, it was highlighted that violent traditional punishments,²⁸ violence or sexual abuse of women or children²⁹ and 'unreasonable customs'³⁰ should not be condoned by Western Australian law. Only two submissions expressed no support whatsoever for recognition of Aboriginal customary law and culture in Western Australia.³¹



22. Ibid 55–56.

23. Ibid 56–57.

24. Ibid 64.

25. Ibid 62. Other arguments against codification included the need for flexibility in the interpretation of Aboriginal customary law, particularly in respect of its interaction with Australian law; the removal of Aboriginal autonomy over the content, application and interpretation of Aboriginal customary law consequent upon codification; the fact, stressed by the ALRC, that courts would become the 'primary agencies for the application of customary law'; and the potential for distortion of customary laws that may follow from application of customary law by non-Indigenous people and agencies.

26. See ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) 147–48; NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 11.

27. Indeed some submissions supported the recognition of Aboriginal customary law in all Australian jurisdictions: Law Council of Australia, Submission No. 41 (29 May 2006) 4.

28. It is noted that some Aboriginal people have also emphasised that they do not favour recognition of all physical customary law sanctions. Such sentiments were strongly expressed by participants at the Commission's return consultation visits to Aboriginal communities in Geraldton (3 March 2006); and Broome (10 March 2006). Others highlighted that physical punishments were only ever acceptable if done in proper ritual conditions: LRCWA, Discussion Paper community consultations – Warburton, 27 February 2006; Kalgoorlie, 28 February 2006; Fitzroy Crossing, 9 March 2006. The latter approach was also widely expressed in the Commission's initial consultations with Aboriginal communities and organisations across Western Australia throughout 2002–2004.

29. For example, Reynold Indich (Jumindi), Submission No. 4 (16 February 2006); Dr Kate Auty SM, Submission No. 9 (16 March 2006); Dr Dawn Casey, Western Australian Museum, Submission No. 24 (1 May 2006); Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006); Law Council of Australia, Submission No. 41 (29 May 2006); Office of Commissioner of Police, Submission No. 46 (7 June 2006); Indigenous Women's Congress, Submission No. 49 (15 June 2006).

30. June Vile, Submission No. 12 (26 April 2006). Ms Vile cited incidents observed by anthropologists in the early 19th century (1820s–1830s) such as 'leaving a grandmother with a broken leg to die under a tree when the tribe went walkabout'. It is submitted that such incidents cannot reasonably be described as 'customs' – these are likely to have been the result of sheer necessity and would be most unlikely to occur today.

31. Brian Marsh, Submission No. 5 (8 February 2006); Margaret Deegan, Submission No. 37 (19 May 2006).

The overwhelming majority of submissions in response to the Commission's Discussion Paper supported recognition of Aboriginal customary laws in Western Australia.

As recognised in many submissions and in the Commission's Discussion Paper,³² Aboriginal customary law is constantly evolving and adapting to the conditions of modern society and the application of Australian law. As a result many physical sanctions traditionally applied under Aboriginal customary law have been significantly tempered or prohibited by Aboriginal people themselves.³³ At the same time certain traditional offences, such as breaches of sacred law³⁴ and kinship rules regarding marriage,³⁵ are often subject to far less serious consequences. Nevertheless, as acknowledged in the Commission's Discussion Paper, some Aboriginal people remain liable to traditional physical punishments and these punishments still have 'major symbolic and cultural significance' among certain Aboriginal peoples.³⁶ As discussed in Chapter One, the Commission's recommendations *do not* condone unlawful violent traditional punishments.³⁷ In respect of violence against Aboriginal women or children, also discussed at length in Chapter One,³⁸ the Commission emphasises that violence or sexual abuse of Aboriginal women and children has never been part of Aboriginal customary law. The Commission's recommendations are incontrovertibly clear that such actions will not be tolerated by Western Australian law.

Forms of recognition

The Commission considered a number of 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.³⁹ 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.⁴⁰ The Commission noted that the judiciary has played an important role in the recognition of customary law for certain purposes in Western Australia;⁴¹ however, it agreed with the ALRC's conclusion that 'the common law does not provide an appropriate *general* basis for the incorporation or recognition of Aboriginal customary laws'.⁴²

The Commission's Conclusion: Functional Recognition

Taking into account the advantages and disadvantages of the different forms of recognition of Aboriginal customary law, the Commission expressed its support in its Discussion Paper 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.⁴³

32. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 91–92.

33. It was observed by Aboriginal people in the Commission's consultations that spearing, for instance, has been considerably curtailed as a punishment for breach of Aboriginal customary law. The significant downturn in frequency of physical sanctions was also recognised by mid-twentieth century anthropologists: see Tonkinson R, *The Jigalong Mob: Aboriginal victors of the desert crusade* (California: Cummings Publishing Co., 1974) 66–67; Williams N, *Two Laws: Managing disputes in a contemporary Aboriginal community* (Canberra: Australian Institute of Aboriginal Studies, 1987) 101. The latter referred to less frequent physical sanctions observed at Yirrkala during 1969–1970.

34. The Commission has noted that some breaches of sacred law would once have resulted in punishment by death. It is clear that such punishment is no longer considered acceptable: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 89.

35. See, for example, the discussion of traditional Aboriginal marriage rules and Aboriginal marriage today: *ibid* 332–35

36. *Ibid* 167.

37. See above pp 28–29.

38. See above pp 18–30.

39. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 62–64.

40. *Ibid* 62.

41. Including in relation to consideration of defences and in the mitigation of sentence for criminal offences; determining applications for bail; coronial and burial matters; claims of native title rights to land; alleged breaches of Indigenous cultural copyright (particularly in respect of artworks); offences against laws controlling the right to hunt, fish and gather native foods; and in determining cases regarding the custody of children: *ibid* 61.

42. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [69] (emphasis in original).

43. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 64.

Affirmative recognition

In the affirmative category, the objectives of the Commission's recommendations for recognition of customary law are the empowerment of Aboriginal people, the reduction of disadvantage, and the resolution of problems and injustice caused by the non-recognition of Aboriginal customary law in the Western Australian legal system. This is achieved by such reforms 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;⁴⁴
- the adoption of a whole-of-government approach to service delivery for Aboriginal Western Australians;⁴⁵
- the introduction of models of self-governance for Aboriginal communities;⁴⁶
- the recognition and removal of existing cultural biases;⁴⁷
- the functional recognition of traditional Aboriginal marriage;⁴⁸ and
- the empowerment of Aboriginal Elders and other respected community members to play an active role in the administration of justice.⁴⁹

Reconciliatory recognition

In the reconciliatory category, the objectives of the Commission's recommendations are the promotion of reconciliation between Aboriginal and non-Aboriginal Western Australians and of pride in Aboriginal cultural heritage and identity. Reconciliatory recognition is

achieved by recommendations that address the decline in cultural authority among Aboriginal people and communities.⁵⁰ In regard to the non-Aboriginal community, reconciliatory recognition is found in the requirement that all employees and contractors of Western Australian government agencies undertake targeted, local cultural awareness training.⁵¹ A further example of such recognition is the establishment of an independent Office of the Commissioner for Indigenous Affairs.⁵² As discussed earlier, this body will provide a focal point for Aboriginal issues in Western Australia and, as well as reporting to Parliament on certain matters, will be tasked with promoting the interests of Aboriginal people and reconciliation in this state.⁵³

But perhaps the clearest example of reconciliatory recognition is the Commission's recommendation for 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.⁵⁴ 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. This recommendation is discussed in more detail immediately below.

The recommendations for affirmative and reconciliatory recognition of Aboriginal law and culture contained in the Commission's Final Report are more than simply symbolic gestures. These recommendations 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 Aboriginal and non-Aboriginal peoples.

44. See, for example, the Commission's recommendations regarding the relevance of Aboriginal customary law and culture to a grant of bail (Recommendations 33 & 34); to sentencing (Recommendation 36); to the possibility of an order for a single-gender jury (Recommendation 41); to prosecutorial guidelines (Recommendation 43); and to funeral attendance for prisoners and restraints used in such circumstances (Recommendations 59 & 61).

45. Recommendation 1.

46. Recommendation 131.

47. For example, the cultural bias against non-lineal family structures was particularly evident to the Commission during research for this reference. This is addressed in recommendations relating to inheritance (Recommendations 65 & 71); funeral attendance for prisoners (Recommendation 59); rights of extended family in the coronial process (Recommendation 76); and recognition of non-biological primary carers of children (Recommendation 59). Other cultural biases are evident in the disproportionate number of Aboriginal people in Western Australian prisons and in the failure to provide adequately for Aboriginal language interpreters for court proceedings. The issue of cultural bias in the context of this project is discussed further in Hands TL, 'Teaching a New Dog Old Tricks' (2006) 6(17) *Indigenous Law Bulletin* 12, 13–14.

48. Recommendations 83, 84 and 85.

49. Recommendation 17.

50. See, for example, the Commission's recommendations for community justice groups (Recommendation 17); for reform of Aboriginal community governance (Recommendations 130 & 131). See also the discussion under 'Principle Six: Respect and empowerment of Aboriginal people', Chapter Two, above pp 37–38.

51. See Recommendation 2, above p 51. See also Recommendations 11, 12, 56 & 128.

52. See Recommendation 3, above p 58.

53. See discussion under 'The Proposed Office of the Commissioner for Indigenous Affairs', Chapter Three, above pp 55–57.

54. See Recommendation 6, below p 74.

The recommendations achieve the intent of statutory and administrative recognition of Aboriginal customary law while allowing Aboriginal control over the content and application of that law to remain.

Constitutional Recognition: The Commission's Recommendation

From its consultations across Western Australia it became apparent to the Commission that many Aboriginal people believed that amendments to laws and policies were not as meaningful without the fundamental respect for Aboriginal peoples and their laws that could be brought about by constitutional change. The Commission's Discussion Paper considered two types of constitutional recognition: constitutional acknowledgement of Aboriginal people as original inhabitants or 'first Australians' and constitutional recognition of Aboriginal customary law as a 'source of law'.⁵⁵

After assessing the advantages and disadvantages of each form of recognition the Commission proposed in its Discussion Paper that Western Australia adopt a form of constitutional recognition of Aboriginal peoples that celebrates their unique status; acknowledges their prior occupation of Western Australia and their continuing connection to the land; and encourages their continuing cultural contribution to the state. This is the type of provision enacted by Victoria in 2004.⁵⁶ Although preambular recognition of Aboriginal peoples has been mooted by the current Attorney General of Western Australia,⁵⁷ the Commission argued that such recognition should instead be entrenched as a foundational provision of the Constitution. This option was preferred for a number of reasons. First, the Commission was concerned that a preamble would be seen as a mere aspirational statement: an add-on rather than a genuine provision of the Constitution. Second, as precedents demonstrate,⁵⁸ constitutional preambles

are likely to include references to other matters germane to the polity, such as equality, freedom and government by Rule of Law. The Commission argued that constitutional recognition of the unique status of Aboriginal peoples must be done with due respect and that, if it is to be taken as a serious reconciliatory gesture, it must be dealt with by a dedicated provision. Finally, the Commission noted that there is currently no s 1 to the Western Australian Constitution – it having been repealed in 1998.⁵⁹ The Commission was of the opinion that this provided a clear and immediate opportunity for constitutional acknowledgment of Aboriginal peoples by foundational provision in the manner of the Victorian amendment.

Submissions to the Discussion Paper were extremely supportive of the Commission's proposal. The Human Rights and Equal Opportunity Commission particularly welcomed the proposal and supported such recognition in the Constitution of every Australian jurisdiction.⁶⁰ The Law Council of Australia commended the Commission's approach of recommending an amendment to the body of the Western Australian Constitution 'rather than simple insertion into a preamble'.⁶¹ The Law Society of Western Australia supported the Commission's proposal⁶² and noted that the Western Australian government has already committed to improving its relationship with the Aboriginal peoples of Western Australia and has recognised their status as first Australians in policy and government charters.⁶³

Because of its importance as a key proposal of the Discussion Paper, the Commission also produced a plain English pamphlet outlining the proposal and its underlying rationale. This brochure was distributed widely to Aboriginal communities and organisations

55. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 57–60.

56. *Constitution (Recognition of Aboriginal People) Act 2004* (Vic) amending the *Victorian Constitution Act 1975*.

57. McGinty J, Attorney General of Western Australia, *Speech to the Constitution at Large Conference* (22 March 2003).

58. See for example, the proposed preamble to the Queensland Constitution: Legislative Assembly of Queensland, Legal Constitutional and Administrative Review Committee, *A Preamble for the Queensland Constitution?*, Report No. 46 (November 2004) 1; and the proposed preamble to the Australian Constitution contained in the schedule to the Constitution Alteration (Preamble) Bill 1999 (Cth) and put to national referendum on 6 November 1999.

59. *Statutes (Repeals and Minor Amendments) Act [No. 2] 1998* (WA), No. 100 of 1998.

60. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 1.

61. Law Council of Australia, Submission No. 41 (29 May 2006) 7.

62. Law Society of Western Australia, Submission No. 36 (16 May 2006) 2.

63. Western Australian Government, Charter of Multiculturalism (November 2004).

across the state. The proposal also featured in discussions during the Commission's return consultations with Aboriginal people in Western Australia and at focus group meetings with Indigenous organisations and government agencies. The Commission's proposal received strong support in each of these forums.

The Commission noted in its Discussion Paper that constitutional acknowledgement of Aboriginal peoples was a form of reconciliatory rather than substantive recognition of Aboriginal customary law and that some may see this as a 'weaker' form of constitutional recognition than source of law recognition. Nonetheless, the Commission believes that, in the context of the pragmatic and extensive recommendations for the recognition of Aboriginal customary law and culture contained in this Report, this is the best path at this time⁶⁴ for Western Australia. Significantly, it avoids the problems with constitutional recognition of customary law described in the Commission's Discussion Paper, such as the need to ascertain the law, to possibly codify it, to limit its scope by reference to other sources of law and, ultimately, to control it. It is this last point that will most likely offend Aboriginal culture and potentially diminish customary law. It remains the Commission's opinion that any method of recognition that involves unnecessary state interference with Aboriginal customary law should be avoided. As Ken Brown has observed, '[c]ustomary law will remain significant to its adherents whether or not it receives formal endorsement in a constitution'.⁶⁵

In the Commission's view, the recommendations for reform that are contained in this Report achieve the intent of statutory and administrative recognition of Aboriginal customary law while allowing Aboriginal control over the content and application of that law to remain. Most importantly, however, the Commission understands this to be the desire of the Aboriginal peoples consulted for this reference who relevantly observed that constitutional acknowledgment of Western Australian Indigenous *peoples*—rather than Indigenous *laws*—was a necessary foundation for effective governance. With the strong support of submissions the Commission therefore confirms its recommendation to Parliament for amendment to Western Australia's Constitution.

Recommendation 6

Constitutional recognition of Aboriginal peoples

That, at the earliest opportunity, the Western Australian government introduce into Parliament a Bill to amend the *Constitution Act 1889* (WA) to effect, in s 1, the recognition of the unique status of Aboriginal peoples as the descendants of the original inhabitants of this state. The Commission commends the following form, modelled on a similar provision in the *Constitution Act 1975* (Vic):

1. Recognition of Aboriginal peoples

- (1) The Parliament acknowledges that the Colony of Western Australia was founded without proper consultation, recognition or involvement of its Aboriginal peoples or due respect for their laws and customs.
- (2) The Parliament recognises that Western Australia's Aboriginal peoples, as the original custodians of the land on which the Colony of Western Australia was established —
 - (a) have a unique status as the descendants of Australia's first people;
 - (b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Western Australia; and
 - (c) have made a unique and irreplaceable contribution to the identity and wellbeing of Western Australia.
- (3) The Parliament does not intend by this section —
 - (a) to create in any person any legal right or give rise to any civil cause of action; or
 - (b) to affect in any way the interpretation of this Act or of any other law in force in Western Australia.

64. The Commission notes that a new constitutional statehood process is currently underway in the Northern Territory and that the further consideration of constitutional recognition of Aboriginal customary law as a source of law will be a part of that process. The Commission notes the comments of the Law Council of Australia in its submission to the Commission's Discussion Paper that a more extensive consideration of the constitutional recognition of Aboriginal customary law is required before such recognition can be ruled out. The Commission suggests that the Western Australian government monitor this process with a view to considering greater constitutional recognition of Aboriginal customary law in the future.

65. Brown K, 'Paper Promises: The constitutional prescription of customary law in the Northern Territory' (1999) 24 *Alternative Law Journal* 221, 223.

Chapter Five

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Introduction

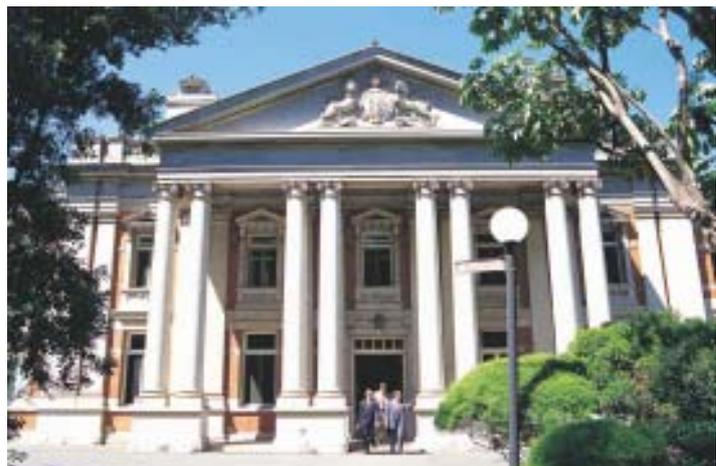
In this chapter the Commission considers the need for recognition of Aboriginal customary law in the criminal justice system. In its Discussion Paper the Commission observed that judicial recognition of Aboriginal customary law in the Western Australian criminal justice system has generally been limited to the recognition of physical traditional punishments during sentencing proceedings. Additionally, the recognition 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.¹ Many of the Commission's recommendations in this chapter are designed to achieve more consistent and reliable 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 recommendations in this Report 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'.²

The Commission concluded in its Discussion Paper that the Western Australian criminal justice system is 'failing Aboriginal people and it is time for a new approach'.³ Despite the recent public debate which has inferred that Aboriginal customary law is somehow responsible for the extent of violence and sexual abuse in Aboriginal communities, the

Commission is of the view that it is the breakdown of Aboriginal customary law in many communities that has contributed to this problem.⁴ In fact, the Commission's consultations with Aboriginal people and research strongly support the conclusion that processes developed consistently with Aboriginal law and culture may assist in solving law and order issues in Aboriginal communities. In particular, the Commission aims to enhance the cultural authority of Elders and other respected persons by providing an opportunity for their direct participation in the administration of the criminal justice system.

During the Commission's consultations with Aboriginal people across the state, the recognition of Aboriginal customary law was paramount. At the same time many Aboriginal people were concerned about practical issues that impacted upon their dealings with the criminal justice system. Therefore, the objective of many of the recommendations in this chapter is to improve the way in which the criminal justice system deals with Aboriginal people and to provide ways in which Aboriginal people can be directly involved in decisions that affect them and their communities.



1. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 83.
2. Morgan N & Motteram J, 'Aboriginal People and Justice Services: Plans, programs and delivery' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No 94 (January 2006) 235, 241.
3. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 83.
4. See discussion under 'Customary Law Does Not Condone Family Violence or Sexual Abuse', Chapter One, above pp 19–22.

Traditional Aboriginal Law and Punishment

The Commission concluded in its Discussion Paper that it is not possible to identify all traditional law offences, traditional punishments and dispute resolution methods employed by Aboriginal people because of the diversity of Aboriginal people in Western Australia and because some aspects of Aboriginal customary law are secret. In any event, the Commission does not consider that it is necessary or desirable to attempt any codification of Aboriginal customary laws.¹ Bearing in mind that this Report deals with the interaction of the Western Australian legal system and Aboriginal law and culture, it is necessary to consider those aspects of traditional law and punishment that may conflict with Western Australian laws.

Although many aspects of the practice of traditional Aboriginal law have changed over time, the Commission's consultations and research revealed that many Aboriginal people in Western Australia remain subject to Aboriginal customary law offences and punishments.² In its Discussion Paper the Commission 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 traditional Aboriginal law, the concept of responsibility under Aboriginal law, traditional offences and punishments, and traditional dispute resolution methods, the Commission has found that there are three main areas of conflict between Aboriginal customary law and the Western Australian criminal justice system.³

Conflict Between Aboriginal and Australian Law

Traditional punishments and practices may constitute an offence against Western Australian law

An Aboriginal person who inflicts traditional physical punishments under Aboriginal customary law may commit an offence against Western Australian law. For example, spearing may amount to an offence of unlawful wounding, assault occasioning bodily harm or grievous bodily harm.⁴ Similarly, certain initiation practices under customary law may constitute a criminal offence.⁵

One way of addressing this conflict would be to recommend that all traditional Aboriginal punishments and practices should be lawful under the Western Australian legal system. The Commission is firmly of the view that this is not appropriate. This approach would be contrary to international human rights standards and would fail to ensure that Aboriginal people are fully protected under Australian law.⁶ Nevertheless, depending on the circumstances there may be some traditional physical punishments and practices that will not be unlawful. This will often depend upon the consent and age of the people involved. In line with the Commission's overall approach to the recognition of Aboriginal customary law, the

1. See discussion under 'How Should Aboriginal Customary Law Be Recognised?', Chapter Four, above pp 70–71; LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 62.
2. LRCWA, *ibid* 91–92.
3. *Ibid* 84–91.
4. See discussion under 'Consent', below pp 139–48.
5. See discussion under 'Traditional initiation practices', below pp 143–45.
6. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 171.

question of the lawfulness or otherwise of traditional practices must be determined on a case-by-case basis.⁷

When considering the relevant offences under the Western Australian *Criminal Code* the Commission has identified inconsistencies between the requirements for the offence of unlawful wounding and assault occasioning bodily harm. While Aboriginal people are affected by these inconsistencies—in terms of how the law in Western Australia deals with traditional punishment and other practices—the impact is in fact much wider. Therefore, the Commission considers that it is appropriate to recommend legislative amendment that would remove the inconsistency for all Western Australians.⁸

Double punishment

Under Australian law a person convicted of a crime is liable to punishment. 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’. It is a principle under Australian law that a person should not be punished twice for the same offence.⁹ In response to this issue, Aboriginal people consulted by the Commission generally supported an appropriate balance between the punishment imposed under customary law and the sentence imposed by the court.¹⁰ The Commission has made a recommendation in respect of Aboriginal customary law and sentencing that will, among other things, enable courts to properly take into account any punishment that has been imposed or will be imposed under customary law.¹¹

Dispute resolution methods

There are significant differences between traditional Aboriginal dispute resolution methods and the Australian criminal justice system. These differences include that:

- Aboriginal dispute resolution methods involve the family and communities, while in the Western legal

system strangers determine disputes and impose punishments;

- the disputants are directly involved in customary law processes compared with the use of advocates under the Australian legal system; and
- Aboriginal customary law decision-making is collective and by consensus, rather than the hierarchical nature of decision-making found under Australian law.¹²

The Commission concluded in its Discussion Paper that as a consequence of these differences, Aboriginal people often feel alienated from the criminal justice system. Further, because family and community members are involved in dealing with ‘offenders’ under customary law, there is a strong case for establishing mechanisms whereby Aboriginal people can be directly involved in the criminal justice system.¹³ The Commission has recommended the establishment of Aboriginal courts.¹⁴ This recommendation recognises the need for Aboriginal people to be more actively involved in mainstream criminal justice processes in order to remove the alienation and distrust of that system felt by many Aboriginal people.

In making its recommendations the Commission has also taken account of the importance of recognising the potential role of Elders in Aboriginal justice strategies.¹⁵ The Commission’s recommendations, in particular the recommendation for community justice groups, are designed to assist dispute resolution in Aboriginal communities by creating the means by which the cultural authority of Elders and other respected Aboriginal persons can be recognised and strengthened. Where appropriate the Commission has also recommended 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.¹⁶

7. Ibid.

8. See Recommendation 25, below p 148.

9. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 214.

10. Ibid.

11. See Recommendation 38, below p 183.

12. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 92.

13. Ibid 92–93.

14. See Recommendation 24, below p 136.

15. The importance of Elders and concern for their declining cultural authority was stressed by many Aboriginal people consulted for this reference. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No 94 (December 2005) 92.

16. Ibid.

Aboriginal People and the Criminal Justice System

Over-Representation in the Criminal Justice System

Historically, Aboriginal people have been discriminated against in the criminal justice system. In its Discussion Paper the Commission emphasised that past discriminatory government policies and laws have shaped Aboriginal peoples' contemporary perceptions of the justice system.¹ Despite the abolition of blatant discriminatory laws and policies, the Commission observed that 'structural racism' or bias within the Western Australian justice system remains. Structural racism refers to the discriminatory *impact* of laws, policies and practices, rather than individual racist attitudes.² An important aim underlying many of the Commission's recommendations in this chapter is to remove discrimination and disadvantages experienced by Aboriginal people in the justice system.

The Commission considers that it is important to again emphasise the unacceptable level of Aboriginal imprisonment in this state. In its Discussion Paper the Commission reported that Western Australia has the highest disproportionate rate of adult imprisonment and juvenile detention of Aboriginal people in Australia.³ Although only constituting about three per cent of the state's population, in 2004 Aboriginal people made up approximately 40 per cent of the adult prison population and 70 per cent of children in Western Australian detention centres.⁴ In 2004, the detention rate of Aboriginal children in Western Australia was 52 times greater than the detention rate of non-Aboriginal children and double the national rate.⁵ It does not

appear that there has been any reduction in the rate of Aboriginal imprisonment and detention over the last two years.⁶

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. It is sometimes assumed that the *only* reason Aboriginal people are over-represented is because they commit more offences. However, 'crime statistics do not measure the incidence of criminal conduct as such, but rather who gets apprehended and punished for it, which is a very different thing.'⁷ While offending rates are clearly 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.⁸ The effect of structural



1. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 94.
2. Office of the Inspector of Custodial Services, *Report of an Unannounced Inspection of Eastern Goldfields Regional Prison*, Report No. 4 (August 2001) 9–10.
3. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 95.
4. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2004* (Perth: Crime Research Centre, 2005) ix & 126.
5. *Ibid* vii.
6. Department of Corrective Services, *Weekly Offender Statistics* (15 June 2006) 1. On 15 June 2006, 39.7 per cent of adults in prison were Aboriginal and 70.3 per cent of children in detention centres were Aboriginal.
7. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co Ltd, 1991) 245.
8. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 94–95. The Office of Inspector of Custodial Services has also concluded that the unacceptable level of over-representation of Aboriginal people in the criminal justice system is in part attributable to structural racism within the criminal justice system itself: see Office of Inspector of Custodial Services, *Directed Review of the Management of Offenders in Custody*, Report No. 30 (November 2005) 5–6. According to the Mahoney Inquiry, the former Department of Justice acknowledged that systemic discrimination is one cause of the high rates of Indigenous over-representation: see Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [9.24].

Western Australia has the highest disproportionate rate of adult imprisonment and juvenile detention of Aboriginal people in Australia.

bias is evidenced by the higher disproportionate rate of imprisonment and detention in Western Australia compared to other states and territories. As stated by Morgan and Motteram:

[U]nless one espouses the absurd notion that Aboriginal Western Australians are many times more evil than their inter-state colleagues, this cannot explain why Western Australia's Aboriginal imprisonment rate is so much higher than the rest of the country.⁹

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.¹⁰ The general under-representation of Aboriginal children in diversionary options has also contributed to the disproportionate rate of Aboriginal detention.¹¹

The Commission acknowledges that there are numerous and complex underlying factors that contribute to high rates of Aboriginal offending and imprisonment. While the focus in this chapter is on issues within the criminal justice system, the Commission maintains that any significant reduction in the high rates of Aboriginal imprisonment and detention will only be achieved through a comprehensive reform agenda: a whole-of-government approach to addressing the current state of Indigenous disadvantage;¹² substantial improvements to the way in which the criminal justice system operates for Aboriginal people; and the recognition and strengthening of Aboriginal law and culture.¹³ The Commission accepts that these reforms

will require significant resources. However, research commissioned for this reference suggests that the cost of Aboriginal over-representation in the Western Australian criminal justice system is considerable.¹⁴

Problems Experienced by Aboriginal People in the Criminal Justice System

Alienation from the criminal justice system

The Commission reported in its Discussion Paper that Aboriginal people often 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; language and communication barriers; and the differences between Aboriginal dispute resolution methods and Western criminal justice processes.¹⁵ The lack of Aboriginal people working in the criminal justice system also contributes to the sense of alienation and the diminished understanding by some Aboriginal people of western justice processes. Aboriginal people consulted by the Commission supported increased employment of Aboriginal people by government justice agencies.¹⁶ The Commission has recognised that it can be difficult to recruit Aboriginal staff because some Aboriginal people are reluctant to work for government agencies due to past negative experiences.¹⁷ The Commission

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9. Morgan N & Motteram J, 'Aboriginal People and Justice Services: Plans, programs and delivery' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 235, 313.
 10. The proportion of Aboriginal people that are dealt with in the courts is less than the proportion of Aboriginal people that are sentenced to imprisonment or detention. For example, about one-third of the children dealt with in the Children's Court are Aboriginal but Aboriginal children account for 70 per cent of all children in detention: see Morgan & Motteram, *ibid* 238.
 11. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 96.
 12. See Recommendation 1, p 48.
 13. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 98. See also Blagg H, Morgan N, Cunneen C & Ferrante A, *Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System* (Melbourne: Equal Opportunity Commission of Victoria, 2005) 176.
 14. See Appendix C.
 15. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 99.
 16. LRCWA, Discussion Paper community consultation – Bunbury, 17 March 2006; LRCWA, *Thematic Summary of Consultations – Manguri*, 4 November 2002, 5; *Mirrabooka*, 18 November 2002, 12; *Midland*, 16 December 2002, 37; *Laverton*, 6 March 2003, 14; *Kalgoorlie* 25 March 2003, 25; *Geraldton* 26–27 May 2003, 15–16; *Albany* 18 November 2003, 15. The Kimberley Aboriginal Reference Group also found that many Aboriginal people in the Kimberley were eager to become more involved in the administration of justice: see Kimberley Aboriginal Reference Group, *Initial Recommendations Toward the Kimberley Custodial Plan* (October 2005) 7.
 17. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 105.

has recommended the establishment of community justice groups and it is anticipated that these groups will be actively involved in criminal justice issues such as diversion, crime prevention, sentencing options and providing information to courts. Because members of a community justice group will be accountable to their community, there will be a greater incentive for Aboriginal people to become involved in justice issues.¹⁸

The motivation for many of the Commission's recommendations is the aim of improving Aboriginal people's understanding of the Western Australian criminal justice system. Problems arising from language and communication barriers and the need for interpreters are dealt with in Chapter Nine. Other recommendations that will assist Aboriginal people in their understanding of the criminal justice system include Aboriginal courts,¹⁹ cultural awareness training,²⁰ Aboriginal liaison officers,²¹ and community education programs with respect to the criminal law.²²

Programs and services

In its Discussion Paper the Commission commented that Aboriginal people generally have less access than non-Aboriginal people to adequate services and programs within the criminal justice system.²³ Morgan and Motteram, in their background paper for this reference, provided an overview of government-owned justice programs and services. They concluded that:

[M]any existing programs are not reaching Aboriginal people to the extent that their numbers in the system would require, and that many of the initiatives remain on the drawing board or in their infancy. In summary, the promises of policy documents remain as yet unfulfilled.²⁴

Morgan and Motteram highlighted, among other things, the lack of services for Aboriginal victims; lack of interpreting services; lack of programs to address sexual offending, violence and substance abuse; and the limited number of programs for children.²⁵ The Commission also observed in its Discussion Paper that despite Aboriginal women constituting half of all female prisoners in Western Australia they 'remain largely invisible to policy makers and program designers with very little attention devoted to their specific situation and needs'.²⁶

The Commission accepts that since the paper by Morgan and Motteram was published the position with respect to justice programs and services for Aboriginal people may well have changed. Nevertheless, it is apparent that problems remain. In 2005 the *Inquiry into the Management of Offenders in Custody and in the Community* (the Mahoney Inquiry) reported that there is a serious deficiency with respect to Aboriginal-specific programs and services designed to reduce offending behaviour. It was stated that the 'lack of appropriate programs for Indigenous offenders may in part explain the high rates of recidivism'.²⁷ Also, the Commission has received submissions arguing that there are inadequate programs and services available for Aboriginal people. The Public Advocate asserted that there are insufficient culturally appropriate programs and services for Aboriginal adults with decision-making disabilities who come into contact with the criminal justice system.²⁸ She reported that the 'prevalence of decision-making disability in Aboriginal communities is estimated to be twice that of non-Aboriginal communities'.²⁹ In 2005 the Public Advocate recommended that culturally specific programs for Aboriginal people with decision-making disabilities must be developed.³⁰

18. Ibid; see Recommendation 17, below pp 112–113.

19. See Recommendation 24, below p 136.

20. See Recommendations 11, 12, 128.

21. See Recommendation 127, Chapter Nine, below p 347.

22. See Recommendation 26, below p 150.

23. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 100.

24. Morgan N & Motteram J, 'Aboriginal People and Justice Services: Plans, programs and delivery' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 235, 295.

25. Ibid 313.

26. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Social Justice Report 2001* (2002) 15.

27. Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) [9.92]. It was recommended that programs and educational courses for offenders should be adapted for Aboriginal offenders: Recommendation 92.

28. Michelle Scott, Office of the Public Advocate, Submission No. 13 (18 April 2006) 4. The Public Advocate has defined a person with a decision-making disability as someone who lacks the 'capacity to make reasoned decisions': see Office of the Public Advocate, *Report into Programs and Services for People with Decision-Making Disabilities in the Department of Justice in Western Australia* (August 2005) 7.

29. Michelle Scott, Office of the Public Advocate, Submission No. 13 (18 April 2006) 5.

30. Office of the Public Advocate, *Report into Programs and Services for People with Decision-Making Disabilities in the Department of Justice in Western Australia* (August 2005) 43. Similarly, the Aboriginal and Torres Strait Islander Social Justice Commissioner has reported that there are limited resources for Indigenous young people with a cognitive disability or a mental illness and he emphasised the need for culturally appropriate programs and services: see Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Indigenous Young People with Cognitive Disabilities and Australian Juvenile Justice Systems* (December 2005) 29.

Aboriginal people generally have less access than non-Aboriginal people to adequate services and programs within the criminal justice system.

The Commission observed in its Discussion Paper that Aboriginal people in Western Australia are over-represented as victims.³¹ In 2003 Aboriginal people were eight times more likely than non-Aboriginal people to be victims of violence.³² For Aboriginal women the position is disturbing: they are 45 times more likely than non-Aboriginal women to be victims of family violence by spouses or partners. Aboriginal children are also more likely to suffer abuse than non-Aboriginal children.³³ In Chapter Seven the Commission explains that the lack of appropriate services for Aboriginal victims is one reason for the under-reporting of sexual abuse and violence.³⁴ Inadequate support services for Aboriginal victims was emphasised by the Ngaanyatjarra Council and during community meetings following the Discussion Paper.³⁵

The Victim Support Service, run by the Department of the Attorney General, provides counselling and support services for all victims of crime. It operates in the metropolitan area and has 13 regional offices. The Commission understands that following the recommendations of the Gordon Inquiry an Aboriginal Services Officer was employed by the Victim Support Service.³⁶ Morgan and Motteram argued that although there have been initiatives designed to improve the services available for Aboriginal victims, 'there appears to be a long way to go before service provision meets required levels'.³⁷ The Commission has been informed that there is an urgent need for more Aboriginal staff to be employed by the Victim Support Service and the Child Witness Service.³⁸ The Department of the

Attorney General's website contains a link for victim services available for Aboriginal people. Most of the services listed are either medical services or crisis accommodation services. There appears to be a deficiency in Aboriginal-specific victim support services that offer a broad range of services (such as counselling, support, advocacy and referral services).³⁹ The Commission is of the view that the Department of the Attorney General should immediately review the adequacy of services for Aboriginal victims.⁴⁰ Further, the Commission considers that there is an urgent need for more appropriate and accessible services for victims of family violence and sexual abuse.

The lack of culturally appropriate and effective programs and services for Aboriginal people means that Aboriginal people are disadvantaged: they have fewer opportunities for rehabilitation and are therefore more likely to re-offend and come into contact with the justice system again. Adopting Harry Blagg's distinction between community-based and community-owned initiatives,⁴¹ the Commission is of the view that the Western Australian government should give priority to the development and support of community-owned programs and services. The Commission contends that its recommendation for the establishment of community justice groups will facilitate the development of Aboriginal-owned programs and services within the criminal justice system. The Commission acknowledges, however, that the implementation of its recommendation for community justice groups will take time and community justice groups will not

31. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 98.

32. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2003* (Perth: Crime Research Centre, 2004) 16.

33. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (2002) 46.

34. See discussion under 'Lack of appropriate support services for Aboriginal victims', Chapter Seven, p 287.

35. LRCWA, Discussion Paper community consultation – Geraldton, 3 April 2006; Brain Steels, Mawarnkarra Health Service, consultation (28 April 2006); Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 50.

36. Morgan N & Motteram J, 'Aboriginal People and Justice Services: Plans, programs and delivery' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 235, 255. The Aboriginal Services Officer also works for the Child Witness Service. The Child Witness Service is run by the Department of the Attorney General and provides support to children who are witnesses in court proceedings.

37. *Ibid* 310.

38. Confidential Submission No. 55 (12 July 2006).

39. There were only three services described in this manner: one each in Derby, Broome and Geraldton.

40. The Commission notes that the Mahoney Inquiry recommended that the Department of the Attorney General should be responsible for the coordination of victims' issues across the criminal justice system: see Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) Recommendation 53, [7.421].

41. Blagg H, 'A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 317, 319.

necessarily be established in all locations. Therefore, it is necessary to reinforce the need for adequate and culturally appropriate programs and services to be made available for Aboriginal people within the criminal justice system.⁴²

Recommendation 7

Programs and services for Aboriginal people within the criminal justice system

1. That the Department of the Attorney General and the Department of Corrective Services immediately review the existing programs and services available for Aboriginal people in the criminal justice system.
2. That the Western Australian government provide resources to ensure that there are adequate and accessible culturally appropriate programs and services for Aboriginal people at all levels of the criminal justice system.
3. That when allocating resources for the provision of programs and services for Aboriginal people, priority should be given to establishing and supporting Aboriginal-owned programs and services.
4. Where it is not possible to establish an Aboriginal-owned program or service, the Western Australian government should ensure that Aboriginal people are involved in the design and delivery of government-owned programs and services.
5. That the Western Australian government pay particular attention to ensuring that there are adequate and accessible culturally appropriate services for Aboriginal victims of family violence and sexual abuse.

Mandatory sentencing

In 1996 the Western Australian government introduced mandatory sentencing laws for offences of home burglary (commonly known as the 'three-strikes' laws).⁴³ These mandatory sentencing laws have been subject to extensive criticism, mainly due to their discriminatory impact on Aboriginal youth. A review of these laws in 2001 indicated that Aboriginal children constituted approximately 80 per cent of all children dealt with under the laws.⁴⁴ In regional areas (where there are currently no juvenile detention facilities) this figure escalates to 90 per cent. Young Aboriginal people from regional locations who are sentenced to detention are taken from their families, communities and culture and must spend at least six months in a detention centre in Perth.⁴⁵ According to the Department of Corrective Services, between 2000 and September 2005 approximately 87 per cent of all children sentenced under the mandatory sentencing laws were Aboriginal.⁴⁶ The Commission proposed in its Discussion Paper that the mandatory sentencing laws should be abolished.⁴⁷

It is generally accepted that the mandatory sentencing laws have not reduced the rate of home burglary in Western Australia.⁴⁸ In contrast, the Office of the Director of Public Prosecutions (DPP) argued that the mandatory sentencing laws have been a 'major factor' impacting upon the rates of home burglary in this state and did not support the repeal of the laws. The DPP stated that the levels of reported home burglary offences have declined in recent years.⁴⁹ However, the mandatory sentencing laws were introduced in 1996 and research has shown that immediately following the introduction of the laws the rate of home burglary actually increased.⁵⁰ As acknowledged by the DPP, there are other factors which have contributed to the

42. The Aboriginal Legal Service submitted that there should be an increase in culturally appropriate services for Aboriginal people: see Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 4.

43. *Criminal Code Amendment Act (No. 2) 1996* (WA).

44. Department of Justice, *Review of Section 401 of the Criminal Code* (2001) 24–25.

45. For a detailed discussion of the impact of the laws on Aboriginal children and a selection of case studies: see Morgan N, Blagg H & Williams V, 'Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth' (Perth: Aboriginal Justice Council, December 2001) 63–72. The Commission acknowledged in its Discussion Paper that Aboriginal children may commit more home burglary offences than non-Aboriginal children. But part of the reason for the high numbers of Aboriginal children caught by the laws is that they have less access to those diversionary options (such as a caution or a referral to a juvenile justice team) that do not count as a relevant conviction for the purpose of the 'three-strikes' law: LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 101; see also Morgan N, 'Going Overboard? Debates and Developments in Mandatory Sentencing, June 2000 to June 2002' (2002) 26 *Criminal Law Journal* 293, 310.

46. The Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 4. The Department also indicated that about 87 per cent of Aboriginal juveniles sentenced under the laws were from regional locations.

47. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 101, Proposal 6.

48. Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing for Property Offences) Bill 2000* (Commonwealth Parliament, 2002) 21.

49. The Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 1. In its submission the DPP stated that the number of reported home burglaries was 39,913 in 2000/2001 and 26,813 in 2004/2005.

50. Morgan N, Blagg H & Williams V, 'Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth' (Perth: Aboriginal Justice Council, December 2001) 67. In this report it was noted that home burglary rates appeared to fluctuate over time.

reduction in the rate of home burglary: the introduction of legislation in 2002 to enable police officers to obtain DNA from suspects and offenders; and a greater focus by the police in responding to home burglary offences.⁵¹ Interestingly police statistics indicate that there was a significant decline in the number of reported home burglary offences in the year following the DNA legislation.⁵²

The Department of Corrective Services also opposed the Commission's proposal to repeal the mandatory sentencing laws.⁵³ The Department stated that the government believes 'detention is an appropriate way to deal with very serious repeat offenders'.⁵⁴ However, as the Commission observed in its Discussion Paper, the mandatory sentencing laws are largely irrelevant for repeat adult offenders because they would nearly always receive the mandatory sentence of 12 months' imprisonment for a third burglary conviction. Similarly, a large proportion of juveniles (especially serious repeat offenders) would also inevitably receive a sentence of detention.⁵⁵ Therefore, the negative impact of the laws is felt by those offenders whose circumstances call for leniency.

The Commission also observed that mandatory sentencing prevents a court from taking into account any relevant aspects of customary law in mitigation of sentence and prevents a court from utilising appropriate diversionary options. Therefore, any Aboriginal community processes (based on customary law or otherwise) to deal with young Aboriginal offenders will be impeded by mandatory sentencing laws.⁵⁶ The Commission has received strong expressions of support for the repeal of the mandatory sentencing laws.⁵⁷ The Commission remains convinced that the mandatory sentencing laws should be repealed because the laws are unjust and unprincipled; there is no evidence to suggest that they are effective in reducing crime; and they continue to impact disproportionately on Aboriginal children.

Recommendation 8

Repeal mandatory sentencing laws for home burglary

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

Legal representation

Because of the alienation felt by Aboriginal people from the criminal justice system, adequate legal representation is essential. For many Aboriginal people their first contact with the system is with police and that experience is rarely perceived as positive. The next point of contact may be with a legal representative. The Commission stressed in its Discussion Paper that if cultural differences are not recognised at this point, serious injustices may result: a judicial officer will generally assume that because an accused is legally represented all relevant issues will have been considered.⁵⁸

In Western Australia, Aboriginal people are most often legally represented by the Aboriginal Legal Service (ALS). Some are represented by the Legal Aid Commission (LAC), community legal centres, private lawyers and smaller Indigenous-specific providers such as Family Violence Prevention Legal Services.⁵⁹ The importance of maintaining adequate Indigenous-specific legal services has been well noted. In 2004 the Commonwealth Senate Legal and Constitutional References Committee concluded that there is a 'clear need for targeted, culturally sensitive and specialised Indigenous legal aid services in order to enable Indigenous people to achieve access to justice'.⁶⁰ Similarly, the 2005 inquiry, *Access of Indigenous Australians to Law and Justice Services*, observed that Indigenous-specific legal services are particularly beneficial because they are community-owned; have

51. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 1.

52. Western Australia Police Crime Statistics 2002–2003, 2003–2004 and 2004–2005. In 2002–2003 there were 40,639 reported home burglary offences and in 2003–2004 there were 33,917. This trend continued in 2004–2005 which would be expected with the increasing database of DNA evidence.

53. The Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 3.

54. *Ibid.*

55. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 101.

56. *Ibid.*

57. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 50; Catholic Social Justice Council, Archdiocese of Perth, Submission No. 24 (2 May 2006) 3; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 12; Law Society of Western Australia, Submission No. 36 (16 May 2006) 3; Law Council of Australia, Submission No. 41 (29 May 2006) 9–10; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 1.

58. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 101–102.

59. Joint Committee of Public Accounts and Audit, *Access of Indigenous Australians to Law and Justice Services*, Report No. 403 (Canberra, 2005) 1–2.

60. Commonwealth Senate Legal and Constitutional Committee, *Legal Aid and Access to Justice*, Final Report (June 2004) 108.

a strong awareness of cultural issues; and are more accessible to Aboriginal people.⁶¹ Both of these federal inquiries called for increased funding for Indigenous-specific legal services.⁶² The Commission is of the view that effective legal representation and legal educational services for Aboriginal people in Western Australia will significantly enhance the practical recognition of Aboriginal law and culture throughout the criminal justice system.

Funding of the Aboriginal Legal Service

During the Commission's initial consultations many Aboriginal people identified problems with legal representation, especially the inadequate funding of the ALS.⁶³ These concerns were reiterated during community meetings following the release of the Commission's Discussion Paper.⁶⁴ The Commission has noted that Aboriginal accused may be less likely to obtain the services of a lawyer despite the existence of Aboriginal legal services.⁶⁵ This is particularly relevant in remote Western Australian locations where ALS representatives may not always be present.⁶⁶

The Department of the Attorney General has developed a management plan for self-represented persons in all areas of the legal system, including criminal justice.⁶⁷ During the development of this management plan the ALS argued that its current resources are insufficient to meet any increased demands that are likely to occur as a result of the establishment of additional police stations in remote areas and extra court circuits in regional areas.⁶⁸ In the criminal justice system there may be serious consequences for accused

people if they are unrepresented. Accused people may plead guilty to offences even though they have a legal defence or they may not present all relevant matters to the court during sentencing proceedings. The Department of the Attorney General has highlighted that in the period from 2003–2004 approximately 25 per cent of all defendants imprisoned in the Magistrates Court were unrepresented.⁶⁹ The Department's management plan states that the adequacy of funding to the ALS (and the LAC) is outside its terms of reference. It acknowledges, however, that increased funding to the ALS (and the LAC) would be likely to improve the ability of these organisations to represent accused appearing before the Magistrates Court on relative serious charges that may result in a term of imprisonment.⁷⁰

During the 2005 federal inquiry *Access of Indigenous Australians to Law and Justice Services* it was recognised that Aboriginal and Torres Strait Islander legal services (ATSILS) operate in a 'climate of static funding and increasing demand'.⁷¹ This inquiry also observed that ATSILS find it difficult to attract and retain experienced staff because remuneration levels are much less than those received by staff in the LAC.⁷² The inquiry supported increased funding, particularly for family and civil law, to Indigenous-specific services dealing with family violence in order to improve access to legal services for Aboriginal women.⁷³ It was not suggested that there should be gender-specific services because this would disadvantage women who should have access to the experience of ATSILS in dealing with criminal justice issues.⁷⁴ In its submission the Law

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61. Joint Committee of Public Accounts and Audit, *Access of Indigenous Australians to Law and Justice Services*, Report No. 403 (Canberra, 2005) 2.
 62. The 2004 inquiry into *Legal Aid and Access to Justice* recommended that the Commonwealth government urgently increase the level of funding to Indigenous legal services: The Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (2004) Recommendation 27. Similarly, the Commonwealth Senate Legal and Constitutional Committee recommended in its inquiry that the Commonwealth increase funding for ATSILS and that the Commonwealth and state/territory governments provide sufficient funding for Indigenous legal services and Family Violence Prevention Legal Services to enable effective legal services for Indigenous women: see Commonwealth Senate Legal and Constitutional Committee, *Legal Aid and Access to Justice*, Final Report (June 2004) 109.
 63. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 102.
 64. LRCWA, Discussion Paper community consultations – Kalgoorlie, 28 February 2006; Broome, 7 March 2006; Fitzroy Crossing, 9 March 2006.
 65. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 102.
 66. Even where a lawyer is available, research has shown that excessively long lists, language and communication barriers, and inadequate time to take appropriate instructions may impede proper legal representation for Aboriginal people from remote communities: see Siegel N, 'Is White Justice Delivery in Black Communities by "Bush Court" a Factor in Aboriginal Over-representation Within our Legal System?' (2002) 28 *Monash University Law Review* 268. See also Siegel N, 'Bush Courts of Remote Australia' (2002) 76 *Australian Law Journal* 640, 644.
 67. The Department of the Attorney General, *Self-Represented Persons in Western Australian Courts and Tribunals: Management Plan* (May 2006).
 68. *Ibid* 21.
 69. *Ibid* 19.
 70. *Ibid* 25.
 71. Joint Committee of Public Accounts and Audit, *Access of Indigenous Australians to Law and Justice Services*, Report No. 403 (Canberra, 2005) 17.
 72. *Ibid* 40–44 & 52. It was recommended that the Commonwealth Attorney-General's department develop a comparative scale of remuneration between ATSILS and LAC. The discrepancy between the salaries for lawyers working at ATSILS and those working for Legal Aid was also referred to by the Law Council of Australia in its submission: see Law Council of Australia, Submission No. 41 (29 May 2006) 10.
 73. Joint Committee of Public Accounts and Audit, *Access of Indigenous Australians to Law and Justice Services*, Report No. 403 (Canberra, 2005) 37–38. The Commission notes that in May 2006 the federal Attorney-General announced that the Commonwealth government would be increasing funding for the expansion of Family Violence Prevention Legal Services (including, one in Broome and the South West): see Attorney General, The Hon Philip Ruddock, *Indigenous Law and Justice Initiatives*, media statement (9 May 2006).
 74. Joint Committee of Public Accounts and Audit, *ibid* 37–38.

Effective legal representation and legal educational services for Aboriginal people will enhance the practical recognition of Aboriginal law and culture throughout the criminal justice system.

Council of Australia argued that ‘significantly more funding for ATSILS is urgently required to ensure that Indigenous people receive appropriate access to justice’.⁷⁵

ATSILS are predominantly funded by the Commonwealth government. While the Commission agrees that the Commonwealth government should consider increasing its funding to ATSILS and other Indigenous legal service providers (such as those which provide legal services in relation to family violence), any recommendation in this regard is beyond the Commission’s mandate. With respect to the question of state funding it has been observed that:

An on-going source of complaint from ATSILSs was that they were funded as providers of services that were supplementary to mainstream legal aid providers, however state and territory governments viewed Indigenous affairs as a Commonwealth responsibility.⁷⁶

The 2005 inquiry recommended that the federal Attorney General should discuss the funding arrangements of ATSILS (and Family Violence Prevention Legal Services) with states and territories with a view to obtaining state/territory contribution to the funding of these services.⁷⁷ The Commission understands that ATSILS in Queensland and Victoria receive limited funding from their state governments.⁷⁸

Without commenting on whether the Western

Australian government should provide ongoing funding to the ALS, the Commission is of the view that the implementation of many of the recommendations in this Report will significantly increase the workload of staff at the ALS. For example:

- Aboriginal courts generally take longer to determine each case and therefore the time spent by defence counsel appearing in those courts will increase.⁷⁹
- The recognition of Aboriginal customary law and culture throughout the criminal justice system (for example, during bail and sentencing proceedings⁸⁰) will necessarily require defence counsel to spend more time preparing cases and representing Aboriginal people.
- The amendments in relation to traffic offences will require additional resources for legal representation and education.⁸¹
- The provision of culturally appropriate information about the obligations of bail and surety undertakings will require extra resources.⁸²
- The preparation of wills for Aboriginal people will necessitate additional resources for legal representation.⁸³

The Commission considers that the Western Australian government should provide additional resources to the ALS for specific purposes arising from the

75. Law Council of Australia, Submission No. 41 (29 May 2006) 11.

76. Joint Committee of Public Accounts and Audit, *Access of Indigenous Australians to Law and Justice Services*, Report No. 403 (Canberra, 2005) 59–60.

77. *Ibid* 66.

78. The Commonwealth Senate Legal and Constitutional Committee observed that state and territory governments have provided funding for ATSILS: see Commonwealth Senate Legal and Constitutional Committee, *Legal Aid and Access to Justice*, Final Report (June 2004) 76. The Finance Officer from the Victorian Aboriginal Legal Service has advised the Commission that it receives limited state funding (applied for on a case-by-case basis) for specific projects and state-based legal issues such as community legal education: Sam Firouzian, Finance Executive Officer, Victorian Aboriginal Legal Service, telephone consultation (17 August 2006). The Chief Executive Officer of the Queensland Aboriginal and Torres Strait Islander Community Legal Service (Townsville) has advised that it receives funding from the state via legal aid grants on a case-by-case basis: Randall Ross, Chief Executive Officer Queensland Aboriginal and Torres Strait Islander Community Legal Service – Townsville, telephone consultation (10 August 2006). The Commission is also aware that the Aboriginal Legal Rights Movement in South Australia is in the process of applying for funding from the state government for a number of purposes, including the provision of adequate salaries for legal staff and the employment of additional staff in particular locations or for specific purposes: Neil Gillespie, Chief Executive Officer, Aboriginal Legal Rights Movement Inc – South Australia, telephone consultation (14 August 2006).

79. See Recommendation 24, below p 136. See also Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 50.

80. See Recommendations 34, below p 168; Recommendation 38 & 39, below pp 183–84.

81. See discussion under ‘Traffic offences and related matters’, below p 93.

82. See Recommendation 35, below p 170.

83. See Recommendation 70, Chapter Six, below p 241.

implementation of the recommendations in this Report.⁸⁴ For example, resources could be provided to employ a designated lawyer to work in a specific Aboriginal court; to facilitate the development of appropriate educational material for Aboriginal people; and to enable legal representation for specific purposes such as an application for an extraordinary licence or the preparation of a will.

Recommendation 9

Funding for the Aboriginal Legal Service of Western Australia

That the Western Australian government consult with the Aboriginal Legal Service with a view to providing funding for specific projects or to assist Aboriginal people obtain adequate legal representation as a consequence of the recommendations in this Report.

Protocols for lawyers working with Aboriginal people

During the Commission's consultations in Kalgoorlie it was suggested that there should be 'protocols to guide lawyers in their dealings with Aboriginal clients'.⁸⁵ In 2004 the Law Society of the Northern Territory developed protocols for lawyers dealing with Aboriginal people. The underlying aim of these protocols is to avoid problems arising from miscommunication between non-Aboriginal lawyers and their Aboriginal clients. There are three main protocols: a test to determine whether the client requires the services of an interpreter; an obligation on lawyers to fully explain their role; and a requirement to use plain English. The protocols also contain information about cultural differences and aspects of Aboriginal customary law. In its Discussion Paper the Commission noted that the Law Society of Western Australia was in the process of adapting these protocols for use in this state.⁸⁶ The Commission expressed its support for the establishment

of these protocols and suggested that they should be used not only by ALS and LAC lawyers, but also by community legal centres, private practitioners and lawyers employed by the DPP.⁸⁷

The Commission understands that the Law Society has agreed to develop and amend the Northern Territory Indigenous Protocols for Lawyers for use in Western Australia. However, during discussions with consultants regarding this project, the Law Society was informed that there would be extensive work involved, including the need to consult relevant Aboriginal people. The Law Society considers that the project requires more than simply amending the references to Northern Territory laws and procedures. As a consequence, the project scope is far wider than originally anticipated and therefore it has been delayed principally due to the Law Society not having the resources or funding to undertake such a significant project.⁸⁸

In Chapter Nine the Commission suggests that the protocols should include information about effective and culturally appropriate methods of leading evidence from Aboriginal witnesses.⁸⁹ The Commission has also recommended that the Department of the Attorney General develop guidelines to assist courts to determine when a person appearing in court requires the services of an interpreter⁹⁰ and that the Western Australia Police develop protocols to determine when a suspect requires the services of an interpreter.⁹¹ Clearly, there should be collaboration between the agencies responsible for developing these protocols and guidelines.

Bearing in mind the potential benefits for Aboriginal people in Western Australia and the criminal justice system in general, the Commission is of the view that the development of protocols for lawyers working with Aboriginal people should be a priority and should be adequately resourced. The Commission has therefore recommended that the Western Australian government provide funding to the Law Society to ensure that such protocols are developed as a priority.

84. The Commission notes that the ALS is seeking funding from both the state and federal governments for the establishment of a statewide interpreter service: see further discussion under 'Aboriginal Legal Service proposal' Chapter Nine, below pp 336–38.

85. LRCWA, *Thematic Summary of Consultations – Kalgoorlie*, 25 March 2003, 27.

86. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 103.

87. In its Discussion Paper the Commission noted that prosecutors are required to examine Aboriginal witnesses and victims and therefore they need to be fully aware of any language, communication or cultural issues that may impact upon the person's understanding of the process. Prosecutors may also be required to object to unfair or inappropriate questions put to an Aboriginal witness during cross-examination: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 103.

88. David Price, Executive Director, Law Society of Western Australia, email (18 August 2006).

89. See 'Educating those who work in the legal system about Aboriginal culture', Chapter Nine, below p 347.

90. See Recommendation 122, Chapter Nine, below p 341.

91. See Recommendation 53, below p 208.

Recommendation 10

Protocols for lawyers working with Aboriginal people

1. That the Western Australian government provide funding to the Law Society of Western Australia for the purpose of developing protocols for lawyers who work with Aboriginal people.
2. That in developing these protocols the Law Society should consult with relevant Aboriginal people and organisations including the Aboriginal Legal Service and Aboriginal interpreting services.

Cultural awareness training for lawyers

In addition to the development of protocols the Commission concluded in its Discussion Paper that lawyers who regularly work with Aboriginal people should undertake cultural awareness training, preferably presented by Aboriginal people. The Commission suggested that with adequate resources the Law Society of Western Australia would be the most appropriate agency to coordinate cultural awareness training programs for legal practitioners and proposed that the Western Australian government should provide adequate resources for the development of such programs.⁹² The response to this proposal has been extremely positive. The Commission has received support from Aboriginal people, legal services and organisations, and the Department of the Attorney General.⁹³ The Law Society has indicated that it is willing to consider the coordination of the development of cultural awareness training programs for lawyers.⁹⁴

The Department of the Attorney General suggested that these training programs could be incorporated into

the Legal Practice Board's proposed mandatory continuing legal education program,⁹⁵ which is expected to commence in 2007.⁹⁶ The Legal Practice Board has advised the Commission that, under its draft program, lawyers will be able to choose from a number of subjects, but they must complete a required number of subjects each year.⁹⁷

The Commission received one submission suggesting that its proposal for cultural awareness training should be funded by the legal profession.⁹⁸ The Commission proposed that the government provide resources for the *development* of appropriate cultural awareness programs. It is a separate question whether the government should seek to recoup these costs from the lawyers who subsequently attend the programs. In this regard the Commission emphasises that the majority of lawyers who represent or work with Aboriginal people are employees of not-for-profit organisations⁹⁹ and therefore it is vital to ensure that attendance at the relevant programs is not cost prohibitive for those people. The Commission does not consider that it is appropriate to determine at this stage the precise details with respect to the costs associated with attending these programs. The focus of the Commission is on the development and availability of Aboriginal cultural awareness programs for lawyers.



92. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 103, Proposal 7.
93. Dr Dawn Casey, Western Australian Museum, Submission No. 24 (1 May 2006) 2; Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2; Department of the Attorney General, Submission No. 34 (11 May 2006) 2; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 3; Law Society of Western Australia, Submission No. 36 (16 May 2006) 1; Law Council of Australia, Submission No. 41 (29 May 2006) 10; Indigenous Women's Congress, Submission No. 49 (15 June 2006) 1; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 1; LRCWA, Discussion Paper community consultation – Fitzroy Crossing, 9 March 2006; Women's Congress, consultation (28 March 2006).
94. David Price, Executive Director, Law Society of Western Australia, email (18 August 2006).
95. Department of the Attorney General, Submission No. 34 (11 May 2006) 2.
96. Clare Thompson, Legal Practice Board of Western Australia, Submission No. 52 (27 June 2006) 2. The program cannot be implemented until amendments to the *Legal Practice Act 2003* (WA) have been made.
97. *Ibid* 1–2. It is expected that the subjects will be delivered by universities, law firms, law associations and commercial providers.
98. Dr Dawn Casey, Western Australian Museum, Submission No. 24 (1 May 2006) 2. The Commission notes that it is anticipated that the proposed mandatory continuing legal education program will be partly funded by the legal profession in the same way that voluntary education programs are funded now. Presently, continuing legal education seminars are provided to practitioners by the Law Society, courts and commercial providers. The costs of these seminars are usually met by the participant or the participant's employer and in some cases participation is free: see Clare Thompson, Legal Practice Board, telephone consultation (9 August 2006).
99. Also in many cases private lawyers who represent Aboriginal people are funded by the Legal Aid Commission.

In Chapter Three, the Commission recommends that government employees and contractors who work directly or have regular dealings with Aboriginal people be required to undertake cultural awareness training. The Commission emphasises, among other things, the need for cultural awareness training to be locally based and to include presentations by Aboriginal people.¹⁰⁰ In the context of legal representation, cultural awareness programs should be available for lawyers working in regional areas and reflect different local circumstances where possible. The Commission highlights that its recommendation for cultural awareness training for lawyers should be read in conjunction with Recommendation 2.

Recommendation 11

Cultural awareness training for lawyers

1. That the Western Australian government provide resources for the development of Aboriginal cultural awareness training programs for lawyers.
2. That the Law Society of Western Australia should coordinate the development of Aboriginal cultural awareness training programs for lawyers.
3. That the Law Society should ensure that Aboriginal cultural awareness training programs are developed in conjunction with Aboriginal people and, where possible, they should be presented by Aboriginal people.
4. That the Law Society should apply for Aboriginal cultural awareness training programs to be accredited as approved programs under the Legal Practice Board's mandatory continuing legal education program (if and when it commences).

Cultural awareness training for government justice agencies

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.¹⁰¹ The Commission has made separate recommendations for cultural awareness training for judicial officers, police and lawyers.¹⁰² In its Discussion Paper the Commission explained that many (but not all) employees of the former Department of Justice participated in cultural awareness training.¹⁰³ In February 2006, as a consequence of the Mahoney Inquiry, the Department of Justice was divided into two Departments: the Department of the Attorney General and the Department of Corrective Services.¹⁰⁴ The Commission proposed that all departmental employees (who work directly with Aboriginal people) should be required to undertake cultural awareness training and, further, that such training should be made available for relevant volunteer workers.¹⁰⁵

All submissions received by the Commission in relation to this proposal were supportive, including the submissions from the Department of the Attorney General and the Department of Corrective Services.¹⁰⁶ The Department of Corrective Services indicated that additional resources would be required for 'community and custodial officers to be released from their operational duties'.¹⁰⁷ The Department expressed support for locally based training for staff who work with remote and regional Aboriginal communities.¹⁰⁸ The ALS submitted that cultural awareness training for staff at the Department of Corrective Services is an immediate priority. As mentioned above, the Commission has also made a general recommendation for cultural awareness training for all government employees and contractors.¹⁰⁹ The Commission reiterates that recommendations for agency specific cultural awareness training must be read together with Recommendation 2.

100. See Recommendation 2, Chapter Three, above p 51.

101. LRCWA, *Thematic Summary of Consultations – Warburton*, 3–4 March 2003, 9 ; *Geraldton* 26–27 May 2003, 16; *Broome*, 17–19 August 2003, 21–22; *Bunbury*, 28–29 October 2003, 11; *Albany* 18 November 2003, 19. Because of the differences between Aboriginal communities the focus was on localised training.

102. See Recommendation 128, Chapter Nine, below p 348; Recommendation 56, below p 212; and Recommendation 11.

103. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 104.

104. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 1. From now on the Commission will refer to the Department of the Attorney General and the Department of Corrective Services.

105. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 104, Proposal 8.

106. Marian Lester, Submission No. 18 (27 April 2006) 1; Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 4; Department of the Attorney General, Submission No. 34 (11 May 2006) 2; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 3; Law Society of Western Australia, Submission No. 36 (16 May 2006) 1; The Law Council of Australia, Submission No. 41 (29 May 2006) 12; Indigenous Women's Congress, Submission No. 49 (15 June 2006) 1; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 1.

107. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 4.

108. *Ibid.*

109. See Recommendation 2, above p 51.

People working for criminal justice agencies should be provided with more effective cultural awareness training.

Recommendation 12

Cultural awareness training for staff and volunteers in the Department of the Attorney General and the Department of Corrective Services

1. That employees of the Department of the Attorney General and the Department of Corrective Services who work directly with Aboriginal people (such as community corrections officers, prison officers and court staff) be required to undertake cultural awareness training.
2. That cultural awareness training be made available at no cost for volunteers who deal with Aboriginal people on behalf of the Department of the Attorney General or the Department of Corrective Services.
3. That cultural awareness training be specific to local Aboriginal communities and include programs presented by Aboriginal people.

there is no public transport, Aboriginal people need to drive for the purposes of court attendance, to comply with cultural obligations such as attending ceremonies or to obtain medical treatment. Cultural obligations may also require an Aboriginal person to transport another for these purposes. It has been observed that it may constitute a breach of customary law to refuse a request to drive another person, if that person stands in a special relationship to the driver.¹¹³ Therefore, the Commission examined relevant legislative provisions to determine if any changes were required.

Pursuant to s 76 of the *Road Traffic Act 1976 (WA)* a person who has been disqualified from holding or obtaining a drivers licence may apply to a court for an extraordinary drivers licence. In all cases there is a time period that must expire before the person can make an application. The amount of time depends upon the nature of the offence that led to the disqualification.¹¹⁴ If granted, an extraordinary drivers licence will allow the person to drive subject to specific conditions imposed by the court. Conditions may relate to the purpose of driving, the hours that the person is permitted to drive and the place or road on which the person is entitled to drive.¹¹⁵

When deciding whether to grant an extraordinary licence the court is required to consider the safety of the public, the character of the applicant, the nature of the offences which led to the disqualification and the applicant's conduct since the licence was disqualified. In addition the court must take into account the 'degree of hardship and inconvenience which would otherwise result to the applicant and his family'¹¹⁶ if an extraordinary licence was not granted.

In the case of a special application (made within one to two months of a disqualification for certain offences

Traffic offences and related matters

Aboriginal people are disproportionately represented in custody for traffic offences. In 2004 Aboriginal prisoners accounted for 64 per cent of all prison receptions for motor vehicle and driving offences.¹¹⁰ Aboriginal people are also significantly over-represented in drivers licence suspension orders that result from fine default.¹¹¹ Consequently, there a large number of Aboriginal people who are not lawfully entitled to drive. The Commission observed in its Discussion Paper that this has significant implications for Aboriginal people in remote communities.¹¹² In these communities, where

110. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2004* (Perth: Crime Research Centre, 2005) ix. This was also referred to in the Mahoney Inquiry: see Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) [9.31].

111. Ferrante A, *The Disqualified Driver Study: A study of factors relevant to the use of licence disqualification as an effective legal sanction in Western Australia* (Perth: Crime Research Centre, 2005) 70.

112. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 105.

113. Siegel N, 'Is White Justice Delivery in Black Communities by "Bush Court" a Factor in Aboriginal Over-representation Within Our Legal System?' (2002) 28 *Monash University Law Review* 268, 289.

114. *Road Traffic Act 1976 (WA)* s 76(1)(a).

115. *Road Traffic Act 1976 (WA)* s 76(5).

116. *Road Traffic Act 1976 (WA)* s 76(3)(f).

related to drink driving or refusing to comply with the requirements of a breath-test) the court can only grant an extraordinary licence if satisfied that the applicant will suffer extreme hardship.¹¹⁷ Extreme hardship is limited to medical treatment for the applicant or his or her family or for the purposes of employment.¹¹⁸ The Commission proposed in its Discussion Paper that the relevant criteria for deciding whether to grant an extraordinary drivers licence should be extended to take into account Aboriginal kinship, and cultural and customary law obligations.¹¹⁹ The Commission anticipated that its proposal would allow a respected member of an Aboriginal community (or a member of a community justice group) to apply for an extraordinary drivers licence for the purpose of transporting community members to court or to funerals, or when someone is in need of urgent medical treatment.

Under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) a person is not entitled to apply for an extraordinary drivers licence if his or her licence is suspended for unpaid fines.¹²⁰ Instead, an application must be made to the registrar of the Fines Enforcement Registry for the licence suspension order to be cancelled. The grounds of the application are that the applicant requires a drivers licence for employment or needs urgent medical treatment for him or herself or a member of his or her family.¹²¹ If the registrar grants the application the offender is required to pay the outstanding fine by instalments. The Commission proposed that the grounds for making an application to cancel a fines suspension order include that it would deprive the applicant or a member of his or her community of the means of obtaining urgent medical attention, or travelling to court or a funeral.¹²²

The Commission received support for both these proposals from the Law Society of Western Australia, the DPP, the Law Council of Australia and the Criminal Lawyers Association.¹²³ A court security and custodial services officer in Broome also expressed support for these proposals highlighting that Aboriginal people from remote areas in the Kimberley suffer particular hardship when there are no other transport options available.¹²⁴

The DPP agreed with the Commission's conclusion that where there are no other feasible transport options a court should take into account customary law obligations when assessing the degree of hardship or inconvenience. However, the DPP qualified its support for the proposals in two ways.¹²⁵ Firstly, the DPP argued that the right to make the relevant application should only be available for a respected member of an Aboriginal community, such as a member of a community justice group. As stated above the Commission expects that it would be likely that members of a community justice group would apply because the ability to drive would assist them in their obligations to their community. Nevertheless, the Commission does not see any reason to limit its recommendation to specific Aboriginal people. In any particular case the court will be required to consider all relevant factors and determine the likelihood that the applicant will need to drive for customary law purposes or to assist members of his or her community.

Secondly, the DPP submitted that an Aboriginal applicant should be required to provide independent evidence 'to establish the standing of the applicant, the lack of other feasible transport options, and a lack of other drivers able to transport members of the community'.¹²⁶ It would be prudent for any applicant to present the most reliable and compelling evidence possible in order to convince the court that the application should be granted. But the Commission does not consider that there is any justification for requiring that only Aboriginal people must independently corroborate evidence with respect to these applications.

The Western Australia Police opposed the Commission's proposal with respect to an application to cancel a fines suspension order because it was considered inappropriate for there to be a 'further opportunity for an individual to avoid taking responsibility'.¹²⁷ The Commission's proposal does not create a further opportunity to avoid responsibility for the unpaid fines. The option of applying to cancel a fines suspension order is already available. The Commission's proposal simply extends the relevant criteria to reflect the

117. *Road Traffic Act 1976* (WA) s 76(3)(a).

118. *Road Traffic Act 1976* (WA) s 76(3)(b).

119. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 106, Proposal 9.

120. *Road Traffic Act 1976* (WA) s 76(1)(aa).

121. *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) ss 27A, 55A.

122. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 106, Proposal 10.

123. Law Society of Western Australia, Submission No. 36 (16 May 2006) 3; Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 2; Law Council of Australia, Submission No. 41 (29 May 2006) 12; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 1.

124. Marian Lester, Submission No. 18 (27 April 2006) 1.

125. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 2.

126. *Ibid.*

127. Office of the Commissioner of Police, Submission No. 46 (77 June 2006) 4.

circumstances of many Aboriginal people. If an application to cancel a fines suspension order is successful, the applicant will be required to pay the fine in instalments and failure to do so will result in a further suspension order.

The ALS submitted, as an alternative to the Commission's proposals, that there should be a legislated customary law defence for driving without a valid drivers licence.¹²⁸ The ALS argued that such a defence was necessary because it takes a long time to obtain an extraordinary licence and in many cases the need to drive (to attend a funeral or medical attention) arises as a matter of urgency. The Commission understands this concern but is of the view that a customary law defence is inappropriate for a number of reasons:

- A customary law defence would generally not cover the need to attend court or medical attention.¹²⁹
- If Aboriginal people are required to rely on a customary law defence they will still be charged by the police; possibly spend time in custody; and need to attend court and present evidence in support of their defence.
- A customary law defence for Aboriginal people who drive without a valid licence or while legally prohibited from driving would create two different laws: one for Aboriginal people and one for non-Aboriginal people.
- The Commission believes that its proposal will be effective if particular Aboriginal people could apply in advance for an extraordinary licence on the basis that there must be a certain number of people in any community who can drive for important reasons such as medical attention, funeral attendance and attendance at court.

The Commission does, however, acknowledge that its proposal will be ineffective if Aboriginal people are not aware of their options and are not in a position to

make the relevant application. In this regard the Law Council of Australia emphasised that many Aboriginal people would find it difficult to make an application without legal representation. The Law Council suggested that a court should consider these issues at the time of sentencing rather than requiring an application to be made at a later date.¹³⁰ However, in many cases the *Road Traffic Act 1976* provides mandatory minimum disqualification for driving offences. Instead, the Commission has included in its recommendation that the government provide resources to the ALS for the purpose of educating Aboriginal people about these new options¹³¹ and for legal representation.¹³²

Recommendation 13

Extraordinary drivers licences

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:

1. Where there are no other feasible transport options, Aboriginal customary law obligations should 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.
2. When 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.

128. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 10.

129. Unless it could be argued that the person driving was under a customary law obligation to drive another person. The Commission notes that the need to drive for the purposes of *urgent* medical attention may be excused in circumstances amounting to an extraordinary emergency pursuant to s 25 of the *Criminal Code* (WA).

130. Law Council of Australia, Submission No. 41 (29 May 2006) 12.

131. See also Recommendation 26, below p 150.

132. The Commission has recommended that the Western Australian government should provide additional resources to the ALS because the implementation of many recommendations in this report will significantly impact upon the workload and existing resources of the Aboriginal Legal Service (Recommendation 9). This is one example. The Commission understands that the ALS does not currently provide legal representation for people applying for an extraordinary drivers licence; however, staff at the ALS may provide advice to a person about how to complete the relevant application forms. The ALS also does not pay for the court filing fee: see Aboriginal Legal Service (WA), *Extraordinary drivers licence*, Brochure <<http://www.als.org.au/Brochures/elicence.html>>.

Recommendation 14

Application to cancel a licence suspension order

That the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) be amended to provide that an Aboriginal person¹³³ may apply to the registrar 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.

Recommendation 15

Education and legal representation for traffic matters

1. That the Western Australian government provide resources to the Aboriginal Legal Service for the purpose of providing educative strategies for Aboriginal people across the state (in particular in remote locations) about the changes to the criteria for applying for an extraordinary drivers licence or the cancellation of a licence suspension order.
2. That the Western Australian government provide resources to the Aboriginal Legal Service for the purpose of providing legal representation for Aboriginal people who are applying for an extraordinary drivers licence or for the cancellation of a licence suspension order.

133. The Commission notes that the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) will need to be amended to provide for a definition of an Aboriginal person to include a Torres Strait Islander person. See also Recommendation 4, above p 63.

Aboriginal Community Justice Groups

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.¹ Throughout this Report, the Commission has emphasised the importance of developing and supporting community-owned initiatives in order to effectively respond to the needs of Aboriginal communities. Similarly, Aboriginal community justice mechanisms should be community-owned rather than merely community-based.² The Commission recognises that the justice needs of Aboriginal communities are diverse and that any reform must, therefore, be flexible. The precise role that each community may wish to take with respect to its involvement in the criminal justice system and in dealing with its own social and justice issues will inevitably vary.

In its Discussion Paper, the Commission 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.³ The Commission acknowledged that there is a number of existing Aboriginal community justice mechanisms in Western Australia; however, current developments in this area are informal and dependent upon specific individuals and government policy at the time. The Commission's

proposals for reform did not attempt to take away from existing initiatives but rather to empower Aboriginal communities to increase their ability to determine their own justice issues and solutions and to recognise Aboriginal customary law processes for dealing with justice matters. Importantly, the Commission found that because there is no formal recognition of Aboriginal community justice mechanisms in Western Australia, there is no provision for these mechanisms to operate within the criminal justice system.

The Establishment of Community Justice Groups

In its Discussion Paper, the Commission proposed the establishment of community justice groups in Western Australia.⁴ The aim of this proposal was twofold: to increase the participation of Aboriginal people in the operation of the criminal justice system and to provide support for the development of community-owned justice processes. As a consequence of the proposed role for community justice groups to directly participate in the criminal justice system, the Commission concluded that it was necessary for community justice groups to be formally established.⁵ The recognition of Aboriginal customary law in the criminal justice system will depend heavily on the ability of courts and other justice agencies to access the expertise, community and customary law knowledge, and authority of community justice groups.

1. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 109–10. 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.
2. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 110. See also 'Principle Five: Community-based and community-owned initiatives', Chapter Two, above pp 36–37. In his background paper Blagg distinguishes between community-based initiatives, which are created by government and criminal justice agencies to operate in a community setting, and community-owned initiatives that empower communities to determine their own solutions: see Blagg H, 'A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 317, 318.
3. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 109–31.
4. Ibid 140, Proposal 18.
5. The Commission proposed that community justice groups should be formally established under new legislation; namely, the 'Aboriginal Communities and Community Justice Groups Act'. This proposed new legislation was suggested because the Commission proposed in its Discussion Paper that the *Aboriginal Communities Act 1979 (WA)* be repealed. However, the Commission has decided not to recommend the repeal of the by-law scheme under *Aboriginal Communities Act* (the reasons for this conclusion are discussed in detail below). Therefore, it is now considered appropriate for community justice groups to be established under the existing *Aboriginal Communities Act*.

Aboriginal Justice Advisory Council

The Commission explained, in its Discussion Paper, that the implementation of its proposal for community justice groups would require consultation with Aboriginal communities. In addition, Aboriginal communities may need advice and support in order to establish a community justice group. To this end, it was proposed that an Aboriginal Justice Advisory Council (AJAC) should be established, comprising of members from both the Aboriginal community and government departments.⁶ The Aboriginal and Torres Strait Islander Social Justice Commissioner expressed strong support for community justice groups but, at the same time, emphasised that prior to the implementation of this proposal there must be a 'comprehensive process of consultation with Aboriginal communities'.⁷ In this regard, it was stated that the establishment of an AJAC was 'critical to the success of any Indigenous justice initiatives'.⁸ Similarly, Aboriginal people have told the Commission that it is essential that they are fully informed about their options under this proposal.⁹ The Commission maintains its view that there must be a statewide body, comprised of Aboriginal people and government representatives, whose primary function is to consult with Aboriginal communities and initiate the implementation of the Commission's recommendation for community justice groups.

Existing Aboriginal groups and committees

In its Discussion Paper, the Commission acknowledged the work that is being undertaken with respect to the Aboriginal Justice Agreement and the development of regional and local justice plans. It was concluded that community justice groups could easily operate in tandem with these other arrangements.¹⁰ However, the Office of the Director of Public Prosecutions (DPP) stated that it is not clear where the Commission's proposal for community justice groups will fit within

the plans under the Aboriginal Justice Agreement and the recommendations of the *Inquiry into the Management of Offenders in Custody and in the Community* (the Mahoney Inquiry). The DPP suggested that the Commission's proposal may result in unnecessary duplication.¹¹ Similarly, the Commission was told that community justice groups may merely replicate existing local groups in some Aboriginal communities.¹² For example, in the South West some communities have established community action groups. The Commission understands that community action groups are a 'local Noongar initiative based on traditional family structures' and were developed in conjunction with the Department of Indigenous Affairs.¹³ Community action groups have equal representation from all family groups in the relevant community, and these groups liaise with government agencies and local bodies in relation to key issues of concern to the community.¹⁴ The Commission understands that it is not a prerequisite for community action groups to have an equal number of men and women.¹⁵ Further, the Commission understands there are plans under the Aboriginal Justice Agreement to establish local justice groups.¹⁶

The Department of the Attorney General suggested in its submission, that community justice groups would be more effective if they had representatives from government agencies.¹⁷ The Commission considers that community justice groups will need advice and support from government agencies. This can be achieved in a number of ways and the Commission does not agree that it necessitates government representation on community justice groups. The AJAC will provide expertise and support to Aboriginal communities at the start of the process. Once community justice groups are established, ongoing support can be achieved by collaboration between community justice groups, government agencies and other relevant groups. There is no reason why a community justice group could not request government representatives to participate in

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6. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 133.
 7. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 10.
 8. *Ibid.*
 9. Carol Martin MLA and community members in Broome, consultation (20 May 2006).
 10. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 133–34.
 11. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 3.
 12. Aboriginal Corporate Development Team, Western Australia Police, consultation (26 June 2006).
 13. Department of Indigenous Affairs, *Community Action Groups: Final Report to the Department of Families, Community Services and Indigenous Affairs* (June 2006) 1. Community action groups have received funding from the Commonwealth Department of Families, Community Services and Indigenous Affairs.
 14. *Ibid.*
 15. Anthony Galante, Acting Director Assistant Regional Management, Department of Indigenous Affairs, telephone consultation (3 July 2006).
 16. Blagg H, *Draft Aboriginal Justice Agreement Implementation Plan* (undated) 35.
 17. Department of the Attorney General, Submission No. 34 (11 May 2006) 4. The Commission notes the contention that community justice groups do not have to be comprised wholly of Aboriginal people is in direct conflict with the Department's other argument that the gender balance requirements may not reflect traditional authority structures.

forums dealing with specific issues. A community justice group may choose to meet regularly with local government representatives.

The Commission is also well aware that it is planned to establish a State Aboriginal Justice Forum and Regional Aboriginal Justice Forums under the Aboriginal Justice Agreement.¹⁸ Similarly, the Mahoney Inquiry recommended the establishment of a State Indigenous Justice Advisory Group and Regional Justice Advisory Groups.¹⁹ The Commission understands that simultaneous plans for different Aboriginal groups and committees may be confusing and appear repetitive. However, the Commission does not consider that its proposal for community justice groups is simply a duplication of other recommendations. The Commission's focus is on Aboriginal-controlled initiatives at the *local* level. Existing local initiatives do not necessarily require the membership of the relevant group to be comprised entirely of Aboriginal people. Further, the Commission's recommendation stipulates that a community justice group must have an equal number of men and women.²⁰ The Commission has not made any recommendations with respect to regional groups but recognises the importance of regional groups working in conjunction with local community justice groups.²¹ At the state level, the Commission suggests that if a statewide body has been established prior to the implementation of the Commission's recommendations, then depending upon its structure and focus it could take on the role of consulting, advising and supporting Aboriginal communities with respect to community justice groups.

Discrete Aboriginal communities

The Commission's proposal distinguished between discrete Aboriginal communities and other Aboriginal communities, such as those in metropolitan areas or in close proximity to regional centres. Discrete Aboriginal

communities are those communities which have identifiable physical boundaries.²² The Commission made a distinction between discrete and non-discrete Aboriginal communities because it concluded that under its proposal only discrete Aboriginal communities would be able to set community rules and community sanctions. 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 option would not be possible.²³

In order for a discrete Aboriginal community to establish a community justice group it will be necessary for the community to be declared as a discrete Aboriginal community under the *Aboriginal Communities Act 1979* (WA).²⁴ The Commission proposed that the relevant legislation provide that the Minister for Indigenous Affairs is to declare a discrete community if he or she is satisfied that there is provision for adequate consultation between the community members and a community justice group, especially in relation to the determination of community rules and sanctions. Once declared under the legislation, a discrete Aboriginal community would be able to apply to the Minister for Indigenous Affairs for approval of their community justice group.²⁵

Most discrete communities occupy land pursuant to a crown lease or a pastoral lease. For these communities, the Commission proposed that there should be a general legislative definition which provides that the community lands are the entire reserve area or pastoral lease, whichever is applicable.²⁶ The Commission noted in its Discussion Paper that there may be some discrete Aboriginal communities that occupy land without any formal agreement specifying the boundaries of the community and that these communities may wish to

18. Blagg H, *Draft Aboriginal Justice Agreement Implementation Plan* (undated) 37.

19. Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) [9.48].

20. See discussion under 'Membership criteria', below p 100.

21. LRCWA, Discussion Paper community consultation – Fitzroy Crossing, 9 March 2006. These comments were endorsed by the Kimberley Aboriginal Law and Culture Centre: see Kimberley Aboriginal Law and Culture Centre Submission No. 17 (17 April 2006) 1.

22. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 133.

23. *Ibid.*

24. The Commission notes that some discrete communities are already declared under the *Aboriginal Communities Act 1979* (WA) for the purposes of the by-law scheme. The Commission considers that these communities should be separately declared for the purpose of establishing a community justice group to ensure that there are structures and provisions in place that require the community justice group to consult with community members about community rules and sanctions.

25. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 134.

26. The Commission observed in its Discussion Paper that for communities with by-laws, the community lands declared under the *Aboriginal Communities Act* have sometimes only included the administrative and residential areas in the community while in other cases the declared lands covered the entire reserve or pastoral lease. The benefit of defining community lands as the entire reserve or pastoral lease is that the Governor would not be required to declare the community lands: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 119.

apply for approval of a community justice group. In this situation it was proposed that the legislation should provide for the Minister to declare the boundaries of the particular community by giving notice in the government gazette.

Non-discrete Aboriginal communities

As mentioned above, the Commission's proposal for community justice groups did not provide for non-discrete communities to set community rules and sanctions. However, it was suggested that a community justice group in a non-discrete community would be able to undertake any of the potential roles and functions within the criminal justice system. These include the provision of customary law or cultural information to courts, the supervision of offenders and the development of diversionary options.²⁷

In its submission, the Department of the Attorney General questioned why non-discrete Aboriginal communities could not also develop their own responses to community justice issues. The Department stated that the absence of a physical boundary does not mean that an Aboriginal community is void of social rules or customs.²⁸ The Commission agrees that any Aboriginal community may have its own customary laws and impose sanctions upon members when those rules are broken. The capacity for an Aboriginal community to enforce informal sanctions (irrespective of whether they are based on customary law) will largely be dependent upon the willingness of all those involved. For discrete Aboriginal communities the Commission has strengthened the legal or formal authority for the community to expel a member (subject to specific conditions) in order to assist those communities to enforce their community rules.²⁹ The absence of physical boundaries precludes this option for non-discrete communities.

Membership criteria

The Commission concluded in its Discussion Paper that membership of a community justice group must be representative of the different family, social or skin groups within the relevant community. The necessity for members to be selected by their own community, rather than by government, was incorporated into the Commission's proposal by the provision that each family, social or skin group must nominate an equal number of members.³⁰ The Commission anticipated that community justice group members would be Elders or respected members of each family, social or skin group and it was observed that the requirement that each group nominate its representatives would ensure that a community justice group has community support. A number of submissions responded positively to the Commission's proposal that members of a community justice group should be selected by the community.³¹

In addition to the requirement for equal family group representation, the Commission concluded that, in order to safeguard the rights of Aboriginal women and children, the membership of a community justice group must be comprised of an equal number of men and women.³² In other words, each relevant family or social group must nominate an equal number of men and women. The Commission believes that the high incidence of family violence and sexual abuse in many Aboriginal communities demands that Aboriginal women have an equal say in justice issues and decisions affecting their community. More specifically, the need for criminal justice agencies (in particular, courts) to be reliably informed about Aboriginal law and culture requires that any information is presented by both Aboriginal men and women.³³ The Commission has received a number of submissions supporting the requirement for community justice groups to have an equal number of men and women as well as an equal number of representatives from each relevant family or social group in the community.³⁴

27. LRCWA, *ibid* 134.

28. Department of the Attorney General, Submission No. 34 (11 May 2006) 4.

29. See discussion under 'Trespass', below pp 106–109.

30. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 134–35.

31. In its submission the Law Society of Western Australia emphasised the importance of community justice group members being elected on a 'bottom-up' basis rather than selected from a 'top-down' process: see Law Society of Western Australia, Submission No. 36 (16 May 2006) 4. Similarly, the Aboriginal Legal Service warned against government 'handpicking' representative without consultation with the relevant community: see Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 4. See also Dr Brian Steels, consultation (28 April 2006).

32. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 135.

33. For further discussion, see 'Evidence of Aboriginal customary law in Sentencing', below pp 183–84 and 'Customary Law as an Excuse for Violence and Abuse', Chapter One, above pp 23–26.

34. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 4; LRCWA, Discussion Paper community consultation – Fitzroy Crossing, 9 March 2006. These comments were endorsed by the Kimberley Aboriginal Law and Culture Centre: see Kimberley Aboriginal Law and Culture Centre, Submission No. 17 (17 April 2006) 1; Carol Martin MLA and community members in Broome, consultation (20 May 2006). The Western Australia Police stated, in its submission, that equal representation of all family groups is necessary to ensure that the community justice group is representative

Aboriginal women must be supported and empowered to act against abuse and violence, and this can only be achieved by ensuring they have an equal voice in their communities.

The Department of the Attorney General argued in its submission that the gender balance requirements under the Commission's proposal may not necessarily mirror traditional authority structures.³⁵ However, the Commission found that both Aboriginal men and Aboriginal women have important roles in decision-making and dispute resolution under Aboriginal law and culture.³⁶ During a meeting in Broome, the Commission was advised that the membership criteria in its proposal accurately reflect existing authority structures.³⁷ Nevertheless, the Commission wishes to underline that the requirement for gender balance only relates to the membership structure of a community justice group. There is nothing in the Commission's proposal that stipulates how a community justice group should conduct its business. The Commission is fully aware there will be certain issues that can only be discussed by Aboriginal men and other matters that can only be discussed by Aboriginal women.³⁸ There is no reason why a community justice group cannot hold separate men's and separate women's meetings when necessary. Further, the responses and processes developed by a community justice group may differ for each gender. For example, the Kapululangu Aboriginal Women's Association in Balgo has recently described how it organised specific cultural camps and activities for Aboriginal girls (and pre-pubescent boys³⁹) and at the same time it has provided support for male Elders in developing cultural activities for older boys.⁴⁰

The DPP did not agree that gender balance would assist in the protection of Aboriginal women and children and claimed that 'there is no regular and systematic evidence that [Aboriginal] women actively protect their children' from abuse.⁴¹ In Chapter One, the Commission has referred to examples where Aboriginal women have initiated responses to violence and sexual abuse in their communities. While the Commission acknowledges that there is an element of silence surrounding violence and sexual abuse in Aboriginal communities, some Aboriginal women have shown great resolve to prevent abuse in the face of extreme disadvantage and lack of government assistance.⁴² The Commission believes that Aboriginal women must be supported and empowered to act against abuse and violence, and that this can only be achieved by ensuring Aboriginal women have an equal voice in their communities and the wider community.

The DPP also submitted that there may not be enough suitably qualified people to act as community justice group members. In support of this contention, the DPP stated that it is *often* Elders or other influential people in Aboriginal communities who are the perpetrators of sexual abuse and violence.⁴³ In Chapter One, the Commission has rejected the argument that Aboriginal male Elders are primarily responsible for the extent of family violence and sexual abuse in Aboriginal communities.⁴⁴ The Commission accepts that *some*

of the community: see Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 6. Despite the consistency between this observation and the Commission's proposal, the Western Australia Police did not support the proposal for community justice groups. The Commission notes that the DPP suggested that family loyalties would give rise to potential conflicts of interest: Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 4. However, the Commission is of the opinion that the requirement of equal family group representation adequately deals with any potential conflict of interest.

35. Department of the Attorney General, Submission No. 34 (11 May 2006) 4. The Commission notes that the requirement for gender balance was not embraced during a meeting in Warburton; however, only one Aboriginal woman was present during the meeting: see LRCWA, Discussion Paper community consultation – Warburton 27 February 2006.

36. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 86. This was reiterated to the Commission during meetings following the Commission's Discussion Paper: see Carol Martin, consultation (10 May 2006); Carol Martin MLA and community members in Broome, consultation (20 May 2006).

37. Carol Martin MLA and community members in Broome, consultation (20 May 2006).

38. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 232 & 408; Carol Martin MLA and community members in Broome, consultation (20 May 2006).

39. It was explained that women Elders are responsible for raising 'girls and pre-pubescent boys in cultural and customary life-skills': see Kapululangu Aboriginal Women's Association, *Beyond Petrol Sniffing: Renewing hope for Indigenous communities*, Submission to the Senate Community Affairs References Committee (13 June 2006) 1.

40. Kapululangu Aboriginal Women's Association, *Beyond Petrol Sniffing: Renewing hope for Indigenous communities*, Submission to the Senate Community Affairs References Committee (13 June 2006) 1.

41. Office of the Director of Public Prosecutions, Submission No. 40B (13 July 2006) 2–3.

42. See 'The Role of Aboriginal Women', Chapter One, above pp 27–28.

43. The Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 4.

44. See discussion under 'Aboriginal Elders Should Not be Stereotyped as Offenders', Chapter One, above pp 22–23.

Aboriginal Elders and leaders may be responsible for serious offences against women and children but this does not mean that all Elders should be stereotyped as perpetrators of abuse. Overall, the Commission believes that there are many respected and suitable Aboriginal Elders and others in the community who can take on the role of community justice group members.

Other submissions received mentioned specific concerns about how the Commission's membership requirements will operate in practice. It was suggested that where there is significant feuding within a family group it may be difficult for that family group to agree about the choice of a male and female representative.⁴⁵ The Commission emphasises that there is no reason why there cannot be more than one male and one female representative from each family, social or skin group. On the other hand, the Commission was advised that in order for the Warburton community to satisfy the membership requirement, a Warburton community justice group would have approximately 40 members. It was suggested that this could become unmanageable.⁴⁶ The Commission appreciates that such a large number of members may be difficult; however, the Commission's recommendation does not impose any requirements about how a community justice group should operate. In some cases it may be appropriate for a large community justice group to form sub-groups for specific purposes.

A few submissions also suggested that young people should be represented on community justice groups.⁴⁷ The Aboriginal Legal Service (ALS) submitted that younger Aboriginal people should be involved in order to 'communicate the social issues and values of young Aboriginal people in contemporary society'.⁴⁸ The Commission does not consider that it is appropriate to specify that there must be a certain number of young people on a community justice group. The Commission's recommendation does not specify the age or status of a community justice group member. The Commission believes that in most cases community justice groups

will be made up of Elders and respected people because this reflects traditional authority structures. However, the Commission's recommendation does not prevent young people from being a member of a community justice group. In addition, the Commission emphasises that a community justice group could set up sub-groups or committees to deal with specific issues. The Commission encourages community justice groups to involve young people in its activities and processes.

Police clearances and spent convictions

Many of the Commission's recommendations (including community justice groups) anticipate the appointment of Aboriginal people to work within the criminal justice system. Given the high numbers of Aboriginal people dealt with by the criminal justice system, many Aboriginal people have a criminal record. However, the existence of a criminal record should not automatically preclude a person from being a member of a community justice group or generally working within the criminal justice system. Past convictions may be related to minor offences, and the offences may have occurred a long time ago. Further, a person who has offended in the past may now have reformed. In terms of assisting other offenders in their rehabilitation, such a person may be able to offer advice and support because of past experiences with the criminal justice system.⁴⁹ It should also be noted that providing employment for Aboriginal people is one solution to the continuing high rates of over-representation of Aboriginal people in custody.⁵⁰

In Western Australia an application can be made at a police station for a national police clearance.⁵¹ A police clearance will prove to a prospective employer that the person does not have a criminal record. If a person does have a criminal record, depending upon the length of time since the conviction, the person can apply for that conviction to be spent. Once a spent conviction is obtained the person will then be able to apply for a police clearance. Generally, a person cannot be discriminated against because of a spent conviction.⁵²

45. Aboriginal Corporate Development Team, Western Australia Police, consultation (26 June 2006).

46. LRCWA, Discussion Paper community consultation – Warburton, 27 February 2006.

47. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 4; Law Society of Western Australia, Submission No. 36 (16 May 2006) 4. A similar observation was also made by Dr Brian Steels, consultation (28 April 2006).

48. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 4. Similar comments were made by Dr Brian Steels, consultation (28 April 2006).

49. Victorian Aboriginal Legal Service Co-operative Ltd, *Submission on the Discrimination in Employment on the Basis of Criminal Record Discussion Paper December 2004* (March 2005) 2.

50. *Ibid* 3.

51. See <<http://www.police.gov.wa.au/Services/Services.asp>>.

52. *Spent Convictions Act 1988* (WA) Div 3. There are various exceptions under the *Spent Convictions Act 1988* (WA) such as justices of the peace, police officers, prison officers, licensed security officers and specific positions in the Department of Corrective Services and the Department of Education. There are also numerous exceptions for employment relating to children: see Schedule 3.

The Commission encourages community justice groups to involve young people in its activities and processes.

The purpose of a spent conviction regime is to facilitate the rehabilitation of offenders by ensuring that past convictions do not continue to negatively affect the person's prospects for reform. The provision to grant spent convictions reflects the principle that 'in the absence of re-offending, the relevance of a criminal conviction diminishes over time'.⁵³ In general terms, a person in Western Australia can apply for a spent conviction after ten years has elapsed since the relevant conviction if, in that time period, there have been no further convictions.⁵⁴ For a 'lesser conviction' the person must apply to the Commissioner of Police. If the application is made in the prescribed form the Commissioner of Police must grant the application.⁵⁵ Therefore, the granting of a spent conviction for lesser convictions is *effectively* automatic. However, the seemingly unnecessary requirement for an application to be made may cause injustice. For example, the Commission was told that one person applied for a police clearance and because she had a minor conviction for shoplifting 30 years earlier, she was required to wait five weeks to obtain a spent conviction and police clearance. In the meantime, an offer of employment was lost.⁵⁶ The current process will only be effective if the person recalls the existence of an old conviction and is aware of the option to apply for a spent conviction. The Commission is of the view that lesser convictions should be automatically wiped from a person's record, without the need for an application to be made, after a certain period of time.

For serious convictions (which are defined as a conviction resulting in imprisonment for more than 12 months or a fine of \$15,000 or more) the person must apply to the District Court for a spent conviction.⁵⁷ In this situation, the court has discretion whether to grant the application. The Commission notes that many people would have received a sentence of more than

12 months' imprisonment for offences usually dealt with in a Magistrates Court (such as traffic offences, assault, damage and stealing). For many Aboriginal people, an application to the District Court may be particularly difficult because of remoteness, language and communication barriers, and the application may be cost prohibitive.

The Commission is aware that the Standing Committee of Attorney Generals (SCAG) is currently considering uniform spent convictions legislation for all Australian states and territories.⁵⁸ The proposed uniform model suggests that spent convictions should be automatically granted.⁵⁹ The Commission agrees with this approach. However, the model also proposes that the spent conviction regime should be limited to convictions that resulted in a sentence of less than 24 months' imprisonment and that for adults the waiting period should be ten years.⁶⁰ The Commission strongly encourages SCAG to consider more flexible provisions. It may be appropriate to establish separate rules for different categories of convictions. For example, less serious convictions should be automatically spent after a certain period of time. For more serious matters, the person should be entitled to apply to a court for a spent conviction to be granted.

The Western Australia Police stated in its submission that community justice group members must have a police clearance in order to 'screen out perpetrators of abuse'.⁶¹ However, a police clearance does not only relate to convictions for serious offences such as sexual abuse or violence; it covers all convictions, including traffic matters, stealing, damage and disorderly conduct. The Commission is of the view that the existence of a criminal record should not preclude a person from being a member of a community justice group (or otherwise working in the criminal justice system).

53. Standing Committee of Attorneys General, *Uniform Spent Convictions: Proposed Model* (July 2004) 4.

54. *Spent Convictions Act 1988* (WA) s11.

55. *Spent Convictions Act 1988* (WA) s 7.

56. Anonymous, Submission No. 14 (11 April 2006).

57. *Spent Convictions Act 1988* (WA) ss 6 & 9.

58. Standing Committee of Attorneys General, *Uniform Spent Convictions: Proposed Model* (July 2004).

59. *Ibid* 9.

60. *Ibid* 6.

61. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 6.

However, for serious offences relating to violence or child abuse the Commission considers that, in order to protect Aboriginal communities, it is necessary to ensure that a potential community justice group member has a Working with Children Check (WWCC).⁶² This scheme commenced in January 2006 and provides that people who are engaged in child-related work must have a WWCC. The WWCC covers specific convictions and charges (for offences that may suggest the person is a risk to children).⁶³ The DPP agreed, in its submission, that community justice group members should be required to have a WWCC.⁶⁴ The Commission has included in its recommendation that before approving the membership of a community justice group, the Minister must be satisfied that each proposed member has a WWCC.

Criteria for approval of a community justice group

In making its proposal, the Commission was concerned to avoid external interference in the establishment and operation of community justice groups. The Commission's intention was that each community can develop its own structures and processes to deal with social and justice issues. For this reason, the Commission proposed that the legislative criteria for approval of a community justice group should be that the membership of the group provide for equal representation of all relevant family, social or skin groups in the community and equal representation of both men and women, and that there has been adequate consultation with the members of the community and that a majority of community members support the establishment of a community justice group.⁶⁵

After taking into account various concerns raised in submissions, the Commission now considers that the criteria for approval of a community justice group should be:

- That the membership of the group provides for equal representation of all relevant family, social or skin groups in the community and equal representation of both men and women.
- That there has been adequate consultation with the members of the community and that a majority

of community members support the establishment of a community justice group.

- That, in the case of a discrete Aboriginal community, a majority of the community supports the community justice group setting community rules and sanctions.
- That each proposed member of a community justice group must have a WWCC and that at regular intervals the Minister for Indigenous Affairs review the membership to determine if all members are still eligible for a WWCC.

Further, the Commission considers that at regular intervals the Minister for Indigenous Affairs should provide the community with an opportunity to approve the continuation of any existing members or, alternatively, nominate new members for each relevant family or social grouping. The legislation should also stipulate that, at regular intervals, the Minister for Indigenous Affairs should provide the community with an opportunity to approve or otherwise the continuation of the community justice group. The Commission does not consider that it is appropriate to specify at this stage how often the Minister should reassess the membership of a community justice group or its continued viability. This should be determined in consultation with Aboriginal communities.

Roles of Community Justice Groups

Community rules and sanctions

Under the Commission's proposal, a community justice group in a discrete Aboriginal community would be able to set community rules and community sanctions. Consistent with the aim of facilitating the highest degree of autonomy possible, the Commission did not consider that it was appropriate to restrict the nature of community rules and sanctions other than by the constraints of Australian law.⁶⁶ In other words, a community would not be able to have a sanction that involved inflicting physical punishment which amounted to an offence under the criminal law. Nor would it be able to impose a sanction which involved the unlawful detention of a person. The Commission considers that

62. Aboriginal people in Geraldton were concerned that some Elders were responsible for sexual abuse and violence and therefore should not be allowed to sit as a member of a community justice group: LRCWA, Discussion Paper community consultation – Geraldton, 3 April 2006.

63. See discussion under 'Working with Children Check', Chapter Seven, below pp 293–94.

64. Office of the Director of Public Prosecutions, Submission No. 40B (13 July 2006) 4.

65. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 135–36.

66. *Ibid* 136.

the AJAC should advise Aboriginal communities during the consultation process about what they can and cannot lawfully do. The Commission noted that its proposal for community rules and sanctions assumes that community members will in most cases voluntarily abide by any community sanctions imposed. However, it was concluded that, if an Aboriginal person does not agree to comply with both the community rules and the community sanctions, the community should have the power through its community council to refuse to allow that person to remain in the community for a specified period of time.⁶⁷

A flexible approach allows each community to decide for themselves the rules and sanctions, and allows the incorporation of matters that are offences against Australian law and offences against Aboriginal customary law. Of course, the rules could include matters which are neither general criminal offences nor offences against customary law, such as the consumption of alcohol and intoxicants.⁶⁸ Importantly, the Commission's proposal allows for community rules and sanctions to reflect Aboriginal customary laws without the need for any codification of those laws.⁶⁹ The Commission stresses that each discrete community can determine its own rules and sanctions. Whether these reflect customary law or not is entirely up to them.

The Ngaanyatjarra Council and the DPP opposed community justice groups setting community rules and sanctions. The Ngaanyatjarra Council stated that it opposed community rules and sanctions 'as a substitute for, or in the absence of' by-laws.⁷⁰ However, the Commission has not recommended the repeal of the by-law scheme. Some discrete communities may wish to rely on the existing by-laws scheme and others may wish to establish a community justice group to set community rules and sanctions. A community may choose to have both. In this regard, the Commission highlights that there are over 300 discrete Aboriginal communities in Western Australia.⁷¹ Only 26 of these

communities currently have by-laws in force.

The DPP opposed the Commission's proposal for community justice groups for a number of reasons.⁷² In relation to community rules and sanctions, the DPP questioned whether 'legislatively enshrined powers should be so open-ended'.⁷³ The Commission has concluded that it is not appropriate to specify in the legislation the exact nature of community rules and sanctions because this would defeat the objectives of flexibility and having community-owned processes. It would also amount to codifying aspects of customary law.⁷⁴ However, it is essential that the relevant community fully supports its community justice group making community rules and sanctions. Therefore, the Commission has recommended that the Minister of Indigenous Affairs must be satisfied before approving a community justice group that a majority of the community wish for the community justice group to set rules and sanctions. The Commission also proposed that, before declaring a discrete Aboriginal community under the legislation, the Minister would have to be satisfied that there are structures in place to ensure that the community has an input into the nature of community rules and sanctions. It is not appropriate to specify at this stage what those structures should be. This should be determined during the consultation phase of this recommendation.

The DPP also argued that the establishment of community justice groups with the power to set community rules and sanctions would create 'two coexistent legitimate systems of criminal law' and a community justice group member would have a 'quasi-judicial status'.⁷⁵ However, the Commission considers that there is only one system of criminal law in Western Australia. Community rules and sanctions are an informal code of behaviour. The members of a community justice group will not be administering and adjudicating Australian laws; they will be administering their own community rules.⁷⁶

67. See discussion under 'Trespass', below p 106.

68. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 136–37.

69. In its Discussion Paper, the Commission rejected any codification of customary laws for a number of reasons: see *ibid* 62. The Department of the Attorney General stated in its submission that the effect of the Commission's proposal is that breaches of customary laws would be subject to legislated sanctions (such as community work, banishment, shaming and compensation). However, these examples were listed in the Discussion Paper for illustrative purposes. The Commission clearly stated that community rules and sanctions should not be contained in legislation: see Department of the Attorney General, Submission No. 34 (11 May 2006) 3.

70. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 41.

71. Dennis Callaghan, Department of Indigenous Affairs, telephone consultation (6 September 2006).

72. Many of the arguments raised by the DPP concerned the relationship between Aboriginal customary law and family violence and sexual abuse in Aboriginal communities. The Commission has examined this in detail in Chapter One.

73. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 1.

74. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 62.

75. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 3.

76. Examples of other organisations or bodies that may set rules and impose penalties include schools, universities, sporting groups and the Western Australia Bar Association.

There may be some community rules that mirror offences against Australian law. The DPP submitted that community justice groups may impede the ability of police to deal with offenders by protecting an alleged offender and attempting to deal with the matter without recourse to the police.⁷⁷ The Commission acknowledges that, where a matter is both a breach of community rules and a breach of the general criminal law, those involved (including the alleged offender, the victim and the community justice group) may choose not to refer the matter to the police. The rules set by a community justice group do not replace mainstream law and the police retain full discretion about whether they charge an offender. The under-reporting of family violence and sexual abuse in Aboriginal communities is well-known and is happening now in the absence of community justice groups.⁷⁸ The Commission believes that community justice groups will assist in increasing the number of Aboriginal victims who report serious offences to the police because Aboriginal women will be actively involved and community justice groups will generally work more closely with criminal justice agencies than is currently the case.

Who is bound by community rules and sanctions?

As discussed in Chapter Four, it is the Commission's view that the question who is bound (and who should be bound) by Aboriginal customary law is a matter for Aboriginal people themselves.⁷⁹ In the context of community rules and sanctions established by community justice groups (some of which may reflect Aboriginal customary law), it is likely that membership of the community will require adherence to these rules and the community will be empowered to exclude members that refuse to comply with community rules. In its Discussion Paper, the Commission considered the position of service providers who are required to reside in the community as part of their employment.⁸⁰ Service providers, such as nurses and teachers, would be required to comply with any community rules that also fall within Australian law. For matters that are not covered by Australian law, the Commission considered that it is an issue which should best be left for

negotiation between service providers and the specific Aboriginal community. Some communities may choose to exempt service providers from certain community rules and sanctions, especially those that reflect aspects of Aboriginal customary law. However, others may not, and it should be the right of a particular Aboriginal community to exclude a person who shows no respect for their customary law.

The Ngaanyatjarra Council provided the only submission about this issue and expressed its concern that the ultimate sanction available for the community for a non-Aboriginal person is that the community could request that person to leave.⁸¹ It was argued that in practice this would be ineffective because of the difficulties in finding staff to work in remote locations and, therefore, communities would be reluctant to ask a service provider to leave.⁸² The clear preference of the Ngaanyatjarra Council is to retain its by-laws because they specifically apply to anyone on community lands. The Commission has not recommended the repeal of the by-law scheme and therefore, the Ngaanyatjarra communities or any other community will be able to retain by-laws that apply to all people on their community lands.

Trespass

In its Discussion Paper, the Commission observed that the offence of trespass under s 70A of the *Criminal Code* would be relevant to 'outsiders' who enter an Aboriginal community without permission. However, this offence is not necessarily applicable to a member of the community who may have been asked to leave.⁸³ Under the *Aboriginal Communities Act* some communities have enacted by-laws permitting the community council to exclude members of the community. Three of the 26 Aboriginal communities with by-laws include a by-law that allows the community council to ask a member of the community to leave. The Bindi Bindi Aboriginal Community By-laws provide that, if a person has been convicted of an offence against the by-laws or the general criminal law and this offence was committed on community lands, the council can ask the person to leave and may also 'revoke the person's membership of the community'.⁸⁴ The

77. Office of the Director of Public Prosecutions, Submission No. 40B (13 July 2006) 4.

78. See discussion under 'Under-reporting of family violence and sexual abuse', Chapter Seven, below pp 284–87.

79. See discussion under 'Who is bound (and who should be bound) by customary law?', Chapter Four, above p 65.

80. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 137.

81. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 42.

82. *Ibid* 43.

83. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 122–23.

84. The Bindi Bindi Aboriginal Community By-laws 2001, by-law 12.

Kundat Djaru Community By-laws provide that the council can order any person to leave the community lands if the person is under the influence of an illegal drug or harmful substance.⁸⁵ Similarly, the Wongatha Wonganarra Aboriginal Community By-laws provide that the council can order a person who is drunk to leave the community lands.⁸⁶ For all other communities with by-laws, a member of the community can only be removed from the community by a police officer for the purpose of being arrested for breaching a by-law.

The Commission proposed in its Discussion Paper that the legislation governing community justice groups should 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 was proposed that community members must be given reasonable notice before being required to leave.⁸⁷ In making this proposal the Commission observed that it would be rare for an Aboriginal community to exclude one of its members, but the Commission considered that Aboriginal communities should be afforded the protection that the right to exclude entails.⁸⁸

The Commission has received only one submission addressing the proposed general offence of trespass for a person to enter community lands without permission. The Department of Corrective Services was concerned that this proposal may prevent community corrections staff from entering a community to conduct their lawful business.⁸⁹ While the Commission considers that staff from government agencies would have a lawful right to enter an Aboriginal community, if necessary, this could be clarified by including specific exceptions.⁹⁰

In response to the proposed provision in relation to the members of a community, the Ngaanyatjarra Council

advised that there are no recorded examples of Ngaanyatjarra communities wishing to exclude a member of their own communities.⁹¹ While recognising that some Aboriginal communities have included in their by-laws the right of a community council to exclude a member of the community, the Ngaanyatjarra Council stated that it was not appropriate for this right to be given to all Aboriginal communities. It was explained that such a right could be open to abuse, for example, the community council could order a person to leave the community for 'political reasons'.⁹² The Western Australia Police and the Department of Indigenous Affairs also submitted that the power to exclude a member may be open to abuse because community councils are not necessarily representative of all family groups and may be dysfunctional.⁹³ The Commission agrees and has refined its recommendation so that a community council can only request a member of the community to leave if it has been recommended by a community justice group.

The right to exclude a member from a community is akin to the customary law punishment of banishment. The Ngaanyatjarra Council questioned the relevance of banishment as a punishment under customary law and indicated that some Ngaanyatjarra people did not consider that banishment would be an effective sanction.⁹⁴ It was explained that if a person was banished from his or her community and later something happened to that person, the community justice group members could be liable under Aboriginal customary law for what had happened.⁹⁵ The Department of Indigenous Affairs expressed concern that a person who has been excluded may have no accommodation, money or family support.⁹⁶ The Commission notes that banishment under customary law does not necessarily involve a person being sent away with no support. In its Discussion Paper, the Commission observed that

85. The Kundat Djaru Community By-laws 2005, by-law 10.

86. The Wongatha Wonganarra Aboriginal Community By-laws 2003, by-law 9.

87. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 122–23, Proposal 14

88. The Department of the Attorney General expressed concern that the Commission's proposal for an offence of trespass (to be inserted into the *Aboriginal Communities Act*) may increase the levels of imprisonment of Aboriginal people because the penalty includes imprisonment: see Department of the Attorney General, Submission No. 34 (11 May 2006) 3. The Commission proposed that the offence of trespass should have the same penalties as trespass under the Criminal Code – \$12,000 and 12 months' imprisonment. The Commission does not expect that the right to ask a member of a community would be utilised often and would only be used when considered necessary.

89. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 5.

90. The Commission notes that s 31 of the *Aboriginal Affairs Planning Authority Act 1972 (WA)* provides that in the absence of a permit it is an offence for any person to enter an Aboriginal reserve unless the person is an Aboriginal person, member of Parliament, police officer, public health officer, officer of a public authority or otherwise lawfully authorised.

91. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 20.

92. *Ibid* 20–21.

93. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 8; Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 6.

94. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 44.

95. *Ibid* 44–45.

96. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 8.

temporary banishment to another location, where it was known that there were family members present, was employed by the Yolngu people in Yirrkala.⁹⁷ In *R v Miyatatawuy*⁹⁸ the accused person had been banished to a dry community outstation with his wife in order to overcome their problems associated with alcohol. It has been reported that community justice groups in Queensland have successfully used banishment as a sanction by sending offenders to an outstation.⁹⁹



Nevertheless, the Commission understands that community justice group members may be reluctant to banish or exclude a member of the community if to do so would place that person's safety in jeopardy. If a person who had been excluded was harmed or died, the community justice group members may then be liable to punishment under customary law. The Commission believes that this factor operates as a potential safeguard for any abuse of this power. The Commission considers that it is appropriate to recommend that a community council (of a discrete Aboriginal community) can only ask a member of the community to leave if that option has been recommended by a majority of the community justice group. Further, it should be provided in the legislation that a member of the community can only be asked to leave with reasonable notice¹⁰⁰ and only where it would not cause immediate danger to the health or safety of the person (or their dependants). Therefore, a community justice group may need to consider whether there is an alternative place where the person could reside and various options could be worked out

in conjunction with regional justice groups.¹⁰¹ These issues demonstrate the need for adequate resources to be provided to Aboriginal communities for alternatives such as outstations.

In its Discussion Paper, the Commission 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. It was also noted that in this context the customary law obligations of traditional owners need to be acknowledged. The Commission invited submissions as to whether (and if so, on what terms) there should be a customary law defence to the proposed offence of trespass.¹⁰² The Department of Indigenous Affairs, the Law Council of Australia and the Criminal Lawyers Association agreed that there should be a customary law defence for Aboriginal people who are charged with trespass for entering community lands.¹⁰³ The Commission agrees that it is entirely appropriate for a customary law defence to apply in this situation.

97. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 98.

98. (1996) 135 FLR 173

99. Wright H, 'Hand in Hand to a Safer Future: Indigenous family violence and community justice groups' (2004) 6(1) *Indigenous Law Bulletin* 17, 18.

100. The Department of Indigenous Affairs mentioned that a person may have obligations under a tenancy agreement or in relation to employment in the community and therefore immediate banishment may cause difficulties: see Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 8.

101. The Commission notes that Aboriginal people were concerned that if a troublemaker was banished from one community he or she would just become a problem to the next community. It was suggested that regional justice groups could be actively involved in negotiating alternative places for some people: see LRCWA, Discussion Paper community consultations – Fitzroy Crossing, 9 March 2006; Broome, 10 March 2006.

102. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 123, Invitation to Submit 3. The Commission also invited submissions about how often the customary law defence under the by-laws had been used: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 116, Invitation to Submit 2. Only the Department of Indigenous Affairs responded to the latter invitation and explained that there are no records to assist in this regard: see Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 12.

103. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 12; Law Council of Australia, Submission No. 41 (29 May 2006) 17; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 1.

Recommendation 16

Trespass

1. That the *Aboriginal Communities Act 1979* (WA) 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 (who is not a member of the community) into their community and, if permission for entry is granted, to determine on what conditions the person may remain on the community. The provision should also state that it is an offence, without lawful excuse, to fail to comply with the conditions or enter without permission and that this offence has the same penalty as the offence of trespass under the *Criminal Code* (WA).
2. That the *Aboriginal Communities Act 1979* (WA) include a specific provision in relation to community members. This provision should state:
 - (a) That the community council of a discrete Aboriginal community which has been declared under Part II of the Act 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.
 - (b) That the community council can only ask a member of the community to leave if a majority of the community justice group in the community has recommended that the person be asked to leave.
 - (c) That the community council cannot ask a member of the community to leave if it would cause immediate danger to the health or safety of the person (or their dependents).
 - (d) That failure to leave the community within a reasonable time, or returning to the community during the specified period, without lawful excuse, constitutes an offence of trespass.
 - (e) That a lawful excuse includes that the person was required to stay in or enter the community for Aboriginal customary law purposes.
 - (f) That a member of the Western Australia Police can remove a person who has not complied, within a reasonable time, with the request of the community council to leave the community.

Roles within the criminal justice system

The Commission proposed that any community justice group could have a significant role within the Western Australian criminal justice system. For example, for sentencing and bail purposes, members of a community justice group may present information to courts about an accused who is a member of their community and provide information or evidence about Aboriginal customary law and culture. 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 suggested

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.¹⁰⁴ The Commission has received extensive support for community justice groups to be directly involved in working in the criminal justice system. The Ngaanyatjarra Council did not support community justice groups being involved in the supervision of offenders for the reason that the communities do not have sufficient resources to take on this role.¹⁰⁵ However, the Ngaanyatjarra Council did support the involvement of community justice groups in diversionary process and in providing cultural information to courts.¹⁰⁶ The ALS agreed that the relationship between Aboriginal

104. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 138.

105. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 42. Also the Western Australia Police did not support community justice groups supervising offenders on court orders, bail or parole. Instead, these matters should continue to be undertaken by the Department of Corrective Services: see Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 6.

106. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 48.

community justice groups and the legal system would be extremely beneficial to Aboriginal people in this state.¹⁰⁷ The Public Advocate expressed support for the Commission's proposal for community justice groups and suggested that such groups would assist her office in establishing links with remote and regional Aboriginal communities.¹⁰⁸

The need for community justice group members to undertake appropriate training and be provided with support was mentioned in a number of submissions.¹⁰⁹ The Aboriginal and Torres Strait Islander Social Justice Commissioner emphasised the importance of training for members, in particular with respect to the roles within the criminal justice system. In addition it was submitted that other criminal justice agencies, such as the police and judicial officers, should also receive training about the operation of community justice groups.¹¹⁰ The ALS highlighted the need for interpreters and Aboriginal liaison officers to assist community justice members in their dealings with the criminal justice system.¹¹¹ The Commission has included in its recommendation that appropriate training be provided to community justice group members.

The Commission concluded in its Discussion Paper that members of an Aboriginal community, who provide services (such as patrols), operate diversionary programs, supervise offenders and provide evidence or information to courts, should be appropriately reimbursed.¹¹² This was supported by a number of submissions¹¹³ and the Commission has made a recommendation to this effect.

Conclusion

The Commission has received general support for its proposal for community justice groups from numerous Aboriginal people, communities, government agencies and individuals.¹¹⁴ Even the two main opponents, the DPP and Ngaanyatjarra Council, supported the involvement of community justice groups in the criminal justice system. Notably, the Aboriginal and Torres Strait Islander Social Justice Commissioner emphasised that community justice groups, 'when well resourced and community driven, can make a real difference to the communities in which they operate'.¹¹⁵ The Law Council of Australia stated that the 'proposed changes provide a sensible approach to empowering Aboriginal communities' and the model provides a 'more flexible approach for individual communities wishing to develop governance structures that are culturally appropriate to the differing circumstances in each community'.¹¹⁶

A number of submissions expressed specific concerns and, where appropriate, the Commission has addressed these concerns in its final recommendation. In conclusion, the Commission wishes to underline the following issues that must be taken into account in the implementation of its recommendation for community justice groups:

- **Ongoing funding and resources:** The need for adequate resources to be provided for community justice groups was highlighted in submissions.¹¹⁷ The Aboriginal and Torres Strait Islander Social Justice Commissioner observed that the legislative

107. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 4.

108. Michelle Scott, Office of the Public Advocate, Submission No. 13 (18 April 2006) 3–4.

109. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 11; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 6; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 5; Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 6. In opposing community justice groups, the DPP relied on the fact that Elders may not have sufficient skills to undertake the role as community justice group members: see Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 4.

110. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 10. The submission referred to the National Indigenous Legal Advocacy Courses and suggested that these courses are a useful model for training for these purposes: see <http://www.humanrights.gov.au/social_justice/nilac/index.html>.

111. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 5.

112. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 139.

113. LRCWA, Discussion Paper community consultations – Broome, 10 March 2006; Geraldton, 3 April 2006; Dr Kate Auty SM, telephone consultation (16 March 2006); Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 5; Aboriginal Corporate Development Team, Western Australia Police, consultation (26 June 2006).

114. Michelle Scott, Office of the Public Advocate, Submission No. 13 (18 April 2006) 4; Kimberley Aboriginal Law and Culture Centre, Submission No. 17 (17 April 2006) 4; Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2; Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 10; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 1; Department of the Attorney General, Submission No. 34 (11 May 2006) 3; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 4; Law Society of Western Australia, Submission No. 36 (16 May 2006) 4; Law Council of Australia, Submission No. 41 (29 May 2006) 12; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 9; LRCWA, Discussion Paper community consultations – Warburton, 27 February 2006; Broome Regional Prison, 7 March 2006; Fitzroy Crossing, 9 March 2006; Broome, 10 March 2006; Bunbury, 17 March 2006. The Commission notes that Aboriginal people in Warburton only supported community justice groups if by-laws remain.

115. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 10.

116. Law Council of Australia, Submission No. 41 (29 May 2006) 12.

117. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 449; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 6; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 10.

The Commission's recommendation for community justice groups will not be effective unless there are adequate resources and ongoing funding.

recognition of community justice groups will be more likely to ensure that there is ongoing and adequate funding for community justice groups.¹¹⁸ The Commission's recommendation for community justice groups will not be effective unless there are adequate resources and ongoing funding.¹¹⁹

- **The need for flexibility:** The Commission's recommendation for community justice groups is a framework for Aboriginal communities and government agencies to work with to ensure that Aboriginal people are provided with the resources, support and encouragement to develop their own justice processes.¹²⁰ It is not a 'one-size-fits-all' model because the functions, roles, processes and procedures are to be determined by individual communities.¹²¹
- **Voluntariness:** The DPP warned in its submission that the Commission's recommendation should not be 'superimposed' upon Aboriginal communities.¹²² The Department of Corrective Services suggested that some communities may be satisfied with their existing governance structures.¹²³ The Commission emphasises that the establishment of a community justice group is entirely voluntary. Further, the various roles that a community justice group may choose to undertake are also voluntary.
- **Capacity:** The Commission understands that the capacity of each Aboriginal community in Western Australia to establish a community justice group and take on its varying functions will differ from one community to another.¹²⁴ Some communities will need support and capacity building in order to establish a community justice group, while others communities will already be in a position to establish a community justice group. For example, Aboriginal people in Fitzroy Crossing considered that a community justice group would work well in that community.¹²⁵ Therefore, the implementation of this recommendation will necessarily be incremental.
- **Evaluation and monitoring:** In Chapter Two, the Commission has emphasised the need for independent monitoring of the implementation of the recommendations in this report.¹²⁶ The Commission has recommended the establishment of an independent Commissioner for Indigenous Affairs.¹²⁷ Specifically, in relation to community justice groups, the Department of Corrective Services submitted that implementation of this recommendation must be evaluated and monitored.¹²⁸ The Commission is firmly of the view that the implementation of its recommendation for community justice groups must be monitored and, further, community justice groups should be evaluated once established throughout the state.

118. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 10.

119. It has been observed that following the success of community justice groups in Queensland, these groups are being given more and more responsibilities but the resources and support provided is insufficient to cover additional tasks: see Wright H, 'Hand in Hand to a Safer Future: Indigenous Family Violence and Community Justice Groups' (2004) 6(1) *Indigenous Law Bulletin* 17, 18–19.

120. The Commission notes that Article 19 of the revised *Declaration on the Rights of Indigenous Peoples* provides that 'Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions': see UN Doc A/HRC/1/I.3 (23 June 2006). For a discussion about the status of this Declaration, see 'Recognition and the Relevance of International Law', Chapter Four, above p 67.

121. The Aboriginal and Torres Strait Islander Social Justice Commissioner stressed the importance of not adopting a one-size-fits all approach: see Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 10.

122. Office of the Director of Public Prosecutions, Submission No. 40B (13 July 2006) 3.

123. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 5.

124. The Commission was advised that in some areas (in particular, in the metropolitan area) it would be difficult for a community to select equal representatives because of feuding: Aboriginal Corporate Development Team, Western Australia Police, consultation (26 June 2006). See also Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 5; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 10.

125. LRCWA, Discussion Paper community consultation – Fitzroy Crossing, 9 March 2006. These comments were endorsed by the Kimberley Aboriginal Law and Culture Centre: see Kimberley Aboriginal Law and Culture Centre Submission No. 17 (17 April 2006) 1. It was also suggested to the Commission by Carol Martin, MLA and other Kimberley women that communities in the Kimberley (and in particular, Fitzroy Crossing) would be ready to establish a community justice group: see Carol Martin, MLA Kimberley, Submission No. 33 (10 May 2006); LRCWA, Carol Martin MLA and community members in Broome, consultation (20 May 2006).

126. See discussion under 'Ongoing monitoring and evaluation', Chapter Two, above p 39.

127. See Recommendation 3, above p 58.

128. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 1 & 5.

Recommendation 17

Community justice groups

1. That the *Aboriginal Communities Act 1979* (WA) provide for the establishment of community justice groups upon the application, approved by the Minister for Indigenous Affairs, of an Aboriginal community.
2. That the current provisions of the *Aboriginal Communities Act 1979* (WA) be incorporated into Part I and that there be a separate part (Part II) of the Act dealing with community justice groups.
3. That Part II of the *Aboriginal Communities Act 1979* (WA) distinguish between discrete Aboriginal communities and all other Aboriginal communities.
4. That for a discrete Aboriginal community to establish a community justice group the community must be declared as a discrete Aboriginal community under Part II of the *Aboriginal Communities Act 1979* (WA).
5. That the Minister for Indigenous Affairs is to declare that an Aboriginal community is a discrete Aboriginal community to which Part II of the Act applies, if satisfied, that
 - (a) A majority of the community supports the community justice group setting community rules and community sanctions; and
 - (b) 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.
6. That both discrete and non-discrete Aboriginal communities may apply to the Minister for Indigenous Affairs for approval of a community justice group.
7. That Part II of the *Aboriginal Communities Act 1979* (WA) provide that the Minister for Indigenous Affairs must approve a community justice group if satisfied:
 - (a) That the membership of the group provides for equal representation of all relevant family, social or skin groups in the community and equal representation of both men and women from each relevant family, social or skin group.
 - (b) That there has been adequate consultation with the members of the community and that a majority of community members support the establishment of a community justice group.
 - (c) That each proposed member of a community justice group must have a Working with Children Check and that at regular intervals the Minister for Indigenous Affairs review the membership to determine if all members are still eligible for a Working with Children Check.
8. That at regular intervals the Minister for Indigenous Affairs provide the community with an opportunity to approve the continuation of any existing members or alternatively, nominate new members for each relevant family, social or skin group.
9. That at regular intervals, the Minister for Indigenous Affairs provide the community with an opportunity to approve or otherwise the continuation of the community justice group.
10. That Part II of the *Aboriginal Communities Act 1979* (WA) define what constitutes community lands.
 - (a) 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.
 - (b) For other communities the Minister is to declare the boundaries of the community lands in consultation with the community.
11. That Part II of the *Aboriginal Communities Act 1979* (WA) provide that the functions of a community justice group include but are not limited to 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.
12. That Part II of the *Aboriginal Communities Act 1979* (WA) provide that the functions of a community justice group in a discrete Aboriginal community include setting community rules and community sanctions and that these rules and sanctions are subject to the laws of Australia.
13. That Part II of the *Aboriginal Communities Act 1979* (WA) include an appropriate indemnity

provision for members of a community justice group.

14. That the Western Australian government establish or appoint an Aboriginal Justice Advisory Council to oversee the implementation of this recommendation. 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 and agencies including the Department of Indigenous Affairs, the Department of the Attorney General, the Department of Corrective Services, and the Western Australia Police. 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. The Aboriginal Justice Advisory Council be responsible for:
 - (a) Consultation with Aboriginal communities about their options under this recommendation.
 - (b) Providing advice and support to communities who wish to establish a community justice group.
15. That community justice group members be paid when performing functions within the Western Australian criminal justice system.
16. That the Department of Indigenous Affairs in conjunction with the Department of the Attorney General provide appropriate training for community justice group members.
17. That the Commissioner for Indigenous Affairs review and evaluate community justice groups at a time to be determined by the Commissioner for Indigenous Affairs.

Western Australian Aboriginal Community By-Law Scheme

The Commission comprehensively analysed the Western Australian Aboriginal community by-law scheme under the *Aboriginal Communities Act 1979 (WA)*.¹²⁹ The scheme, which commenced in the late 1970s, aimed to assist certain Aboriginal communities to control and manage behaviour on their community lands. Although originally piloted in only three communities, the Commission understands that there are now 26 Aboriginal communities with by-laws established under the scheme.¹³⁰ Following a detailed consideration of the arguments in support of and against the by-law scheme the Commission proposed in its Discussion Paper that the *Aboriginal Communities Act* should be repealed.¹³¹

One of the main reasons for this proposal was that the by-laws appear to simply create another layer of law applicable only to Aboriginal communities. If a person breaches a by-law they may be charged with an offence and dealt with in court in the usual manner. It was observed that most of the by-laws enacted cover similar conduct that is addressed by the general criminal law, such as disorderly conduct, damage, traffic control, possession of firearms and entering houses without permission. However, there are other matters which are not dealt with by the general criminal law; the most notable being the prohibition of possession and use of alcohol and volatile substances. The Commission also observed, from the perspective of recognising Aboriginal customary law, that by-laws are not generally directly relevant to customary law issues. Some communities have included a by-law which provides that, where the person was acting under a custom of the community, it is a defence to a charge of breaching a by-law.¹³² The Commission noted that this defence may be potentially applicable to offences of entry onto lands without permission, causing disturbances and the interruption of meetings.¹³³

The Commission also formed the view that the by-law scheme does not appear to have any cultural basis in

129. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 115–20.

130. The Department of Indigenous Affairs stated in its submission that there were 19 communities with by-laws as at September 2005 and since then three additional communities have enacted by-laws: see Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 6. However, the Commission notes that there are 26 separate sets of by-laws enacted and listed on the state law publisher's website.

131. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 120, Proposal 11.

132. See, for example, Wongatha Wonganarra Aboriginal Community By-Laws 2003, by-law 13; Djarindjin Aboriginal Community By-Laws 1997, by-law 14. Note that the ALRC was informed by a magistrate that this defence had been rarely used and when so, with limited success: see ALRC *Aboriginal Customary Law and Local Justice Mechanisms: Principles, Options and Proposals*, Research Paper No. 11/12 (1984) 69.

133. The Commission invited submissions as to the extent to which this defence has been used (Invitation to Submit 2) and in response the Department of Indigenous Affairs stated that it was not aware of any records which would provide this information: see Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 12.

the custom of the relevant communities. The by-law scheme is controlled by community councils which may not necessarily be reflective of traditional authority structures. Further, the Commission was told that the content of the by-laws is sometimes dependent upon the personality of the chairperson of the community council. In one example, an Aboriginal person told the Commission that if the chairperson wants to drink alcohol then the by-laws will not prohibit the use of alcohol, irrespective of the views of the community.¹³⁴ The Commission also took into account that because by-laws can only be enforced by police (and in many Aboriginal communities there is no regular police presence) there have been significant problems with respect to the enforcement of the breaches of community by-laws.

When making its proposal to repeal the by-law scheme under the *Aboriginal Communities Act*, the Commission was of the view that its proposal for community justice groups would be a far more effective and culturally appropriate way for Aboriginal communities to determine their own justice issues and processes. In this regard, it was considered that community justice groups would be able to incorporate processes under Aboriginal customary law when appropriate and desired. However, regardless of the Commission's view about the by-law scheme, it was recognised that individual communities must support this initiative. It was suggested that all relevant communities should be consulted about whether they wish to establish a community justice group and if they wish to abolish their by-laws.¹³⁵

The majority of submissions in response to this proposal have opposed the repeal of the by-law scheme under

the *Aboriginal Communities Act*.¹³⁶ The Ngaanyatjarra Council expressed the strongest resistance to the repeal of by-laws. The predominant reasons included that:

- The Ngaanyatjarra communities have a sense of ownership in the by-laws.¹³⁷ The Ngaanyatjarra Council stated that the by-laws are not imposed upon communities and that they reflect the views of Ngaanyatjarra peoples.¹³⁸ The Department of Indigenous Affairs agreed with these views.¹³⁹
- The by-law scheme provides a degree of self-management and self-control.¹⁴⁰ Similarly, the ALS submitted that the by-law scheme provides a 'source of empowerment and self determination for Aboriginal people'.¹⁴¹ The Commission remains of the view that community justice groups could potentially provide a greater degree of self-management and empowerment.
- By-laws are useful to deal with matters that fall in between Australian law and Aboriginal customary law, such as the possession of alcohol and inhalants.¹⁴² The Ngaanyatjarra Council was very concerned that because the Commission did not support the general criminalisation of inhalant use, if by-laws were repealed the community would be significantly disadvantaged.¹⁴³ Maggie Brady submitted that the Ngaanyatjarra Council by-laws 'provide the people of that region with a valuable structure which serves to support and validate their attempts to deal with alcohol and inhalant use'.¹⁴⁴
- With sufficient police presence, the by-laws are an effective method for controlling behaviour on communities because of the threat of 'white' authority.¹⁴⁵

134. LRCWA, Discussion Paper community consultation – Kalgoorlie, 28 February 2006. A review of the by-law scheme observed that some communities complained that council members themselves breached by-laws, in particular with respect to alcohol: see McCallum A, *Review of the Aboriginal Communities Act 1979 (WA)* (Perth: Aboriginal Affairs Planning Authority, July 1992) 22.

135. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 121.

136. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 3; Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 3; Department of the Attorney General, Submission No. 34 (11 May 2006) 2; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 5; Office of the Director of Public Prosecutions, Submission No. 40A (16 June 2006) 1; Dr Maggie Brady, Australian National University, Submission No. 45 (31 May 2006) 1–2; Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 4; LRCWA, Discussion Paper community consultations – Warburton, 27 February 2006; Kalgoorlie, 28 February 2006; Broome Regional Prison, 7 March 2006; Leanne Stedman, Ngaanyatjarra Council, telephone consultation (7 March 2006).

137. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 16; LRCWA, Discussion Paper community consultation – Warburton, 27 February 2006.

138. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 8.

139. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 6. Similarly, Maggie Brady stated that the Ngaanyatjarra communities had considerable input into their by-laws: see Dr Maggie Brady, Australian National University, Submission No. 45 (31 May 2006) 1.

140. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 5.

141. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 5.

142. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 10; LRCWA, Discussion Paper community consultation – Warburton, 27 February 2006; Leanne Stedman, Ngaanyatjarra Council, telephone consultation (7 March 2006). This was also mentioned by Department of Indigenous Affairs: see Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 5.

143. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 11. The Commission has made recommendations directly below to cover some of the deficiencies that exist in Australian law but has concluded that it is not appropriate to criminalise inhalant use.

144. Dr Maggie Brady, Australian National University, Submission No. 45 (31 May 2006) 1.

145. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 18; Leanne Stedman, Ngaanyatjarra Council, telephone consultation (7 March 2006). The importance of the threat of 'white' authority was also mentioned during community consultation in Kalgoorlie: LRCWA, Discussion Paper community consultation – Kalgoorlie, 28 February 2006.

Some submissions opposed the proposal primarily because it was not considered necessary for the by-laws to be repealed in order for community justice groups to operate.¹⁴⁶ Other submissions have suggested that any repeal of the by-laws should not take place until there is further consultation with all relevant communities.¹⁴⁷ In contrast, the Law Council of Australia supported the proposal to repeal the by-law scheme (and replace it with community justice groups). The Law Council agreed that community justice groups would provide greater flexibility and more effectively empower Aboriginal communities.¹⁴⁸

The Commission has been persuaded by submissions that, because some Aboriginal communities have a strong sense of 'ownership' of their by-laws and believe that they are an effective way to control behaviour in their communities, it would be inappropriate to recommend the repeal of the by-law scheme. In these circumstances, the Commission acknowledges that such repeal would be contrary to the Commission's guiding principle of voluntariness.¹⁴⁹ This conclusion is also consistent with the view expressed in the Commission's Discussion Paper that any repeal of the by-laws must not be undertaken in the absence of consultation with the relevant communities.

The Commission recognises that it is not necessary for the by-laws scheme to be repealed in order for a community to establish a community justice group. There is no reason that a community could not retain its by-laws in addition to the establishment of a community justice group. Alternatively, some communities may wish to rely solely on the existing by-law scheme and others may wish to have a community justice group without any by-laws.¹⁵⁰ Having said this, the Commission has not departed from its original conclusion that the by-law scheme has significant problems and is not necessarily the most effective way for Aboriginal people to control and determine their own responses to law and justice issues in communities. The Commission understands why some communities

may be reluctant to give up their one source of self-management in the absence of a proven workable alternative. The Commission believes that once community justice groups have been established, the by-law scheme should be reviewed to determine if Aboriginal communities still support the by-law scheme. In Chapter Three, the Commission has recommended the establishment of an independent Commissioner for Indigenous Affairs.¹⁵¹ The Commission considers that the Commissioner for Indigenous Affairs should comprehensively review the by-law scheme and consult with all relevant Aboriginal communities as to whether there is any continuing support for by-laws once community justice groups are well-established.

Recommendation 18

Review of the by-law scheme under the *Aboriginal Communities Act 1979* (WA)

1. That the Commissioner for Indigenous Affairs review and evaluate the by-law scheme under the *Aboriginal Communities Act 1979* (WA).
2. That the review take place at a time to be determined by the Commissioner for Indigenous Affairs but the review should take place approximately three to five years after the establishment of at least five community justice groups in Western Australia.
3. That this review should consider whether by-laws are still considered necessary and supported by Aboriginal people.
4. That in undertaking this review, the Commissioner for Indigenous Affairs consult with Aboriginal community council members, community justice group members and community members.
5. That if it is concluded that the by-law scheme should be abolished then the Commissioner for Indigenous Affairs consider whether any other legislative changes are required.¹⁵²

146. Department of Indigenous Affairs, Submission No. 29 (2 May 2006); Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 5.

147. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 6–7; Department of the Attorney General, Submission No. 34 (11 May 2006) 2; Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 4. The DPP suggested that because the by-law scheme is currently being reviewed by Department of Indigenous Affairs it would be premature to recommend that the by-law scheme be repealed: see Office of the Director of Public Prosecutions, Submission No. 40A (16 June 2006) 1. However, the Department of Indigenous Affairs has explained that this review (completed in 2005) was a 'desk-top' audit which essentially looked at administrative and procedural matters associated with the existing by-laws. Although some additional communities have apparently indicated a desire to enact by-laws, it does not appear that this review fully analysed the effectiveness of the by-law scheme nor did it consider alternatives. No written report of this review is available: see Charles Vinci, Acting Director General, Department of Indigenous Affairs, letter (15 May 2006).

148. Law Council of Australia, Submission No. 41 (29 May 2006) 12.

149. See discussion under 'Voluntariness and consent', Chapter Two, above p 35.

150. This view was expressed by the Aboriginal Legal Service: see Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 5.

151. See Recommendation 3, above p 58.

152. For example, discussion directly below about disorderly conduct. The Commission also notes that the Department of Indigenous Affairs explained in

Recommendation 19

Statistics and records in relation to by-laws

That in order to facilitate the review of the by-law scheme, the Department of the Attorney General immediately establish procedures to keep accurate statistics about all charges arising from a breach of a by-law enacted under the *Aboriginal Communities Act 1979* (WA) and that these records include the outcome of the court proceeding.

Specific Australian Laws and Discrete Aboriginal Communities

The Commission has observed that 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. However, the general law provisions are not necessarily applicable to discrete Aboriginal communities; that is, communities with identifiable physical boundaries. The Commission proposed amendments, where appropriate, to ensure that the general law is applicable to the circumstances in discrete Aboriginal communities. The principal reason for these proposals was to ensure that in the absence of by-laws Aboriginal communities would still have recourse to Australian law. In re-examining these Australian laws, it has been necessary to consider whether reform is required now that the Commission has not proceeded with its proposal to repeal the by-law scheme. In this regard, the Commission notes that there are about 300 discrete Aboriginal communities that do not currently have by-laws in place.

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'. Public place is defined in s 1 of the *Criminal Code* to include 'a place to which the public, or any section of the public, has or is permitted

to have access, whether on payment or otherwise'. In its Discussion Paper, the Commission proposed that the definition of a public place in s 1 of the *Criminal Code* be amended to include a discrete Aboriginal community other than an area of that community which is used for private residential purposes.¹⁵³

The Commission has not received any submissions directly addressing the substance of this proposal. The Commission is of the view that most discrete Aboriginal communities would probably fall within the definition of a public place in s 1 of the *Criminal Code* but it is not convinced that all discrete Aboriginal communities would be considered a public place.¹⁵⁴ However, the Commission does not consider that it is necessary to amend the *Criminal Code* at this stage because of the relatively minor nature of the offence of disorderly conduct. If following the review of the *Aboriginal Communities Act*, the Commissioner for Indigenous Affairs concludes that the by-law scheme should be repealed then it may be necessary to revisit this issue.

Traffic offences

For offences that regulate the manner of driving (such as careless driving, dangerous driving and drink driving) the alleged driving must, pursuant to s 73 of the *Road Traffic Act 1974* (WA), 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 proposed in its Discussion Paper that s 73 of the *Road Traffic Act* be amended to include the lands of a discrete Aboriginal community.¹⁵⁵

In response, the Department of Corrective Services stated that it was concerned that this proposal would result in more Aboriginal people being arrested and imprisoned.¹⁵⁶ However, the Commission believes that in most cases, the definition in s 73 of the *Road Traffic Act* would already be applicable to discrete Aboriginal communities because these communities would be

its submission, that in the absence of by-laws other less serious *Road Traffic Act* offences would be immune from prosecution in Aboriginal communities: see Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 7. For example, driving without a licence under s 49 of the *Road Traffic Act* and various offences under the *Road Traffic Code* are only applicable to driving on a road and do not extend to places where the public are permitted to have access. The Commission suggests if the by-laws are to be repealed in the future it will be necessary to also consider if any legislative changes are required with respect to other traffic matters.

153. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 121, Proposal 12.

154. Under reg 8 of the *Aboriginal Affairs Planning Authority Act Regulations 1972* the Minister of Indigenous Affairs can grant permits to members of the public to enter certain Aboriginal communities.

155. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 122, Proposal 13.

156. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 4.

places where members of the public have access. The Commission has been advised that people who have driven in a discrete Aboriginal community, contrary to relevant sections of the *Road Traffic Act*, have been charged by the police and convicted.¹⁵⁷ However, unlike the case of disorderly conduct, the relevant traffic offences are potentially very serious, such as dangerous driving causing death. The Commission is concerned that some discrete Aboriginal communities may fall outside the definition in s 73 of the *Road Traffic Act*. Aboriginal people living in these communities deserve full protection under Australian law. It would be extremely unfortunate if a person could escape criminal liability for dangerous driving causing death because it was ruled that a particular community was not a place where the public are permitted to have access. The Commission notes that this situation could arise when a person who is not a member of the community drives dangerously through the community and causes the death of a community member. The Commission has received support for its proposal from the Law Council of Australia and the Western Australia Police.¹⁵⁸ The Commission has concluded that it is preferable to remove any doubt and amend s 73 of the *Road Traffic Act* to include discrete Aboriginal communities.

Recommendation 20

Definition of driving under s 73 of the *Road Traffic Act 1974 (WA)*

That in order to remove any doubt and ensure that Aboriginal people living in discrete Aboriginal communities are protected by the provisions of the *Road Traffic Act 1974 (WA)*, s 73 of the *Road Traffic Act 1974 (WA)* be amended to bring the community lands of an Aboriginal community declared under the *Aboriginal Communities Act 1979 (WA)* within the definition of 'driving'.

Substance abuse

The Commission's consultations with Aboriginal people revealed that substance abuse, in particular petrol-sniffing, was of serious concern to many Aboriginal communities, both in regional and metropolitan areas. The devastation caused by the abuse of solvents such as petrol, is well known. Recently, the Senate Community Affairs References Committee has completed an inquiry into petrol sniffing. A number of recommendations have been made to address the problem of petrol sniffing across Australia.¹⁵⁹ This inquiry found that there are a number of possible strategies to address petrol sniffing, including the supply of alternative fuels, effective policing strategies, legislative intervention, permanent police presence in Aboriginal communities, community night patrols, the recruitment of community members as Aboriginal liaison and community officers to work alongside sworn police officers, and community-based initiatives.¹⁶⁰

By-laws

One response in Western Australia for dealing with substance abuse has been the enactment of by-laws prohibiting the possession, sale and supply of deleterious substances. Currently, 16 Aboriginal communities have by-laws to this effect. Apart from these communities, it is not an offence to possess or use inhalants. There are conflicting views as to whether by-laws are effective in preventing inhalant abuse. The recent Senate inquiry observed that by-laws are not always enforced and that, in some cases, petrol sniffers will simply relocate to another place that does not prohibit inhalant use.¹⁶¹ The Commission remains of the opinion that the general criminalisation of inhalant use is inappropriate. Nevertheless, because the Commission has not proceeded with its proposal to repeal the by-law scheme, those communities who wish to enact by-laws making it an offence to possess or use inhalants will be able to do so.¹⁶²

157. A person has been convicted for dangerous driving causing death in Balgo: Superintendent Steve Robins, Kimberly District Office, Western Australia Police, telephone consultation (31 August 2006).

158. Law Council of Australia, Submission No. 41 (29 May 2006) 12; Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 5. Other submissions opposed the proposal on the basis that the repeal of the by-law was not supported: see Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 7; Department of the Attorney General, Submission No. 34 (11 May 2006) 3; Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 1.

159. The Senate Community Affairs References Committee, *Beyond Petrol Sniffing: Renewing hope for Indigenous communities*, (June 2006).

160. *Ibid.*

161. The Senate Community Affairs References Committee, *Beyond Petrol Sniffing: Renewing hope for Indigenous communities*, (June 2006) 62–63 & 68. The inquiry noted that a Northern Territory Select Committee on substance abuse had previously observed that the impact of the by-laws in Ngaanyatjarra communities was that 'those who wanted to sniff simply crossed to communities on Ngaanyatjarra lands in the Northern Territory'. Nevertheless, it was noted that sniffing is less prevalent in Ngaanyatjarra communities than the Pitjantjatjara communities in South Australia.

162. The Commission has taken into account in its decision not to recommend the repeal of the by-laws that the Ngaanyatjarra Council has expressed strong support for the retention of by-laws prohibiting the possession and use of inhalants: see Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 33.

Police powers to seize intoxicants

In its Discussion Paper, the Commission also examined the *Protective Custody Act 2000* (WA) in order to determine whether this legislation was applicable to or effective for discrete Aboriginal communities. Under the *Protective Custody Act* the police have the power to seize intoxicants; however, this power is limited to public places. The power to seize an intoxicant (which includes alcohol, drugs and volatile substances) applies to children who are consuming (or about to consume) an intoxicant in a public place or to both adults and children who have been apprehended because they were already intoxicated. Apart from police, this power may be exercised by authorised officers,¹⁶³ including public transport security officers and community officers.¹⁶⁴

The Commission proposed that the definition of public place should include discrete Aboriginal communities.¹⁶⁵ The Department of Indigenous Affairs supported this proposal but noted that extending the definition of public place could mean that residences in the community would fall within the definition and therefore police would be authorised to enter people's homes.¹⁶⁶ The Ngaanyatjarra Council observed that the current definition of public place would probably not cover a child in his or her front yard. The Ngaanyatjarra Council also expressed concern that the Commission's proposal would cause unintended consequences and questioned whether a sorry camp, single men's camp or place where women conduct law business would be included in the definition of public place.¹⁶⁷

Public place is defined in s 3 of the *Protective Custody Act* to include, among other things, 'a place to which the public are admitted on the payment of money or other consideration, the test of admittance being only the payment of money or other consideration'. This definition is different from the definition of public place

in the *Criminal Code*. A discrete Aboriginal community could only fit within this definition if it was a place to which the public are admitted on the payment of money or other consideration. This is different to the Code definition which provides that a place is a public place if members of the public are permitted to have access whether on payment or otherwise. The Commission understands that generally the permit system for Aboriginal communities does not require the payment of a fee.

The Commission is of the view that it would be useful for the sake of clarity to include discrete Aboriginal communities within the definition of a public place under the *Protective Custody Act*. However, the Commission does not believe that it is appropriate for residences to be included in the ambit of the legislation. Private residences are not included for other people in the general community.¹⁶⁸ Also, there may be particular areas within a community that have special cultural significance and it may not be appropriate for these areas to be included in the definition of public place under the *Protective Custody Act*. Because of these issues, the Commission considers that further consultation with Aboriginal communities is necessary before any changes are made to the definition of a public place under the *Protective Custody Act*.

Community officers

The Commission noted in its Discussion Paper that in 2002 the Commissioner of Police had not yet appointed any community officers.¹⁶⁹ During the Second Reading Speech for the *Protective Custody Bill 2000* it was explained that the provision to appoint community officers was aimed at recognising the work of Aboriginal community groups such as patrols.¹⁷⁰ The Commission proposed that the Commissioner of Police seek nominations from Aboriginal community councils for the appointment of persons as community officers under

163. *Protective Custody Act 2000* (WA) ss 5, 6, 9.

164. *Protective Custody Act 2000* (WA) ss 3, 27. A public transport security officer can only seize intoxicants on property defined under the *Public Transport Act Authority Act 2003* (WA). Note that a community officer is a voluntary position appointed by the Commissioner of Police. The Gordon Inquiry noted that at the time of its report the Commissioner of Police had not yet appointed any community officers: see Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities* (2002) 227.

165. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 124, Proposal 15.

166. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 10. The Commission notes that the Law Council of Australia also supported this proposal: Law Council of Australia, Submission No. 41 (29 May 2006) 12. The Department of the Attorney General and the DPP both opposed the proposal only on the basis that they did not support the repeal of the by-law scheme: see Department of the Attorney General, Submission No. 34 (11 May 2006) 3; Office of the Director of Public Prosecutions, Submission No. 40A (16 June 2006) 1.

167. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 38.

168. *Protective Custody Act 2000* (WA) s 3.

169. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 124; and see Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities* (2002) 227.

170. Western Australia, *Parliamentary Debates*, Legislative Council, 11 May 2000, 6865–6866 (Mr Peter Foss, Attorney General).

s 27 of the *Protective Custody Act*.¹⁷¹ It was suggested that this would allow members of a community justice group or other community members (such as patrol members or wardens) to be appointed and have the power to confiscate substances in their own communities. In its submission to this reference, the Western Australia Police did not comment at all on this proposal.¹⁷² The Commission has subsequently been advised that there have still been no appointments for community officers made under the legislation.¹⁷³



The Department of Indigenous Affairs supported this proposal and submitted that community officers would need training and resources to ensure compliance with the legislation, such as keeping adequate records. It was also highlighted by the Department of Indigenous Affairs that in practice the option of appointing community officers will be ineffective if there are no appropriate places to detain intoxicated people.¹⁷⁴ Further, the Department noted that under the *Protective Custody Act* community officers cannot be paid. It was suggested that community officers could be paid through CDEP or such other future similar schemes and that it would be worthwhile if current Aboriginal patrols could be incorporated into the *Protective Custody Act* regime.¹⁷⁵

The Ngaanyatjarra Council did not consider that the appointment of community officers would assist in dealing with inhalant abuse in its communities. It was stated that Ngaanyatjarra people cannot directly intervene when a person is using inhalants because of cultural barriers.¹⁷⁶ In her submission, Maggie Brady

explained that while all people would face difficulties when dealing with family members or close relatives, it is particularly problematic for Aboriginal people:

For Aboriginal people, these difficulties are magnified because of socially and culturally embedded notions of individual autonomy and an ethos of non-interference in the affairs of others.¹⁷⁷

Maggie Brady has reported that some Aboriginal communities had appointed a male Aboriginal community worker to act as a 'warden' and this person's role was to patrol the community and discourage people from sniffing. It was stated that this was 'usually accomplished by confronting users and pouring out their petrol supplies, breaking up using groups and urging youngsters to return to their houses or camps'.¹⁷⁸ Brady's research suggests that some Aboriginal people do not support these types of local interventions¹⁷⁹ but these interventions have nonetheless taken place. There are examples where Aboriginal people intervene in the lives of others to prevent destructive behaviour. In the Senate inquiry report the Northern Territory Mt Theo program is described in detail. The program involves Yuendumu Warlpiri Elders sending young petrol

171. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 123–24, Proposal 15.

172. Office of the Commissioner of Police, Submission No. 46 (7 June 2006).

173. Robert Skesteris, Manager Corporate Research and Development, Western Australia Police, telephone consultation (15 September 2006).

174. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 9. The Criminal Lawyers Association noted in its submission that members of a community justice group or Aboriginal community should be able to confiscate volatile substances from people in their own communities: see Criminal Lawyers Association, Submission No. 58 (4 September 2006) 1.

175. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 9.

176. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 39.

177. Dr Maggie Brady, Australian National University, Submission No. 45 (31 May 2006) 2. Maggie Brady made similar observations in her submission to the recent senate inquiry into petrol sniffing: see Senate Community Affairs References Committee, *Beyond Petrol Sniffing: Renewing hope for Indigenous communities* (June 2006) 28. Maggie Brady has stated that '[a]utonomy of action and the belief in the right to control one's own body are inherent in Aboriginal social life. Those momentarily deranged by the ingestion of drugs will assert that they have the right to do as they please and that no-one can stop them': see Brady M, *Heavy Metal: The social meaning of petrol sniffing in Australia* (Canberra: Aboriginal Studies Press, 1992) 75.

178. Brady M, *Heavy Metal*, *ibid* 100.

179. *Ibid* 101–102.

sniffers to the Mt Theo outstation to provide guidance and instruction about traditional law. It was stated that today 'petrol sniffing is a rare occurrence in Yuendumu and the zero tolerance approach of the community ensures early intervention if any one is found sniffing'.¹⁸⁰

The Ngaanyatjarra Council submitted that providing legislative authority for Ngaanyatjarra people to seize intoxicants would not remove the cultural constraints.¹⁸¹ During the recent Senate inquiry it was similarly observed that for some Aboriginal communities it may be culturally inappropriate for an Aboriginal person to be involved in enforcement of laws on other Aboriginal people but, in some communities it may be possible.¹⁸² The Commission also recognised in its Discussion Paper that Aboriginal night patrols operate in a non-coercive manner and patrol members would only transport an intoxicated person to a safe place with that person's consent.¹⁸³ The exact nature of any intervention in relation to the use of inhalants will no doubt vary from one community to another.

The Commission is concerned, however, that no appointments for community officers have been made and is still of the view that if agreed to by the relevant Aboriginal community this would be a useful tool in preventing volatile substance abuse. It is clear that these issues concerning the *Protective Custody Act* and discrete Aboriginal communities need further consideration. The Commission has concluded that the Western Australia Police in conjunction with the Department of Indigenous Affairs should immediately review the option of community officers under the *Protective Custody Act*. Aboriginal communities should be consulted to determine if there are any members of the community who are willing and able to take on this role. If so, consideration will need to be given to the nature of any training and support that is required. The Commission also agrees with Department of Indigenous Affairs that community officers should be paid. The provision of a salary for a community may facilitate the employment of Aboriginal people from another location who may therefore be able to more effectively intervene.

Recommendation 21

Community officers under the *Protective Custody Act 2000 (WA)*

1. That the Western Australia Police and the Department of Indigenous Affairs jointly review the option of community officers under s 27 of the *Protective Custody Act 2000 (WA)*.
2. That as part of this review the Western Australia Police and the Department of Indigenous Affairs consult with Aboriginal communities as to whether there are any community members who are willing and able to act as community officers under the *Protective Custody Act 2000 (WA)*.
3. That as part of this review the Western Australia Police and the Department of Indigenous Affairs consider the training and support requirements of and payment for community officers.
4. That as part of this review the Western Australia Police and Department of Indigenous Affairs consider in consultation with Aboriginal communities if it is necessary for the definition of public place to expressly include discrete Aboriginal communities (or parts of those communities) which have been declared under the *Aboriginal Communities Act 1979 (WA)*.

Alcohol

Regulating the use of alcohol

The Commission noted in its Discussion Paper that the prohibition and regulation of alcohol use is one of the main reasons that many Aboriginal communities have joined the by-law scheme.¹⁸⁴ Currently, 25 communities have by-laws which prohibit the possession or use of alcohol on community lands.¹⁸⁵ Generally, the scheme does not appear to have been successful in preventing alcohol use and it has been even less effective for

180. The Senate Community Affairs References Committee, *Beyond Petrol Sniffing: Renewing hope for Indigenous communities* (June 2006) 80.

181. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 39.

182. The Senate Community Affairs References Committee, *Beyond Petrol Sniffing: Renewing hope for Indigenous communities* (June 2006) 67.

183. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 113.

184. *Ibid* 125.

185. Five of these communities have by-laws that provide for the community council to grant permission for a person to possess or use alcohol on community lands. For the communities that allow the council to grant permission, see Bidyadanga Community By-laws 2004, by-law 9; Kalumburu Aboriginal Corporation By-laws, by-law 10; Looma Community Inc By-laws, by-law 10; Mindibungu Aboriginal Corporation By-laws, by-law 10; Oombulgurri Association Incorporated By-laws, by-law 10.

communities located near towns where alcohol is freely available.¹⁸⁶ Because of the problems identified with the by-law scheme generally, the Commission concluded that a complementary model, which encompasses both community and statutory control, is the preferable way to deal with alcohol restrictions in Aboriginal communities.

The review of the *Liquor Licensing Act 1988* (WA) in 2005 recommended that the Director General of the Department of Indigenous Affairs should be able to apply to the licensing authority for regulations to support restrictions proposed by a community under the *Aboriginal Communities Act 1979* (WA).¹⁸⁷ The regulations would create offences and provide penalties for breaching the provisions. In other words, provisions similar to those that currently appear in Aboriginal community by-laws could be included in the *Liquor Licensing Regulations 1989* (WA). The Commission proposed in its Discussion Paper, as an alternative to by-laws, 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 would have the power to apply for regulations on behalf of a discrete Aboriginal community. The proposal stated that an application could only be made if it was supported by a majority of the community. The enactment of regulations would mean that any use of alcohol contrary to the regulations would constitute an offence.¹⁸⁸ The Commission also emphasised that Aboriginal communities could at the same time develop other 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 received support for this proposal from the Department of Indigenous Affairs, the Department of Corrective Services, and the Department of the Attorney General.¹⁸⁹ The Department of Indigenous Affairs also suggested that if this proposal is implemented there should be a review after two years to determine if the enactment of regulations has improved the health and wellbeing of Aboriginal communities.¹⁹⁰ The ALS supported the right of Aboriginal people to determine appropriate liquor licensing laws for their individual communities.¹⁹¹

The Commission's original proposal provided that an application to apply for liquor licensing regulations could only be made if it had the support of the majority of the community members. The importance of ensuring community support was emphasised by the Aboriginal and Torres Strait Islander Social Justice Commissioner. It was explained that legislative restrictions which are

186. McCallum A, *Review of the Aboriginal Communities Act 1979* (WA) (Perth: Aboriginal Affairs Planning Authority, July 1992) 18; LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 40–41.

187. Independent Review Committee, *Liquor Licensing Act 1988: Report of the Independent Review Committee* (Perth, May 2005) 76–77. In its Discussion Paper the Commission noted that it is vital that any prohibition or restriction to the use of alcohol is only imposed with the support of the community. If not, a prohibition may infringe the *Racial Discrimination Act 1975* (Cth): see Calma T, Acting Race Discrimination Commissioner and Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Implications of the Racial Discrimination Act 1975 with Reference to State and Territory Liquor Licensing Legislation' (Paper presented at the 34th Australasian Liquor Licensing Authorities' Conference, Hobart, 26–29 October 2004).

188. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 125–26, Proposal 16.

189. Department of Indigenous Affairs, Submission No. 25 (2 May 2006) 10; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 5; Department of the Attorney General, Submission No. 34 (11 May 2006) 3. The Catholic Social Justice Council and the Law Council of Australia also supported this proposal but the Law Council only expressed support on the basis that it supported the repeal of the by-laws scheme: see Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2; Law Council of Australia, Submission No. 41 (29 May 2006) 12.

190. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 10.

191. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 6.

specific to Aboriginal people may contravene the *Racial Discrimination Act 1975* (Cth) unless classified as a ‘special measure’. In order to meet the criteria to be considered a special measure, it is necessary for the wishes of the community to be taken into account. Special measures usually confer a benefit on a disadvantaged group. From one perspective, alcohol restrictions cause a detriment because the relevant class of persons is not entitled to lawfully drink alcohol. Therefore, as stated by the Aboriginal and Torres Strait Islander Social Justice Commissioner, if alcohol restrictions are imposed against the will of the community they will not meet the necessary standards of a special measure and will therefore be contrary to the *Racial Discrimination Act*.¹⁹²

The Ngaanyatjarra Council opposed the proposal and argued that the liquor licensing scheme is not an appropriate vehicle to regulate the use of alcohol in Ngaanyatjarra communities.¹⁹³ It was submitted that the liquor licensing authority is required by legislation to balance competing interests. Therefore, the Ngaanyatjarra Council was concerned that the interest of non-community members such as licensees (or prospective licensees) or four-wheel-drive tourist operators may take priority over the interests of the Aboriginal community. Further, the Ngaanyatjarra Council submitted that it has chosen a zero-tolerance approach to alcohol use and this is in conflict with the harm minimisation policy adopted by the liquor licensing authority.¹⁹⁴

The Commission has decided not to recommend the repeal of the by-laws and therefore the Ngaanyatjarra Council and any other community will be able to keep its by-laws if they wish to. However, there are many Aboriginal communities without by-laws. Some of these communities may wish to prohibit or regulate the possession and use of alcohol, but do not want by-laws that will regulate other behaviour. The Commission is of the view that it is appropriate to recommend that regulations can be enacted for this purpose under the *Liquor Licensing Regulations*, but it must be established that the community supports the regulations and that all of the requirements of a special measure under the *Racial Discrimination Act* have been met.

Recommendation 22

The prohibition or restriction of alcohol in discrete Aboriginal communities

1. That the Director General of the Department of Indigenous Affairs can apply to the liquor licensing authority, on behalf of an Aboriginal community declared under the *Aboriginal Communities Act 1979* (WA), for regulations in relation to the restriction or prohibition of alcohol.
2. That the Director General of the Department of Indigenous Affairs ensure that prior to making the application he or she is satisfied that the regulations would not contravene the *Racial Discrimination Act 1975* (Cth).
3. That an application can only be made by the Director General if the majority of the community members support the application.
4. That the regulations provide that breaching the restrictions or prohibition imposed is an offence.
5. That any regulations made under this recommendation can only be amended with the support of the majority of the community.
6. That the Commissioner for Indigenous Affairs review (at a time to be determined by the Commissioner for Indigenous Affairs) the effectiveness of any regulations made under this recommendation.

Supply or sale of alcohol

In its Discussion Paper the Commission recognised the serious implications for Aboriginal communities that have prohibited the use of alcohol when an ‘outsider’ brings alcohol into the community or supplies/sells alcohol to a community member. The Commission expressed support for the recommendation in the review of *Liquor Licensing Act 1988* (WA) that there should be an additional offence under the legislation in relation to the illegal sale of liquor to Aboriginal communities with

192. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 16–18.

193. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 23. Maggie Brady also opposed the proposal and supported the retention of by-laws to deal with alcohol prohibition: see Dr Maggie Brady, Australian National University, Submission No. 45 (31 May 2006) 1–2. The DPP opposed the proposal only on the basis that it did not support the repeal of the by-laws: Office of the Director of Public Prosecutions, Submission 40A (14 June 2006) 1. In Warburton the Commission was told that the initiatives linked to the liquor licensing authority may be poorly received because its measures introduced in Laverton have not been successful: LRCWA, Discussion Paper community consultation – Warburton, 27 February 2006.

194. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 24–30.

strong deterrent penalties.¹⁹⁵ The Commission notes that s 109 of the *Liquor Licensing Act 1988* (WA) creates an offence for selling liquor without a licence or a permit and the maximum penalty is a \$10,000 fine. The review recommended that the maximum penalty should be increased to \$20,000. However, this offence is only applicable to the sale of alcohol and would not cover people who knowingly supply alcohol to Aboriginal communities. The Commission proposed that it should be 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.¹⁹⁶

The Commission received a number of submissions in support of this proposal.¹⁹⁷ The Western Australia Police confirmed that people taking alcohol into Aboriginal communities remains a significant problem.¹⁹⁸ However, the Commission's proposal was opposed by the Aboriginal Legal Service. It was argued that it would be very difficult for a seller to know the intent of the person purchasing the alcohol. It was suggested that all Aboriginal people may be suspected of breaching this law and therefore Aboriginal people would be discriminated against as consumers.¹⁹⁹ Similarly, the Department of the Attorney General contended that the Commission's proposal would place an 'unusual onus' on alcohol suppliers – to know which Aboriginal communities had prohibited alcohol use as well as all individuals who live in these communities.²⁰⁰

The Commission's aim was not to prevent Aboriginal people from purchasing alcohol from licensed suppliers in locations that do not prohibit the use of alcohol. Therefore, the Commission has clarified that licensed suppliers will only be committing an offence if they know that the person will take the alcohol into an Aboriginal community that has prohibited the use or

possession of alcohol. Because the Commission has not proceeded with its proposal to repeal the by-laws, there will be some Aboriginal communities that prohibit alcohol use under by-laws and others that may adopt the above recommendation to apply for regulations under the *Liquor Licensing Act*. Of course, some communities may use both. Thus, both types of provision are included in the recommendation. The Commission emphasises that, even where by-laws exist, any supply of alcohol outside the community lands (even if only just outside) will not be caught by the by-law provisions.

Recommendation 23

Sale or supply of alcohol in discrete Aboriginal communities

1. 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 through by-laws enacted under the *Aboriginal Communities Act 1979* (WA) and/or under the *Liquor Licensing Regulations 1989* (WA).
2. That the *Liquor Licensing Act 1988* (WA) provide that this provision is only applicable to a licensed supplier of alcohol if that person actually knows that the alcohol will be taken into an Aboriginal community which has prohibited the consumption of liquor through by-laws enacted under the *Aboriginal Communities Act 1979* (WA) and/or under the *Liquor Licensing Regulations 1989* (WA).

195. Independent Review Committee, *Liquor Licensing Act 1988: Report of the Independent Review Committee* (Perth, May 2005) 76. See also McCallum's comments that it was well-known that taxi drivers performed 'grog-runs' in the Kimberley and because they did not necessarily enter the community lands the by-laws were ineffective in dealing with this problem: McCallum A, *Review of the Aboriginal Communities Act 1979* (WA) (Perth: Aboriginal Affairs Planning Authority, July 1992) 22.

196. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 127, Proposal 17.

197. Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2; Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 10; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 5; Law Council of Australia, Submission No. 41 (29 May 2006) 12; Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 6; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 2.

198. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 6. The Commission was also told in Fitzroy Crossing that school teachers bring alcohol into communities and the ALS stated that taxi drivers are sometimes known to bring alcohol into communities for profit. See LRCWA, Discussion Paper community consultation – Fitzroy Crossing, 9 March 2006; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 6.

199. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 6. The DPP also opposed this proposal but only on the basis that it opposed the Commission's proposal to repeal the by-law scheme: see Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 1.

200. Department of the Attorney General, Submission No. 34 (11 May 2006) 3.

Aboriginal Courts

In its Discussion Paper the Commission considered the development of Aboriginal courts throughout Australia.¹ The term 'Aboriginal courts' is used by the Commission to refer to all the current models in Australia where Aboriginal Elders or other respected persons are involved in sentencing proceedings. These models currently exist in various forms in most Australian states and territories and include the Nunga Court, Koori Court, Murri Court and circle sentencing.²

The number of Aboriginal courts in Australia is increasing. Since the preparation of the Commission's Discussion Paper additional courts have been established.³ In Western Australia, an Aboriginal court commenced at Norseman in February 2006. From February until June 2006 the Norseman Community Court has convened on a monthly basis. There is a pool of six Aboriginal community members (both Elders and respected persons) who are available to sit with the magistrate.⁴ The traditional court layout has been altered by removing the bar table and having all participants sitting in chairs in a circle.⁵ In May 2006 the Department of the Attorney General announced plans for an Aboriginal court at Kalgoorlie.⁶ The Commission understands that consultations have taken place with the local community and it is anticipated that the Kalgoorlie Community Court will commence in November 2006.⁷

Contrary to claims that Aboriginal courts represent a separate system of law for Aboriginal people, these courts operate within the boundaries of the Australian legal system and in no case does an Aboriginal Elder have the authority to decide a case or impose punishment.⁸ The role of Elders and respected persons 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. A magistrate in an Aboriginal court can only impose a penalty that is available as a sentencing option under the general law of the relevant jurisdiction.

Aboriginal-Controlled Courts

The Commission has distinguished Aboriginal courts from Aboriginal-controlled courts. The latter are courts where Aboriginal Elders or other community members are vested with the authority to determine the final outcome of a case. In its Discussion Paper the Commission did not support the establishment of Aboriginal-controlled courts because court-like structures or processes do not appear to be part of Aboriginal customary law. The Commission concluded that it is preferable to establish structures which do not involve the exercise of western judicial power. For this reason the Commission has recommended the

1. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 142–57.

2. Ibid.

3. In Victoria the Koori Court has been extended to Mildura: see <<http://www.magistratescourt.vic.gov.au>>; and a Koori Children's Court has commenced in Melbourne: see Office of the Attorney General Victoria, *First Children's Koori Court opens in Melbourne*, media statement (9 September 2005) <http://www.dpc.vic.gov.au/domino/Web_Notes/newmedia.nsf>. In Queensland the Murri Court has been extended to Caboolture (children only) and Townsville (both adults and children); and the Murri Courts at Rockhampton and Mt Isa also now operate for children: see <<http://www.justice.qld.gov.au/courts/factsht/C11MurriCourt.htm>>. In New South Wales circle sentencing operates in eight locations and recently it has been extended to Mount Druitt: see <http://www.lawlink.nsw.gov.au/lawlink/Corporate/II_corporate.nsf/pages/LL_Homepage_announcements#Mount%20Druitt>. The Commission notes that Mount Druitt will be the first metropolitan location for circle sentencing in New South Wales. The Ngambra circle sentencing court in Canberra is now permanent: see Legislative Assembly for the Australian Capital Territory Standing Committee on Legal Affairs, *Transcript of Evidence*, Canberra (10 November 2005) 81. Circle courts have also commenced in the Northern Territory: see Bradley S, 'Applying Restorative Justice Principles in the Sentencing of Indigenous Offenders and Children' (Paper presented to the *Sentencing: Principles, Perspectives and Possibilities* conference, Canberra, 10–12 February 2006) 2. In its Discussion Paper the Commission referred to the Wiluna Aboriginal court which was instigated by Magistrate Wilson in 2001: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 147. Information received by the Commission from the present magistrate indicates that Aboriginal Elders currently only sit with the magistrate on an irregular basis: S Richardson SM, *Magistrates Court of Western Australia Carnarvon*, email (23 June 2006).

4. Bradley Mitchell, Project Manager Kalgoorlie Magistrates Court, email (7 July 2006).

5. Daly K, 'WA's First Aboriginal Court: Bid to stem skyrocketing incarceration rates', *The Kalgoorlie Miner*, 15 February 2006, 3.

6. Department of the Attorney-General, *\$16m for new DotAG initiatives in state budget*, media statement (11 May 2006) <<http://www.justice.wa.gov.au/portal/server.pt/gateway>>.

7. Bradley Mitchell, Project Manager, Kalgoorlie Magistrates Court, email (13 September 2006).

8. See Spencer B, 'Courts to Recognise Tribal Punishment', *The West Australian*, 7 February 2006, 1. In this article the establishment of Aboriginal courts was relied on as one example of how the Commission's proposals would create a separate legal system for Aboriginal people. The Commission has rejected this argument: see discussion under, 'Two Separate Systems of Law?', Chapter One, above pp 13–17.

Aboriginal courts operate within the boundaries of the Australian legal system and in no case does an Aboriginal Elder have the authority to decide a case or impose punishment.

establishment of community justice groups.⁹ While the members of a community justice group will necessarily be bound by Australian law, the Commission's recommendation enables Aboriginal communities to determine their own culturally appropriate processes for responding to justice issues. 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.¹⁰ The Commission has received only one submission advocating Aboriginal-controlled courts.¹¹ It was argued that, in circumstances where an offender and victim are from the same community, the matter could be dealt with 'in a customary court, presided over by a tribal elder and be conducted in the tribal language'.¹² The Commission remains of the view that such courts are inappropriate. The establishment of Aboriginal-controlled courts by the Western Australian legal system could significantly distort Aboriginal customary law. In addition, Aboriginal-controlled courts could arguably be viewed as creating a separate legal system for Aboriginal people.

Problem-Solving Courts and Therapeutic Jurisprudence

The Commission noted in its Discussion Paper the development of specialist courts and problem-solving courts. In addition, the practice of therapeutic

jurisprudence was discussed.¹³ The Commission considered how Aboriginal courts fit within these categories and indicated that it had strong reservations about the categorisation of Aboriginal courts as problem-orientated or problem-solving courts.¹⁴ It was noted:

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.¹⁵

Nonetheless, the Commission acknowledges that therapeutic jurisprudence initiatives or restorative justice may be effective for Aboriginal offenders.¹⁶ In this regard the Commission welcomes the plan to commence a therapeutic jurisprudence-based program targeting Aboriginal family and domestic violence. While the program is not Aboriginal-specific, the aim is to provide culturally appropriate programs for Aboriginal people.¹⁷

In April 2006 the Department of the Attorney General announced that an Aboriginal family violence court will commence in Geraldton. An Aboriginal reference group is working in tandem with the Department of the Attorney General and the Department of Corrective Services to formulate a 'model to address family and domestic violence and Aboriginal imprisonment'.¹⁸ The Commission understands that consultations are underway with the Aboriginal community in Geraldton and that the community has indicated its support for

9. See Recommendation 17, below pp 112–13.

10. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 142–44.

11. R Titellius, Submission No. 16 (27 April 2006) 1.

12. *Ibid* 3.

13. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 145–46.

14. Dr Peggy Dwyer recently observed that although there may be some similarities between Aboriginal courts and problem-solving courts and the practice of therapeutic and restorative justice, 'indigenous court structures defy classification into existing models and must be recognised as having a unique place in the Australian criminal justice system': see Dwyer P, 'Sentencing Aboriginal Offenders: The future of Indigenous justice models' (Paper presented at the 19th International Conference of the International Society for the Reform of Criminal Law, Edinburgh, 26–30 June 2005) 2–3.

15. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 146. Dr Michael King SM has acknowledged that 'Aboriginal courts are a response to the problem of the legal system's inadequate response to the law-related needs of Aboriginal people' but has also argued that Aboriginal courts do fit within the practice of therapeutic jurisprudence: see King M, 'Problem-Solving Court Programs in Western Australia' (Paper presented to the *Sentencing: Principles, Perspectives and Possibilities* conference, Canberra, 10–12 February 2006).

16. In its Discussion Paper the Commission referred to the work the Geraldton Alternative Sentencing Regime: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 148. The Commission has received further comments about the benefits of therapeutic jurisprudence for Aboriginal people: see Dr Brian Steels, consultation (28 April 2006). The Commission is aware that there is a restorative justice project underway in Roebourne: see Campione E & Steels B (Untitled paper presented at the 3rd International Conference on Therapeutic Jurisprudence, Perth, 7–9 June 2006). The Commission will further consider the link between therapeutic jurisprudence and problem-orientated courts in the reference on Problem-orientated Courts and Judicial Case Management, Project No. 96.

17. Mallon J, Department of the Attorney General, email (25 May 2006).

18. Department of the Attorney General, *Project addresses Aboriginal imprisonment*, media statement (10 April 2006), <<http://www.justice.wa.gov.au>>.

the involvement of Aboriginal respected persons during the court process. Further, it is anticipated that the court will be supported by programs specifically designed for Aboriginal people.¹⁹

The Value and Effectiveness of Aboriginal Courts

In its Discussion Paper the Commission observed that it was too early to comprehensively judge the effectiveness of Aboriginal courts. Nevertheless, it did appear that Aboriginal courts had achieved significant gains in justice outcomes for Aboriginal people. The Commission noted that Aboriginal courts had achieved substantial improvements in court attendance rates. Also it appeared that offenders were more likely to comply with court orders as a direct result of the involvement of their Aboriginal community.²⁰

In making its final recommendations the Commission has taken into account the recently published evaluation of the Koori Courts at Shepparton and Broadmeadows in Victoria. It was reported that this evaluation 'found that in virtually all of the stated aims of the Koori Court Pilot Program, it has been a *resounding success*'.²¹ Following are some of the achievements identified in this evaluation report.

- The Koori Courts have experienced reduced levels of recidivism. At the time of the Koori Court evaluation report the general rate of recidivism in Victoria was about 30 per cent. Over the two-year evaluation period the rate of recidivism in the Shepparton Koori Court was 12.5 per cent and in the Broadmeadows Koori Court it was 15.5 per cent.
- There have been improvements in the rate at which defendants appear in court.
- There have been reductions in the breach rate for community-based orders.

- There has been increased involvement by the Koori community in the criminal justice system.
- The Koori Courts provide a less alienating court process for participants.
- The Koori Courts encourage cultural matters to be taken into account during sentencing.
- The cultural authority of Elders and respected persons, and the Koori community in general has been strengthened.²²

Similar outcomes have been observed in relation to other Aboriginal courts. Although only newly established, it has been noted that there are significantly less children appearing in the Murri Children's Court at Townsville than previously in the mainstream Children's Court.²³ Both circle sentencing courts in New South Wales and the Murri Courts in Queensland have shown positive results in relation to recidivism rates.²⁴ In relation to the Murri Court it has been noted that 'perhaps initially unforeseen, but arguably the most significant, benefit has been the reconnection of offenders with their communities'.²⁵

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 general criminal justice system and are subject to the same sentencing principles as any other court. Reports from people working in Aboriginal courts do not support the contention that they are a 'soft option'. Magistrate Dick from New South Wales stated:

We have even experienced the unexpected, that is, a victim protesting that the penalty of the circle was too harsh. Sentences imposed by Circle Courts to date have consistently fallen in the heavier end of the scale of penalties.²⁶

As indicated by the Commission in its Discussion Paper, it is not easy for Aboriginal offenders to face their Elders in court.²⁷ It was reported that Elders involved in the

19. Nichole Councillor, Department of the Attorney-General, email (17 July 2006); Steve Sharratt SM, telephone consultation (17 July 2006).

20. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 155.

21. Victorian Department of Justice, *Victorian Implementation Review of the Recommendations from the Royal Commission Into Aboriginal Deaths in Custody*, Review Report (Vol 1, October 2005) 485. This review recommended that the Victorian Attorney General give 'urgent attention' to expanding Koori Courts to other areas in consultation with Indigenous communities: see Recommendation 114.

22. Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 8, 85 & 92.

23. Opening of the Murri Court at Townsville, 2 March 2006, Transcript of Proceedings, 3.

24. Steering Committee for the Review of Government Service Provision (SCRGSP), *Overcoming Indigenous Disadvantage – Key Indicators 2005* (July 2005) 9.9.

25. Hennessy A, 'Reconnection to Community as a Sentencing Tool (Paper presented at the 3rd International Conference on Therapeutic Jurisprudence, Perth, 7–9 June 2006) 3.

26. Dick D, 'Circle Sentencing of Aboriginal Offenders: Victims have a say' (2004) 7 *The Judicial Review* 57, 65. See also Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 74–75.

27. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 155.

Aboriginal court at Norseman claimed that the process was more difficult and confronting for the accused because 'Aboriginal people felt a great sense of shame when they were judged by their own community'.²⁸ In any event, even if an Aboriginal court was to impose a very lenient sentence the prosecution are entitled (as is the defence) to appeal against any perceived sentencing errors.

What Aboriginal courts appear to achieve, through the active involvement of Aboriginal Elders and other community members, is a more meaningful court experience. Offenders are more likely to comply with the order of the court and change their behaviour; while Aboriginal communities are strengthened by the reinforcement of the traditional authority of Elders. These outcomes are in the interests of both Aboriginal communities and the wider community.

The Commission's Proposal for Aboriginal Courts

During the Commission's initial consultations many Aboriginal communities expressed support for Elders to sit with a magistrate in court and the various models of Aboriginal courts which were currently operating. The Commission concluded in its Discussion Paper 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.²⁹

The Commission proposed the establishment of Aboriginal courts in both the metropolitan area and in regional locations (subject to consultation with the relevant Aboriginal communities). It was also proposed that Aboriginal courts should be available for both adults and children.³⁰ The Commission did not consider that legislative change is required to implement this proposal. 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 set up. The Commission's proposal envisaged that after two years of operation there would be an independent evaluation of Aboriginal courts to determine their effectiveness, whether any legislative changes are required and whether any Aboriginal courts should be afforded permanent status.³¹

The Commission recognises and commends the continued efforts of individual magistrates and others in developing Aboriginal courts in Western Australia.³² However, the Commission does not consider that the long-term sustainability of Aboriginal courts in this state should be left to individual magistrates. Inevitably magistrates are transferred or retire. The Koori Court evaluation report argued that the success of the Koori Court is largely dependent upon the choice of the most appropriate magistrate.³³ Apart from the necessity for Aboriginal courts to be supported by government in terms of resources, a formal government policy will also mean that there will be an obligation on the Western Australian government to ensure the appointment of judicial officers with the appropriate level of training, experience and willingness to successfully engage with Aboriginal communities. The Commission therefore remains of the view that there should be a formal government policy to establish Aboriginal courts in order to ensure long-term sustainability.

Responses to the Commission's Proposal for Aboriginal Courts

The Commission has received overwhelming support for the introduction of Aboriginal courts in Western Australia.³⁴ While generally supportive of Aboriginal courts, there were a small number of submissions that raised specific concerns about the manner in which Aboriginal courts would be established. Some of these submissions dealt with issues about the selection of

28. Daly K, 'WA's First Aboriginal Court: Bid to stem skyrocketing incarceration rates', *The Kalgoorlie Miner*, 15 February 2006, 3.

29. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 156.

30. *Ibid* 157, Proposal 19.

31. *Ibid*.

32. *Ibid* 146–48. The fact that the current examples of Aboriginal courts have been dependent on the goodwill of individual magistrates was mentioned again to the Commission during the Discussion Paper community consultation – Broome, 7 March 2006.

33. Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program, October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 34–36.

34. Dr Michael King SM, Perth Drug Court, email (13 February 2006); Chief Magistrate Heath, Submission No. 10 (21 March 2006) 2; Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006), 3; Bishop H, AbSolve, Submission No. 26 (28 April 2006) 2; Centre for Aboriginal Studies, Curtin University of Technology, Submission No. 28 (1 May 2006); Department of the Attorney General, Submission No. 34 (11 May 2006) 5; Aboriginal Legal Service, Submission No. 35 (12 May 2006) 5; Law Society of Western Australia, Submission No. 36 (16 May 2006) 4; Law Council of Australia, Submission No. 41 (29 May 2006) 13; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 11; LRCWA, Discussion Paper community consultations – Warburton, 27 February 2006; Broome, 7 March 2006; Fitzroy Crossing, 9 March 2006; Bunbury, 17 March 2006.

Elders or respected persons to sit with the magistrate.³⁵ Other concerns related to the establishment of Aboriginal courts in the metropolitan area.

Aboriginal courts in the metropolitan area

The Chief Magistrate indicated in his submission that it may be difficult to establish an Aboriginal court in the metropolitan area because such a court may not be acceptable to all metropolitan Aboriginal people. He also argued that the Commission did not provide any justification for the establishment of a metropolitan Aboriginal court.³⁶ When proposing that Aboriginal courts should be set up in the metropolitan area the Commission was strongly influenced by the support expressed by Aboriginal people during its metropolitan consultations.³⁷ Further, in the Discussion Paper the Commission observed that:

[I]t is important to recognise that there is a benefit in reconnecting Aboriginal people who are not from remote areas to their cultural values and it is not just Aboriginal people from remote traditional areas who feel alienated from the criminal justice system.³⁸

This view was supported by the Centre for Aboriginal Studies at Curtin University of Technology. The Centre was strongly in favour of an Aboriginal court in the metropolitan area and in its submission stated that Aboriginal courts can 'allow for Aboriginal peoples and communities to re-establish the authority of Elders and cultural values'.³⁹ Recently, in relation to the Murri Court in Queensland, a magistrate has argued that:

The path to a true reduction in the rate of recidivism for indigenous offenders living in an urban setting may lie in the ability of the indigenous community to reconnect the offender with traditional indigenous values and communal responsibilities.⁴⁰

The Koori Court evaluation report highlighted that the court process is effective even in cases where Aboriginal customary law or traditional culture is not directly relevant to the case. This is because Elders are able to reprimand the offender in a culturally appropriate manner and discuss with the offender their own life experiences.⁴¹

The Aboriginal Legal Service (ALS) also supports the establishment of Aboriginal courts in the metropolitan area and believes, that with adequate consultation, an acceptable pool of Elders and respected persons can be selected.⁴² The ALS did observe, however, that there may be cases in Perth where the offender has committed an offence elsewhere and he or she does not come from the local Aboriginal community. In these types of cases it may not be appropriate for the offender to appear before a metropolitan Aboriginal court.⁴³ Alternatively, a panel of Elders in the metropolitan area could include Aboriginal people with cultural connections to other parts of the state. As stated by the ALS, this would allow the 'matching' of the offender to an appropriate Elder or respected person.⁴⁴ In cases where the offender is from a different area but the offence was committed locally, it may be appropriate for the offender to appear before a metropolitan Aboriginal court. The Shepparton Koori Court officer has observed that:

If the defendant is from another country, they are told their behaviour is not acceptable in our country and advised that their behaviour most likely would not be tolerated by their community either.⁴⁵

While there may be issues about which Elders or respected persons should sit in relation to a particular offender, the Commission believes that these matters can be addressed through appropriate consultation with Aboriginal people and by the Aboriginal justice officer attached to the court.

35. See discussion under 'Selection of Elders and respected persons', below p 134 and 'The DPP submission', below p 130.

36. Chief Magistrate Heath, Submission No. 10 (21 March 2006) 2. Also the Commission notes that in its submission the Office of the Director of Public Prosecutions claimed that Aboriginal courts are 'less relevant in respect of offences committed in metropolitan regions by urbanised Aboriginal people': see Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 18.

37. The Commission was informed by Aboriginal people that they supported the various Aboriginal court models and the concept of Aboriginal Elders sitting with magistrates during the consultations at Manguri, Mirrabooka, Armadale, Rockingham and Midland: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 143.

38. LRCWA, *ibid* 156–57.

39. Centre for Aboriginal Studies, Curtin University of Technology, Submission No. 28 (1 May 2006) 2.

40. Hennessy A, 'Reconnection to Community as a Sentencing Tool' (Paper presented at the 3rd International Conference on Therapeutic Jurisprudence, Perth, 7–9 June 2006) 2.

41. Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program, October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 41–42.

42. Aboriginal Legal Service, consultation (7 April 2006): Tonia Brajcich, Aboriginal Legal Service, email (15 May 2006).

43. It has been observed that 'there may be little point in referring an Aboriginal offender to a circle court where they have no connection to the local community': see Dwyer P, 'Sentencing Aboriginal Offenders: The future of Indigenous justice models' (Paper presented at the 19th International Conference of the International Society for the Reform of Criminal Law, Edinburgh, 26–30 June 2005) 9.

44. Tonia Brajcich, Aboriginal Legal Service, email (15 May 2006).

45. Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program, October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 28.

The Department of the Attorney General submitted that an Aboriginal court should not be set up in the metropolitan area until such a court has been tested in a regional location. In support of this approach, the Department argued that in other jurisdictions (New South Wales, Victoria and South Australia) the practice has been to develop a pilot in a regional location and then, after the pilot has been evaluated, consider extending the model into other locations. The Department also claimed that an Aboriginal court has not been established in a capital city or major metropolitan area in New South Wales, Victoria or South Australia.⁴⁶

Although often developed in regional areas, Aboriginal courts have been established in metropolitan locations. In Victoria, the Koori Court sits at Broadmeadows and the first Koori Children's Court commenced in Melbourne.⁴⁷ In South Australia the first Nunga Court commenced in Port Adelaide. The first Murri Court was established in Brisbane and there is an Aboriginal court in Canberra. The Commission did not suggest in its proposal exactly where an Aboriginal court should sit in the metropolitan area. The location or locations will depend upon various factors including the views of the relevant Aboriginal communities; the availability of suitable Elders and respected persons; the availability of judicial officers; and logistics concerning the layout of the court and other administrative issues.

Submissions opposing the Commission's proposal

The Commission received two submissions opposing its proposal to establish Aboriginal courts. These submissions were from the Office of the Director of Public Prosecutions (DPP) and the Western Australia Police. While the DPP opposed the concept of an Aboriginal court, the Western Australia Police indicated that they do not support the establishment of additional Aboriginal courts without further consultation and until the existing Aboriginal courts in Western Australia have been evaluated. In its submission the

Western Australia Police stated that there is a need for further community consultation 'in order to gauge community readiness and address concerns'.⁴⁸ The Commission received wide support for Aboriginal courts during its initial consultations with Aboriginal communities and, as stated above, it has received extensive support in submissions and meetings with Aboriginal communities throughout the state. The Commission does not consider that there is any further need to consult to find out if the concept of Aboriginal courts is supported. Of course, as the Commission has made clear, further consultation with the relevant Aboriginal communities is necessary to ensure that each community is willing and to address practical implementation issues before any court is actually set up.⁴⁹

The other concern expressed by the Western Australia Police is that existing Aboriginal courts in Western Australia have not been adequately evaluated.⁵⁰ The Western Australia Police argued that existing courts should be evaluated to determine their effectiveness for victims, offenders, communities and the wider community. Further, it was suggested that reductions in recidivism rates is not enough to justify a conclusion that Aboriginal courts are effective. The Western Australia Police did acknowledge that the Yandeyarra Aboriginal court has seen a decrease in recidivism rates and that already, anecdotal reports suggest, that the Norseman court is achieving reductions in offending.⁵¹

The Commission agrees that Aboriginal courts should be properly evaluated – not just in terms of recidivism but also on qualitative outcomes such as the effect on participants, victims and communities.⁵² The suggestion by the Western Australia Police that evaluating Aboriginal courts requires sufficient resources is also correct. However, the existing examples of Aboriginal courts in Western Australia have not been developed with formal government support. As stated above, the current examples of Aboriginal courts have largely been initiated by individual judicial officers and this has been done in the absence of additional funding and support services. The Commission is of the opinion that it would

46. Department of the Attorney General, Submission No. 34 (11 May 2006) 5.

47. The Commission notes that during the consultation phase of the Koori Court pilot project it was determined at the outset by an Aboriginal Justice Forum that the first Koori Court should be in Shepparton and then a metropolitan Koori court should commence in Broadmeadows. The evaluation did not commence until both courts were operating: see Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program, October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 17.

48. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 7.

49. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 157.

50. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 7.

51. *Ibid.*

52. The need for ongoing evaluation and monitoring was also mentioned by the Aboriginal and Torres Strait Islander Social Justice Commissioner: see Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 11.

be unreasonable for the future of Aboriginal courts in this state to be dependent upon the results of any evaluation of these courts. There has been sufficient positive evaluation of Aboriginal courts in Australia to justify expansion in this state. Once Aboriginal courts are formally supported with resources and staff then evaluations must be undertaken to consider their long term future needs.

The DPP submission

The DPP submission expressed strong opposition to the establishment of Aboriginal courts in Western Australia. Because the submission contains a number of different arguments for this view and because the DPP submission is the only submission that opposes the concept of an Aboriginal court, the Commission considers that the arguments must be separately addressed.

Membership

In its submission the DPP argued that there will not be enough suitable Aboriginal Elders or respected persons to facilitate the establishment of Aboriginal courts.⁵³ The Commission is not aware of any problem arising from a lack of suitable Elders or respected persons in the development of Aboriginal courts in other Australian jurisdictions. Nevertheless, in some communities in Western Australia there may be a lack of Elders or respected persons who are willing or able to sit on an Aboriginal court. If that is the case then an Aboriginal court will not be able to commence in that location and the existing mainstream court processes will apply.

The DPP has also asserted that there will not be enough suitable Elders in its response to the Commission's recommendation for community justice groups.⁵⁴ In both cases the DPP claimed that it is often Aboriginal Elders and leaders who are responsible for sexual and violent offending against Aboriginal women and children.⁵⁵ In Chapter One the Commission has separately discussed and strongly rejected the stereotypical view that Aboriginal Elders are primarily responsible for serious

offending against Aboriginal women and children.⁵⁶

Ability of Aboriginal courts to deal with offending against non-Aboriginal victims

In its submission the DPP argued that Aboriginal courts may not be effective in addressing offences committed against non-Aboriginal victims.⁵⁷ Because an Aboriginal court is subject to the same law and sentencing principles as any other court, Aboriginal courts will deal with offending against non-Aboriginal victims in the same way that other courts deal with non-Aboriginal victims. The Koori Court evaluation report notes that the involvement of victims is not as fundamental to the process as it may be for restorative justice initiatives and the Koori Court process is not substantially different in terms of victim involvement than a general court.⁵⁸ Nonetheless, the evaluation report did note positive examples of victim involvement.⁵⁹ In comparison, the circle sentencing model does place a greater emphasis on victim participation.⁶⁰ The Commission does not consider that Aboriginal courts will be less inclusive of victims than mainstream courts. The Commission is of the view that Aboriginal courts will be more likely to involve the victim and take into account the victim's views because Aboriginal courts take a more holistic approach and take more time to consider each case.

Aboriginal courts may set a precedent for other cultures

The DPP submission contends that establishing Aboriginal courts 'may set a precedent for other cultures seeking tailored criminal justice processes'.⁶¹ In Chapter One the Commission considered in detail the principle of equality before the law and rejected arguments that Aboriginal courts or other special measures contravene this principle. Further, the Commission has outlined why the circumstances of Aboriginal people require different treatment in order to achieve actual equality.⁶² Specifically, in relation to Aboriginal courts, it should not be forgotten that there is no other ethnic group that constitutes nearly half of all prisoners in the Western Australian criminal justice system.⁶³

53. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 17. In support of this argument the DPP referred to evidence based on material dealing with Canadian initiatives.

54. See discussion under 'Membership criteria', above pp 100–102.

55. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 4.

56. See discussion under 'Aboriginal Elders should not be stereotyped as offenders', Chapter One, above pp 22–23.

57. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 17.

58. Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program, October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 56.

59. Ibid.

60. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 151; Dick D, 'Circle Sentencing of Aboriginal Offenders: Victims have a say' (2004) 7 *The Judicial Review* 57, 62.

61. Ibid.

62. See discussion under 'Non-Discrimination and Equality Before the Law', Chapter One, above pp 8–12.

63. See discussion under 'Over-Representation in the Criminal Justice System', above p 82.

Aboriginal courts will not be effective in dealing with serious intra-Aboriginal offending

The DPP submission asserted that because sexual offences are usually dealt with in the District Court it is not clear how Aboriginal courts would deal with the issue of intra-Aboriginal abuse.⁶⁴ Only two offences of a sexual nature can be dealt with by a Magistrates Court: aggravated indecent assault and indecent assault.⁶⁵ Sexual offences against children and very serious offences, such as sexual penetration without consent, must be dealt with by the District Court.⁶⁶ The Commission does not claim that Aboriginal courts would prevent serious intra-Aboriginal offending or that Aboriginal courts would necessarily deal with these types of offences. Underlying the need for Aboriginal courts in Western Australia is the excessive rate of Aboriginal imprisonment. Aboriginal courts have the potential to reduce the Aboriginal imprisonment rate because they would deal with offences of a less serious nature for which imprisonment may not be necessary or appropriate. In some other jurisdictions there has been reluctance by Aboriginal communities for Aboriginal courts to deal with family violence and sexual abuse.⁶⁷ Exactly what offences should be included or excluded from the jurisdiction of an Aboriginal court is a matter that should be determined in consultation with the local Aboriginal community and other stakeholders. It may well vary from one place to another. As indicated in its Discussion Paper, the Commission is of the view that there is no reason why an Aboriginal court could not be set up in the District Court if all relevant parties agreed.⁶⁸

Other initiatives to deal with serious intra-Aboriginal offending

As an alternative to Aboriginal courts the DPP advocated a 'systemic restorative justice approach for

all levels of criminal offences'.⁶⁹ The DPP also put forward other initiatives to deal with sexual and violent offending by Aboriginal people, such as specialist sexual offences courts and diversionary civil approaches.⁷⁰ The DPP did not suggest that any of these initiatives should be Aboriginal-specific.

While not rejecting the potential benefits of these alternative approaches the Commission does not consider that it is appropriate to consider these options in this reference. Given the serious nature of sexual offending the Commission is of the view that more research is needed about the appropriateness of these options across the board. The Commission is also undertaking a separate reference on problem-orientated courts and is of the view that it would be more appropriate to consider the viability of these options within that reference.

The Commission also considers that any alternative approaches that target Aboriginal people in the criminal justice system should not be undertaken without significant consultation with Aboriginal communities. The Commission has not consulted with Aboriginal people about the options referred to in the DPP submission. In its reference on problem-orientated courts the Commission will be providing an opportunity for submissions from interested parties about possible alternatives to the traditional approach used by courts in the criminal justice system.

Furthermore, there is no reason, if any of these options are considered to be appropriate, that they cannot be implemented in addition to Aboriginal courts.⁷¹ Because Aboriginal courts are generally convened in the lower court level they deal with less serious offending and for that reason they are an important criminal justice response to the disproportionate rate of Aboriginal imprisonment.

64. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 18.

65. *Criminal Code (WA)* ss 323 & 324.

66. *Criminal Code (WA)* Div XXXI.

67. Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program, October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 122.

68. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005)153. The Commission notes that in May 2006 the *Sentencing Act 1995 (WA)* was amended to provide for a new sentencing option: conditional suspended sentence of imprisonment. Part 12 provides that a superior court can order that an offender appear before a speciality court at certain times. Although currently the only speciality court is the Drug Court it may be appropriate that an Aboriginal court is prescribed as a speciality court. This would allow the District or Supreme Courts to impose a conditional suspended sentence on an Aboriginal offender and then order that the offender appear before the Aboriginal court for ongoing monitoring.

69. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 20.

70. *Ibid* 18.

71. The submission by the DPP referred to restorative justice initiatives in Canada and the Australian Capital Territory: see Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 19–20. Both these locations also have Aboriginal courts: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 152; *Glaude (Aboriginal Persons) Court Ontario Court of Justice*, Fact Sheet, <http://www.aboriginallegal.ca/docs/apc-_factsheet.htm>.

Key Features of Aboriginal Courts

The Commission observed in its Discussion Paper that although the exact procedures for each Aboriginal court differ (because of the diversity of Aboriginal communities) there are a number of common key features.⁷² The Commission believes that when considering the establishment of any Aboriginal court in Western Australia the following features should be taken into account.

Changes to the court layout and informal procedures

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. This is particularly important given the language barriers and communication issues faced by some Aboriginal people in the legal system.⁷³

Most Aboriginal courts adopt 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.⁷⁴ The importance of an appropriate physical layout in addition to the acknowledgment of Aboriginal culture in the courtroom (for example, by displaying local Aboriginal artwork and by having a traditional welcome at the commencement of proceedings) cannot be underestimated.⁷⁵ In this regard the Commission encourages the government to consider the suitable layout for Aboriginal courts as an important aspect in the design of new court buildings in Western Australia.

Resources and support services

Because of the greater participation by all parties in the proceedings and the adoption of an holistic approach to the rehabilitation of the offender, the Commission acknowledges that Aboriginal courts are more resource intensive than mainstream courts. For example, the Koori Court evaluation report observed that a Koori Court may deal with between five and 10 matters per day compared to about 50 matters in a general court.⁷⁶ The success of any Aboriginal court will also hinge on the availability of appropriate counselling and rehabilitative programs and services for Aboriginal offenders. The Commission notes that the location of the first Koori Court was chosen because there were locally available drug and alcohol treatment programs, an Indigenous women's mentoring program and other culturally appropriate service providers.⁷⁷ The Commission considers that if Aboriginal courts are to be developed in various locations there will need to be adequate resources for additional magistrates, court staff (including an Aboriginal justice officer) and community support services.⁷⁸

The Commission is also of the view that the cost effectiveness of Aboriginal courts should be evaluated not only in terms of reduced recidivism but also in terms of any reduction in the level of over-representation of Aboriginal people in the justice system and the positive outcomes for participants and Aboriginal communities. In this regard, a cost benefit analysis prepared for this reference⁷⁹ indicated that the introduction of Aboriginal courts would save money for the government. The commissioned study found that for every dollar spent on an Aboriginal court in Western Australia there will be a saving of at least \$2.50.⁸⁰ This calculation has only taken into account the reduced cost to the state of imprisonment and the reduced costs associated with the criminal justice system. When other savings, such

72. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 152–56.

73. *Ibid* 153.

74. *Ibid*.

75. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 153; Dr Brian Steels, consultation (28 April 2006); Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program, October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 26.

76. Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 32.

77. *Ibid* 63.

78. The impact of Aboriginal courts on the existing judicial and court administrative resources was mentioned to the Commission by Chief Magistrate Heath and Deputy Chief Magistrate Woods, consultation (17 May 2006). The need for adequate resources for administrative purposes as well as community support services was emphasised by the Aboriginal and Torres Strait Islander Social Justice Commissioner: see Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 11.

79. The cost benefit analysis was prepared by economist Dr Margaret Giles from the University of Western Australia.

80. See Appendix C. The Commission acknowledges that this research has made necessary assumptions based upon a similar study of the Koori Courts in Victoria.

as reduced costs to households and victims and to the insurance and security industries, are taken into account, there is a very strong case that Aboriginal courts will be extremely cost effective.⁸¹

Voluntariness

The Commission mentioned in its Discussion Paper that participation in an Aboriginal court must be voluntary.⁸² During a meeting in Broome it was emphasised that participation should be voluntary because there may be some matters that offenders would consider too 'shameful' to be dealt with by Aboriginal Elders.⁸³ Any Aboriginal offender should have the right to be dealt with in a general court and in any event it is unlikely that an Aboriginal court would be effective if the offender was not a willing participant.

In some locations an Aboriginal court may convene on specified days or in a specified courtroom. In these cases there would be no difficulty because the accused could be dealt with in a general court on a different day or in a different courtroom. However, in remote locations the reality is that an Aboriginal court may effectively be the only court sitting. If an offender did not want to be dealt with in this manner then the judicial officer could simply convene for that particular matter without any Elders or respected persons being directly involved in the proceedings.

Aboriginal court workers

The Commission observed that in most jurisdictions Aboriginal courts employ an Aboriginal court worker, project officer or justice officer. This role provides an effective link between the general criminal justice system and the Aboriginal community.⁸⁴ The Koori Court evaluation report stressed that 'the Koori Court officer is crucial to the successful operation of the Koori Court'.⁸⁵ During the evaluation of the court, Magistrate Auty observed that:

[I]f you get the right Aboriginal justice officer a lot of stuff falls into place, like the roster for the Elders, the careful consideration of what Elders ought to sit with what Elders, considered views of which matters ought to be proceeding before those particular Elders, which matters particular magistrates might have an understanding of and I think something like, I think working out when you sit women in matters and when you sit men in matters, those sorts of things.⁸⁶

The importance of this position has been further underlined in submissions. For example, Magistrate King stressed that an Aboriginal project officer is 'vital' in assisting the court to decide whether a particular Aboriginal offender can be dealt with by Elders from a different community.⁸⁷ The need for Aboriginal staff to be employed by any metropolitan Aboriginal court was also highlighted by the Centre for Aboriginal Studies at Curtin University of Technology.⁸⁸

Aboriginal Elders and respected persons

The role of Elders and respected persons

Elders and respected persons have a vital role in all Aboriginal courts. Some speak directly to the offenders, while in other courts Elders and respected persons provide advice to the magistrate. A magistrate involved in circle sentencing in New South Wales has stated that:

It is one thing for me as a magistrate to convey the community's concerns; it is another entirely to have those concerns communicated by persons for whom the offender holds a deep-seated respect.⁸⁹

The presence of Elders or respected persons in court can be effective in imparting a positive and constructive notion of shame. Additionally, Elders can provide valuable information to the judicial officer about the offender and relevant cultural matters.⁹⁰ During a meeting in Broome the Commission was asked whether

81. Ibid.

82. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 156.

83. Submissions received at LRCWA, Discussion Paper community consultation – Broome, 10 March 2006.

84. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 154.

85. Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program, October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 38.

86. Ibid 39.

87. Dr Michael King SM, Perth Drug Court, email (14 February 2006). The Commission has also been advised by Magistrate Sharrat that the Aboriginal court worker has a central role in assisting the court to work out any conflict of interest issues and determine who are the most appropriate Elders or respected persons to sit in relation to a particular matter: see Steve Sharrat SM, telephone consultation (17 July 2006).

88. Centre for Aboriginal Studies, Curtin University of Technology, Submission No. 28 (1 May 2006) 2.

89. Dick D, 'Circle Sentencing of Aboriginal Offenders: Victims have a say' (2004) 7 *The Judicial Review* 57, 60.

90. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 154–55.

the success of any Aboriginal court was dependent upon the involvement of Elders or the rehabilitative programs to which offenders were referred.⁹¹ The Commission believes that both are essential to the success of an Aboriginal court.

Conflict of interest

Because an Elder may have kin and family ties with the offender there may be a potential conflict of interest. In reference to community justice groups the DPP argued that 'strong family loyalties' within Aboriginal communities could mean that Elders were not sufficiently impartial and therefore a conflict of interest may arise.⁹² Aboriginal courts have developed ways of dealing with conflict of interest issues. In relation to the Koori Court it has been reported that in circumstances where there is a conflict of interest the Elders or respected persons seek to disqualify themselves.⁹³ Those involved in the Koori Court have suggested that these issues are minimised by having more than one Elder or respected person sitting for each case and by having both a male and female Elder or respected person present.⁹⁴ The Aboriginal justice officer also has a role to play in considering the suitability of particular Elders and respected person for specific cases.⁹⁵ The fact that the ultimate sentencing authority is retained by the magistrate also provides protection in these circumstances. If a community justice group was established in the relevant Aboriginal community, the requirement for equal representation from all family and other social groupings would provide a suitable pool from which Elders and respected persons could be chosen. At least one Elder or respected person could be chosen from a family or social group to which the offender does not belong.

Selection of Elders and respected persons

Although the practice for selecting Elders and respected persons differs between jurisdictions, the Commission concluded in its Discussion Paper that Aboriginal communities must be directly involved in the selection of Elders and respected persons to sit with the magistrate.⁹⁶ Aboriginal people consulted by the Commission were strong in their view that Aboriginal Elders should not be selected by government agencies.⁹⁷

Magistrate King has emphasised the difficulty in selecting or appointing Aboriginal Elders to sit with the magistrate in a location where there may be family feuding or division in the Aboriginal community.⁹⁸ The Commission accepts that the selection process may be more difficult or take longer in some communities.⁹⁹ Because the Minister for Indigenous Affairs will be required to approve the membership constitution of a community justice group (and this will require equal representation of all family and social groups as well as gender balance),¹⁰⁰ the Commission believes that the members of a community justice group may provide a suitable panel from which to select Elders and respected persons for Aboriginal courts.

It has also been suggested to the Commission that Elders or respected persons who have a criminal record should not be entitled to participate in an Aboriginal court.¹⁰¹ The Commission agrees that Elders or respected persons involved in an Aboriginal court should not have a serious criminal record.¹⁰² However, a minor record or a record with a significant gap in offending would not always mean that the person was unsuitable. It would be unlikely that the relevant Aboriginal

91. Submissions received at Aboriginal Customary Laws Discussion Paper community meeting, Broome, 10 March 2006.

92. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 4.

93. Auty K, Briggs D, Thomson K, Gibson M & Porter G, 'The Koori Court: A positive experience' (2005) 79(5) *Law Institute Journal* 40, 41. The Koori Court evaluation report referred to a 'code of conduct' that applies to Elders and respected persons and this code of conduct requires them to disqualify themselves if there is a conflict of interest: see Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program, October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 45.

94. Auty et al, *ibid* 42.

95. See discussion under 'Aboriginal court workers', above p 133.

96. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 155.

97. *Ibid*.

98. Dr Michael King SM, Perth Drug Court, email (13 February 2006). Dr King also mentioned that an Aboriginal project officer is necessary in order to overcome these types of issues. When establishing the Geraldton Alternative Sentencing Regime the court did consider having Aboriginal Elders sit with the magistrate but because there was no Aboriginal project officer it was difficult to know which Aboriginal Elders could be considered to sit with the Magistrate. In a meeting with Magistrate Steve Sharratt it was stressed that where there is family feuding in the community the role of an Aboriginal coordinator to 'match' Elders with offenders becomes of paramount importance: see Steve Sharratt SM, Geraldton, consultation (3 April 2006). In comparison, the Commission was advised by Dr Kate Auty SM that the Aboriginal community in Norseman did not experience any problems in selecting Elders and respected persons for the Aboriginal court: see LRCWA, Discussion Paper community consultation – Warburton, 27 February 2006.

99. Despite the potential difficulty, the Commission understands that 13 Elders and respected persons have been nominated by the Aboriginal community for the Kalgoorlie Community Court, see Bradley Mitchell, Project Manager Kalgoorlie Magistrates Court, email (13 September 2006).

100. See discussion under 'Membership criteria', above p 100.

101. Submissions received at LRCWA, Discussion Paper community consultation – Geraldton, 3 April 2006;

102. In this regard the Commission notes that members of a community justice group will need a Working with Children Check in order to be approved see Recommendation 17, above pp 112–13.

Aboriginal communities must be directly involved in the selection of Elders and respected persons to sit with the magistrate.

community would select or nominate a person known to have a serious criminal record. But the existence of a criminal record will not always be known. Therefore it would be appropriate for the Department of the Attorney General to require any Elder or respected person nominated or selected by the Aboriginal community to undergo a criminal record check. The Department should have the discretion in consultation with the relevant judicial officer to consider whether a person with a record of convictions is suitable.¹⁰³

Payment

A further issue is whether Elders and respected persons who sit with the magistrate in an Aboriginal court should be paid. In Victoria, at the time of the Koori Court evaluation report, the Elders and respected persons were paid a sitting fee of \$150 per day.¹⁰⁴ The Commission concluded in its Discussion Paper that Elders should be paid for any service provided within the criminal justice system.¹⁰⁵ Elders and respected persons are involved in Aboriginal courts because of their cultural experience and expertise and they should be appropriately remunerated.

Training

The Commission acknowledges that some Elders and respected persons will need training in order to effectively undertake their role in an Aboriginal court. As the ALS mentioned in its submission, some Elders may not be familiar with the workings of the criminal

justice system and some will not speak English as their first language.¹⁰⁶ The Koori Court evaluation report explained that, in Victoria, Elders and respected persons participate in a five-day training course about the criminal justice system and court processes.¹⁰⁷ The Commission has made recommendations aimed at improving access to and the availability of Aboriginal interpreters as well as a recommendation that Aboriginal court liaison officers should be employed in all Western Australian courts.¹⁰⁸ These recommendations will assist Elders and respected persons working in Aboriginal courts. However, prior to their appointment, the Department of the Attorney General should ensure that Elders and respected persons selected to work in an Aboriginal court receive suitable training about the criminal justice system.

The need for flexibility

The Department of the Attorney General indicated in its submission that once an Aboriginal court model is agreed upon it can then be 'rolled out to other locations'.¹⁰⁹ Aboriginal people consulted by the Commission had differing views about which models they preferred.¹¹⁰ The Commission does not agree with a one-size-fits-all approach. In their submissions, the ALS and the Aboriginal and Torres Strait Islander Social Justice Commissioner¹¹¹ maintained that it is vital to ensure that each different Aboriginal court is developed in consultation with the relevant Aboriginal community and is reflective of their individual needs and views.

103. See discussion under 'Police clearances and spent convictions', above, pp 102–104.

104. Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 45. The Commission understands that the amount may have increased to \$300 per day: see Dr Kate Auty SM, telephone consultation (16 March 2006).

105. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 139. The Commission has received support for this conclusion: Dr Kate Auty SM, telephone consultation (16 March 2006); Steve Sharrat SM, telephone consultation (17 July 2006).

106. The Aboriginal Legal Service, Submission No. 35 (12 May 2006) 5.

107. Harris M, *A Sentencing Conversation: Evaluation of the Koori Courts pilot program October 2002–October 2004* (Melbourne: Department of Justice Victoria, 2006) 43. The Commission understands that the Elders and respected persons who will be involved in the Kalgoorlie Community Court have participated in relevant training sessions, see Bradley Mitchell, Project Manager Kalgoorlie Magistrates Court, email (13 September 2006).

108. See Recommendation 117, below p 337; Recommendation 121, below p 340; Recommendation 127, below p 346.

109. Department of the Attorney General, Submission No. 34 (11 May 2006) 5.

110. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 157.

111. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 11; Dr Brian Steels, consultation (28 April 2006).

Ongoing monitoring and evaluation

In its Discussion Paper the Commission suggested that Aboriginal courts should be independently evaluated and consideration given to whether any legislative changes are required.¹¹² The need for ongoing evaluation and monitoring has been supported by the Aboriginal and Torres Strait Islander Social Justice Commissioner.¹¹³ The Commission has recommended the establishment of an independent Commissioner for Indigenous Affairs¹¹⁴ and considers that the evaluation and monitoring of Aboriginal courts should be undertaken by this office.

The Commission's Recommendation

The Commission acknowledges that Aboriginal courts may not be appropriate for all areas and may take longer to establish in some locations than in others. In some areas it may be difficult to quickly reach a decision about who should sit as the Elders or respected persons in the court. In other areas there may not be enough community support services or programs in place to ensure that the participants receive appropriate treatment and assistance. There may also not be enough magistrates available to justify an Aboriginal court in certain places. Therefore, the implementation of the Commission's recommendation for Aboriginal courts will necessarily be incremental.

The Commission remains convinced that Aboriginal courts will significantly improve the criminal justice system in this state for Aboriginal offenders, victims and communities as well as the wider community. Following the Commission's Discussion Paper, the Western Australian Attorney General, Jim McGinty, expressed his support for the Commission's proposal for Aboriginal courts and described it as one of the Commission's 'key recommendations'.¹¹⁵ He also stated that the Western Australian government will establish Aboriginal courts throughout the state.¹¹⁶ In order to maximise the success of Aboriginal courts in Western Australia it is vital that the government allocate sufficient resources to implement the Commission's recommendation.

Recommendation 24

Aboriginal courts

1. That the Western Australian government establish as a matter of priority Aboriginal courts for both adults and children in regional locations and in the metropolitan area.
2. That the location, processes and procedures of any Aboriginal court be determined in direct consultation with the relevant Aboriginal communities.
3. That the Western Australian government provide adequate resources for the appointment of additional judicial officers and court staff. In particular, each Aboriginal court should be provided with funding for an Aboriginal justice officer to oversee and coordinate the court.
4. That the Western Australian government provide ongoing resources for Aboriginal-controlled programs and services as well as culturally appropriate government-controlled programs and services to support the operation of Aboriginal courts in each location.
5. That Aboriginal Elders and respected persons should be selected either by or in direct consultation with the local Aboriginal community. Aboriginal Elders and respected persons should be provided with adequate culturally appropriate training about their role and the criminal justice system generally.
6. That Aboriginal Elders should be appropriately reimbursed with a sitting fee.
7. That participation in an Aboriginal court by an accused, victim or any other participant be voluntary.
8. That the Commissioner for Indigenous Affairs evaluate and report on each Aboriginal court after two years of operation and consider whether any legislative or procedural changes are required to improve the operation of Aboriginal courts in Western Australia.

112. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 157.

113. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 11;

114. See Recommendation 3, below p 58.

115. Attorney General of Western Australia, *Push for Aboriginal courts throughout the state*, media statement (28 February 2006).

116. *Ibid.*

Criminal Responsibility

Under Australian law criminal responsibility, which means that a person is liable to punishment for an offence, is determined by assessing three possible elements:

- the act or omission that constitutes the offence;
- any mental element such as intention or wilfulness; and
- any defence that may be applicable in the circumstances.¹

There are some aspects of Aboriginal customary law that may be considered unlawful under Australian law.² For example, the traditional punishment of spearing may, in some cases, constitute an offence of assault occasioning bodily harm, unlawful wounding or grievous bodily harm. In its Discussion Paper, the Commission considered whether there is any scope to recognise Aboriginal customary law when determining the criminal responsibility for an offence under Australian law.³ The Commission found that Aboriginal customary law has, on occasions, been considered by Australian courts in the context of criminal responsibility. However, there is currently no defence of general application that absolves

a person of criminal responsibility because the conduct was required or justified under Aboriginal customary law. 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.⁴

Defences Based on Aboriginal Customary Law

General defence

In its Discussion Paper the Commission considered whether there should be a general defence based on Aboriginal customary law. Such a defence would excuse an Aboriginal person from any criminal conduct if it could be established that the conduct was required or justified under Aboriginal customary law. In examining this issue, the Commission acknowledged 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 relevant law may result in punishment.⁵

During the Commission's consultations Aboriginal people did not generally support any separate system of criminal responsibility. Indeed, it was pointed out that 'two laws may be divisive'.⁶ A general Aboriginal customary law defence would create different notions of criminal responsibility. Further, the Commission has rejected a general customary law defence because such a defence may not provide equal protection under Australian law for other Aboriginal people, especially women and children.⁷



1. The term 'defence' is commonly used; however, it is somewhat misleading. For general defences, such as self-defence, provocation, duress, and honest claim of right, the obligation is on the prosecution to prove beyond a reasonable doubt that the defence does not apply. For others, in particular specific defences set out in the legislative provision which creates the offence, the defendant is required to prove (on the balance of probabilities) that the defence has been made out.
2. See discussion under 'Traditional punishments and practices may constitute an offence against Western Australian law', above p 80.
3. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 158–89.
4. *Ibid* 158.
5. *Ibid*.
6. LRCWA, *Thematic Summary of Consultations – Wiluna*, 27 August 2003, 21.
7. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 159.

Partial defence to homicide

A difficult issue arises in relation to offences of homicide. Under Western Australian law if a person unlawfully kills another with the intention to kill, that person will be guilty of wilful murder.⁸ If a person kills with an intention to cause grievous bodily harm then he or she will be guilty of murder.⁹ In both cases there is a mandatory punishment of life imprisonment. Although the court has discretion to determine, within a prescribed range, the minimum amount of time the person must spend in jail before he or she can be considered for release, a sentence of life imprisonment must be imposed regardless of the circumstances of the case.¹⁰ The Commission observed in its Discussion Paper that 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.¹¹

The Commission considered the possible option of introducing a partial customary law defence (which would reduce an offence of wilful murder or murder to manslaughter).¹² In order to permit Aboriginal customary law to be taken into account by a court, an alternative would be to remove the mandatory requirement of life imprisonment for wilful murder and murder. The Commission invited submissions as to whether there should be a partial defence of Aboriginal customary law or, alternatively, whether the penalty for wilful murder and murder should be changed to a maximum of life imprisonment.¹³ All responses received by the Commission opposed the introduction of a partial defence of Aboriginal customary law for wilful murder and murder.¹⁴ In its submission, the Law Council of

Australia emphasised that customary law has never been used as a defence for abusive or violent behaviour.¹⁵ The Office of the Director of Public Prosecutions (DPP) stressed the importance of ensuring that all people are protected by Western Australian law, including Aboriginal people.¹⁶

The Commission is currently working on a dedicated reference dealing with the law of homicide and has received two submissions commenting on a partial Aboriginal customary law defence in response to its Issues Paper. The Department of Community Development opposed the introduction of a partial defence of customary law.¹⁷ In its submission, the Indigenous Women's Congress expressed support for a partial defence based on Aboriginal customary law, on the proviso that the defence is applied with caution. However, at the same time, the Indigenous Women's Congress also submitted that Aboriginal customary law should not be used as a defence for violent crimes.¹⁸

In the Commission's view, it is not possible to reconcile the need to ensure equal protection under the law for Aboriginal people (in particular, Aboriginal women and children) with the introduction of a partial Aboriginal customary law defence. As highlighted by the DPP, a partial customary law defence would reduce deliberate violent conduct committed with an intention to kill or to cause grievous bodily harm to an offence of manslaughter.¹⁹ The Commission is of the opinion that any relevant aspects of customary law should be taken into account during sentencing. In its final report on the homicide reference, the Commission will address whether mandatory life imprisonment should be abolished. At this stage, it is noted that if mandatory

8. *Criminal Code (WA)* s 278.

9. *Criminal Code (WA)* s 279.

10. Section 90 of the *Sentencing Act 1995 (WA)* provides that for a sentence of life imprisonment for murder, the minimum term must be between seven and 14 years and for wilful murder it must be between 15 and 19 years. Section 91 provides that if the sentence (for wilful murder) is strict security life imprisonment, the minimum term is to be between 20 and 30 years. This means that after the offender has served the minimum term he or she is eligible to be considered for release. The Parole Board must first recommend to the Attorney General that the offender is suitable for release. If the Attorney General recommends to the Governor that the offender should be released then the Governor has the final word. See *Sentencing Administration Act 2003 (WA)* ss 25 & 26. In some other jurisdictions the punishment for murder is a maximum term of life imprisonment, and therefore the court could take into account the circumstances of the offence and in particular whether the person was acting in pursuance of Aboriginal customary law: see for example *Crimes Act 1958 (Vic)* s 3.

11. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 160.

12. The ALRC recommended that there should be a partial defence of Aboriginal customary law: see ALRC, *The Recognition of Aboriginal Customary Laws*, Final Report No. 31 (1986) [453].

13. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 160, Invitation to Submit 4.

14. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 9; Law Council of Australia, Submission No. 41 (29 May 2006) 19–21; Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 14; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 2.

15. Law Council of Australia, Submission No. 41 (29 May 2006) 19. The Law Council also submitted that mandatory life imprisonment for wilful murder and murder should be abolished.

16. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 9.

17. LRCWA, *A Review of the Law of Homicide*, Project No. 97, Department of Community Development, Submission No. 42 (7 July 2006) 11.

18. LRCWA, *A Review of the Law of Homicide*, Project No. 97, Indigenous Women's Congress, Submission No. 41 (12 July 2006) 3. In its submission for the Aboriginal customary laws reference, the Indigenous Women's Congress did not discuss a partial defence of customary law but it was similarly stated that customary law should not be used as a defence to any violent crime: see Indigenous Women's Congress, Submission No. 49 (15 June 2006) 1.

19. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 9.

Underlying the Commission's approach to the recognition of Aboriginal customary law is the aim to encourage greater recognition of non-violent aspects of Aboriginal law and culture.

life imprisonment is abolished for wilful murder or murder, sentencing courts will have a greater scope for considering relevant aspects of Aboriginal customary law.

Specific defences

Although the Commission does not support a general customary law defence, or a partial customary law defence for wilful murder or murder, there may be circumstances where a specific defence is appropriate. A specific defence is a defence that applies to a particular offence and is therefore limited in its application. In its Discussion Paper, the Commission concluded that 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.²⁰ The Commission has identified two areas where a specific defence is appropriate. First, 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.²¹ Second, the Commission has recommended that there should be a customary law defence applicable to the offence of trespass under the *Aboriginal Communities Act 1979 (WA)*.²²

Consent

As mentioned above, Aboriginal people who inflict physical traditional punishment may be guilty of an offence under Western Australian law. Further, certain traditional initiation practices may also constitute an offence. Depending upon the nature of the punishment (or practice) and the degree of any physical injury, the person may be charged with assault, assault occasioning bodily harm, unlawful wounding, grievous bodily harm or homicide. Under Western Australian law, for violent

offences that require proof of an assault, the consent of the 'victim' may mean that the accused is not held to be criminally responsible. For these offences *lack of consent* must be proved by the prosecution beyond a reasonable doubt. However, consent is irrelevant for unlawful wounding and grievous bodily harm. The distinction between those 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 such as spearing. The current status of the law with respect to consent in Western Australia does not solely affect Aboriginal people: the arbitrary distinction between assault occasioning bodily harm and unlawful wounding has the potential to affect any Western Australian.

In considering this issue, the Commission emphasises that physical traditional punishments are not the most important aspect of Aboriginal customary law and there are many forms of non-violent customary law punishments. Underlying the Commission's approach to the recognition of Aboriginal customary law in the criminal justice system is the aim to encourage greater recognition of non-violent aspects of Aboriginal law and culture. Nevertheless, traditional physical punishments continue today and are an important part of tradition to many Aboriginal people in this state.²³

In its Discussion Paper, the Commission examined the interaction of Western Australian law with traditional physical punishments under customary law.²⁴ As background, the Commission considered the position at common law and found that the position in relation to consent to violence in Western Australia is quite different to the position at common law. At common law a person can only consent to common assault. Anything more serious (such as bodily harm, wounding or grievous bodily harm) is generally unlawful,

20. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 161–62.

21. See 'Expanding the current customary harvesting exemption for fauna and flora', Chapter Eight, below pp 306–307.

22. See discussion under 'Trespass', above pp 106–109.

23. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 167. The importance of traditional punishment was again mentioned to the Commission during community meetings following its Discussion Paper: see LRCWA, Discussion Paper community consultation – Broome, 10 March 2006; Indigenous Women's Congress, consultation (28 March 2006).

24. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 163–72.

irrespective of whether or not the 'victim' consented.²⁵ However, there are a number of exceptions at common law—such as ritual male circumcision, tattooing, ear-piercing and violent sports including boxing—which have been considered justifiable in the public interest.²⁶

The Commission has also taken into account relevant international human rights standards. It has been suggested that spearing or other forms of physical traditional punishment may contravene the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, and the *International Covenant of Civil and Political Rights*, both of which prohibit torture and other acts of cruel, inhuman or degrading treatment or punishment. However, the Commission observed that what is regarded as cruel, inhuman or degrading may depend upon the 'cultural perspective' of the participants.²⁷ It has been argued that 'an action alleged to breach the prohibition of torture and cruel, inhuman and degrading treatment must be intended to inflict a degree of cruelty and humiliation on the victim'.²⁸ For many Aboriginal people imprisonment is considered 'cruel and unusual' punishment.²⁹ The Commission believes that consensual participation in traditional physical punishments and practices may not necessarily contravene human rights standards. The Commission has recommended that the recognition of Aboriginal customary law must be consistent with international human rights standards.³⁰

The Criminal Code (WA)

In Western Australia, for any offence where assault is an element, the prosecution must prove beyond a

reasonable doubt that the application of force was without the consent of the victim.³¹ Such an offence is assault occasioning bodily harm which requires proof of an assault and bodily harm.³² Section 301 of the *Criminal Code* (WA) provides that any person who unlawfully wounds another is guilty of a crime.³³ Because 'assault' is not an element of the offence of unlawful wounding the issue of consent is irrelevant.³⁴ A person who unlawfully inflicts grievous bodily harm is guilty of an offence under s 297 of the *Criminal Code*.³⁵ Similarly, because the term assault does not appear in s 297, consent is not an element of grievous bodily harm.³⁶

Although it has been suggested that a person cannot legally consent to an assault occasioning bodily harm, the Commission concluded in its Discussion Paper that under the *Criminal Code* consent is relevant to bodily harm but not to unlawful wounding.³⁷ When determining if a person consented to bodily harm, it is necessary for the prosecution to prove that the victim consented to the actual degree of force used.³⁸ In other words, it is for the jury to decide whether the 'degree of violence used in the assault exceeded that to which the consent had been given'.³⁹ Each case must consider the relevant facts 'existing at the time the consent is expressly given or is to be inferred from the circumstances'.⁴⁰

The Commission has carefully examined whether there is any justification for the distinction between unlawful wounding and assault occasioning bodily harm. Although at first glance it may be assumed that the offence of unlawful wounding is more serious than assault occasioning bodily harm, the maximum penalties for

25. Kell D, 'Consent to Harmful Assaults Under the Queensland Criminal Code: Time for a reappraisal' (1994) 68 *Australian Law Journal* 363.

26. *R v Brown* [1993] 2 All ER 75, 79 (Lord Templeman).

27. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 170.

28. NTLRC, *International Law, Human Rights and Aboriginal Customary Law*, Background Paper No. 4 (2003) 23.

29. Garkawe S, 'The Impact of the Doctrine of Cultural Relativism on the Australian Legal System' (1995) 2(1) *Murdoch University Electronic Journal of Law* 11. This was also observed by the ALRC: see ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [184]. See also LRCWA, *Thematic Summary of Consultations – Wuggubun*, 9–10 September 2003, 36.

30. See Recommendation 5, above p 69.

31. See s 222 of the *Criminal Code* (WA) for the definition of assault.

32. *Criminal Code* (WA) s 317. Bodily harm is defined in s 1 of the *Criminal Code* as any bodily injury which interferes with health or comfort.

33. The Commission notes that there are other offences that involve wounding but also include additional elements such as an intention to maim or disfigure or cause grievous bodily harm. The discussion which follows about the arbitrary distinction between unlawful wounding and assault occasioning bodily harm does not necessarily extend to these other offences.

34. A wound is not defined in the *Criminal Code* but has been judicially interpreted as requiring the breaking of the skin and penetration below the epidermis (the outer layer of the skin): see *Halsbury's Laws of Australia* (Sydney: Butterworths, 1991) [130-1055]. Usually a wound will be caused by an instrument but it may also be caused by a fist – a split lip could be categorised as a wound: see *R v Shepard* [2003] NSWCCA 351.

35. Grievous bodily harm is defined in s 1 of the *Criminal Code* as 'any bodily injury of such a nature as to endanger, or be likely to endanger life, or to cause, or be likely to cause, permanent injury to health'.

36. In contrast, s 317A of the *Criminal Code* provides an offence for assaulting a person with intent to cause grievous bodily harm and therefore because assault is an element of this offence consent would appear to be applicable.

37. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 165. See, in particular, *Lergesner v Carroll* [1991] 1 Qd R 206.

38. *Lergesner v Carroll*, *ibid* 217–18 (Cooper J).

39. *Ibid* 212 (Shepherdson J).

40. *Ibid* 218 (Cooper J). In *Horan v Ferguson* [1995] 2 Qd R 490, 495, McPherson JA stated that consent includes consent that is tacit or implied: 'Just as the absence of consent may be inferred from the circumstances, so too equally its presence may be inferred'.

The Commission has recommended that the recognition of Aboriginal customary law must be consistent with international human rights standards.

both offences are the same.⁴¹ This indicates that Parliament, when setting the maximum penalties, considered the offences to be equally serious.

In practical terms, a specific example of unlawful wounding may be either more or less serious than an assault occasioning bodily harm. For instance, a small cut would amount to a wound while a broken nose could be categorised as bodily harm. In a review of the *Criminal Code* in 1983 the anomaly between assault occasioning bodily harm and wounding was acknowledged.⁴² It was argued that unlawful wounding covers a wide range of harm from serious to trivial and that it is an

unsatisfactory concept because it involves any full thickness penetration of the skin, whether that be by a pin prick or a shot gun blast.⁴³

The discrepancy is further evidenced in relation to ear-piercing, body-piercing and, possibly, tattooing. A person who pierces the ear or any other body part of another with consent could, under the present law, be guilty of unlawful wounding. Nonetheless, the *Health (Skin Penetration Procedure) Regulations 1998* (WA) establish controls over 'skin penetration procedures', which include procedures where the skin is cut, punctured or torn. The regulation of these activities demonstrates that there are some circumstances

where Parliament considers that consent to wounding is acceptable.⁴⁴

Traditional Aboriginal punishments

Traditional physical punishments under Aboriginal customary law may involve spearing, beatings, and sometimes both.⁴⁵ The Commission's consultations with Aboriginal people indicated that spearing is still practised by, and considered important in, many Aboriginal communities.⁴⁶ In Warburton it was emphasised that spearing is not the only punishment available but it does have 'major symbolic and cultural significance'.⁴⁷ The fact that spearing still regularly occurs is evidenced by the number of cases which come before the courts where the issue of spearing is raised in mitigation of sentence.⁴⁸ However, it is not practised in all communities⁴⁹ and is not used in every possible situation.⁵⁰ Nevertheless, it has been explained that in some circumstances there is no alternative under customary law to spearing.⁵¹

Depending upon the type of traditional punishment an offence of common assault, assault occasioning bodily harm, unlawful wounding or grievous bodily harm may be committed. Some traditional punishments could potentially cause death. In practice, traditional punishment that consists of beating with sticks or other

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41. The maximum penalty for assault occasioning bodily harm and unlawful wounding is five years' imprisonment. If the victim of either of these offences is of or over the age of 60 years the maximum penalty is seven years' imprisonment: see *Criminal Code* (WA) ss 317, 310 respectively.
 42. Murray M, *The Criminal Code: A general review* (1983) 202. The Commission notes that Murray J is still of the same view that unlawful wounding is an unsatisfactory concept and should be repealed: see His Honour Justice Murray, letter (9 June 2006).
 43. Murray M, *The Criminal Code: A general review* (1983) 202. It has also been noted that a wound may involve a minor injury that may not even amount to bodily harm because there may be no interference with health or comfort: see Kell D, 'Consent to Harmful Assaults Under the Queensland Criminal Code: Time for a reappraisal' (1994) 68 *Australian Law Journal* 363, 372. See also Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code* (May 1999) Ch 5, 123.
 44. In its Discussion Paper the Commission observed that the *Criminal Code* also distinguishes between unlawful wounding and assault occasioning bodily harm in regard to the availability of the defence of provocation: see *Criminal Code* (WA) ss 245 & 246. A person may be excused for assault occasioning bodily harm if there was provocation for the assault, but provocation cannot constitute a defence to unlawful wounding. There does not appear to be any justification for distinguishing between assault occasioning bodily harm and unlawful wounding in relation to the availability of the defence of provocation.
 45. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 90.
 46. The Commission observed, however, that the circumstances in which spearings occur today differ from the past. Because of diabetes, high blood pressure and other medical complaints it is recognised by Aboriginal people that some members of their community cannot be given the same level of punishment as others: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 167.
 47. LRCWA, *Thematic Summary of Consultations – Warburton*, 3–4 March 2003, 5.
 48. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 212.
 49. LRCWA, *Thematic Summary of Consultations – Meekatharra*, 28 August 2003, 29.
 50. LRCWA, *Thematic Summary of Consultations – Mowanjun*, 4 March 2004, 49.
 51. LRCWA, *Thematic Summary of Consultations – Warburton*, 3–4 March 2003, 5. For further discussion about the nature of traditional physical punishments, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 167–68.

instruments would probably result in a charge of assault occasioning bodily harm. On the other hand (in the absence of any grievous bodily harm), spearing would probably result in a charge of unlawful wounding.⁵² Even if the person punished in the first case was bruised and swollen all over, unless the prosecution could establish a lack of consent, the person who inflicted the punishment would not be criminally responsible. In the second case, even if the wound was minor, the consent of the person punished would be irrelevant. The Commission concluded that the distinction between assault occasioning bodily harm and unlawful wounding appears arbitrary in the context of traditional punishment.⁵³

The Commission found that it is uncommon for an Aboriginal person to be charged with a criminal offence for inflicting traditional punishment; however, this is not because physical traditional punishments do not occur. The scarcity of cases where an Aboriginal person has been charged may evidence an 'unofficial policy' by the police to acquiesce in such punishments where the person receiving the punishment consents.⁵⁴ Therefore, the decision to prosecute an Aboriginal person in these circumstances is at the discretion of the police: a situation which does not provide Aboriginal people with any certainty of their legal position. Another explanation may be that many spearings are inflicted in secret, which may in fact be more dangerous because there will be no police or medical staff present. Further, incidents of traditional punishment may not come to the attention of police because the person who receives the punishment consents and, therefore, makes no complaint about the matter.

Consent and traditional punishments

In its Discussion Paper, the Commission acknowledged that perhaps the most difficult issue is how to determine whether an Aboriginal person consents to

the infliction of traditional physical punishment.⁵⁵ It is questionable whether Aboriginal people living in communities that still practise traditional punishments, such as spearing, have a free and voluntarily choice to participate. One view is that because of the possibility that family members will be punished if the offender fails to accept traditional punishment, there can be no true consent because the offender is 'forced' to agree to the punishment. The Commission is mindful of the numerous reports from Aboriginal people that where a person who had offended against Aboriginal customary law was not available for punishment, members of his or her family would be punished instead.⁵⁶ In addition, the consequences of not consenting to punishment may extend to being ostracised from community and culture. On the other hand, there will be situations where Aboriginal people agree to undergo traditional punishment without any external pressure.⁵⁷

The Commission explained that the western law concept of consent (which focuses on individual freedom of choice) may be difficult to transpose to Aboriginal people because of the concepts of mutual obligations and collective responsibilities and rights under customary law.⁵⁸ It has been stated that:

Indigenous people have a greater sense of community in terms of both rights and responsibilities and thus place greater importance on collective rights over individual rights.⁵⁹

The age at which a person can legally consent to violence further complicates the issue. A child under the age of 13 years cannot consent to offences of a sexual nature,⁶⁰ but there is nothing in the *Criminal Code* to prevent a child consenting to an application of force. In *R v Judson*,⁶¹ the victim was 14 years old and all the accused were acquitted of assault occasioning bodily harm because the prosecution could not prove beyond a reasonable doubt that the 'victim'

52. The Commission concluded in its Discussion Paper that a spearing may result in grievous bodily harm but it may also result in a less serious injury such as a wound: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 167–68. See discussion of the relevant cases: *The Police v Z* (Unreported, Supreme Court of Western Australia, No. 34/2002, McClure J, 30 April 2002); *R v Rictor* (Unreported, Supreme Court of Western Australia, No. 34/2002, McClure J, 30 April 2002); *R v Judson* (Unreported, District Court of Western Australia, No. POR 26/1995, O'Sullivan J & Jury, 26 April 1996). In *R v Minor* (1992) 2 NTLR 183, 195–96, Mildren J also expressed the view that spearing in the thigh would not necessarily amount to grievous bodily harm. The Commission noted that whether a spearing would cause grievous bodily harm or a wound will depend upon where the spear penetrates, how deep the wound is and how many times the person was speared.

53. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 168.

54. See discussion under 'Police and Aboriginal Customary Law', below pp 192–94.

55. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 168–69.

56. See LRCWA, *Thematic Summary of Consultations – Fitzroy Crossing*, 3 March 2004, 41–42; *Pilbara*, 6–11 April 2003, 8; *Geraldton*, 26–27 May 2003, 11; *Wiluna*, 27 August 2003, 22.

57. See LRCWA, *Thematic Summary of Consultations – Warburton*, 3–4 March 2003, 5; *Pilbara*, 6–11 April 2003, 9; *Geraldton*, 26–27 May 2003, 13–14.

58. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 168–69.

59. Gerber P, 'Black Rights/White Curriculum: Human rights education for Indigenous peoples' [2004] *Deakin Law Review* 3, 85.

60. *Criminal Code* (WA) s 319(2).

61. (Unreported, District Court of Western Australia, No. POR 26/1995, O'Sullivan J & Jury, 26 April 1996).

had not consented. There are situations where consent to the application of force is appropriate for children, such as in some sports. However, for other situations, such as traditional punishment, it is arguable that children should be protected because they are not necessarily in an equal position to be able to refuse.

Due to the diversity of Aboriginal people in Western Australia and the difficulty of determining the exact nature of customary law in any particular community, the Commission believes 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.

Traditional initiation practices

The Commission acknowledges that aspects of traditional initiation ceremonies may also constitute an offence under Western Australian law. The Commission did not explicitly deal with initiation practices in its Discussion Paper – it was not a matter which was discussed during the Commission's consultations with Aboriginal people. However, following its Discussion Paper the Commission has received some submissions about traditional male initiation practices. As in the case of traditional physical punishments, whether such practices amount to a breach of Australian law will largely depend upon the issue of consent and the nature of any injury received.

The nature of initiation under Aboriginal customary law

Both Aboriginal men and women participate in their own initiation ceremonies. Initiation ceremonies involve Elders and other initiated people passing knowledge of customary law to younger people.⁶² Anthropological

studies have found that initiation ceremonies, which varied from one place to another, usually included physical practices such as male circumcision.⁶³ For females, initiation generally takes place at puberty and involves instruction about women's law business. It may also involve 'body-cleansing, body-painting and ornamentation, and perhaps body scarification'.⁶⁴ Similarly, males will receive instruction about the rights and responsibilities of adulthood and aspects of sacred law. Male initiation rites include 'tests of worthiness and courage' and may also include 'tooth evulsion, circumcision, nose piercing, sleep deprivation, and/or the cutting of ceremonial markings upon skin'.⁶⁵ Berndt and Berndt reported that initiation may also involve blood-letting, removal of body hair, scarring, and subincision.⁶⁶ The age at which males have undergone initiation varies. Berndt and Berndt observed that the age at initiation has varied from between six and 16.⁶⁷ The Queensland Law Reform Commission has noted that the age may vary from eight up to 17 years of age.⁶⁸

It appears that in some cases young males participate voluntarily in initiation ceremonies while in others participation is not consensual. Kathryn Trees explained, in reference to initiation ceremonies in Roebourne, that young men are choosing to go through the law.⁶⁹ Berndt and Berndt found that young men did not usually know what was in store for them; they participated because they had no choice.⁷⁰ The consequences for failing to participate in initiation are substantial and include the loss of status in the community, the inability to fully participate in traditional ceremonies, and reduced marriage prospects.⁷¹ John Cawte has observed that:

Many educated Aborigines who have grown up without undergoing the circumcision ceremony, because of Mission affiliations at the time, express an uncomfortable sense of incomplete tribal responsibility and status. They are asking for the operation, even at a mature age.⁷²

62. Ibid.

63. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 170–77.

64. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [2.6.1].

65. Ibid.

66. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 170–77.

67. Ibid 166.

68. Queensland Law Reform Commission, *Circumcision of Male Infants*, Research Paper, Miscellaneous Paper No. 6 (December 1993) 8–9.

69. Trees K, 'Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – A case study' in LRCWA, *Aboriginal Customary Law: Background Papers*, Project No. 94 (January 2006) 213, 221.

70. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 166–67.

71. Queensland Law Reform Commission, *Circumcision of Male Infants*, Research Paper, Miscellaneous Paper No. 6 (December 1993) 8–9.

72. Cawte J, 'Social Medicine in Central Australia: The opportunities of Pitjantjara Aborigines' (1977) *Medical Journal of Australia*, 221, 227 as cited in Queensland Law Reform Commission, *ibid* 8.

The Commission is not aware (in any detailed way) of the nature of different initiation rites practised in Western Australian Aboriginal communities today. However, it is clear that initiation practices continue to take place and that, in some places, male circumcision and other physical procedures are performed. The Commission was informed during a community meeting that blood-letting still occurs and boys as young as 12 years of age have been taken to Royal Perth Hospital for treatment following these procedures. A confidential submission indicated that Aboriginal boys have been seriously injured following initiation ceremonies. This submission emphasised that in some cases initiation practices take place without the consent of the boy or his or her family.⁷³

The relevant Western Australian law

As stated above, in Western Australia any application of force without consent will constitute an offence. Depending upon the nature of any injury sustained during initiation there may be an offence of assault occasioning bodily harm, unlawful wounding or grievous bodily harm. Therefore, the same discrepancy as discussed above arises: if a person is charged with unlawful wounding as a result of performing a circumcision or similar practice, it will be irrelevant that the person undergoing the procedure consented. On the other hand, if the person was charged with assault occasioning bodily harm consent could relieve criminal responsibility.

Routine male circumcision

In order to determine its response to Aboriginal initiation practices, the Commission has considered the arguments for and against routine infant male circumcision. It is noted that in Australia and in many other countries female genital mutilation is a criminal

offence.⁷⁴ The relevant legislative provisions in Australia provide that consent to the procedure is irrelevant.⁷⁵ However, male circumcision has not been criminalised. The practice of routine infant male circumcision in Australia has significantly declined since the 1960s.⁷⁶ Opinion is divided as to whether routine male circumcision should be criminalised.⁷⁷ It has been argued that routine male circumcision breaches international law, in particular the *Convention on the Rights of the Child*.⁷⁸

When discussing the routine circumcision of infants, it has been observed that consent can only be given by the parents if it is in the best interest of the child.⁷⁹ Routine infant circumcision is obviously different to Aboriginal initiation practices because the procedure is generally performed by a medical practitioner and the infant is unable to consent. The Queensland Law Reform Commission found, in relation to circumcision generally, that if circumcision is performed without the consent of the child's parents or without consent of the child (if he or she is mature enough to understand) then those performing the procedure will be guilty of a criminal offence.⁸⁰ It has been observed that there is no set age at which a child is capable of consenting to medical or surgical treatments. Instead it will depend upon the nature of the treatment and the maturity of the child.⁸¹

Of particular relevance to this discussion are the comments that have been made about the cultural importance of routine circumcision for particular groups. The Queensland Law Reform Commission concluded in its research paper on the circumcision of male infants that:

Although male circumcision is not now generally encouraged for medical reasons in the light of modern medical and scientific knowledge, there is an argument

73. Confidential Submission No. 28 (1 March 2004) 1.

74. Female genital mutilation is a criminal offence in all Australian states and territories: see *Crimes Act 1900* (ACT) ss 73–77; *Crimes Act 1900* (NSW) s 45; *Criminal Code* (NT) Schedule 1 ss 186A–186D; *Criminal Code* (Qld) ss 323A & 323B; *Criminal Law Consolidation Act 1935* (SA) ss 33–33B and *Children's Protection Act 1993* (SA) s 26 B; *Criminal Code* (Tas) Schedule, ss 178A–178C; *Crimes Act 1958* (Vic) ss 15, 32–34A; *Criminal Code* (WA) s 306.

75. The Commission notes that under the Victorian legislation an adult can consent to particular procedures.

76. Queensland Law Reform Commission, *Circumcision of Male Infants*, Research Paper, Miscellaneous Paper No. 6 (December 1993) 10.

77. Queensland Law Reform Commission, *ibid* 2; Harberfield L, 'The Law and Male Circumcision in Australia: Medical, Legal and Cultural Issues' (1997) 23 *Monash University Law Review* 92, 104; Richards D, 'Male Circumcision: Medical or Ritual?' (1996) 3 *Journal of Law and Medicine* 371, 373–374; Boyle GJ, Svoboda JS, Price CP & Turner JN, 'Circumcision of Healthy Boys: Criminal Assault?' (2000) 7 *Journal of Law and Medicine* 301, 309. Medical opinion is also divided on whether there is any medical justification for routine male circumcisions, although generally today it appears that the medical profession does not consider that there is any medical justification for the practice: see Queensland Law Reform Commission, *ibid* 18; Richards D, 'Male Circumcision: Medical or Ritual?' (1996) 3 *Journal of Law and Medicine* 371, 371; Boyle *et al*, *ibid* 306–307.

78. Boyle *et al*, *ibid* 304. Boyle further argued that the criminalisation of female genital mutilation in the absence of the criminalisation of male circumcision amounts to a breach of international law that requires equal protection under the law without discrimination on the basis of sex (or otherwise).

79. Queensland Law Reform Commission, *Circumcision of Male Infants*, Research Paper, Miscellaneous Paper No. 6 (Dec 1993) 13 & 39.

80. *Ibid* 13.

81. Fairall P & Yeo S, *Criminal Defences in Australia* (Australia: LexisNexis, 2005) 95. See also Harberfield L, 'The Law and Male Circumcision in Australia: Medical, Legal and Cultural Issues' (1997) 23 *Monash University Law Review* 92, 106.

that it should not be made unlawful because the harm to the child involved ... may be outweighed by the benefits to the child of being accepted into his cultural group or religious group.⁸²

Similarly, it has been argued that a 'child who is not circumcised may feel psychologically and spiritually cut off from his religion and culture'.⁸³ The Commission acknowledges that initiation practices (including circumcision) are extremely important in some Aboriginal communities. However, unlike routine infant circumcision, the practice occurs at an older age and therefore the child may be capable of giving free and informed consent for the procedure.

Conclusion

Kathryn Trees stressed in her background paper that for Aboriginal communities in Roebourne initiation ceremonies were an important time for the resolution of customary law issues and a significant social and family occasion.⁸⁴ It has been suggested by some Aboriginal people that instead of blood-letting practices, initiation ceremonies should be restricted to instruction about songs, languages and important sites.⁸⁵ The Commission was also told by Aboriginal people, during community meetings in Broome and in Geraldton, that the age for initiation should be raised because young males today do not have the maturity to understand the responsibility that initiation entails.⁸⁶

One submission emphasised that in some cases initiation practices take place without the consent of the boy or his family; that the contemporary use of surgical blades (rather than the traditional sharp stone) is potentially more dangerous; that Aboriginal law practitioners who perform the procedures may sometimes be intoxicated; and that medical staff working in Aboriginal communities are placed in a difficult position.⁸⁷ It was suggested to the Commission that regulation of Aboriginal law practitioners, including training by registered medical practitioners, is one

solution.⁸⁸ The Queensland Law Reform Commission has suggested that 'it might be reasonable to require that all circumcisions be performed by medical practitioners or other experienced and skilled people in circumstances which reduce to a minimum any adverse consequences'.⁸⁹ More generally, it has been argued that if the aim is to discourage circumcision, it is more effective to do this through education than to criminalise the practice, especially when the procedure is performed for cultural or religious reasons.⁹⁰

The Commission strongly encourages Aboriginal people to ensure that participation in any physical initiation procedure is based upon free and informed consent. Failure to do so may result in criminal prosecution. The Commission has recommended that the Western Australian government develop educative initiatives to, among other things, inform Aboriginal people about practices under customary law that may breach the criminal law or human rights standards. These educative strategies should specifically include education and information for Aboriginal people about initiation practices under customary law. Further, Aboriginal communities should be encouraged and supported to ensure that, where initiation practices are not unlawful, they are carried out in a manner which will minimise the risk to the health and safety of the participants.

Options for reform

The Commission does not support any reform of the law which would result in *all* Aboriginal traditional punishments and practices being lawful. It has been argued that there should be 'cultural defence' for Aboriginal people who carry out traditional punishments.⁹¹ However, the Commission is of the view that to do so, regardless of the individual circumstances (such as whether the person being punished or initiated consents, the age of the person and the nature of the traditional punishment or practice) would breach international human rights standards. It would also be

82. Queensland Law Reform Commission, *Circumcision of Male Infants*, Research Paper, Miscellaneous Paper No. 6 (December 1993) 40.

83. Harberfield L, 'The Law and Male Circumcision in Australia: Medical, Legal and Cultural Issues' (1997) 23 *Monash University Law Review* 92, 108.

84. Trees K, 'Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – A case study' in LRCWA, *Aboriginal Customary Law: Background Papers*, Project No. 94 (January 2006) 213, 221.

85. LRCWA, Discussion Paper community consultation – Geraldton, 3 April 2006.

86. LRCWA, Discussion Paper community consultations – Broome, 10 March 2006; Geraldton, 3 April 2006.

87. Confidential Submission No. 28 (1 March 2004) 1.

88. *Ibid* 2.

89. Queensland Law Reform Commission, *Circumcision of Male Infants*, Research Paper, Miscellaneous Paper No. 6 (December 1993) 41. The Commission notes that Sweden enacted the *Circumcision Act 2001* in order to regulate the practice of male circumcision. This Act provides that circumcisions can only be undertaken under an anaesthetic and must be performed by a registered doctor or nurse, except for a circumcision which is performed during the first two months of age. In these circumstances the procedure can be performed by a licensed person. South Africa has also passed the *Traditional Health Practitioners Act 2004* which requires traditional healers to be licensed to perform certain traditional practices.

90. Harberfield L, 'The Law and Male Circumcision in Australia: Medical, legal and cultural issues' (1997) 23 *Monash University Law Review* 92, 120.

91. Bielefeld S, 'The Culture of Consent and Traditional Punishments under Customary Law' (2003) 7 *Southern Cross University Law Review* 142, 143.

contrary to the state's obligation to protect individuals from harm. Any reform must, at the very least, ensure that each case can be determined depending upon the individual circumstances: a court would have to decide based upon the evidence before it, whether there was in fact genuine consent.

In its Discussion Paper, the Commission grappled with the complex issues in this area and recognised that any accommodation of physical punishment may be seen to encourage violence. Nonetheless, the Commission was of the view that to ignore the issue would fail to address the unjustifiable inconsistency between the offences of assault occasioning bodily harm and unlawful wounding.⁹² Importantly, these inconsistencies not only affect Aboriginal people but all Western Australians.

The Commission identified three possible options for legislative change. The first was to amend the *Criminal Code* to introduce an element of consent into the offence of unlawful wounding. The second option was to repeal the offence of unlawful wounding. In this regard, the Commission observed that the 1983 Murray report recommended that the offence of unlawful wounding should be abolished.⁹³ The third approach was to reconsider the current classification of harms resulting from violence in a similar manner as set out in the draft Model Criminal Code (which distinguishes between harm and serious harm).⁹⁴

The Commission identified some of the potential benefits of reforming the law in this area, namely:

- That properly sanctioned and consensual spearing that is not likely to cause permanent injury to health or death could take place without the person who inflicted the punishment being liable to a criminal sanction.
- That reform may provide more guidance to assist police officers in their approach to traditional punishment. As discussed separately, police officers are faced with a dilemma of whether to facilitate traditional punishment because it potentially breaches the criminal law. If police officers are satisfied that the person to be punished genuinely

consents then they can, with the agreement of the community, be present during the punishment. The Commission also recognises that nurses and doctors may be placed in a difficult position with respect to unlawful traditional punishments and initiation practices.⁹⁵

- That reform may provide more flexibility for courts when dealing with bail applications and in sentencing decisions. Evidence might be led to satisfy the court that an accused genuinely consents to a spearing and that the proposed punishment falls within the level of harm that can legally be consented to. A court would not then be precluded from releasing a person from custody for the purpose of traditional punishment. In this regard, the Commission highlights that free and informed consent would necessarily require that the person to be punished had prior knowledge of the nature of the proposed punishment.
- That reform would remove the unnecessary distinction between assault occasioning bodily harm and unlawful wounding. This has other implications; for example, for people involved in ear or body piercing or tattooing.

However, in the absence of specific submissions about the possible options for reform from Aboriginal people and from the wider community, the Commission was unable to reach a conclusion. Therefore, the Commission invited submissions as to whether the *Criminal Code* should be amended to remove the distinction between assault occasioning bodily harm and unlawful wounding and, if so, which of the three options is preferable.⁹⁶

The Commission has only received a few submissions in response to its invitation. The Aboriginal Legal Service (ALS) submitted that the offence of unlawful wounding should be repealed. Therefore, traditional punishment (undertaken with the consent of the person being punished) that does not cause grievous bodily harm would be lawful. But any traditional punishment inflicted without consent would remain unlawful. The ALS explained that the usual process under traditional punishment is for the 'victim' to consent.⁹⁷

92. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 171.

93. Murray M, *The Criminal Code: A general review* (1983) 202.

94. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code* (May 1999) Ch 5, [5.1.2].

95. The problem for nursing staff was referred to in two submissions: one in relation to traditional punishment. See Bill Marchant, Submission No. 1 (10 February 2006) 1; and one in the context of initiation: see Confidential Submission No. 28 (1 March 2004).

96. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 172, Invitation to Submit 5.

97. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 14.

The Western Australia Police submitted that there should be further consideration before any changes are made that would facilitate traditional physical punishments.⁹⁸ They also stated that the *Criminal Code* 'adequately distinguishes between types and severity of offence and injury'.⁹⁹ Similarly, the DPP submitted that there is no need to amend the law because the current distinction between assault occasioning bodily harm and unlawful wounding is appropriate. The DPP explained that an offence of assault occasioning bodily harm is generally charged where the injury is inflicted as a consequence of a 'physical altercation involving fists' or from a



'blunt instrument'.¹⁰⁰ An offence of unlawful wounding is usually charged when the injury results from a cut inflicted from a sharp object such as a 'knife, screwdriver or broken glass'.¹⁰¹ These examples demonstrate that the practical distinction between the two offences is based on the manner by which the injury is inflicted and not because one type of injury is necessarily more serious than the other. The Model Criminal Code Officers Committee argued that it was fundamentally wrong for offences of violence to be structured primarily on the basis of the manner by which the harm was done rather than on the extent of the harm caused.¹⁰²

Out of the three possible options put forward in its Discussion Paper, the Commission prefers the option of repealing the offence of unlawful wounding. The Commission does not consider the offence of unlawful wounding is necessary. If unlawful wounding is repealed then the relevant offences will generally either be assault occasioning bodily harm or grievous bodily harm. In some cases a wound will constitute bodily harm. But in many cases a wound will be more serious and a charge of grievous bodily harm will be applicable. The Commission is not in favour of introducing the element

of consent into the offence of unlawful wounding because this would mean that a person could lawfully consent to harm which, on the one hand could be very minor but, on the other, could be very serious and potentially life threatening. The Commission believes that woundings, that is penetration of the skin, should be classified as either bodily harm or grievous bodily harm.

The Law Council of Australia did not indicate a firm view as to whether the law in Western Australia should be reformed. Nevertheless, the Law Council recognised the importance of traditional punishment for Aboriginal

communities and that if traditional punishment was lawful in some instances, this would allow police and medical personnel to be present and thus minimise the risk of serious harm.¹⁰³ At the same time, the Law Council stated that it has 'serious concerns about the risks involved in sanctioning violent behaviour'.¹⁰⁴ The Commission shares these concerns; however, as observed in its Discussion Paper, Australian law currently sanctions violent behaviour, such as boxing and other violent sports.¹⁰⁵ In this regard, it has been argued that there is a clear social benefit to be derived from Aboriginal traditional punishment (harmony within Aboriginal communities) whereas the social benefits of legitimate forms of violence, such as boxing, are less obvious.¹⁰⁶

The Law Council stated that it may be very difficult for courts to determine whether an Aboriginal person has consented to traditional punishment because the person may have 'consented' due to fear that a family member will be punished instead or because of pressure from his or her community. The Law Council suggested that if the law is reformed consent should be defined in the legislation.¹⁰⁷ Consent is defined in s 319(2) of

98. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 14.

99. Ibid.

100. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 11.

101. Ibid.

102. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code – Chapter Five, Non Fatal Offences Against the Person Report* (September 1998) 4.

103. Law Council of Australia, Submission No. 41 (29 May 2006) 24.

104. Ibid.

105. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 168.

106. Bielefeld S, 'The Culture of Consent and Traditional Punishments under Customary Law' (2003) 7 *Southern Cross University Law Review* 142, 146.

107. Law Council of Australia, Submission No. 41 (29 May 2006) 24.

the Western Australian *Criminal Code* but only for the purposes of sexual offences. However, as the Commission noted in its Discussion Paper, this definition has been applied for offences of violence.¹⁰⁸ The essence of the definition of consent is that it must be freely and voluntarily given.

The Commission agrees that the question of consent is difficult but it would be inappropriate to specify separate or different requirements for consent for Aboriginal people. Where a person is prosecuted for inflicting traditional punishment the court will need to carefully examine the possible reasons for any apparent consent to determine if that consent was free and voluntary. In this regard, the Commission notes that an accused person under Western Australian law may be relieved of criminal responsibility if he or she honestly and reasonably believed that the person consented.¹⁰⁹ An Aboriginal person may appear to consent but in truth only agrees to undergo punishment because of fear or intimidation. From the perspective of an accused person, the question is whether criminal responsibility should attach in circumstances where the accused honestly and reasonably believed that the 'victim' was a willing participant. Overall, the Commission is of the view that Aboriginal people, when charged with a violent offence, should have the same right as any other Western Australian to rely on the fact that the 'victim' consented.

It was also stated that the Commission's suggestions to 'legitimise' traditional punishment should be limited to Aboriginal people living in communities that follow traditional Aboriginal laws.¹¹⁰ But the Commission does not agree that its suggestions for reform do in fact legitimise traditional punishment. In examining the law that may be applicable to traditional physical punishments, the Commission has found an anomaly in the law that applies to all Western Australians. The Commission fully acknowledges that reforming the law may mean that certain examples of traditional physical punishment (which were previously unlawful) will no longer be unlawful. But currently certain forms of

traditional physical punishments are lawful (such as where the 'victim' consents to bodily harm.) The Commission is not advocating that traditional punishments should be undertaken or that Aboriginal people should expect that they will not be prosecuted when violent punishment has taken place. The Commission's recommendation for educational strategies to inform Aboriginal people about the criminal law and, in particular, any criminal laws that potentially conflict with customary practices will assist in this regard.¹¹¹

The Commission has concluded that it is appropriate to recommend that the offence of unlawful wounding in s 301(1) of the *Criminal Code* be repealed.¹¹² In making this recommendation, the Commission has been strongly influenced by the fact that the removal of unlawful wounding does not lead to any expansion to the level of violent harm to which a person can legally consent.¹¹³ Currently, the most serious form of physical harm that a person in Western Australia can lawfully consent to is bodily harm. Under the Commission's recommendation the most serious form of physical harm to which a person can lawfully consent will still be bodily harm.

Recommendation 25

Repeal the offence of unlawful wounding

That the *Criminal Code* (WA) be amended to remove the offence of unlawful wounding in s 301(1).

Ignorance of the Law

The law in Western Australia reflects the common law position that ignorance of the law does not generally provide an excuse for criminal behaviour.¹¹⁴ Although Western Australia is a code state, not all criminal offences are contained in the *Criminal Code*, or even in legislation that deals with a particular subject matter.¹¹⁵ Some offences (regulatory offences) are contained in

108. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 169.

109. *Criminal Code* (WA) s 24.

110. Law Council of Australia, Submission No. 41 (29 May 2006) 24.

111. See Recommendation 26, below p 150.

112. The Commission notes that s 301(2) of the *Criminal Code* (WA) deals with administering any poison or other noxious thing. The phrase 'unlawfully wounds' also appears in s 294 of the *Criminal Code*. This section primarily deals with acts done with an intention to cause grievous bodily harm. It may be necessary for this section to also be amended to remove the reference to unlawful wounding.

113. The Commission notes that the repeal of the offence of unlawful wounding was recommended by the 1983 Murray Review of the Criminal Code: see Murray M, *The Criminal Code: A general review* (1983) 202.

114. *Criminal Code* (WA) s 22. There is a limited exception to this general rule (known as an honest claim of right) which applies only to offences relating to property. For a detailed discussion of the interaction of Aboriginal customary law with this defence, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 175–78.

115. For example, *Misuse of Drugs Act 1981* (WA) and *Road Traffic Act 1974* (WA).

Many Aboriginal people in Western Australia were concerned about their lack of knowledge of Australian law and sought improved education about Australian law and the legal system.

complex legislation and these types of offences may only be known to those people who are directly involved in the activities or industry that is subject to the regulation. The Commission observed in its Discussion Paper, that the rule that ignorance of the law does not provide an excuse has the potential to operate unjustly in circumstances where a person honestly believed that his or her conduct was lawful and the nature of the legal prohibition was not one that the person should be expected to know.¹¹⁶

Changes to the criminal law are published in the government gazette. The Commission does not consider that the publication of criminal laws in the government gazette is an effective way of advising Aboriginal people (and others) about the content of those laws. For Aboriginal people with language and communication barriers the difficulty of knowing all matters that are proscribed by the criminal law will be more pronounced. In addition, Aboriginal people whose lives are primarily controlled by customary law may engage in conduct that is acceptable or required by customary law without knowing that this conduct is unlawful under Australian law. For example, Aboriginal people may take rare flora for the purposes of customary harvesting without realising that they may be committing an offence.¹¹⁷ For traditional Aboriginal people, the need to consider and understand Australian written law may not be readily apparent given that Aboriginal customary law is based on oral tradition.

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. One possible option would be provide that ignorance

of the law does provide a defence for Aboriginal people. 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 because they did not know they were committing an offence does not provide adequate protection for other people, including other Aboriginal people. For example, in the highly publicised Northern Territory case *R v GJ*,¹¹⁸ the accused (who was a traditional Aboriginal man) was sentenced for having sexual relations with a child. The sentencing judge took into account in mitigation the fact that the accused did not know that he was committing an offence and that he believed that his actions were justified under customary law. If ignorance of the law was a defence then this accused may well have been acquitted. 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.¹¹⁹

The Commission's consultations indicated that many Aboriginal people in Western Australia were concerned about their lack of knowledge of Australian law and sought improved education about Australian law and the legal system.¹²⁰ The Commission concluded in its Discussion Paper that improved education about Australian law is the best way to reduce the potential for injustice for Aboriginal people. It was proposed that relevant government departments should provide culturally appropriate information about changes to the criminal law that may significantly affect Aboriginal people.¹²¹ The Commission suggested that government

116. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 173. See for example *Ostrowski v Palmer* (2004) 206 ALR 422 where the High Court held that although a fisherman had been given erroneous advice by a fisheries office about the areas where fishing was prohibited this did not provide a defence because the fisherman had been acting in ignorance of the law.

117. This issue is discussed by the Commission in its Discussion Paper: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 177–78 & 372.

118. (Unreported, Supreme Court of Northern Territory, SCC 20418849, Martin CJ, 11 August 2005) 6, <http://www.nt.gov.au/ntsc/doc/sentencing_remarks/2005/08/gj_20050811.html>.

119. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 173–74.

120. LRCWA, *Thematic Summary of Consultations – Cosmo Newberry*, 6 March 2003, 20; *Kalgoorlie*, 25 March 2003, 25; *Pilbara*, 6–11 April 2003, 11; *Wiluna*, 27 August 2003, 22; *Albany*, 18 November 2003, 14; *Wuggubun* 9–10 September 2003, 35.

121. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 175, Proposal 20. The Commission has also recommended specific educative measures to improve understanding about particular Western Australian laws (for example, hunting and foraging, 'promised' child marriages, discipline of children and traffic matters).

departments should consider engaging Aboriginal organisations and groups to assist with the design and delivery of any legal education program.

The Commission received extensive support for this proposal.¹²² The Aboriginal Education and Training Council explained that Aboriginal people frequently complain about the lack of appropriate and accessible information with respect to legislative changes.¹²³ Overall, it was emphasised that educative strategies about the criminal law must be designed and delivered by Aboriginal communities and organisations, and these initiatives must be locally based.¹²⁴

It was also submitted that the scope of the Commission's proposal should be extended to include information about existing criminal laws. The Aboriginal and Torres Strait Islander Social Justice Commissioner stated that there is a

critical need for community education programmes to be developed with the full participation of Indigenous peoples to inform Indigenous communities about conflicts between customary law, human rights and the general application of the criminal law.¹²⁵

The ALS suggested that the Commission's proposal should also include culturally appropriate information about court processes and procedures, as well as information about services available for Aboriginal people.¹²⁶ In Chapter Seven the Commission has recommended that the Western Australian government provide educative strategies in relation to the legal rights of and services available for Aboriginal women and children in the context of family violence and sexual abuse.¹²⁷ The Commission agrees that its original proposal should be expanded to include information about existing criminal laws, court procedures, and services available for Aboriginal people in the criminal justice system.

Recommendation 26

Education about the criminal law and the criminal justice system

1. That the Western Australian government provide resources for the development of educative initiatives to inform Aboriginal people about Western Australian criminal laws, court procedures, and services available in the criminal justice system.
2. That in developing these initiatives, particular attention be given to providing information about any criminal laws and international human rights standards that may potentially conflict with Aboriginal customary laws.
3. That these initiatives be developed in conjunction with Aboriginal communities and organisations.
4. That these initiatives be locally based and, where possible, be presented by Aboriginal people and delivered in local Aboriginal languages.

Duress

In its Discussion Paper the Commission examined the defence of duress and its potential interaction with Aboriginal customary law.¹²⁸ The defence of duress relieves a person from criminal responsibility where the offence was compelled by threats. The rationale for the defence is to excuse criminal liability where a person has been faced with a choice between two evils: a choice of either committing the offence or suffering the harm that has been threatened.¹²⁹ The Commission recognised that some Aboriginal people may engage

122. Aboriginal Education and Training Council, Department of Educations Services, Submission No. 20 (26 April 2006) 3; Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2; Hon Norm Marlborough MLA, Acting Minister for Education & Training, Submission No. 27 (1 May 2006) 3; Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 11; Department of the Attorney General, Submission No. 34 (11 May 2006) 5; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 4; Pilbara Development Commission, Submission No. 39 (19 May 2006) 2; Law Council of Australia, Submission No. 41 (29 May 2006) 13; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 8; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 2.

123. Aboriginal Education and Training Council, Department of Educations Services, Submission No. 20 (26 April 2006) 3.

124. The Pilbara Development Commission suggested that educative strategies should make use of Indigenous media: Pilbara Development Commission, Submission No. 39 (19 May 2006) 2. The Aboriginal Education and Training Council suggested that local language centres should be involved: Aboriginal Education and Training Council, Department of Educations Services, Submission No. 20 (26 April 2006) 3.

125. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 8.

126. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 4. The ALS stated that it would be willing to be involved in educational programs with respect to court processes and procedures.

127. See Recommendation 90, below p 286.

128. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 180–83.

129. *R v Howe* [1987] AC 417, 433 (Hailsham LJ).

in conduct which is unlawful under Australian law because of threats or fear that they will be punished under traditional Aboriginal law.

The requirements of the defence of duress in Western Australia

In Western Australia the defence is contained in s 31(4) of the *Criminal Code*.¹³⁰ To satisfy the requirements of the defence:

- 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 Commission observed in its Discussion Paper that the specific requirements of the defence differ between jurisdictions and the defence in Western Australia is more restrictive than in most other Australian jurisdictions.¹³¹ The requirement that the threat must be of *immediate* death or grievous bodily harm has been interpreted to mean a 'very short time after doing the relevant act'.¹³² In common law jurisdictions it has been held that the threat must be present, continuing and imminent,¹³³ although not necessarily immediate.¹³⁴

Also there is no requirement for the threat to be of *immediate* harm in Queensland,¹³⁵ the Northern Territory,¹³⁶ the Australian Capital Territory,¹³⁷ or under Commonwealth legislation.¹³⁸ The nature of the threat is also more limited in Western Australia because there must be a threat to cause either *death* or *grievous bodily harm*.¹³⁹ In Western Australia the threat must be directed to the accused and no other, whereas in most other jurisdictions a threat to harm another person may suffice.¹⁴⁰

On the other hand, unlike Western Australia, the defence of duress in most other Australian jurisdictions includes an objective standard.¹⁴¹ In Western Australia the defence is wholly subjective: it is sufficient if the accused believed that he or she was otherwise unable to escape the threat of immediate death or grievous bodily harm. The Commission is of the view that the inclusion of an objective test of reasonableness balances the broader scope of the defences in other jurisdictions.

Aboriginal customary law and the defence of duress

The principal behaviour under Aboriginal customary law that may involve a breach of Australian law is the infliction of traditional physical punishments. The Commission considered the possible reasons why Aboriginal people would impose traditional physical punishment on others. In some circumstances it may be because they fear being subject to traditional punishment themselves.¹⁴²

130. The defence is not available for wilful murder, murder, grievous bodily harm or an offence that includes an intention to do grievous bodily harm. It is also not available when the accused has made himself or herself liable to such threats because of an unlawful association or conspiracy.

131. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 180. The Commission notes that the defence in Tasmania is similar to Western Australia because it requires a threat of immediate death or grievous bodily harm: see *Criminal Code* (Tas) s 20.

132. *R v Pickard* [1959] QdR 457, 476 (Stanley J; Townley and Stable JJ concurring) as cited in *P (A Child) v The Queen* (Unreported, Supreme Court of Western Australia; Library No. 950469S, No. 222 of 1994, Kennedy J, 7 September 1995).

133. *R v Hurley* [1967] VR 526, 543 (Smith J).

134. A threat to cause harm at some future time was alluded to in *R v Abusafiah* (1991) 24 NSWLR 531, 538 (Hunt J). See also Leader-Elliott I, 'Warren, Coombes and Tucker' (1997) 21 *Criminal Law Journal* 359, 360 where it was stated that in South Australia there does not have to be a threat of immediate harm.

135. *Criminal Code* (Qld) s 31(d) which provides that there must be a threat by some person in a position to carry out the threat. The Commission notes that the defence in Queensland was originally the same as in Western Australia. It was amended in October 2000.

136. *Criminal Code* (NT) s 40 which requires that the accused believed that the person making the threat was in a position to execute the threat.

137. *Criminal Code 2002* (ACT) s 40 which provides that there must be a threat that will be carried out unless the offence is committed; that there is no reasonable way to make the threat ineffective; and that the conduct is a reasonable response to the threat.

138. *Criminal Code 1995* (Cth) s 10.2. The defence under the Commonwealth legislation is the same as in Australian Capital Territory.

139. *Criminal Code 2002* (ACT) s 40 and *Criminal Code 1995* (Cth) s 10.2 refer only to a threat; *Criminal Code* (NT) s 40 only refers to a threat; *Criminal Code* (Qld) s 31(d) refers to a threat to cause serious harm or detriment to a person or property.

140. *Criminal Code 1995* (Cth) s 10.2; *Criminal Code 2002* (ACT) s 40; *Criminal Code* (NT) s 40; *Criminal Code* (Qld) s 31(d); *Crimes Act 1958* (Vic) s 9AG.

141. *Ibid.*

142. For example, the ALRC referred to *R v Isobel Phillips* (Unreported, Northern Territory Court of Summary Jurisdiction, 19 September 1983). In this case the accused was required by customary law to fight any woman who was involved with her husband. Failure to do so would result in death or serious injury and while she remained in her community she would be unable to avoid these consequences. The magistrate acquitted the accused on the basis of the defence of duress. See ALRC, *The Recognition of Aboriginal Customary Laws*, Final Report No. 31 (1986) [430]. Elizabeth Eggleston argued that the defence of duress might be appropriate in some cases if an Aboriginal person was forced through fear of traditional punishment to commit an offence against Australian law: see Eggleston E, *Fear, Favour or Affection: Aborigines and the criminal law in Victoria, South Australia and Western Australia* (Canberra: Australian National University Press, 1976) 297–98. Anthropological accounts indicate that kinship obligations may require an Aboriginal person to punish another regardless of his or her personal feelings and therefore in some cases there is a duty to inflict traditional punishment: see ALRC, 'Traditional Aboriginal Society and its Law' in Edwards WH (ed.), *Traditional Aboriginal Society* (Melbourne: MacMillan Education Australia Pty Ltd, 2nd ed., 1998) 217.

In *R v Warren, Coombes and Tucker*¹⁴³ the defence of duress was argued by three Aboriginal men who had been charged with serious offences of violence. They claimed that they were required to inflict the injuries on the victim as traditional punishment for the victim's breach of customary law. The defendants stated that if they had not imposed the traditional punishment they would have received the same punishment themselves. The trial judge held that the defence of duress was not available; however, on appeal it was accepted by the majority that an obligation under Aboriginal customary law could provide a basis for the defence of duress. In this case the court held that duress was not applicable because the explanation given by the defendants was not believed. The trial judge had found that the motivation for the assault was for a 'show of strength'.¹⁴⁴

The ALRC found that traditionally orientated Aboriginal people generally follow their customary laws 'not just because of fear of punishment, but because of belief in their legitimacy'.¹⁴⁵ The ALRC concluded that in some situations Aboriginal people follow customary law voluntarily while in other cases they may do so under duress. The Commission's consultations revealed mixed



views as to whether compliance with Aboriginal customary law is the result of the exercise of choice, is achieved because of the fear of repercussions, or is a consequence of a belief in the validity of the law.¹⁴⁶ In its Discussion Paper, the Commission concluded that the reasons an Aboriginal person would comply with Aboriginal customary law would depend upon the individual circumstances of the case.¹⁴⁷

The main problems with the defence of duress in Western Australia

There must be a threat made by a person actually present

In Western Australia, for the defence of duress to be available a threat must have been made, by a person actually present, against the accused. In the context of Aboriginal customary law, duress would have no application unless a particular person (who was present) threatened the accused with traditional punishment amounting to death or grievous bodily harm if he or she failed to comply with customary law.¹⁴⁸ An Aboriginal person may be compelled to commit an offence, not because a specific individual made a threat, but because of knowledge of the repercussions that would flow from a failure to comply with Aboriginal customary law.¹⁴⁹ In its Discussion Paper the Commission concluded that it would not be appropriate to remove the requirement that there must actually be a threat. The removal of this requirement would unjustifiably extend the scope of the defence. It 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 does not consider that it should be a prerequisite for the defence of duress, that the person making the threat is actually present.¹⁵⁰

143. (1996) 88 A Crim R 78.

144. Ibid 81 (Doyle CJ; Cox J concurring).

145. ALRC, *The Recognition of Aboriginal Customary Laws*, Final Report No. 31 (1986) [430].

146. LRCWA, *Thematic Summary of Consultations – Broome*, 17–19 August 2003, 23 where it was stated that traditional law is not a choice because it is a 'part of who you are'. Some communities expressed the view that there was no choice to comply because of repercussions that may follow to family members. This was in the context of the failure of a person who was liable for traditional punishment presenting himself or herself for that punishment: see LRCWA, *Thematic Summary of Consultations – Fitzroy Crossing*, 3 March 2004, 41–42; *Geraldton*, 26–27 May 2003, 13–14; *Pilbara*, 6–11 April 2003, 8–9; *Wiluna*, 27 August 2003, 22. Other Aboriginal people said that there was a choice as to whether a person would be subject to Aboriginal customary law: see LRCWA, *Thematic Summary of Consultations – Warburton*, 3–4 March 2003, 22–23; *Geraldton*, 26–27 May 2003, 14.

147. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 182.

148. In *R v Warren, Coombes and Tucker* (1996) 88 A Crim R 78, 81–82 Doyle CJ was not convinced that at common law there had to be a threat from an 'external source'; however, it was not necessary for him to decide the issue.

149. Leader-Elliott I, 'Warren, Coombes and Tucker' (1997) 21 *Criminal Law Journal* 359, 361.

150. It has been reported that the requirement that the person making the threat is actually present (coupled with the requirement for immediacy) under the *Criminal Code* (Canada) is unduly restrictive: see Law Reform Commission of Ireland, *Duress and Necessity*, Consultation Paper 39 (April 2006) 40.

The threat must be made against the accused

The current formulation of the defence in Western Australia requires that the threat is made against the accused. Therefore, an accused person would not be able to rely on a threat to harm a family member or close relative. Because of strong kinship obligations under customary law, this is potentially relevant for an Aboriginal person who may be compelled to commit an offence in order to protect another person. The Commission is of the opinion that the defence of duress should be available for all Western Australians, where the threat is to harm another person.¹⁵¹ It has been suggested that 'a parent who acts out of love for a child is perhaps the most obvious case where duress might be put forward as an excuse to murder'.¹⁵² The question of whether duress should be available as a defence to murder will be considered in the Commission reference on homicide. Nonetheless, this example demonstrates that the moral culpability of a person who engages in criminal behaviour in order to save another may well be less than a person who commits an offence to save himself.

The threat must be of immediate death or grievous bodily harm

The necessity for a threat of *immediate* death or grievous bodily harm would appear to preclude any reliance upon duress where the actions were taken in carrying out Aboriginal customary law. The Commission is unaware of any example where traditional punishment has followed immediately after an Aboriginal person has refused to comply with an obligation under customary law. Traditional punishment usually occurs some time after a violation of customary law and therefore it would be difficult for an Aboriginal person to argue that he or she feared immediate harm.¹⁵³

It has been observed that the requirement for a threat of immediate harm is not necessarily justified because the 'pressure that is brought to bear on an accused could be just as great' where the harm may take place at a later time.¹⁵⁴ The requirement that the accused

feared immediate harm is one aspect of the defence that is potentially gender biased. Women who are the victims of serious domestic or family violence may be compelled to commit an offence under a threat of being harmed in the future. While the threat may not be of immediate harm, because of the history of violence, the execution of the threat may nevertheless be imminent or inevitable.

The Commission also notes that grievous bodily harm is defined in s 1 of the *Criminal Code (WA)* as 'any *bodily injury* of such a nature as to endanger, or be likely to endanger life, or to cause, or be likely to cause, permanent injury to health'. The requirement for the threat to cause actual 'bodily injury' may preclude reliance on the defence of duress where the accused was threatened with serious non-physical harm such as sexual assault or deprivation of liberty. The incorporation of a requirement that the conduct of the accused must be a reasonable response to the threat, in the Commission's opinion, operates as a safeguard against any abuse of an extended defence.

Proposal for reform of duress in Western Australia

The Commission concluded in its Discussion Paper that the defence of duress is unduly restrictive in Western Australia. In reaching this conclusion the Commission took into account the difficulties for all Western Australians. The Commission emphasised that an extension of the defence of duress would not imply that all Aboriginal people follow their customary law because of the fear of repercussions. Instead, it would recognise that some Aboriginal people may be forced to inflict traditional punishment or engage in other conduct under customary law because they were compelled by threats.

After reviewing the defence in other jurisdictions the Commission proposed that for all Western Australians the defence of duress should be based upon the defence in the Australian Capital Territory and the Commonwealth.¹⁵⁵ The Commission is also aware that

151. The Law Reform Commission of Ireland has recently proposed that the defence of duress should be available where there is a threat of death or serious harm directed towards any person. In reaching this conclusion it took into account that in Ireland, England and in most Australian jurisdictions the threat may be directed to someone other than the accused. See Law Reform Commission of Ireland, *ibid* 18–21.

152. Fairall P & Yeo S, *Criminal Defences in Australia* (Australia: LexisNexis, 2005) 155.

153. For example, it is stated by Berndt and Berndt that 'settlement by duel' was not held immediately following an offence at customary law, but after there was time for anger to cool: see Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 350.

154. Law Reform Commission of Ireland, *Duress and Necessity*, Consultation Paper 39 (April 2006) 40.

155. See *Criminal Code 1995 (Cth)* s 10.2 and *Criminal Code 2002 (ACT)* s 40. Note that both provisions restrict the operation of the defence to persons who voluntarily associate with others who engage in criminal conduct thereby making themselves liable to such threats. The defence of duress in these jurisdictions can apply to any offence including murder.

in November 2005 the *Crimes Act 1958* (Vic) was amended to provide for a defence of duress (in similar terms as the defence in the Australian Capital Territory and the Commonwealth) applicable to offences of murder, manslaughter and defensive homicide.¹⁵⁶ In these jurisdictions, in order to rely on the defence, it is necessary that the accused reasonably believes that:

- a threat has been made that will be carried out unless the offence is committed;¹⁵⁷
- there is no reasonable way to make the threat ineffective;¹⁵⁸ and
- the conduct is a reasonable response to the threat.

The Commission has received four submissions which have responded to this proposal. The Western Australia Police supported the Commission's proposal noting that currently there is very limited use of the defence of duress in Western Australia.¹⁵⁹ The Law Council of Australia and the Criminal Lawyers Association also expressed support for the proposal.¹⁶⁰ On the other hand, the DPP opposed the proposal because it considers that it is not appropriate to remove the requirement for a threat of 'immediate death or grievous bodily harm' or to extend the defence to circumstances where the threat is made to harm another person.¹⁶¹ The DPP stated that the defence should remain within 'strictly confined circumstances'.¹⁶²

In response to the Commission's Issues Paper prepared for its reference on homicide, a number of submissions referring to the general scope of duress have been received. Most of these submissions did not support any change to the current defence of duress under s 31(4) of the *Criminal Code*.¹⁶³ However, the Department of Community Development submitted that duress should be reformed to incorporate an objective standard of reasonableness along similar lines to the Commission's proposal in its Discussion Paper on Aboriginal customary laws.¹⁶⁴

The Commission considers that any argument that its proposal will significantly extend the scope of the defence is flawed. The Commission acknowledges that its proposal broadens the scope of the defence by removing restrictions as to the nature of the threat. But the incorporation of an objective standard inevitably makes the ambit of defence narrower. For example, a person would only be able to rely upon duress under the Commission's proposal if there was no other reasonable way to render the threat ineffective.¹⁶⁵ Similarly, if the response to the threat is not a reasonable response then the defence will fail. The law in Western Australia, as it currently stands, allows the defence of duress to apply in circumstances where the accused believed that he or she was otherwise unable to escape the threat (of death or grievous bodily harm) even

156. *Crimes (Homicide) Act 2005* (Vic) came into operation on 23 November 2005 and inserted s 9 AG into the *Crimes Act 1958* (Vic). This section (unlike the Australian Capital Territory and the Commonwealth) restricts the application of the defence of duress to murder only if the threat was a threat to cause death or really serious injury.

157. Therefore, the threat can be made to harm the accused or some other person.

158. This element incorporates the requirement to escape contained in s 31(4) of the *Criminal Code* (WA) as well as under the common law. It has been held that the defence of duress at common law was available for a woman who committed social security fraud because of her fear of violence by her abusive husband. The fact that she had not sought help from the police was not fatal to her defence as it was held that she was not expected to leave her marital relationship: see Leader-Elliot I, 'Warren, Coombes and Tucker' (1997) 21 *Criminal Law Journal* 359, 362. This reasoning could also apply to Aboriginal people who, due to their strong ties to the community, should not necessarily be expected to leave. In the same way that courts have received expert evidence in relation to 'battered women's syndrome', it may be necessary for evidence about Aboriginal customary law to be presented to the jury in order for the jury to assess the reasonableness of the accused person's conduct.

159. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 7.

160. Law Council of Australia, Submission No. 41 (29 May 2006) 13; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 2.

161. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 2.

162. *Ibid* 3.

163. LRCWA, *A Review of the Law of Homicide*, Project No. 97, Miller J, Submission No. 3 (22 May 2006) 6; Law Society, Submission No. 37 (4 July 2006); Criminal Lawyers Association, Submission No. 40 (14 July 2006) 10. The Law Society suggested that the Commission consider the position with respect to duress in the United States, United Kingdom and Canada. The Commission notes that in the United Kingdom the defence of duress incorporates an objective standard, although it is limited to a threat of death or serious injury. However, the threat may be against a third person and the threat does not have to be immediate: see *R v Hanson* [2005] 2 AC 467 [489]–[492]. Section 17 of the *Criminal Code* (Canada) provides that there must be a threat of immediate death or *bodily harm* by a person present and the accused must believe that the threats will be carried out. There are a number of offences for which this defence is not available. It has been reported that while a threat of death or serious injury is generally required in the United States, in some jurisdictions courts have looked at the seriousness of the offence and in some circumstances a less serious threat may be sufficient: see Law Reform Commission of Ireland, *Duress and Necessity*, Consultation Paper 39 (April 2006) 16.

164. LRCWA, *A Review of the Law of Homicide*, Project No. 97, Department of Community Development, Submission No. 42 (7 July 2006) 10.

165. The Western Australian Court of Appeal has recently considered the defence of duress under s 10.2 of the *Criminal Code 1995* (Cth) in *Morris v R* [2006] WASCA 142 [106]. The accused was charged with importing prohibited drugs contrary to the *Customs Act 1901* (Cth). The accused argued that he only committed the offence because of threats made to harm his family by a person in England. The accused brought the drugs from England to Perth and was arrested at the Perth airport. The prosecution contended that the accused could not avail himself of the defence of duress because he had numerous opportunities (from the time he left England and was arrested at Perth) to report the matter to the police or customs authorities. At [112] Roberts-Smith J stated that the 'requirement that an accused believe that there is no reasonable way the threat can be rendered ineffective is not one to be met to readily. There are clear considerations of public policy dictating that people under threat should take opportunities to render such threats ineffective by reporting their circumstances to police or other appropriate authorities, rather than commit serious criminal offences, when presented with realistic opportunities to do so. Likewise, it could not be accepted as objectively reasonable in the circumstances of this case that the law enforcement authorities could not have acted to safeguard the appellant and his parents against the threats made'. The Commission notes that the question of whether the accused reported the matter to police is expressly included in the defence in the Northern Territory see *Criminal Code* (NT) s 40.

where that belief is not objectively reasonable. The Commission remains of the view that the defence of duress in Western Australia should be amended. Because the Commission is separately reviewing the law of homicide, the question whether the amended defence of duress should be available for homicide offences will be considered in that reference.

Recommendation 27

Duress

1. That s 31(4) of the *Criminal Code (WA)* be repealed and the *Criminal Code (WA)* be amended to provide that a person is not criminally responsible for an offence¹⁶⁶ if he or she reasonably believes that:
 - (a) a threat has been made that will be carried out unless the offence is committed;
 - (b) there is no reasonable way to make the threat ineffective; and
 - (c) the conduct is a reasonable response to the threat.
2. That the *Criminal Code (WA)* provide that the defence of duress does not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.

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. In its Discussion Paper the Commission considered 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.¹⁶⁷

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, determining the power of self-control of an ordinary person, is more complicated. Whether an ordinary person should be a person of the same cultural background for this purpose is subject to conflicting views. It has been argued that the second stage of the ordinary person test is discriminatory because various ethnic groups may have different standards of self-control. On the other hand, others have argued that there is no justification for taking into account cultural differences when assessing the capacity to lose self-control.¹⁶⁸ In this regard, the Commission agrees with the view that any suggestion that Aboriginal people have a lesser capacity for self-control is offensive.¹⁶⁹

The Commission acknowledged in its Discussion Paper that the relevance of provocation as a defence is increasingly being questioned. Because the law with respect to provocation was being examined in detail in its homicide reference, the Commission 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 both the gravity of the provocation and whether an ordinary person could have lost self-control.¹⁷⁰ The submissions received in response to this question did not support the incorporation of cultural characteristics into the test for an ordinary person's capacity for self-control. The DPP submitted that the defence of provocation should

166. In Project No. 97 the Commission will examine whether there are any offences which should be excluded from the operation of this defence.

167. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 183–87.

168. For a detailed discussion of the relevant arguments, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 185–86.

169. Yeo S, 'Sex, Ethnicity, Power of Self Control and Provocation Revisited' (1996) 18 *Sydney Law Review* 304, 316.

170. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 187, Invitation to Submit 6.

be abolished but, if it is retained, it should remain in its current form because cultural characteristics can be taken into account when deciding the seriousness of the relevant provocative conduct.¹⁷¹ The Law Society suggested that in the absence of any evidence to suggest that there are 'innate differences in cultural or ethnic capacity for self-control' there does not appear to be any justification for changing the second limb of the provocation test.¹⁷² The Commission will consider whether there is any need to reform the law in relation to provocation in its reference on homicide.¹⁷³

Discipline of Children

The Commission's consultations indicated that many Aboriginal people were concerned about the discipline of their children. Many believed that welfare agencies have interfered with their right to discipline their children.¹⁷⁴ For example, some Aboriginal people were concerned when young people threatened families with 'white man's law' if they attempted to impose any type of physical discipline.¹⁷⁵ However, under Western Australian law (s 257 of the *Criminal Code*), reasonable physical discipline is permitted as long as it is for the purpose of correcting the child's behaviour and not for retribution.¹⁷⁶ Courts have held that the reasonableness of any physical discipline must be judged according to current community standards¹⁷⁷: what was acceptable many years ago in mainstream Australia would no longer be considered acceptable today. It is also necessary to take into account the age, physique and mental development of the child.¹⁷⁸

In its Discussion Paper, the Commission considered whether there is any conflict between Western Australian law and Aboriginal customary law with respect to the discipline of children.¹⁷⁹ The Commission found that physical discipline of children in traditional Aboriginal societies was rare.¹⁸⁰ In contemporary Aboriginal communities it appears that excessive physical discipline of children is met with disapproval. In this context the Commission emphasises that the abuse of children is not considered acceptable under Aboriginal law and culture.¹⁸¹ The Commission concluded that Australian law concerning childhood discipline does not appear to conflict with legitimate Aboriginal customary law practices.

The Commission has observed that many Aboriginal people appear to be under a misapprehension that they are not allowed to smack their children under Australian law.¹⁸² For example, in June 2005 it was reported that the Federal Health Minister, Tony Abbott, was told by Aboriginal Elders in Alice Springs that they were unable to do anything in response to uncontrollable behaviour by some young people because if they were to smack them the authorities would intervene. Mr Abbot assured this group that parents who acted with 'caution and restraint' would not have a problem with Australian law and indicated with surprise the 'cultural confusion' that existed about this issue.¹⁸³ Similarly, the Commission has been told by Aboriginal people that Australian law prevented them from using physical punishment on their children.¹⁸⁴ The Commission concluded in its Discussion Paper that Aboriginal people in Western Australia should be made

171. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 12; The Western Australia Police also indicated that there is no need for any reform of the defence of provocation: see Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 14. The Criminal Lawyers Association also suggested that the current test adequately incorporates cultural characteristics: see Criminal Lawyers Association, Submission No. 58 (4 September 2006) 2.

172. Law Society of Western Australia, Submission No. 36 (16 May 2006) 4. The Law Council of Australia supported the comments made by the Law Society: see Law Council of Australia, Submission No. 41 (29 May 2006) 26.

173. LRCWA, *Review of the Law of Homicide*, Project 97.

174. Wohlan C, 'Aboriginal Women's Interests in Customary Law Recognition' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 507, 529.

175. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 20. See also LRCWA, *Thematic Summary of Consultations – Geraldton, 26–27 May 2003*, 12.

176. *Higgs v Booth* (Unreported, Supreme Court of Western Australia, Library No. 6420, 29 August 1986) as cited in *Cramer v R* (Unreported, Supreme Court of Western Australia, Court of Criminal Appeal, Library No. 980620, White J, 28 October 1998) 4.

177. *Ibid.*

178. *R v Terry* [1955] VLR 114, 116–17 (Scholl J). The Commission observed in its Discussion Paper that although research has shown that the majority of Australian parents smack their children and consider that physical punishment of children is acceptable, there is a growing trend of opinion that physical punishment is ineffective and undesirable. See, for example, Tasmanian Law Reform Institute, *Physical Punishment of Children*, Final Report No. 4 (2003) 26 & 47; Department of Community Development, *Keeping Our Kids Safe*, <<http://www.community.wa.gov.au/NR/rdonlyres/D3E85AFF-0AE0-4246-978F-EEE297946D65/0/DCDGUIKeepingOurKidsSafe.pdf>>. The Commission noted that physical correction such as smacking may be lawful in Western Australia but more serious instances where a child receives injuries or is punished with an instrument may be viewed differently in the current climate: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 188.

179. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 187–89.

180. *Ibid.* 187. The Commission recognised that in traditional Aboriginal societies, childhood usually ended at puberty or initiation.

181. See 'Customary Law Does Not Condone Family Violence or Sexual Abuse', Chapter One, above pp 19–22.

182. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 189.

183. Price M, 'Abbott Dances Around a Punishing Question', *The Australian*, 30 June 2005, 1.

184. During a community meeting following the Commission's Discussion Paper, the Commission was advised by Aboriginal women that some young people report adults to the Police and the Department of Corrective Services if they are physically disciplined: Indigenous Women's Congress, consultation (28 March 2006).

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. While it remains lawful to discipline a child physically, Aboriginal families (as well as other Australians) should be informed about what are the appropriate limits.¹⁸⁵

The Commission proposed that the Western Australian government, in conjunction with Aboriginal people, 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.¹⁸⁶ The Commission noted that the Department of Community Development is already involved in parenting education programs for Aboriginal people. However, it was acknowledged that some Aboriginal people may be reluctant to participate in programs organised by the Department of Community Development because of the negative history of its involvement in the removal of Aboriginal children from their families. Therefore, the Commission invited submissions as to which government agency should coordinate (in conjunction with Aboriginal people) the proposed educational strategies.¹⁸⁷

The response to this proposal has overall been very positive.¹⁸⁸ The Department of Indigenous Affairs emphasised that the design and delivery of these educational programs must be undertaken in 'real partnership with Aboriginal communities and organisations'.¹⁸⁹ The ALS agreed that Aboriginal people should be educated about their rights and responsibilities under Western Australian law with respect to the discipline of children. However, the ALS stated that its Executive Committee opposed the Commission's proposal.¹⁹⁰ This Committee (which is made up of Aboriginal people) was concerned that the Commission's proposal would mean that government agencies could 'dictate' how Aboriginal people should look after and discipline their children.¹⁹¹ This was never the Commission's intention. The purpose



of this recommendation is to assist and inform Aboriginal people and not to impose western ideas with respect to child rearing practices. The Commission believes it is essential that any education program with respect to the parenting and discipline of children by Aboriginal families should be designed and delivered by Aboriginal people. First, and foremost, the programs should inform Aboriginal people about what Western Australian law requires: that physical discipline of children must be reasonable in all the circumstances. Second, the programs should contain information for Aboriginal families about other possible strategies for the discipline of children.

The Commission believes that it is necessary for a particular government agency to be responsible for the implementation of this recommendation in order to ensure that resources are effectively allocated, and that there is adequate coordination between relevant government departments and Aboriginal community organisations. The Department of Community Development submitted that it should be responsible for the coordination of these programs, in partnership with the Department of Health and the Department of Education and Training.¹⁹² However, it was emphasised by the ALS that Aboriginal people remain extremely wary of the Department of Community Development and it was also asserted that the

185. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 189.

186. *Ibid*, Proposal 22.

187. *Ibid*, Invitation to Submit 7.

188. Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2; Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 11; Law Council of Australia, Submission No. 41 (29 May 2006) 13; Department of Community Development, Submission No. 51 (27 June 2006) 2; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 2.

189. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 11.

190. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 7. The ALS also suggested that there should be more community workers to assist families with other matters such as budgeting and household maintenance.

191. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 7.

192. Department of Community Development, Submission No. 51 (27 June 2006) 2

Department does not access local knowledge or try to get to know Aboriginal families properly.¹⁹³

Nonetheless, as stated by the Department of Indigenous Affairs, the Department of Community Development has the statutory responsibility for the welfare of children.¹⁹⁴ Because of this responsibility and its provision of existing parenting programs, the Commission believes that the Department of Community Development should be one agency involved in the implementation of this recommendation. But it should not be the lead agency because the history of a negative relationship with Aboriginal people could significantly impact upon the effectiveness of these educational programs. Further, in its submission, the Department of Community Development discussed the importance of partnerships between government agencies. However, in the Commission's opinion the focus should be on partnerships between relevant government agencies and Aboriginal people. The Commission believes that the Department of Indigenous Affairs should be primarily responsible for the coordination of the development of these educational programs. The Department of Indigenous Affairs demonstrated the need for direct Aboriginal involvement in the development and implementation of these educational programs. For example, the Department suggested that Aboriginal medical services may be usefully employed in the provision of education programs with respect to parenting.¹⁹⁵

In conclusion, the Commission wishes to stress that its recommendation is not designed to be prescriptive. Instead, the aim is to provide Aboriginal people with culturally appropriate educational programs with respect to their rights and responsibilities under Western Australian law and to inform and assist Aboriginal people. It is not suggested that participation in these programs should be compulsory.¹⁹⁶

Recommendation 28

Education about parenting and discipline of children under Australian law

1. That the Western Australian government develop strategies to inform Aboriginal communities about their rights and responsibilities under Australian law in relation to the discipline of children, in particular to inform Aboriginal communities of their right to use physical correction that is reasonable in the circumstances.
2. That these educative strategies provide information to Aboriginal communities about effective alternative methods of discipline.
3. That these strategies be developed and presented by Aboriginal communities and organisations. In particular, Elders and other respected members, including members of a community justice group, should be involved in the design and delivery of any educational programs.
4. That the Western Australian government provide resources to the Department of Indigenous Affairs so that it can coordinate—in partnership with the Department of Community Development, Department of Health and the Department of Education and Training—the development of these programs.
5. That participation by Aboriginal people in these educational programs be voluntary.

193. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 7. The Department of Community Development itself recognised its negative history with Aboriginal people: see Department of Community Development, Submission No. 51 (27 June 2006) 2

194. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 11.

195. *Ibid.*

196. The Parental Support and Responsibility Bill 2005 (WA) was referred to the Standing Committee on Legislation on 30 November 2005. This Bill provides, among other things, that a court can make a responsible parenting order and that this order will require the parent to attend particular courses or counselling. In response to a previous version of this bill, Tonia Brajcich of the Aboriginal Legal Service, has argued that it is preferable that the government provides the opportunity for Aboriginal families to improve parenting skills on a voluntary basis and in a culturally appropriate manner: see Brajcich T, 'The WA Proposed Parental Responsibility Contracts and Orders: An analysis of their impact on Indigenous families', (2004) *Indigenous Law Bulletin* 5(30) 11, 12.

Bail

When a person is charged with a criminal offence under Australian law a decision is made whether he or she will be released into the community on bail or remanded in custody until the charge is finalised. This decision can be made, prior to the first appearance in court, by an authorised officer.¹ The factors which are relevant to the decision as to whether an accused should be released on bail are set out in the *Bail Act 1982 (WA)*.² The main purposes of bail are to ensure that accused people attend court and that they do not commit further offences. However, these factors are balanced with the need to ensure that accused people (who are presumed innocent) are not deprived of their liberty without good reason.³ If an accused is released on bail he or she must enter into a bail undertaking, which is a promise to appear in a particular court on a specified day and time. Conditions may be imposed upon accused people while they are subject to bail to make sure they attend court and refrain from offending.⁴

The Problems in Relation to Bail for Aboriginal people

It has been recognised for some time that Aboriginal people encounter problems with respect to bail. 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.⁵ The Commission observed in its Discussion Paper that the level of over-representation of Aboriginal people in prison, regardless of whether they are sentenced or on remand, is unacceptable.⁶ The Commission has considered alternative bail options

for Aboriginal people and endeavoured to remove some of the disadvantages experienced by Aboriginal people with respect to bail.

Sureties

In some cases an accused can only be released on bail if he or she can find a person to act as a surety. A surety is a person who enters into an undertaking (promise) to forfeit a specified sum of money if the accused does not appear in court at the required time. It has been widely acknowledged that many Aboriginal people are unable to obtain surety bail because family members and friends often do not have sufficient assets.⁷

Responsible person as an alternative to surety bail

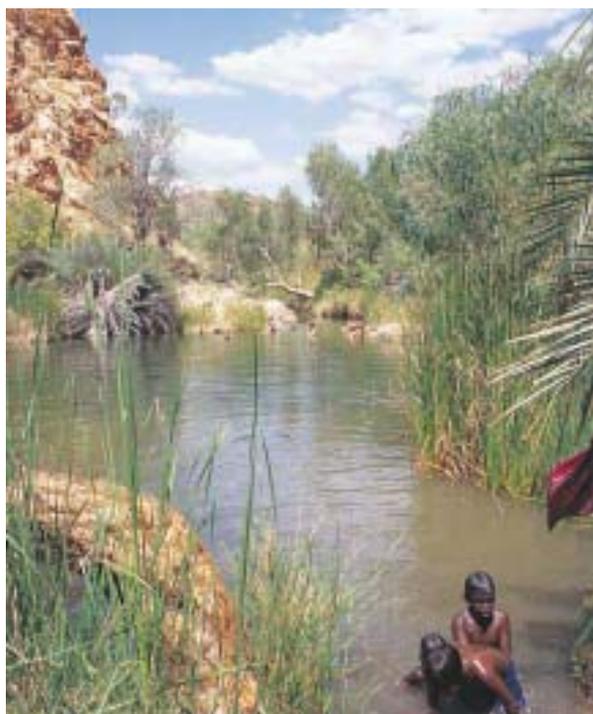
In its Discussion Paper the Commission argued that the disproportionate impact of surety conditions upon the ability of Aboriginal people to be released on bail needs to be addressed.⁸ When considering possible alternatives the Commission noted reasons underlying the failure of some Aboriginal people to attend court. These included: lack of transport; poor literacy skills and language barriers which prevent some Aboriginal people from fully understanding their obligations concerning bail; and a general sense of alienation from the criminal justice system.⁹

The Commission 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 to ensure that the accused attends court as

1. Under the *Bail Act 1982 (WA)*, an authorised officer is a police officer, justice of the peace or, in the case of a child, an authorised community services officer. An authorised community services officer may be the Chief Executive Officer (Justice) or his or her delegate, a registrar of the Children's Court or the superintendent of a detention centre. See *Bail Act 1982 (WA)* s 3 and Sch 1, Pt A, cl 1.
2. For a discussion of the criteria for determining release on bail in Western Australia, see *Bail Act 1982 (WA)* Sch 1; LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 190.
3. Victorian Law Reform Commission (VLRC), *Review of the Bail Act: Consultation Paper* (November 2005) 10.
4. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 190.
5. *Ibid* 191.
6. *Ibid*.
7. LRCWA, Project No. 94, *Thematic Summary of Consultations – Manguri*, 4 November 2002, 5; Auditor-General of Western Australia, *Waiting for Justice: Bail and Prisoners on Remand: Performance Examination*, Report No. 6 (October 1997) 31; LRCWA, *Bail*, Final Report (March 1979) 5; Stamford's Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth: Department of Justice, August 2001) 48; Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [16.16].
8. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 191.
9. *Ibid* 192.

required.¹⁰ The benefit of this option for Aboriginal adults is that it would allow a respected member of the accused's community to provide an assurance to the court that he or she would support the accused while on bail and provide assistance in attending court. For example, assume that an Aboriginal person has previously failed to attend court because of a lack of available transport. In such a case, a promise by a respected member of the person's community that he or she would personally drive the accused to court may be sufficient to satisfy the decision-maker that bail should be granted.

In its Discussion Paper the Commission acknowledged that, in contrast to a surety, there would be no financial incentive for the responsible person to ensure the accused person's attendance.¹¹ The Western Australia Police argued in its submission that further consideration of this proposal is required because of the absence of any financial penalty for a responsible person if he or she fails to ensure that the accused attends court.¹² However, the Commission explained in its Discussion



Paper that Aboriginal Elders and other respected persons would be likely to perform this role effectively because of social and cultural duty.¹³ Further, the Commission concluded that the effectiveness of this proposal could be strengthened by providing that the judicial officer or authorised officer should determine the suitability of any proposed responsible person. The person deciding the suitability of the responsible person would need to be satisfied that the proposed person had sufficient connection with and influence over the accused.¹⁴ The Commission maintains its view that appropriate Aboriginal Elders and other respected persons would undertake this role in a reliable manner. On the other hand, it needs to be stressed that the Commission is not suggesting that the responsible person option would be appropriate for all cases where a surety would otherwise be required. Some offences are too serious to warrant anything less than a significant surety. But there are cases where an accused may be required to find a surety (such as where an accused has previously breached bail on a number of occasions) and the alternative of a responsible person may be sufficient. This is especially relevant for Aboriginal people who often breach bail for reasons other than a deliberate attempt to avoid responsibility for the offence. If the decision-maker is satisfied that the proposed responsible person is in a position to positively influence the accused or assist the accused to attend court then the option of a responsible person (in lieu of a surety) is entirely appropriate.

The Commission has recommended the establishment of community justice groups¹⁵ and suggested that one potential role for community justice groups could be to supervise and support Aboriginal people while they are on bail.¹⁶ A member of a community justice group could act as the responsible person where appropriate. Other conditions could also be imposed that would allow an accused to undergo programs that have been developed by the community justice group, including programs that aim to strengthen Aboriginal customary law such as cultural or bush trips or family healing centres.¹⁷

10. Ibid 193, Proposal 23. The Commission also noted that a responsible person who signs an undertaking should have the same powers and responsibilities as a surety. In particular, a responsible person should have the power to apprehend the accused or notify police when there are reasonable grounds for believing that the accused has breached a condition of bail or is unlikely to comply with bail.

11. Ibid 192.

12. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 7–8.

13. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 192.

14. Ibid 193, Proposal 23.

15. See Recommendation 17, above pp 112–13.

16. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 193.

17. Under cl 2(1), Pt D, Sch 1 of the *Bail Act 1982 (WA)* the authorised officer or judicial officer can impose conditions on the accused as to his or her conduct while on bail or in relation to where the accused lives in order to ensure that he or she attends court and does not commit any offence or endanger any person or property. In Geraldton the Commission was told that magistrates in the region used the *Bail Act 1982 (WA)* to 'send Aboriginal people on bush programs for alcohol related problems'. See LRCWA, Project No. 94, *Thematic Summary of Consultations – Geraldton, 26–27 May 2003*, 14.

The Department of Corrective Services argued that the effectiveness of the Commission's proposal for bail to a responsible person will be *dependent* upon the establishment of community justice groups.¹⁸ The Commission is of the view that community justice groups will add to the effectiveness of this proposal (because there will be a recognised group of Aboriginal Elders and respected persons in a particular community) but the proposal is not dependent upon the existence of a community justice group. It is a matter for the decision-maker to determine in each case whether the suggested responsible person is suitable. The Department suggested that the viability of this proposal is also dependent upon the availability of appropriate people to undertake the role of a responsible person.¹⁹ Therefore, some people will be disadvantaged if there is no suitable responsible person. Of course, an accused will be disadvantaged if he or she cannot find a suitable responsible person, but accused people are currently disadvantaged if they cannot find a suitable surety and for Aboriginal people this is often the case. The Commission's aim is to provide a broader range of bail options for Aboriginal people.

Importantly, the Department of Corrective Services observed in its submission that there is a risk of net-widening with this proposal.²⁰ In other words, if courts and police impose a condition that a responsible person is required—in circumstances where, under the current law, personal bail would have been imposed—then there may be more accused people in custody because they cannot locate a suitable responsible person. The Commission agrees that net-widening is a risk if the underlying purpose of the proposal is misinterpreted. Accordingly, the Commission has included in its final recommendation that the *Bail Act* must provide that the responsible person condition cannot be used where a personal undertaking would be appropriate. The option of a responsible person should be understood as an alternative to surety bail and not an alternative to a personal bail undertaking.

The Commission concluded in its Discussion Paper that there is no reason to limit the responsible person option to Aboriginal people. There are other people who may

not be in a position to obtain a surety.²¹ The Commission has received submissions supporting this proposal²² and recommends that the *Bail Act* provide for the option of bail to be granted for adults on condition that a responsible person enters into an undertaking.

Recommendation 29

Responsible person bail for adults

1. That Clause 1(2) of Part D to the Schedule of the *Bail Act 1982* (WA) be amended to include, as a possible condition of bail, that a responsible person undertakes in writing in the prescribed form to ensure that the accused complies with any requirement of his or her bail undertaking.
2. That Clause 1(2) of Part D to the Schedule of the *Bail Act 1982* (WA) be amended to provide that the authorised officer or judicial officer must be satisfied that the proposed responsible person is suitable.
3. That Clause 1(2) of Part D to the Schedule of the *Bail Act 1982* (WA) be amended to provide that the condition of bail to a responsible person can only be used in circumstances that would, in the absence of the responsible person option, require a surety.

The financial position of the surety

The rationale behind a surety undertaking is that when a surety is liable to lose a significant amount of money if the accused does not appear in court, then the surety will do everything possible to make certain that the accused attends court when required. The Commission concluded in its Discussion Paper that the amount which a surety is liable to lose, relative to his or her financial means, is therefore relevant and should be taken into account.²³ In Western Australia, a judicial officer, a police officer, or other authorised officer has discretion in setting the amount of a surety. Taking into account

18. Department of Corrective Services (WA), Submission No. 31 (May 2006) 7.

19. *Ibid.*

20. *Ibid.*

21. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 193. In its submission the Office of the Director of Public Prosecutions expressed support for Proposal 23 and noted that it would be of assistance to all people: see Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 3.

22. Department of Corrective Services (WA), Submission No. 31 (May 2006) 6; Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 3; Law Council of Australia, Submission No. 41 (29 May 2006) 13; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 2.

23. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 193.

that many Aboriginal families do not have extensive assets, the Commission proposed in its Discussion Paper that when exercising his or her discretion, the judicial officer or other authorised officer should consider the financial means of any proposed surety.²⁴ Again the Commission did not limit this proposal to Aboriginal people because there are obviously other people whose family and friends may have limited financial means. The Commission has received widespread support for this proposal.²⁵ The Law Society expressed its support on the grounds of ‘fairness and equity’.²⁶ The Aboriginal Legal Service (ALS) affirmed in its submission that sureties are often set far too high for Aboriginal accused bearing in mind that many Aboriginal people only receive social security.²⁷ Similarly, the Department of Corrective Services agreed that Aboriginal people often find it difficult to find a surety because their family and friends have limited financial means.²⁸

The Chief Magistrate stated in his submission that he had two concerns with the Commission’s proposal. First, he submitted that the surety amount is generally determined without reference to any proposed surety and that when a surety is being approved (administratively) it would not be appropriate for the court officer to change the amount set by the court.²⁹ The Commission is not recommending that the surety amount should be altered via administrative procedures. The Commission agrees that the discretion as to the amount of the surety must remain with the judicial officer, police officer or other authorised officer who is responsible for deciding the bail terms. Certainly, if an accused does not put forward a possible surety or indicate to the court the financial means of any likely surety, it will be impossible for the decision-maker to take into account the financial means of any proposed surety. But there may be cases where a family member or friend of an accused has indicated a willingness to undertake the role of a surety and therefore, in these cases, the financial means of that person can be considered.

The second concern stated by the Chief Magistrate was that the surety amount is currently determined ‘on the basis of the amount that is considered necessary to ensure the accused appears’.³⁰ The Chief Magistrate suggested that an accused person who has been charged with selling drugs would normally require a surety amount of \$50,000. He argued that reducing this amount to say \$1,000 would be inappropriate and that the seriousness of the offence and the likelihood of failing to appear must be the most important considerations. The Commission agrees that these two factors are extremely important. However, the Commission’s proposal enables the decision-maker to weigh up all relevant factors when setting the amount of the surety. The financial means of any proposed surety is just one of many factors to be considered. The Commission still considers that the amount necessary to ensure that the accused appears in court may differ according to the means of the surety. A surety amount of \$1,000 for a person with limited financial means may be a sufficient incentive for the surety to do everything possible to ensure that the accused attends court when required. However, the same amount for a millionaire may not be sufficient to ensure that the surety complies with his or her obligations. The Commission agrees—as submitted by the Office of the Director of Public Prosecutions (DPP)—that the surety amount must remain at a level that is adequate to provide an incentive for the surety to ensure the accused attends court.³¹

Recommendation 30

Financial circumstances of the surety

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.

24. Ibid, Proposal 24. Since the completion of the Commission’s Discussion Paper, VLRC has published a consultation paper in relation to bail. It was submitted to the VLRC that the process for setting a surety is discriminatory because the financial means of the surety are not taken into account: see VLRC, *Review of the Bail Act: Consultation Paper* (November 2005) 96.

25. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 7; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 6; Law Society of Western Australia, Submission No. 36 (16 May 2006) 5; Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 3; Law Council of Australia, Submission No. 41 (29 May 2006) 13; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 2.

26. Law Society of Western Australia, Submission No. 36 (16 May 2006) 5.

27. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 6.

28. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 7.

29. Chief Magistrate Heath, Magistrates Court, Submission No. 10 (21 March 2006) 2.

30. Ibid.

31. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 3. It has been submitted to the VLRC that if the decision-maker modified the surety amount to reflect the financial means of the surety then the incentive for the surety to ensure that the accused attends court may be the same even though the actual amount of the surety is less than it would otherwise be for someone else with more significant assets or income: see VLRC, *Review of the Bail Act: Consultation Paper* (November 2005) 96.

Bail considerations for children

In its Discussion Paper the Commission examined the situation with respect to children and bail.³² Although children have a greater right to bail than adults, in practice this is not always the case. The *Bail Act* provides that a child under the age of 17 years can only be released on bail if a responsible person signs an undertaking.³³ It has been observed that this requirement can discriminate against children because if a child cannot find a responsible person they will be remanded in custody.³⁴ This is even the case where the offence is only of a minor nature. Aboriginal children may not be able to meet the requirement for a responsible person to sign bail when they are arrested some distance from their home or when family members are unable to attend the place of arrest due to socio-economic problems such as lack of transport. In its Discussion Paper the Commission emphasised that one way of alleviating this problem is for police officers to make greater use of notices to attend court instead of arrest and the subsequent need to release on bail.³⁵ The Commission understands that the Department of the Attorney General is in the process of preparing amendments to the *Bail Act* that will allow a judicial officer to dispense with the need for an accused to enter into a bail undertaking for minor offences.³⁶ The Commission is of the view that this option will be very useful for children who are charged with minor offending and there is no demonstrated need for a responsible person.

Telephone applications

Aboriginal children from regional and remote areas are particularly disadvantaged if they are not released on bail. Any child who is detained in custody must be brought to Perth because currently there are no

juvenile detention facilities outside the metropolitan area.³⁷ If bail is initially refused by a police officer, a Justice of the Peace or authorised community services officer (or conditions are set which cannot be met), the child will be remanded to Perth until the next available Children's Court date. Also it is important to highlight that adults from remote locations are also disadvantaged by a decision to refuse bail: they will be taken from their community to the nearest custodial facility. In its Discussion Paper the Commission 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. It was proposed that this application can only be made if the accused could not otherwise be brought before a court by 4.00 pm the following day.³⁸ The Commission observed that this proposal would be of particular benefit to Aboriginal people from remote and rural locations and would reduce the number of children being transported long distances to Perth in police custody.³⁹

The Commission is aware that the Department of the Attorney General is considering amending the *Bail Act* to provide that when an accused is required to be brought before a judicial officer for the purpose of bail to be considered, he or she may attend via video or audio link.⁴⁰ These changes will be likely to alleviate, in many cases, the need for a telephone application (as proposed by the Commission). Nevertheless, there will still be some accused persons who cannot be brought before a judicial officer (either in person or by video or audio link) by 4.00 pm the day following their arrest, without being transported in custody to another location. This is particularly important for children in regional areas because they will have to be transported to Perth.

32. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 194.

33. *Bail Act 1982* (WA) Sch 1, Pt C, cl 2(2). It is possible for a 17-year-old to be released on his or her own personal undertaking provided that he or she is of sufficient maturity to live independently.

34. See Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth: Department of Justice, August 2001) 43.

35. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 194. See discussion under 'Police – Attending court without arrest', below pp 201–202.

36. Bail Amendment Bill 2006 (WA).

37. The Commission notes that the Western Australian government has committed to building juvenile remand institutions at Geraldton and Kalgoorlie. Even when these facilities are built there will still be a significant number of juveniles who will be taken long distances from their families and communities.

38. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 194, Proposal 25. A review of the *Bail Act* in 2001 similarly recommended that when an accused is dissatisfied with a bail decision he or she should be entitled to apply by telephone to a magistrate: see Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth: Department of Justice, August 2001) 32, 44. The Commission notes that telephone applications are available in South Australia and the Northern Territory: see VLRC, *Review of the Bail Act: Consultation Paper* (November 2005) 52.

39. It would also benefit accused people who are refused bail or unable to meet the conditions set in metropolitan areas when the accused has been arrested over a weekend. The DPP and the Department of Corrective Services both agreed, in their submissions, that this proposal would be particularly beneficial for children from remote and regional areas: see Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 3; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 8.

40. Bail Amendment Bill 2006 (WA).

The Department of Corrective Services, the DPP, the Law Council of Australia, and the Criminal Lawyers Association supported the Commission's proposal for telephone applications.⁴¹ In the absence of any submissions opposing this proposal the Commission has concluded that it is appropriate to make a final recommendation. The Commission suggests that any administrative and procedural requirements to facilitate the implementation of this recommendation should be determined in consultation with the Department of the Attorney General and the Western Australia Police.⁴²

Recommendation 31

Telephone applications for bail

That the *Bail Act 1982* (WA) be amended to provide that where an adult or child has been refused bail by an authorised police officer, justice of the peace or authorised community services officer or the accused 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 (either in person or by video or audio link) by 4.00 pm the following day.

Supervised bail facilities

The supervised bail program run by the Department of Corrective Services is designed to alleviate, where possible, injustice for those children who are unable to locate a responsible person. Where no responsible person can be located a supervised bail coordinator

can act as the responsible person and the juvenile will reside at an approved location, usually a hostel.⁴³ In regional and remote locations the supervised bail program has operated in conjunction with at least four Aboriginal communities. According to the Department of Corrective Services, the programs in the Pilbara and the Kimberley are no longer operating and are currently under review.⁴⁴ There is presently one program operating in the Goldfields.⁴⁵ In its submission the Department of Corrective Services stated that it is 'currently working to identify and develop bail options for juveniles in regional areas'.⁴⁶ The Commission observed in its Discussion Paper that local non-custodial bail initiatives have the potential to prevent young Aboriginal people from cultural and community dislocation. Aboriginal people consulted by the Commission during this project indicated support for community-based bail facilities for children.⁴⁷

In its Discussion Paper the Commission proposed that the Department of Corrective Services should continue to develop non-custodial bail facilities in rural and remote areas. The Commission further proposed that the Department should work in conjunction with any local community justice group when developing non-custodial bail facilities.⁴⁸ The Commission acknowledged that the Department would need to be satisfied that any community bail programs provide adequate and safe supervision of children. The Commission also observed that community justice groups will require sufficient resources and assistance from appropriate government departments to build capacity to provide programs for young people that address any safety issues.

The Western Australia Police strongly supported the Commission's proposal and emphasised that there are significant resource implications when a child is remanded

41. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 8; Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 3; Law Council of Australia, Submission No. 41 (29 May 2006) 13; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 2.
42. The Commission notes that there is already a precedent for telephone applications (under the *Restraining Orders Act 1997* (WA)). For example, s 17 of the *Restraining Orders Act 1997* provides that there must be at least one magistrate available at all times for telephone applications and ss 19 & 21 provide that telephone applications can be made and heard by telephone, fax, radio, video conference, electronic mail or other similar methods.
43. Morgan N & Motteram J, 'Aboriginal People and Justice Services: Plans, programs and delivery' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 235, 293.
44. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 9. Chief Magistrate Heath advised the Commission in his submission that the program at Yandeyarra community has ceased operation and he thought that it was no longer departmental policy to develop these types of facilities, see Chief Magistrate Heath, Magistrates Court, Submission No. 10 (21 March 2006) 2. The Banana Well program outside Broome and the Bell Springs program at Kununurra were withdrawn in 2004. In their background paper, Neil Morgan and Joanne Motteram stated that the Bell Springs program was closed 'due to on-going concerns regarding the level of supervision'. See Morgan & Motteram, *ibid* 293.
45. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 9.
46. *Ibid*.
47. LRCWA, Project No. 94, *Thematic Summary of Consultations – Warburton*, 3–4 March 2003, 6 & 10; *Pilbara*, 6–11 April 2003, 15; *Geraldton*, 26–27 May 2003, 14.
48. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 194–95, Proposal 26. The Mahoney Inquiry also recommended that 'specific attention be given to supporting the Supervised Bail program in regional areas': see Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) [11.46].

Aboriginal people consulted by the Commission during this project indicated support for community-based bail facilities for children.

in custody because police are required to escort the young person to Perth.⁴⁹ The proposal was also supported by the Catholic Social Justice Council, the Department of Corrective Services, the DPP, the Law Council of Australia and the Criminal Lawyers Association.⁵⁰ The DPP did, however, submit that the proposal should be applicable to all children in remote and rural locations.⁵¹ In response, the Commission highlights that its proposal is directed to the development of non-custodial bail facilities for Aboriginal children in conjunction with *Aboriginal* communities. If there is a demonstrated need for non-custodial bail facilities to be developed in other communities then this will need to be separately considered by the Department of Corrective Services. In this regard, the Commission emphasises that during the last financial year Aboriginal juveniles constituted 90 per cent of all children from regional areas who were remanded in custody.⁵²

Recommendation 32

Non-custodial bail facilities for children in remote and regional locations

That the Department of Corrective Services 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 Corrective Services should work in conjunction with a local community justice group.

Aboriginal Customary Law and Bail

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.⁵³ In its Discussion Paper the Commission observed that these criteria (many of which focus on western concepts) have the potential to disadvantage Aboriginal people applying for bail.⁵⁴ 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.⁵⁵ For Aboriginal people assessment of their family, kin and community ties would be more appropriate. In some other Australian jurisdictions bail legislation specifically refers to aspects of Aboriginal culture.⁵⁶

The *Bail Act* allows a judicial officer or an authorised officer to take into account any matters which he or she considers are relevant when deciding if an accused person should be released on bail.⁵⁷ Although the *Bail Act* is silent on Aboriginal customary law and other cultural issues, there is no reason why these matters could not be taken into account if relevant to the question of bail. However, the Commission expressed concern in its Discussion Paper that unless judicial

49. Office of Commissioner of Police, Submission No. 46 (7 June 2006) 8.

50. The Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 3; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 9; Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 4; Law Council of Australia, Submission No. 41 (29 May 2006) 13; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 3.

51. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 4

52. Mikila Barry, Acting Executive Officer, Juvenile Custodial Services, the Department of Corrective Services, email (25 July 2006).

53. *Bail Act 1982* (WA) Sch 1, Pt C, cl 3(b).

54. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 196.

55. *Ibid.*

56. *Ibid* 196. For example, s 32(1)(a)(ia) of the *Bail Act 1978* (NSW) provides that when assessing the background and community ties of Aboriginal and Torres Strait Islander people, regard should be had to the person's connections to 'extended family and kinship and other traditional ties to place'. Also s 16(2)(e) of the *Bail Act 1980* (Qld) provides that when considering bail the court or the police officer shall have regard to, if the defendant is an Aboriginal person or a Torres Strait Islander, any submissions made by a representative of the community justice group in the defendant's community, including information about the defendant's relationship to his or her community, any cultural consideration or any considerations relating to programs and services for offenders in which the community justice group participates.

57. *Bail Act 1982* (WA) Sch 1, Pt C, cl 1.

officers and authorised officers are directed to consider these issues, practices will remain varied and likely to disadvantage many Aboriginal people.⁵⁸ Injustice may occur if individual police, judicial officers or legal representatives are not fully aware of relevant Aboriginal customary law and cultural issues. Therefore, the Commission proposed that the *Bail Act* should be amended to provide that any relevant Aboriginal customary law or other cultural issues are to be taken into account when determining bail. For example, customary law or cultural factors may explain more fully an Aboriginal person's ties to his or her community. It may also provide a reason why an accused previously failed to attend court.⁵⁹ Aboriginal customary law processes may impact upon the choice of appropriate bail conditions.⁶⁰ In order to ensure that the decision-maker is reliably informed about customary law and cultural issues the Commission also proposed that a judicial officer or an authorised officer must take into account any submissions made by a member of a community justice group from the accused person's community.⁶¹

The response to the Commission's proposal

The Commission received conflicting responses to this proposal. The ALS and the Law Council of Australia fully supported the proposal.⁶² The Law Society stated that it was concerned that the Commission's proposal did not specifically exclude unlawful customary law punishments.⁶³ The Commission does not consider that it is necessary to expressly exclude unlawful punishments because (as the Commission explains below) the current law in this state does not allow a judicial officer (or an authorised officer) to facilitate unlawful punishment. In other words, the decision-maker is not permitted to release an accused on bail for the purpose of undergoing unlawful traditional punishment.⁶⁴

The manner of presenting information about customary law and culture

The Department of Corrective Services expressed in principle support for the Commission's proposal. At the same time it raised a number of specific concerns.⁶⁵ The Department questioned the ability of a court to access appropriate information about any relevant customary law or cultural matters, especially when the court is not sitting at the relevant Aboriginal community. The Commission is of the view that its recommendation for community justice groups will, once implemented, provide a suitable pool of Aboriginal people who can provide relevant evidence or information to a court about customary law or cultural issues. In addition, the Commission has recommended the appointment of Aboriginal liaison officers at all courts in Western Australia.⁶⁶ Aboriginal liaison officers would be able to assist a court in deciding who would be an appropriate person to present information in a particular case. Similarly, if an Aboriginal court has been established in a particular location, the Aboriginal justice officer could assist in this regard.⁶⁷

The Commission does acknowledge, however, that in some cases it may be difficult to promptly determine who to call upon to provide the relevant information. From a practical perspective, if the circumstances of a case indicate that bail would be granted irrespective of any customary law factors it is highly unlikely that the accused would seek to present that information to the court (especially, if to do so would require an adjournment). On the other hand, if relevant customary law or other cultural information is likely to be the decisive factor (and therefore result in the court granting bail) it would be in the accused person's interest to have the matter adjourned until the appropriate person or persons could present the information.⁶⁸

58. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 196.

59. See discussion under 'Funeral Attendance', below p 169.

60. In its submission the ALS provided an example. It was stated that bail conditions may sometimes stipulate that the accused must not be in a particular location. In some circumstances this would mean that the accused would be required to leave that location immediately. Because customary law prevents certain people from speaking to one another or being in each other's presence, it may not be possible for an accused to leave the community in the first available transport (for example, because the other person is also present in the vehicle): see Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 7.

61. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 196–97, Proposal 27.

62. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 7; Law Council of Australia, Submission No. 41 (29 May 2006) 13. The Criminal Lawyers Association also indicated its support for this proposal: see Criminal Lawyers Association, Submission No. 58 (4 September 2006) 3.

63. Law Society of Western Australia, Submission No. 36 (16 May 2006) 5.

64. See discussion under 'Traditional Punishment and bail', below, p 170.

65. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 9. One issue raised by the Department of Corrective Services was that Aboriginal people providing advice or information should be paid. The Commission stated in its Discussion Paper that Aboriginal Elders and other respected person who provide services within the criminal justice system or provide cultural advice to courts should be paid: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 139. See also Recommendation 17, above pp 112–13.

66. See Recommendation 127, below p 347.

67. See Recommendation 24, above p 136.

68. Pursuant to s 22 of the *Bail Act* a judicial officer or authorised officer may receive and consider information in whatever manner he or she see fit.

Conflict of interest

The Department of Corrective Services raised the issue of any potential conflicts of interest in circumstances where the person providing advice or information to the court is connected to the offender (or the victim). This issue has been raised in respect to community justice groups and other proposals that allow Aboriginal people to provide advice to criminal justice agencies.⁶⁹ The Commission agrees that it is important for any decision-maker to be aware of the relationship of the person providing information or advice to the offender and/or the victim. Therefore, the Commission has included in all relevant recommendations that an Elder, respected person or member of a community justice group must inform the decision-maker of his or her relationship with the accused and/or the victim. The Commission points out, however, that the presence of a potential conflict of interest should not preclude the information being presented or the decision-maker from relying upon it. The decision-maker will have to decide in the particular circumstances of each case what weight will be given to the relevant information.

Delays

The Chief Magistrate suggested in his submission that the Commission's proposal would cause delays in court. When discussing the Commission's proposal for customary law to be taken into account during sentencing proceedings, he argued that the requirement that the court *must* consider any relevant customary issues would create a positive obligation on the court to conduct its own investigations.⁷⁰ When formulating these proposals, the Commission did not intend that a judicial officer would be obliged in every case involving an Aboriginal accused to make its own inquiries about the possible relevance of customary law. In order to make this clear the Commission has recommended that the decision-maker must consider any *known* relevant Aboriginal customary law issues. Accordingly, before such issues can be taken into account it will need to be apparent on the facts presented or alternatively the accused, the prosecution or a member of a community justice group will need to present any relevant information. Importantly, it

should be remembered that the Commission's recommendation does not remove the decision-maker's discretion with respect to the appropriate weight that should be given to any known customary law issues.

Cultural background

The DPP argued in its submission that the Commission's proposal should apply to all Western Australian cultural groups.⁷¹ The Commission is of the view that there is some merit in this argument. Cultural factors for other groups in the community may well be relevant to bail. Therefore, the Commission has recommended that the *Bail Act* be amended to provide that the cultural background of any accused is a relevant factor.⁷²

Recommendation 33

Cultural background as a relevant factor for bail

That Clause 3(b) Part C of Schedule 1 to the *Bail Act 1982* (WA) be amended to provide that the judicial officer or authorised officer shall have regard to the following matters, as well as to any others which he considers relevant,

(b) the character, previous convictions, antecedents, associations, home environment, family, social and cultural background, place of residence, and financial position of the accused.

Notwithstanding this new recommendation, the Commission considers that its original proposal is still necessary because it goes further than providing that the cultural background of an accused is a relevant factor for bail. The proposal included the role of community justice groups in providing information about customary law. Further, as stated above, the Commission is of the view that it is necessary to specifically recommend that Aboriginal customary law should be taken into account in order to ensure that relevant customary law issues are not overlooked and to ensure that these issues are presented in a reliable manner.

Therefore, it is possible for information about customary law to be presented in a variety of ways. In some cases it may be appropriate for information to be received in writing and in others it may be necessary for oral evidence to be presented.

69. See discussion under headings 'Evidence of Aboriginal customary law in sentencing', below p 183; 'Parole and Aboriginal customary law', below pp 221–22.

70. Chief Magistrate Steven Heath, Magistrates Court, Submission No. 10 (21 March 2006) 3.

71. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 4.

72. The Commission took a similar approach in its Discussion Paper with respect to sentencing: see Proposal 29.

Victim issues

The victim of an offence may be particularly concerned about the prospect of an accused being released in the community. This is especially relevant for sexual and violent offences.⁷³ The Victorian Law Reform Commission has recently commented that it is important that the interests and concerns of victims are taken into account during bail proceedings but, at the same time, it is necessary to recognise that an accused is presumed innocent.⁷⁴ Following the recent public debate about family violence and sexual abuse in Aboriginal communities, the Council of Australian Governments (COAG) has asked the Standing Committee of Attorneys-General (SCAG) to report 'on the extent to which bail provisions and enforcement take particular account of potential impacts on victims and witnesses in remote communities and to recommend any changes required'.⁷⁵

The *Bail Act* provides that a judicial officer or authorised officer must consider, when deciding whether to release an accused on bail, the likelihood that the accused would endanger the safety of any person or interfere with any witnesses.⁷⁶ During bail proceedings it is also necessary for the decision-maker to ensure that any concerns or views of the victim can be taken into account when deciding whether to release the offender from custody.⁷⁷ For Aboriginal victims of violence and sexual abuse it may be difficult for them to provide information to a judicial officer or police officer about their concerns.⁷⁸ Where the accused and the victim both reside in a remote community the decision as to whether the accused should be released from custody may be further complicated. In this context it is important to acknowledge that any bail condition that prevents an accused from living in his or her home community may be problematic.⁷⁹ If an accused is required to leave his or her family, community and support structures this may have negative

consequences on the wider community. At the same time the need to protect victims is of paramount importance. It is necessary therefore to balance all relevant factors. The Commission believes that its recommendation to allow members of a community justice group to provide submissions to a judicial officer or other authorised officer who is deciding the question of bail has the potential to assist the decision-maker in this regard. Therefore, the Commission has included in its recommendation that the judicial officer or authorised officer must take into account any submissions from a member of a community justice group in the victim's community.

Recommendation 34

The relevance of Aboriginal customary law and other cultural factors during bail proceedings

1. 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, where the accused is an Aboriginal person, to any known Aboriginal customary law or other cultural issues that are relevant to bail.⁸⁰
2. That Clause 3 of Part C in Schedule 1 of the *Bail Act 1982* (WA) provide that, without limiting the manner by which information about Aboriginal customary law or other cultural 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 group⁸¹ in the victim's community and/or the accused person's community.

73. VLRC, *Review of the Bail Act: Consultation Paper* (November 2005) 27.

74. *Ibid.*

75. Council of Australian Governments, Communiqué of meeting on 14 July 2006.

76. *Bail Act 1982* (WA) Sch 1, Part C, Cl 1(a).

77. *Victims of Crimes Act 1994* (WA) Sch 1, Guideline 10. Section 3 of this Act provides that public officers and bodies should apply the guidelines where relevant and s 2 provides that a public officer includes a judicial officer or a police officer. Guideline 6 also provides that a victim who has so requested should be kept informed about any bail applications.

78. For a detailed discussion about the reasons why Aboriginal women may be reluctant to report or discuss incidents of sexual abuse and violence: see discussion under 'Under-reporting of family violence and sexual abuse', Chapter Seven, below pp 282–86.

79. In *Clumpoint v Director of Public Prosecutions* [2005] QCA 43 (2 March 2005) the accused was required to leave his community as part of the bail conditions. During an application to vary that condition the Queensland Court of Appeal observed at [2] that this condition was particularly onerous because it 'deprives him of the companionship and support of his wife, his ability to be a father to his children, his employment and financial independence and the right to live in this own home'.

80. The *Bail Act 1982* (WA) should also be amended to insert a definition of an Aboriginal person to include a Torres Strait Islander person: see also Recommendation 4, above p 63.

81. A community justice group is defined as a community justice group as established under the *Aboriginal Communities Act 1979* (WA).

Given the importance of Aboriginal customary law to many Aboriginal people, cultural and customary law obligations may take precedence for them over the requirement to attend court.

Funeral attendance

In Western Australia it is an offence to fail to attend court, without reasonable cause, at the time and place specified. If an accused has been unable to attend court and fails to notify the court of the reason for non-attendance and subsequently fails to attend court as soon as practicable, he or she will also commit an offence.⁸² During its consultations with Aboriginal people the Commission heard numerous comments about the importance of funeral attendance.⁸³ Given the importance of Aboriginal customary law to many Aboriginal people, cultural and customary law obligations may take precedence for them over the requirement to attend court.

The Commission observed in its Discussion Paper 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.⁸⁴ The Commission concluded that this issue needs to be addressed through improved communication when Aboriginal people enter into their bail undertaking. The Commission therefore 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.⁸⁵ It was also suggested by the Commission that members of community justice groups

could support Aboriginal people who are on bail by providing assistance in notifying the court when an accused person is unable to attend court due to a funeral or other associated cultural ceremonies.

The Commission received considerable support for its proposal.⁸⁶ The ALS submitted that this proposal should also take into account the variety of Aboriginal languages spoken.⁸⁷ The Commission has included in its recommendation that, where possible, information should be provided in Aboriginal languages. The ALS also suggested that relevant information should be provided in oral as well as written form. The Commission's recommendations for the establishment of community justice groups and for the appointment of Aboriginal liaison officers in each court will assist in this regard. During a community meeting in Geraldton the Commission was told that Aboriginal people who enter into a surety undertaking also require additional information about their responsibilities and the consequences for them if the accused does not attend court.⁸⁸ The Commission agrees and has included sureties in its recommendation.

The Department of the Attorney General has advised the Commission that bail forms are currently being redeveloped as part of the drafting of the Bail Amendment Bill 2006.⁸⁹ The Department submitted that bail forms should be standard but that the Commission's objectives could be achieved by including additional pamphlets prepared by the Legal Aid

82. *Bail Act 1982* (WA) ss 51(1) & (2). The penalty for this offence is a fine up to \$10,000 or up to three years imprisonment. The Commission understands that the Department of the Attorney General plans to amend ss 28 & 51 of the *Bail Act* and if these amendments are passed it will be an offence to fail to appear at the required time and place and it will be an offence to fail to subsequently appear as soon as practicable if the accused did not appear at the required time and place: Bail Amendment Bill 2006 (WA).

83. The importance of funerals in traditional Aboriginal societies was discussed in the Commission Discussion Paper: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 310. See also LRCWA, Project No. 94, *Thematic Summary of Consultations – Carnarvon*, 30–31 July 2003, 5; *Pilbara*, 6–11 April 2003, 13.

84. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 198.

85. *Ibid* 197–98, Proposal 28. In its Discussion Paper the Commission acknowledged that individual staff at the ALS endeavour to advise their clients of their obligations under bail. However, not all Aboriginal accused are represented by the ALS and some are not represented at all. The Commission also noted that the Mahoney Inquiry observed that many accused do not understand the bail system: see Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [16.23].

86. Marian Lester, Submission No. 18 (27 April 2006) 1; Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 9; Department of the Attorney General, Submission No. 34 (11 May 2006) 6; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 7; Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 4; Law Council of Australia, Submission No. 41 (29 May 2006) 13; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 3.

87. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 7.

88. Submission received at LRCWA, Discussion Paper community consultation – Geraldton (3 April 2006).

89. Department of the Attorney General, Submission No. 34 (11 May 2006) 6.

Commission and the ALS or other appropriate bodies.⁹⁰ The Commission understands that it may be problematic for bail forms to be specifically tailored to different cultural groups and therefore, it has altered its recommendation to reflect this. On a similar note, the DPP argued that more effective information should be provided to other cultural groups that may also lack understanding of their obligations with respect to bail.⁹¹ The Commission agrees and strongly encourages the Department of the Attorney General to provide resources for relevant organisations to develop culturally appropriate information for other ethnic groups in the community.

Recommendation 35

Improved bail and surety forms and notices

1. That bail and surety forms and notices (including the bail renewal notice handed to an accused after each court appearance) be provided in plain English and clearly set out the relevant obligations of the accused or the surety.
2. That the Department of the Attorney General provide resources to suitable Aboriginal organisations to prepare culturally appropriate educational material in relation to the obligations of an accused on bail and the obligations of a surety. This material should include what an accused person can do if he or she is unable to attend court.
3. That the culturally appropriate educational material include, where possible, information provided in Aboriginal languages.

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.⁹² The preferable position according to many Aboriginal people is for the offender to face traditional punishment prior to being arrested and dealt with by Australian law.⁹³ The question of whether a police officer can or should allow traditional punishment to take place before an accused is arrested is discussed in the section on police.⁹⁴

In the context of bail, the Commission has considered whether an accused person's wish to undergo traditional punishment can be legitimately taken into account after the accused has been arrested. The Commission 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.⁹⁵ 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. The Commission is of the view that 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.⁹⁶

It was also observed by the Commission in its Discussion Paper that 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 recommendation outlined above (the legislative direction for courts determining bail to consider Aboriginal customary law and other cultural issues) will encourage this to happen.⁹⁷

90. Ibid.

91. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 4.

92. LRCWA, Project No. 94, *Thematic Summary of Consultations – Warburton*, 3–4 March 2003, 3–4; *Cosmo Newbery*, 6 March 2003, 19; *Pilbara*, 6–11 April 2003, 8 & 12; *Geraldton*, 26–27 May 2003, 14; *Wiluna*, 27 August 2003, 22; *Wuggubun*, 9–10 September 2003, 36; *Albany*, 18 November 2003, 16.

93. LRCWA, Project No. 94, *Thematic Summary of Consultations – Warburton*, 3–4 March 2003, 3–4; *Pilbara*, 6–11 April 2003, 8, 12; *Casuarina Prison*, 23 July 2003, 3; *Carnarvon*, 30–31 July 2003, 4; *Wuggubun*, 9–10 September 2003, 36.

94. See discussion under 'Police and Aboriginal Customary Law', below pp 192–94.

95. *Bail Act 1982 (WA)* Sch 1, Pt C, cl 1(b).

96. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 199.

97. The Commission also concluded in its Discussion Paper that it is not appropriate to impose conditions upon the nature of the customary law punishment where that punishment is otherwise lawful: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 201.

Sentencing

Sentencing is the stage of the criminal justice process where a court determines the appropriate penalty for an offence. A judicial officer, when deciding what penalty to impose, is required by law to take into account the statutory penalty for the offence, various sentencing principles and any other relevant factor. Each case is decided on an individual basis because the circumstances of each offence and each offender are different.¹ The main objectives of sentencing are punishment, deterrence, incapacitation, denouncement and rehabilitation.² Underlying these objectives are the overall aims to reduce crime and protect the community.³ Sentencing principles require that any penalty should be proportionate to the seriousness of the offence, which is determined by taking into account the harm caused and the culpability of the offender.⁴ In Western Australia, a number of sentencing principles are included in the *Sentencing Act 1995* (WA). For children relevant principles are contained in the *Young Offenders Act 1994* (WA).

The Cultural Background of the Offender

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.⁵ This general proposition does not mean

that the individual characteristics of a particular offender (including matters associated with his or her cultural background) cannot be taken into account by a court when determining the appropriate sentence for an offence. In *Neal v The Queen*⁶ Brennan J stated that a sentencing court is required to consider 'all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group'.⁷

In some Australian jurisdictions sentencing legislation includes, as a relevant sentencing factor, the cultural background of the offender (both for adults and children).⁸ In Western Australia, in relation to adults, the *Sentencing Act* is silent on the relevance of cultural factors. In comparison, s 46(2)(c) of the *Young Offenders Act* provides that when sentencing a young person the court is to take into account the cultural background of the offender.⁹

The relevance of Aboriginality to sentencing

In its Discussion Paper the Commission examined the manner in which courts have considered relevant facts associated with an offender's Aboriginal background.¹⁰ Cases reveal that courts have taken into account various factors, such as social and economic disadvantages; alcohol and substance abuse (where that abuse is related to the environment in which the offender has

1. For further discussion about the importance of 'individualised justice', see discussion under 'General sentencing principles', Chapter One, above p 14.
2. For a more detailed discussion of these objectives and general sentencing principles, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 202–203.
3. New South Wales Law Reform Commission (NSWLRC), *Sentencing: Aboriginal Offenders*, Report No. 96 (2000) 29.
4. *Ibid* 29–30.
5. If an Aboriginal person was sentenced more leniently than a non-Aboriginal person merely because he or she was Aboriginal then this could arguably contravene the *Racial Discrimination Act 1975* (Cth): see *Rogers v Murray* (1989) 44 A Crim R 301. The NSWLRC stated that 'Aboriginality does not of itself mean that an offender will automatically receive special or lenient treatment, since it may have no bearing on the commission of the offence': see NSWLRC, *Sentencing: Aboriginal Offenders*, Report No. 96 (2000) 28.
6. (1982) 42 ALR 609.
7. *Ibid* 626. Martin Flynn has observed that this principle is an illustration of the 'substantive equality principle': Flynn M, 'Not "Aboriginal Enough" for Particular Consideration When Sentencing' (2005) 6(9) *Indigenous Law Bulletin* 15. In Chapter One the Commission explains in detail what is meant by substantive equality. The Commission has concluded that the consideration of the cultural background of an offender (including relevant aspects of Aboriginal customary law) during sentencing proceedings is consistent with the substantive equality principle: see discussion under 'The relevance of Aboriginal customary law and culture', Chapter One, above pp 14–15.
8. *Crimes Act 1914* (Cth) s 16 (2)(m); *Crimes Act 1900* (ACT) s 342(i); *Penalties and Sentences Act 1992* (Qld) s 9(2)(o). Also in New Zealand s 8(i) of the *Sentencing Act 1992* (NZ) provides that a court must take into account the cultural background of the offender.
9. See also ss 6 (f) and 7(l) of the *Young Offenders Act 1994* (WA) which provide that courts are to ensure young people are dealt with in a manner that is culturally appropriate and that courts are to generally take into account the cultural background of a young person.
10. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 203–208. See also Williams V, 'The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law', LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 1, 62–75.

grown up); the hardship of imprisonment for Aboriginal people who face the loss of connection to land, culture, family and community; the effects of past government policies that removed Aboriginal people from their families; and the views of the offender's Aboriginal community. The Commission found that most cases have focused on historical and socio-economic factors. However, there are a limited number of cases that have acknowledged the disadvantages experienced by Aboriginal people within the criminal justice system.¹¹

In May 2005 the Western Australian Court of Criminal Appeal in *WO (A Child) v The State of Western Australia*¹² made important observations about the inadequacy of programs and services for Aboriginal children in regional areas. In addition the court took into account systemic bias within the justice system. The court considered whether 'all reasonable steps towards the rehabilitation of these children had been taken'.¹³ In this regard, it was noted that there were fewer programs and services available for this purpose in regional areas. The court also took into account that the rate of referral to diversionary juvenile justice options is far less for Aboriginal children and, as a result, Aboriginal children come into contact with the formal criminal justice system at a much faster rate. Therefore, when making decisions based in part upon the offender's criminal record, it was held that a court must be careful to ensure that the cumulative effect of previous decisions is taken into account and that details of any past offending are closely examined.¹⁴

The Commission concluded that, although there is sufficient case law authority to allow matters associated with an offender's Aboriginal background to be taken into account during sentencing, the cases are not consistent in approach. Notwithstanding that some cases have taken a broader view of the types of factors that relate to an offender's Aboriginal background, the Commission was concerned that this approach may not be adopted by all courts, especially the lower courts

that deal with Aboriginal people on a daily basis. For the purposes of consistency and to ensure that important issues associated with the Aboriginality of an offender are not overlooked, the Commission considered that there should be a legislative provision requiring courts to have regard to the cultural background of the offender. The Commission was also of the view that there is no reason to limit this provision only to Aboriginal people because matters associated with the cultural background of other groups in the community may also be relevant to sentencing.¹⁵

In its Discussion Paper the Commission noted that, unlike Western Australia, sentencing legislation in most other Australian jurisdictions includes comprehensive sentencing principles and an extensive list of relevant sentencing factors.¹⁶ In 2000 the New South Wales Law Reform Commission (NSWLRC) observed that there had been a recent trend to include, for the purpose of guidance, the factors that should be taken into account in sentencing. Western Australia was noted as an exception to this general trend.¹⁷ Recently, the Australian Law Reform Commission (ALRC) concluded that it is appropriate for federal sentencing legislation to provide for a wide-ranging (but not exhaustive) list of relevant sentencing factors.¹⁸ The Commission noted that given the current structure of the *Sentencing Act*, the proposal that courts should take into account the cultural background of the offender, may appear out of place.¹⁹ Where a similar provision appears in legislation in other jurisdictions it is contained in the list of other relevant sentencing factors. The Commission therefore recommends that the *Sentencing Act* should be amended to include a list of factors that are generally considered relevant to sentencing. This list should be for the purpose of guidance on the relevant principles, but it should not constitute an exhaustive list because flexibility is required in sentencing.

The Commission has received submissions supporting its proposal to include the cultural background of the

11. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 207. See for example, *Russell v The Queen* (1995) 84 A Crim R 386; *R v Scobie* [2003] SASC 85.
12. [2005] WASCA 94.
13. *Ibid* [57].
14. *Ibid* [65].
15. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 208, Proposal 29.
16. *Ibid* 203. See *Crimes Act 1914* (Cth) s 16A; *Crimes Act 1900* (ACT) ss 341, 342; *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 3A, 5; *Sentencing Act 1995* (NT) s 5; *Penalties and Sentences Act 1992* (Qld) s 9; *Criminal Law (Sentencing) Act 1988* (SA) ss 10, 11; *Sentencing Act 1991* (Vic) s 5.
17. NSWLRC, *Sentencing: Aboriginal Offenders*, Report No. 96 (2000) 35.
18. ALRC, *Same Crime, Same Time: Sentencing of federal offenders*, Final Report No. 103 (June 2006) [6.11]–[6.12].
19. The Law Society, in its submission, suggested that the Commission's proposal should be extended to the 'economic, social and cultural background of the offender': see Law Society of Western Australia, Submission No. 36 (16 May 2006) 5. The Commission agrees that other aspects of an offender's background may be relevant to sentencing; however, the Commission does not consider that it is appropriate to recommend in this project specific amendments with respect to other relevant sentencing factors.

The Commission firmly rejects the argument that permitting courts to take into account the cultural background of an offender is contrary to the principle of equality before the law.

offender as a relevant sentencing factor.²⁰ There have been no submissions opposing this proposal. However, the Commission is aware that in response to the recent debate about family violence and sexual abuse in Aboriginal communities, the federal government is considering removing the reference to the cultural background of an offender in s 16A of the *Crimes Act 1914* (Cth).²¹ This approach is contrary to the recommendations contained in the recently published ALRC report which deals with the sentencing of federal offenders.²² In this report, the ALRC emphasised that the consideration of factors relating to the background and circumstances of the offender are necessary to ensure that the principle of individualised justice is maintained.²³ The Law Council of Australia has argued that prohibiting courts from considering the cultural background of an offender will 'unnecessarily restrict the discretion of the court to consider matters which may be relevant, either to mitigate or aggravate, the seriousness of the offence'.²⁴

In Chapter One, the Commission firmly rejects the argument that permitting courts to take into account the cultural background of an offender is contrary to the principle of equality before the law.²⁵ All accused, whether Aboriginal or not, are entitled to present relevant facts concerning their social, religious and family background and beliefs. The Law Council has asserted that the federal government's approach, rather than resulting in one-law-for-all, will in fact discriminate against Aboriginal people and other cultural groups.²⁶ The Commission considers it essential that all courts in Western Australia are directed to take into account any relevant matters connected with an offender's cultural background. Of course, the cultural background

of an offender is just one of many relevant sentencing factors and courts will retain discretion as to the weight to be attached to any relevant matter in each case.

Recommendation 36

Cultural background of the offender as a relevant sentencing factor

1. That the *Sentencing Act 1995* (WA) include as a relevant sentencing factor the cultural background of the offender.
2. That the cultural background of the offender be included in a list of other relevant sentencing factors.

Imprisonment – A Sentence of Last Resort

Over-representation of Aboriginal people in custody

Despite the practice of sentencing courts taking into account relevant factors associated with the Aboriginality of an offender, 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 its Discussion Paper, the Commission observed that Western Australia has a 'long-established and continuing tradition of high rates of imprisonment'.²⁷

20. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 10; Department of the Attorney General, Submission No. 34 (11 May 2006) 7; Law Society of Western Australia, Submission No. 36 (16 May 2006) 5; Law Council of Australia, Submission No. 41 (29 May 2006) 14; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 3.

21. Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities, *Safer Kids, Safer Communities* (26 June 2006), <http://www.atsia.gov.au/media/media06/4606_attach.aspx>.

22. ALRC, *Same Crime, Same Time: Sentencing of federal offenders*, Final Report No. 103 (June 2006) [29.45].

23. *Ibid* [6.88].

24. The Law Council of Australia, *Recognition of Cultural Factors in Sentencing*, Submission to Council of Australian Governments (10 July 2006) 3.

25. See discussion under 'The relevance of Aboriginal customary law and culture', Chapter One, above pp 14–15.

26. The Law Council of Australia, *Recognition of Cultural Factors in Sentencing*, Submission to Council of Australian Governments (10 July 2006) 3.

27. Harding R, 'The Excessive Scale of Imprisonment in Western Australia: The systemic causes and some proposed solutions' (1992) 22 *University of Western Australia Law Review* 72, 73. The former Department of Justice stated that Western Australia 'has a justice system characterised by over use of imprisonment': see Department of Justice *Reform of Adult Justice in Western Australia* (2002) 6.

In addition, Western Australia has the highest rate of Aboriginal imprisonment in the nation.²⁸ Aboriginal people consulted by the Commission acknowledged that imprisonment is required for some offenders; however, many considered 'the current levels of mass incarceration as destructive of Aboriginal culture and law'.²⁹ The Commission has concluded that the issue of over-representation must be addressed both for the general welfare of Aboriginal people and to ensure that the criminal justice system does not further contribute to the destruction of Aboriginal culture and law.³⁰

The Commission considered, in its Discussion Paper, the reasons for the high level of over-representation of Aboriginal people in custody.³¹ The Commission recognises that there are a number of underlying factors that contribute to the over-representation of Aboriginal people in the criminal justice system. However, it is now widely acknowledged that part of the reason for the high levels of Aboriginal people in custody is the cumulative effect of what has been described as 'structural racism' and bias within the justice system.³²

Principle that imprisonment should only be used as a last resort

In response to the disproportionate rate of Aboriginal imprisonment, the RCIADIC recommended that 'governments which have not already done so should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort'.³³ The principle that imprisonment should only be used as a last resort is reflected in the provisions of the *Sentencing Act* and the *Young Offenders Act*.³⁴ It has been observed that the principle that imprisonment should only be used as a last resort has particular relevance to Aboriginal people but it has not yet

resulted in any significant reduction in the rate of Aboriginal imprisonment.³⁵

The need for sentencing reform

The Commission acknowledges that sentencing reform of itself will not significantly reduce Aboriginal offending rates or the alienation felt by Aboriginal people from the criminal justice system.³⁶ As stated earlier in this chapter, any significant reduction in the high rates of Aboriginal imprisonment and detention will only be achieved through a comprehensive reform agenda: to address underlying factors that contribute to offending rates; to improve the way in which the criminal justice system operates for Aboriginal people; and to recognise and strengthen Aboriginal law and culture.³⁷

In addition to recognising Aboriginal law and culture, many of the Commission's recommendations are aimed at reducing the rate of imprisonment of Aboriginal people in Western Australia. However, the Commission acknowledges that many of its recommendations will take time to implement and longer to have any significant impact on the rate of Aboriginal imprisonment. For example, the Commission considers that its recommendation for the establishment of community justice groups has the potential to reduce imprisonment rates in the long-term through the use of diversionary options and support for Aboriginal-controlled crime prevention and justice mechanisms. Many of the Commission's recommendations will remove disadvantages experienced by Aboriginal people in the criminal justice system and improve the way in which the system deals with Aboriginal people. Nevertheless, the Commission still considered that sentencing reform was necessary in order to ensure that courts would actively consider the situation of Aboriginal imprisonment in this state.

28. See discussion under 'Over-Representation in the Criminal Justice System', above pp 82–83.

29. Morgan N & Motteram J, 'Aboriginal People and Justice Services: Plans, programs and delivery', LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 235, 241.

30. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 209.

31. *Ibid* 97–99.

32. *Ibid* 98–99. See Office of Inspector of Custodial Services, *Directed Review of the Management of Offenders in Custody*, Report No. 30 (November 2005) 5–6. According to the Mahoney Inquiry, the former Department of Justice acknowledged that systemic discrimination is one cause of the high rates of Indigenous over-representation: see Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [9.24].

33. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) Recommendation 92.

34. *Sentencing Act 1995* (WA) ss 6(5), 35(1) & 39; *Young Offenders Act 1994* (WA) s 7(h). The Commission notes that most Australian jurisdictions contain legislative provisions to the effect that imprisonment must not be used by a court unless all other sentencing options are considered inappropriate: see *Crimes Act 1914* (Cth) s 17A; *Crimes Act 1900* (ACT) s 345; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5; *Criminal Law (Sentencing) Act 1988* (SA) s 11; *Sentencing Act 1997* (Tas) s 12; *Sentencing Act 1991* (Vic) s 5(4). Section 9(2) of the *Penalties and Sentences Act 1992* (Qld) provides that a court must have regard to, among other things, the principles that a 'sentence of imprisonment should only be imposed as a last resort' and that a 'sentence that allows the offender to stay in the community is preferable'.

35. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 210.

36. Hasllo S, 'Aboriginal Sentencing Reform in Canada – Prospects for Success: Standing tall with both feet planted firmly in the air' (2000) 7(1) *Murdoch University Electronic Journal of Law* [7].

37. See discussion under 'Over-Representation in the Criminal Justice System' above, pp 82–83.

In its Discussion Paper, the Commission examined an approach adopted in Canada to deal with the over-representation of Indigenous people within the Canadian criminal justice system.³⁸ The *Criminal Code 1985* (Canada) was amended in 1996 to include the following principle:

All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, *with particular attention to the circumstances of aboriginal offenders.*³⁹

The Supreme Court of Canada considered this section in *R v Glaude*⁴⁰ and held that it was introduced for the purpose of reducing the tragic over-representation of Aboriginal people in Canadian prisons. The court held that the section directs sentencing courts to undertake the sentencing process for Aboriginal offenders differently, 'in order to endeavour to achieve a truly fit and proper sentence in the particular case'.⁴¹ Further, the court stated that the phrase 'particular attention to the circumstances of Aboriginal offenders' does not mean that judges are to pay 'more' attention when sentencing Aboriginal offenders.⁴² Rather, the court held that judges should 'pay particular attention to the circumstances' of Aboriginal offenders 'because those circumstances are unique, and different' from the circumstances of non-Aboriginal offenders.⁴³

The court also noted that imprisonment may be less appropriate or a less useful sanction for Aboriginal offenders.⁴⁴ Importantly, the court observed that the Canadian government's objective when enacting the section was directed at reducing the use of prison; increasing the use of restorative justice principles in sentencing; and utilising, where possible, Aboriginal community justice initiatives when sentencing Aboriginal offenders.⁴⁵ The court emphasised that this approach did not mean that Aboriginal people would escape prison for serious or violent offences.⁴⁶

In its Discussion Paper the Commission considered whether to introduce a legislative provision in similar terms to the Canadian statute. The Commission took into account that the principle that imprisonment should only be used as a last resort is already reflected in legislation and that common law sentencing principles allow for issues connected with an offender's Aboriginality to be considered. The Commission examined the arguments for and against the introduction of a similar provision in Western Australia.⁴⁷ The Commission noted the lack of judicial decisions acknowledging the detrimental effect of practices within the criminal justice system upon the rate of imprisonment of Aboriginal people. It was concluded that this fact justified the introduction of a legislative provision which directs courts to consider the particular circumstances of Aboriginal people when deciding whether to impose a custodial sentence.⁴⁸

The Commission emphasised that general sentencing principles would still apply and where an offence is particularly serious imprisonment would still be required. The objective of the Commission's proposal was to encourage courts to adopt an approach to the sentencing of Aboriginal people consistent with the approach by the Western Australian Court of Appeal in *WO (A Child) v The State of Western Australia*.⁴⁹ In this case the court considered research that indicated Aboriginal children were diverted from the formal criminal justice system less often than non-Aboriginal children. The court observed that:

[T]he dramatic over-representation of Aboriginal youth in the criminal justice system, and particularly in detention, may be a consequence of a sequence of decisions, each of which appears relatively inconsequential at the time, but which compound and become serious retrospectively. Young Aborigines then quickly develop a 'profile' of characteristics which identify them as habitual offenders and quickly exhaust whatever diversionary alternatives exist.⁵⁰

38. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 210–11.

39. *Criminal Code 1985* (Canada) s 718.2(e) (emphasis added).

40. [1999] 171 DLR (4th) 385.

41. *Ibid* [33] (Cory & Iacobucci JJ).

42. *Ibid* [37].

43. *Ibid*. Richard Edney argued that an 'examination of the life stories that make up RCIADIC and upon which the RCIADIC Recommendations are built, would reveal that the Indigenous experience of the criminal justice system is *unique and different*': see Edney R, 'The Retreat from Fernando and the Erasure of Indigenous Identity in Sentencing' (2006) 6(17) *Indigenous Law Bulletin* 8, 10.

44. *Ibid*.

45. *Ibid* [47]. At the same time as the introduction of s 718.2(e), other principles were included in the *Criminal Code*, such as the objective to 'provide reparations for harm done to victims or to the community and 'to promote a sense of responsibility in offenders': see *Criminal Code 1985* (Canada) ss 718 (e)–(f).

46. *Ibid* [80].

47. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 210–12.

48. *Ibid* 212, Proposal 30.

49. [2005] WASCA 94. For a discussion of the case, see 'The relevance of Aboriginality to sentencing', above pp 171–73.

50. *Ibid* [60].

The Court stated that as a consequence of these past decisions, children appearing before a court may incorrectly be assumed to be the more serious offenders and therefore the court held that it 'is critical that, at each stage of that process, the Court should examine, by reference to the detailed circumstances of the prior offences, whether those assumptions are justified'⁵¹.

The Department of the Attorney General indicated in its submission that the Commission's proposal may be perceived as discriminatory but noted that affirmative action is permitted under the *Racial Discrimination Act 1975* (Cth).⁵² In its Discussion Paper, the Commission referred to the potential argument that this proposal could be seen as discriminatory. The Commission concluded that a provision directing courts when considering imprisonment to take into account the particular circumstances of Aboriginal people would fall within the meaning of a special measure under s 8 of the *Racial Discrimination Act 1975* (Cth).⁵³ The Commission discusses in Chapter One that affirmative action or special measures are permitted in order to achieve substantive equality.⁵⁴

The Commission received support for its proposal from the Department of Corrective Services, the Aboriginal Legal Service (ALS), the Law Council of Australia, and the Criminal Lawyers Association.⁵⁵ The Chief Magistrate responded to the Commission's proposal by stating that all sentencing courts currently have regard to the particular circumstances of Aboriginal people. As explained above, the Commission found that courts generally take into account socio-economic disadvantages experienced by Aboriginal people during sentencing decisions, but what is required is a consideration of the particular factors Aboriginal people face within the criminal justice system. The Chief

Magistrate further submitted that it would be preferable to ensure that there are effective sentencing alternatives, in particular for Aboriginal people in remote areas.⁵⁶ The Commission agrees that there is currently a lack of effective sentencing and diversionary options for Aboriginal people and believes that some of its recommendations will address this issue.

The Law Society suggested an alternative recommendation that the relevant sentencing legislation should provide:

When considering whether a term of imprisonment is appropriate for an Aboriginal offender, the court is to have regard to the particular circumstances of that offender, including his or her economic, social and cultural characteristics. In respect of offences other than serious offences against the person, consideration shall be given to methods of punishment other than confinement to prison.⁵⁷

In the Commission's opinion the first part of the Law Society's suggestion essentially duplicates the Commission's recommendation that the cultural background of the offender is a relevant sentencing factor. This recommendation does not include the 'economic' or 'social' characteristics but, as noted above, the Commission recommends that the sentencing legislation in Western Australia should contain a list of all relevant sentencing factors for all offenders (which would necessarily include other aspects of an offender's background).

The second part of the Law Society's suggestion emphasises that imprisonment is usually required for serious offences against the person.⁵⁸ Similarly, the Chief Magistrate submitted that for repeat serious offenders there is no alternative to imprisonment.⁵⁹ The Commission agrees that imprisonment is generally

51. Ibid [62]. These observations were repeated by Wheeler JA in *TL (A Child) v Western Australia* [2005] WASCA 173 [35]–[37]. See also discussion under 'Police – Diversion', below pp 197–205.

52. Department of the Attorney General, Submission No. 34 (11 May 2006) 7. The Department did not specify whether it supported or opposed the Commission's proposal.

53. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 211.

54. See discussion under 'Non-Discrimination and Equality Before the Law', Chapter One, above pp 8–12. Haslip mentioned, when discussing the Canadian provision, the argument that the provision could be seen as creating a 'two-tiered' justice system. She observed that when taking into account the gross overrepresentation of Aboriginal people in custody in Canada there may already be two systems of justice: see Haslip S, 'Aboriginal Sentencing Reform in Canada – Prospects for Success: Standing tall with both feet planted firmly in the air' (2000) 7(1) *Murdoch University Electronic Journal of Law* [42].

55. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 10; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 14–15; Law Council of Australia, Submission No. 41 (29 May 2006) 14; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 3.

56. Chief Magistrate Steven Heath, Magistrates Court, Submission No. 10 (21 March 2006) 3.

57. The Law Society of Western Australia, Submission No. 36 (16 May 2006) 5–6.

58. In its submission the Law Society referred to the International Labour Organisation *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention 169). The Law Society noted that article 10 provides that when imposing general law penalties upon Indigenous people 'account shall be taken of their economic, social and cultural characteristics'. The Law Society also noted that article 10 provides that 'preference shall be given to methods of punishment other than confinement in prison'. The Commission's believes that its recommendation takes into account this principle. The ILO Convention 169 is not binding upon Australia but it has been referred to by Australian judges: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 69–70.

59. Chief Magistrate Steven Heath, Magistrates Court, Submission No. 10 (21 March 2006) 3.

The Commission strongly encourages courts in Western Australia to consider more effective and appropriate options for Aboriginal offenders.

required for serious repeat offenders, especially with respect to violent and sexual offending. The Commission's recommendation—that when considering imprisonment courts should have regard to the particular circumstances of Aboriginal people—may be considered more relevant in sentencing for offences of a less serious nature. Generally, Aboriginal adults constitute about 40 per cent of the adult prison population.⁶⁰ In 2004, Aboriginal people constituted more than half of all adult prisoners in custody for property damage and good order offences. With respect to driving offences Aboriginal people made up more than 60 per cent of all prisoners in custody.⁶¹

The ALS strongly supported the Commission's proposal observing that:

There is strong need for legislation compelling judges and magistrates to take into account the particular circumstances of Aboriginal and Torres Strait Islander people ... the Western Australian legal system repeatedly demonstrates the systemic racism that occurs when response to the particular circumstances of Aboriginal and Torres Strait Islander people is left to the discretion of officials.⁶²

The ALS also highlighted that imprisonment has become a 'normal part of life' for many Aboriginal people and that this cycle must be broken.⁶³ The Commission is of the view that the mass imprisonment of Aboriginal people in this state demands immediate attention. It is accepted that there are various methods for reducing Aboriginal offending and imprisonment rates. But until these methods are funded and operational the lives of Aboriginal people, their families and communities will continue to be destroyed by the over-use of incarceration.

The Commission wishes to make it clear that its recommendation does not mean that Aboriginal offenders will not go to prison. Nor does it mean that Aboriginal people will be treated more leniently than non-Aboriginal people just on the basis of race. By making this recommendation, the Commission strongly encourages courts in Western Australia to consider more effective and appropriate options for Aboriginal offenders, such as those developed by an Aboriginal community or a community justice group. What the Commission is recommending is that when judicial officers are required to sentence Aboriginal people they turn their minds not just to the matters that are directly relevant to the individual circumstances of the offender but to the circumstances of Aboriginal people generally. These circumstances include over-representation of Aboriginal people in the criminal justice system. A judicial officer would need to be satisfied that the particular offender has experienced in some way the negative effects of systemic discrimination and disadvantage within the criminal justice system and the community.⁶⁴

Recommendation 37

Taking into account the circumstances of Aboriginal people when considering the principle that imprisonment is a sentence of last resort

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 (or a term of detention) is appropriate the court is to have regard to the particular circumstances of Aboriginal people.⁶⁵

60. See discussion under 'Over-Representation in the Criminal Justice System', above pp 82–83.

61. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2004* (Perth: Crime Research Centre, 2005) 140–43.

62. The Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 15.

63. Ibid. The ALRC has noted that for Aboriginal people it is a 'widely held view that no stigma attaches to going to gaol': see ALRC, *The Recognition of Aboriginal Customary Laws*, Final Report No. 31 (1986) [535]. Similarly, John Nicholson has observed that some Aboriginal men consider prison as a 'rite of passage' and therefore it may be pointless to continue to impose penalties that neither deter nor rehabilitate Aboriginal offenders: see Nicholson J, 'The Sentencing of Aboriginal Offenders' (1999) 23 *Criminal Law Journal* 85, 88. This issue was alluded to during the consultations at Albany where it was stated that some 'boys see prison as a rite of passage, although they are still scared when they arrive': see LRCWA, *Thematic Summary of Consultations – Albany*, 18 November 2003, 19.

64. For example, this approach may justify giving an Aboriginal offender from a remote area one further chance in the community because on every other time the offender was released in the community there was not support programs available to assist in rehabilitating the offender and this explains, in part, why this particular person continued to offend.

65. The *Sentencing Act 1995* (WA) and the *Young Offenders Act 1994* (WA) should also be amended to provide a definition of an Aboriginal person which includes a Torres Strait Islander person: see Recommendation 4, above p 63.

Aboriginal Customary Law and Sentencing

In its Discussion Paper the Commission observed that there is extensive judicial authority for the consideration of Aboriginal customary law when sentencing. This has been done on the basis that customary law is one factor associated with an offender's Aboriginal background. Most commonly, customary law has been considered when an offender is liable to traditional punishment. Courts have also, although far less often, considered aspects of Aboriginal customary law when considering the reason or explanation for an offence.⁶⁶

Traditional punishment as mitigation

If an Aboriginal person commits an offence against Australian law and the conduct giving rise to the offence also violates Aboriginal customary law the person may be liable to face two punishments. From an examination of the relevant cases the Commission has identified the most important issues:

- Courts cannot condone or sanction the infliction of traditional punishment that may be unlawful under Australian law.⁶⁷ While judicial officers have recognised that unlawful traditional punishment has or will take place they have avoided incorporating the punishment into a sentencing order.⁶⁸
- 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.⁶⁹
- When taking into account the fact that an Aboriginal person has been or will be punished under customary law, courts have acknowledged the principle that a person should not be punished twice for an offence. Many Aboriginal people consulted by the Commission were very concerned about the issue of double punishment. The Commission is of the view that 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.⁷⁰
- The Western Australian cases (in comparison to other jurisdictions) that have taken into account traditional punishment have generally involved physical punishments only.⁷¹ However, in other jurisdictions various other forms of traditional punishment (such as banishment, community meetings and reprimands by Elders) have been taken into account as mitigation.⁷² The Commission is of the view that its recommendations for the establishment of community justice groups and Aboriginal courts will encourage greater awareness and recognition of non-violent forms of customary law punishment.
- During its consultations the Commission was made aware of the need to consider whether traditional punishment was properly undertaken in accordance with Aboriginal customary law. The Commission was told that the infliction of traditional punishment is a regulated process, generally involving Elders, and should not be confused with alcohol-related revenge violence.⁷³ The Commission stated that in order to prevent any distortion of Aboriginal customary law,

66. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 208 & 212.

67. *Ibid* 213.

68. The Department of the Attorney General, in its submission, referred to unlawful traditional punishments and suggested that courts in Western Australia currently exercise their powers to allow traditional punishment to occur. The Department submitted that the recognition of traditional punishment should not be formally recognised in legislation because of the 'tension' between traditional punishments and Western Australian law: see Department of the Attorney General, Submission No. 34 (11 May 2006) 8. However, the Commission is not aware of any case where a court in this state has structured its sentencing decision to facilitate unlawful traditional punishment. On the contrary, courts have regularly emphasised that when taking into account the fact that the offender has been punished under customary law the court is not condoning the behaviour. It is the Commission's view that under the current law in this state, and pursuant to the Commission's recommendations, a court will not be permitted to make a decision to allow an offender to be released for the purpose of undergoing traditional punishment where that punishment would constitute an offence against Western Australian law.

69. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 213–14. In its submission the Law Council of Australia suggested that the recognition of traditional punishment during sentencing proceedings is only likely to be appropriate if the traditional punishment has occurred prior to the sentencing decision: see Law Council of Australia, Submission No. 41 (29 May 2006) 14. The Commission agrees that taking into account traditional punishment that has not yet taken place is problematic. Nonetheless, if reliable and convincing evidence is presented which satisfies the court that the punishment will in fact take place, then it may be appropriate for the court to take this into account when determining the appropriate penalty.

70. LRCWA, *ibid* 214.

71. *Ibid* 214–15.

72. Williams V, 'The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law', LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 1, 10–12.

73. See for example, LRCWA, Project No. 94, *Thematic Summary of Consultations – Warburton*, 3–4 March 2003, 5; *Laverton*, 6 March 2003, 14; *Pilbara*, 6–11 April 2003, 8. In *R v Gurruwiwi* (Unreported, Supreme Court of the Northern Territory, SCC 20510847, Thomas J, 12 January 2006) 4–6, the accused assaulted his mother who was being sworn at in an offensive manner by another person. Evidence was presented to the court to explain that under the relevant customary laws of the community, the accused was obliged to protect his mother from this type of abuse. In the past, this would have been done by throwing a woomera at his mother and upon the drawing of blood the person who had been swearing would feel guilty

The Commission has rejected the argument that Australian courts permit Aboriginal men to rely on Aboriginal customary law as an excuse for family violence and sexual abuse.

courts should be satisfied that the punishment was properly done in accordance with customary law.⁷⁴

Aboriginal customary law as the reason or explanation for an offence

The Commission has found that courts are generally reluctant to take into account Aboriginal customary law as the reason or explanation for an offence.⁷⁵ In some cases, this is because of the manner in which the information about Aboriginal customary law was presented to the court. In other cases, despite arguments to the contrary, the court has rejected the contention that the offence was committed because of Aboriginal customary law. For example, in *Ashley v Materna*⁷⁶ the accused was convicted of assaulting his sister. It was argued that because the victim's husband had sworn at her in the presence of the accused there was a breach of customary law and the accused was allowed to punish his sister. This explanation was rejected by the court. There was no evidence that the assault was obligatory under customary law or that the offender would face any consequences if he had not 'punished' his sister. In addition, the offender was affected by alcohol at the time of the offence. Therefore, the court held that the conduct could not be properly categorised as Aboriginal customary law.⁷⁷

Violent and sexual offences

In Chapter One, the Commission has considered and rejected the argument that Australian courts permit Aboriginal men to rely on Aboriginal customary law as an excuse for family violence and sexual abuse.⁷⁸ The Commission acknowledged that, in the past, courts have at times imposed more lenient penalties on Aboriginal people who commit violent offences against other Aboriginal people, especially women and children.⁷⁹ However, the Commission found that courts have generally taken the view that violent and sexual offences are too serious under Australian law for there to be any significant reduction in penalty.⁸⁰ Further, arguments that family violence is generally acceptable within Aboriginal communities or permitted under customary law have been firmly rejected by courts.⁸¹

For example, in *R v Danie*⁸² it was stated that Aboriginal people who commit violent offences against other members of their communities should not 'be accorded special treatment by the imposition of lighter sentences'.⁸³ In relation to the belief by some Aboriginal men that violence against Aboriginal women is acceptable under customary law, Kearney J in the Northern Territory Supreme Court stated that courts must endeavour to dispel the widespread belief that

and stop the abusive language. In this case the accused was heavily intoxicated and hit his mother with a rock. The evidence presented by an Aboriginal woman in the community also established that the accused was not required to hit his mother and he would not have been traditionally punished if he had done nothing. The sentencing judge held that because the accused was affected by alcohol, the court could not attach any weight to the customary law considerations.

74. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 215. Recently, in the Northern Territory, Riley J held that an attack on the offender by the victim's family could not properly be described as customary law punishment. It was noted that there was no anthropological evidence or evidence from Elders and Riley J concluded that what had occurred was merely private revenge. Riley J stated that traditional payback is 'not mere vengeance' and that it is 'directed towards securing the peace and welfare of a particular community': *R v Joran* (Unreported, Supreme Court of the Northern Territory, SCC 20015521, Riley J, 19 July 2006) 3–4. See also *R v Egan* (Unreported, Supreme Court of the Northern Territory, SCC 20510088, Olsson AJ, 16 December 2005).
75. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 216. In two South Australian cases Aboriginal customary law has been accepted to explain offences of arson. In *R v Goldsmith* (1995) 65 SASR 373 the Aboriginal offender set fire to the house where his friend had died. The court took into account the offender's cultural belief that the lighting of the fire would allow the spirit of his friend to rest in peace. In *R v Shannon* (1991) 57 SASR 14 the court took into account as mitigation the fact that the offender lit the fire to protect himself from his father who had threatened the offender with the 'kadaitcha' men: see *Williams V*, 'The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law', LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 1, 13. (Unreported, Supreme Court of the Northern Territory, No. JA1/1997, Bailey J, 21 August 1997).
76. *Ibid* 9.
77. *Ibid* 9.
78. See discussion under 'Customary law as an excuse for violence and abuse', Chapter One, above pp 23–26.
79. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 216.
80. *Ibid* 206–207.
81. *Ibid* 217.
82. [1998] 1 Qld R 499, 530–31 (Fitzgerald P).
83. *Ibid* 530–31 (Fitzgerald P).

such violence is acceptable.⁸⁴ The Western Australian Court of Criminal Appeal has acknowledged the need to protect Aboriginal women and that this will often mean that mitigatory circumstances such as socio-economic disadvantage will have less weight.⁸⁵

The Commission has also considered the continuing debate about offences that arise from the practice of promised brides under traditional Aboriginal law. The Commission examined the two relevant Northern Territory cases where it has been argued that it is permissible to have sexual relations with young Aboriginal girls because of the practice of promised brides.⁸⁶ The Commission is of the view 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.⁸⁷

The Commission strongly condemns the suggestion that family violence or sexual abuse against Aboriginal women and children is justified under Aboriginal customary law.⁸⁸ Nevertheless, the Commission recognises the potential for offenders to argue that such behaviour is acceptable under customary law. The Commission has received submissions emphasising the need to ensure that Aboriginal women and children are protected by Australian law.⁸⁹ For example, the Indigenous Women's Congress submitted that customary law should not be used as a defence or mitigating factor in relation to violent crimes.⁹⁰ In response, the Commission stresses that there has never been a customary law defence in

Western Australia for violent or sexual offences. And further, the Commission has rejected the introduction of a customary law defence which could potentially apply to violent and sexual offences in order to ensure that Aboriginal women and children are fully protected by Australian law.⁹¹

The Commission emphasises that just because an offender argues that violence or sexual abuse is acceptable under customary law does not mean that the behaviour is acceptable nor does it mean that courts will accept these arguments. The Commission concluded in its Discussion Paper that the potential for some accused to argue that violence or sexual abuse is acceptable under customary law does not justify a ban on courts considering Aboriginal customary law issues.⁹² 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.⁹³ In Chapter Four the Commission has recommended that the 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. It has also recommended that within this process particular attention should be paid to the rights of women and children.⁹⁴

The Commission is aware that at a meeting of the Council of Australian Governments (COAG) on 14 July 2006 all state and territory governments agreed to ensure, if necessary by legislative amendment, that Aboriginal customary law or cultural practices cannot be used to excuse, justify, authorise, require or lessen the seriousness of violence or sexual abuse.⁹⁵ In Chapter

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84. *Amagula v White* (Unreported, Supreme Court of Northern Territory, No. JA 92/1997, Kearney J, 7 January 1998). In *Jardurin v The Queen* (1982) 44 ALR 424 the Federal Court in the Northern Territory rejected an argument that it was acceptable in Aboriginal communities for women to be beaten if they do not obey their husbands: see Law Council of Australia, *Recognition of Cultural Factors in Sentencing*, Submission to Council of Australian Governments (10 July 2006) 11.
85. *R v Woodley, Boonga and Charles* (1994) 76 A Crim R 302, 318. See also *Wiggin v The Queen* (Unreported Supreme Court of Western Australia, Court of Criminal Appeal, Sct No. 120 of 1990, 24 January 1991) where the court emphasised the need to protect Aboriginal women.
86. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 217–218. See also discussion under 'Customary law as an excuse for violence and abuse', Chapter One, above pp 23–26.
87. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 218.
88. In its submission, the Law Council of Australia similarly argued that Aboriginal customary law is not, and cannot, be used to support violent or abusive conduct against women and children: see Law Council of Australia, Submission No. 41 (29 May 2006) 5.
89. The Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006); Indigenous Women's Congress, Submission No. 49 (15 June 2006)1; LRCWA, telephone conversation with Dr Kate Auty SM (16 March 2006); Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 4–5.
90. Indigenous Women's Congress, Submission No. 49 (15 June 2006) 1.
91. See discussion under 'Defences Based on Aboriginal Customary Law', above pp 137–39.
92. The Aboriginal and Torres Strait Islander Social Justice Commissioner indicated that the Commission has adequately ensured that the 'recognition of customary law is consistent with the protection of the rights of Indigenous women and children': see Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 1.
93. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 218–19.
94. See Recommendation 5, above p 69. The Commission's approach to the recognition of customary law during sentencing proceedings is consistent with the approach adopted by the ALRC in its recent report about the sentencing of federal offenders: see ALRC, *Same Crime, Same Time: Sentencing of federal offenders*, Final Report No. 103 (June 2006) [29.71]. The Commission's approach is also supported by the views of the Aboriginal and Torres Strait Islander Social Justice Commissioner: see Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 8.
95. COAG meeting, 14 July 2006, <<http://www.coag.gov.au/meetings/140706/index.htm#indigenous>>.

If courts are not permitted to have reference to customary law, the important issue of double punishment will be overlooked.

One the Commission explains why it remains of the view that a ban on courts considering customary law is both unnecessary and inappropriate.⁹⁶ It is unnecessary because courts today, in particular in Western Australia, do not appear to accept the argument that Aboriginal law or culture justifies or authorises family violence or sexual abuse. It is inappropriate because there are other aspects of Aboriginal customary law that could be relevant to an offence of a violent nature and therefore lessen the court's view of the seriousness of that offence.⁹⁷ For example, an Aboriginal person may receive traditional punishment in his or her own community as a result of committing a violent offence. Courts have taken into account the fact that an offender has been punished already under customary law in order to ensure that the offender is not punished excessively for his or her conduct. The ALS emphasised in its submission that one of the main objectives in the recognition of customary law is to avoid double punishment for Aboriginal people who are punished under both Aboriginal customary law and Western Australian law.⁹⁸ If courts are not permitted to have reference to customary law, the important issue of double punishment will be overlooked. In addition, the potential for customary law punishment and processes to rehabilitate an offender could not be taken into account.

If the Western Australian government was to impose a legislative ban on Aboriginal customary law from being referred to during sentencing proceedings, the Commission strongly discourages adopting the wording used at the COAG meeting; that is, 'that no customary law or cultural practice excuses, justifies, authorises,

requires, or lessens the seriousness of violence or sexual abuse'.⁹⁹ In particular, the words 'lessens the seriousness of violence' could prohibit courts from taking into account in mitigation the fact that an Aboriginal person, either male or female, has been traditionally punished in respect of a violent offence.¹⁰⁰ But as stated above, the Commission does not agree with any legislative intervention in this regard and strongly believes that its recommendations in this report will equip courts to reject any arguments that customary law justifies family violence or sexual abuse.¹⁰¹

Aboriginal customary law as an aggravating factor

Generally, a sentencing court is entitled to take into account aggravating factors subject to the overriding principle that the sentence imposed must be proportionate to the offence committed. An accused who has engaged in conduct that is permitted or required under Aboriginal customary law may be considered less blameworthy. On the other hand, where an accused has engaged in conduct that is prohibited under customary law it could mean that the court will consider the accused to be more blameworthy. For example, an Aboriginal offender may commit an offence of sexual assault against a person that the offender was prohibited from having contact with because of avoidance rules under customary law. While the offence of sexual assault would be viewed seriously by both Aboriginal people and non-Aboriginal people, this additional violation would make the offence more serious from the point of view of the offender's Aboriginal community.

96. See discussion under 'Recognition of customary law in sentencing'; Chapter One, above pp 28–29.

97. The Commission notes that Aboriginal customary law may also aggravate the seriousness of an offence of violence but at the same time the fact that the offender has been traditionally punished may provide mitigation.

98. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 2.

99. COAG meeting, 14 July 2006, <<http://www.coag.gov.au/meetings/140706/index.htm#indigenous>>.

100. The Commission notes that in November 2005 the Sentencing Amendment (Aboriginal Customary Law) Bill was introduced into the Northern Territory Parliament (and subsequently defeated) to provide that a court 'must not have regard to any aspect of Aboriginal customary law in sentencing an offender'. This bill was introduced for the sole purpose of preventing Aboriginal men from hiding behind customary law for violent offences against women: see Northern Territory, *Parliamentary Debates*, Tenth Assembly, 30 November 2005, Carney, Second Reading Speech. However, if this bill had been passed the wording would have prevented a court from considering all aspects of customary law, including the fact that someone had been traditionally punished and positive non-violent customary law punishments and processes. It would also have prevented a court from considering aggravating aspects under customary law.

101. For example, the establishment of community justice groups with gender balance will enable courts to hear relevant evidence from Aboriginal women. The Commission's recommendations in relation to Aboriginal cultural awareness will assist judicial officers (and others working in the criminal justice system) to understand what is and what is not acceptable under Aboriginal law and culture. The provision of Aboriginal liaison officers and the establishment of Aboriginal courts will also ensure that the criminal justice system is better informed about all aspects of customary law.

Legislative recognition of Aboriginal customary law during sentencing proceedings

In its Discussion Paper the Commission concluded that although there is judicial authority to support the consideration of Aboriginal customary law during sentencing proceedings, there is no consistent approach in Western Australia. Further, the judicial recognition of Aboriginal customary law in Western Australia has generally been limited to physical punishments. The Commission considered that reform is necessary in Western Australia to ensure that Aboriginal customary law is viewed more broadly. For example, in *R v Goutjawuy*¹⁰² the Northern Territory Supreme Court has recently taken into account non-violent traditional punishment. The accused was convicted of arson. During an argument with his wife he set fire to some clothes in his house, and the house and its contents were destroyed. The court was told that following the offence the accused had been placed in 'territorial asylum' by members of his community for seven months. The accused was required to comply with various conditions: he was constrained as to his whereabouts; prohibited from drinking and smoking; and required to spend time on his clan's homeland. It was explained that the purpose for sending the accused to his homeland was so that the accused could 'remain in neutral territory, for him to appreciate the law of his country and to reflect upon the seriousness of his offending'.¹⁰³ The leaders of the clan also erected a physical structure (referred to as a 'chamber of law'). The accused was required to spend about four hours each day over a period of three months attending this chamber and being instructed about traditional law. The court was informed that the accused was still required to complete the final stage of the 'chamber of law' and during the first two stages the Elders believed that the accused was committed to the process and remorseful for his offending behaviour. Southwood J took into account that the accused had undergone traditional punishment and as a result imposed a sentence of suspended imprisonment. One

condition attached to the suspended sentence was that the accused was required to complete the third and final stage of the 'chamber of law'. The Commission believes that this case is a useful example to demonstrate how Aboriginal customary law can be used effectively in the rehabilitation of an offender and to encourage a more holistic approach to the recognition of customary law.

The Commission proposed in its Discussion Paper 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.¹⁰⁴ The Commission stressed that in all cases the court would retain discretion and determine the appropriate weight to be given to Aboriginal customary law depending upon the circumstances of the case.

The Chief Magistrate submitted that the Commission's proposal would cause delays in court. He argued that the requirement that the court *must* consider any relevant customary issues would create a positive obligation on the court to conduct its own investigations.¹⁰⁵ As similarly explained in the section on bail, it was not the Commission's intention that judicial officers would be obliged in every case involving an Aboriginal accused to make their own inquiries about the possible relevance of customary law. Therefore, the Commission has recommended that the court must consider any *known* relevant Aboriginal customary law issues.¹⁰⁶

The Commission has received significant support for this proposal.¹⁰⁷ In particular, the Department of Corrective Services agreed that courts should take into account relevant aspects of customary law and that courts are able to balance Aboriginal customary law and international human rights standards that require the protection of women and children.¹⁰⁸

102. (Unreported, Supreme Court of the Northern Territory, SCC 20407332, Southwood J, 15 July 2005).

103. *Ibid.*, 3.

104. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 219–20, Proposal 31.

105. Chief Magistrate Steven Heath, Magistrates Court, Submission No. 10 (21 March 2006) 3.

106. See discussion under 'Bail – Personal circumstances of the accused', above pp 165–68. The Commission notes the ALRC has recently concluded that it is appropriate for sentencing legislation to provide that courts *must* consider any relevant sentencing factor where that factor is *known* to the court: see ALRC, *Same Crime, Same Time: Sentencing of federal offenders*, Final Report No. 103 (June 2006) [6.23].

107. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 11; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 2 & 16; Law Society of Western Australia, Submission No. 36 (16 May 2006) 6; Law Council of Australia, Submission No. 41 (29 May 2006) 14; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 3.

108. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 11.

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.

Recommendation 38

Aboriginal customary law and sentencing

That the *Sentencing Act 1995* (WA) and the *Young Offenders Act 1994* (WA) be amended to provide that when sentencing an Aboriginal offender¹⁰⁹ a sentencing court must consider:

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

Evidence of Aboriginal customary law in sentencing

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. As provided by s 15 of the *Sentencing Act 1995* (WA) a sentencing court 'may inform itself in any way it thinks fit'. It is not bound by the strict rules of evidence that apply to a court when conducting a trial. The Commission has recognised that there is a need to balance the requirement for reliable evidence about customary law and the flexible nature of sentencing proceedings.

The Commission was told during its consultations with Aboriginal people that false claims are sometimes 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.¹¹⁰ Of particular concern are cases involving violent or sexual offences against Aboriginal women (and children) if the information about customary law is presented from the viewpoint of the male offender.¹¹¹ In making its recommendations the Commission is mindful of the need to ensure 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.¹¹² 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 concluded in its Discussion Paper 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.¹¹³

The Commission examined the legislative provisions in the Northern Territory and Queensland that deal with the reception of information about Aboriginal customary law for sentencing purposes.¹¹⁴ The Commission proposed that there should be a legislative provision in

109. The *Sentencing Act 1995* (WA) and the *Young Offenders Act 1994* (WA) should also be amended to insert a definition of an Aboriginal person to include a Torres Strait Islander person: See Recommendation 4, above p 63.

110. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 221.

111. Ibid 222. See also Indigenous Women's Congress, consultation (28 March 2006).

112. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 221.

113. Ibid 222–23. The Department of Corrective Services expressly agreed with the Commission's conclusion that information about customary law should not be presented solely from defence counsel: see Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 11.

114. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 223. Following the legislative amendment in the Northern Territory the Commission notes that the Northern Territory Supreme Court took into account, after receiving affidavits from Elders in the offender's community and after hearing oral evidence from Elders belonging to the victim's family, that an offender had faced severe traditional punishment: see *R v Anthony* (Unreported, Supreme Court of the Northern Territory, SCC 20326538, Southwood J, 21 December 2005). The Commission also notes that s 9C of the *Criminal Law (Sentencing) Act 1988* (SA) was inserted in December 2005 to provide for sentencing conferences for Aboriginal defendants and that the views expressed during these conferences (which may include the views of Aboriginal Elders) can be taken into account by the sentencing court.

Western Australia to promote more reliable and balanced methods of presenting evidence about customary law to a sentencing court. The Commission's proposal provided that a sentencing court must have regard to any submissions made by a representative of a community justice group, or by an Elder or a respected member of the Aboriginal community of the offender or the victim. It was further proposed that submissions could be made orally or in writing on the application of the accused, the prosecution or a community justice group. The sentencing court must allow the other party a reasonable opportunity to respond to the submissions if requested.¹¹⁵

The Commission has concluded, throughout this Report, that whenever an Elder, a respected person or a member of a community justice group is providing information or evidence that person should disclose his or her relationship to the offender or the victim. The presence of a relationship may not necessarily weaken the relevance of the information put forward but it is important that whoever is relying on the information is appraised of any potential conflicts of interest. In relation to community justice groups, there will be an equal number of members from all relevant family and social groupings in the community. Therefore, if necessary, a court would be able to request evidence or information from a member of the community justice group that comes from a different family group to the offender (or the victim).

Numerous submissions agreed with the Commission's proposal to allow information or evidence in relation to customary law to be presented by Aboriginal community members.¹¹⁶ The Department of the Attorney General suggested, while agreeing with the Commission's proposal, that any submission from community members should only be presented to the court with the agreement of the victim. The Commission does not agree with this proposition because victims do not currently have the right to veto what information is presented to a sentencing court. By providing that the court must consider any submissions made by an appropriate member of the victim's community, the

Commission's recommendation ensures that the views of the victim can be taken into account.

Some submissions indicated that the practical implementation of the Commission's proposal may cause delays.¹¹⁷ For instance, Aboriginal people may not be able to respond to a request from the court to provide information during Aboriginal law ceremonial times.¹¹⁸ The Commission is of the view that where Aboriginal customary law is extremely important to the case, the interests of justice would necessarily require that the matter be adjourned for the relevant information to be presented. While any delays are regrettable, the Commission remains of the view that it is essential that courts are accurately informed about Aboriginal law and culture.¹¹⁹

Recommendation 39

Evidence of Aboriginal customary law during sentencing proceedings

That the *Sentencing Act 1995* (WA) and the *Young Offenders Act 1994* (WA) be amended to provide:

1. That when sentencing an Aboriginal person the court must have regard to any submissions made by a member of a community justice group,¹²⁰ an Elder and/or respected member of any Aboriginal community to which the offender and/or the victim belong.
2. 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 (or parties) a reasonable opportunity to respond to the submissions if requested.
3. That if an Elder, respected person or member of a community justice group provides information to the court then that person must advise the court of any relationship to the offender and/or the victim.

115. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 224, Proposal 32

116. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 11; Department of the Attorney General, Submission No. 34 (11 May 2006) 8; Law Society of Western Australia, Submission No. 36 (16 May 2006) 7; Law Council of Australia, Submission No. 41 (29 May 2006) 14; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 3. In its submission the Law Society suggested an alternative way of drafting the recommendation. The Commission agrees with the suggestion because it takes into account the fact that the court may receive submissions from more than one person and that the offender and the victim may both come from the same community.

117. Chief Magistrate Steven Heath, Magistrates Court, Submission No. 10 (21 March 2006) 3; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 11; Department of the Attorney General, Submission No. 34 (11 May 2006) 8.

118. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 11.

119. The Commission notes that sentencing may be delayed for a significant period of time in order to obtain pre-sentence, psychiatric and/or psychological reports.

Sentencing Options

Diversionsary schemes

In the criminal justice system there are two types of diversionary options: those that divert offenders away from the criminal justice system and those that divert offenders away from more punitive sentencing options (such as imprisonment). The police generally control options that divert offenders from entering the criminal justice system: a choice is made whether to charge or to divert the alleged offender. The role of police in diversion is considered below.¹²¹ In its Discussion Paper the Commission examined the existing diversionary options available to sentencing courts in Western Australia for Aboriginal offenders (both adults and juveniles).¹²²

For children there are two main diversionary options: a referral to a juvenile justice team and court conferencing. The Commission noted in its Discussion Paper that the juvenile justice team option has been potentially improved by the provision for Aboriginal Elders and others to become more directly involved in the team process.¹²³ Nonetheless, 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 Commission believes that community justice groups could play an active role in diversionary justice options. The exact nature of that role will be dependent upon further community consultation and agreement. The Commission also concluded that 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).

Apart from victim-offender mediation run by the Department of Justice there are currently no formal conferencing options for adults in Western Australia. The Mahoney Inquiry recommended that the Western Australia Police and the Department of the Attorney General should establish a conferencing trial based on the juvenile justice team model for first time and minor young adult offenders. It was suggested that after considering the outcome this model could be expanded.¹²⁴ While conferencing or other restorative justice programs may be beneficial for all adult offenders, in the context of this project, the Commission wishes to indicate its supports for Aboriginal-controlled diversionary options for adult Aboriginal offenders.¹²⁵

In order to facilitate the use of Aboriginal diversionary options, the Commission proposed that s 16 of the *Sentencing Act* be amended to allow a sentencing court to adjourn sentencing for up to 12 months (instead of the current maximum of six months).¹²⁶ The Commission was of the view that 12 months should allow sufficient time for Aboriginal diversionary programs to be decided upon and completed. Most submissions in respect of this proposal were supportive.¹²⁷ The Department of the Attorney General, in its submission, commented that extending the adjournment period for sentencing may make diversionary options 'a more viable alternative to prison'.¹²⁸ The Western Australia Police did not support this proposal because an extension to the period that a court can adjourn sentencing may not be in the best interests of the victim. It was explained that if an offender is not sentenced as soon as possible the victim may suffer additional stress.¹²⁹ However, pursuant to s 33A of the *Sentencing Act* a court can currently adjourn sentencing for up to two years if it imposes a presentence order (PSO).¹³⁰ A court can impose a PSO if it considers that a term of imprisonment is warranted. Therefore, sentencing can be adjourned for up to two years for more serious offences. The Commission's

120. A community justice group is defined as a community justice group as established under the *Aboriginal Communities Act 1979* (WA).

121. See discussion under 'Police – Diversion', below pp 197–205.

122. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 224–25.

123. *Ibid* 226.

124. Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) Recommendation 46 [7.337].

125. The Commission is of the view that existing and future diversionary programs (whether they are government-controlled or Aboriginal-controlled) should be monitored and evaluated: see Recommendation 51, above p 205.

126. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 227, Proposal 33.

127. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 12; Department of the Attorney General, Submission No. 34 (11 May 2006) 9; Law Council of Australia, Submission No. 41 (29 May 2006) 14.

128. Department of the Attorney General, Submission No. 34 (11 May 2006) 9.

129. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 8.

130. The Department of Corrective Services mentioned that the introduction of conditional suspended sentences in May 2006, means that a prescribed court can adjourn sentencing for up to two years: see Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 12. However, the Commission notes that pursuant to s 81 of the *Sentencing Act 1995* (WA) a conditional suspended sentence is in fact a sentence (which incidentally can be imposed for up to two years).

proposal will broaden the available options for diversion: a court will effectively be able to consider diversionary options in circumstances where a PSO is not appropriate.

It was also argued by the Western Australia Police that delays in sentencing may increase the possibility of 'retribution and violent payback' because it could be seen that 'justice has not been done'.¹³¹ It is not clear whether the Western Australia Police are referring to Aboriginal traditional payback or retribution in a wider sense. Traditional punishment generally takes place irrespective of any decision by a criminal court. The Commission is of the view that the risk of general retribution would generally be greater where there is dissatisfaction about the actual penalty imposed rather than merely because the decision about penalty has been delayed. In any event, the Commission does not consider that the proper administration of justice should be affected by concerns that some members of the community, who do not agree with the court's decision, may act unlawfully. The Commission is of the view that it is appropriate to extend the time available for a court to consider whether an offender has successfully engaged in a diversionary option. This recommendation does not mean that every court will adjourn sentencing for 12 months: it means that a court can adjourn sentencing for up to 12 months in appropriate circumstances.



Recommendation 40

Adjournment of sentencing

That s 16(2) 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.

Community-based sentencing options

The Commission has stressed that Aboriginal people should be involved in the design and delivery of community-based sentencing options.¹³² Earlier in this chapter the Commission recommended that the Western Australian government ensure there are adequate culturally appropriate programs and services for Aboriginal people in the criminal justice system, including offenders.¹³³ In making that recommendation the Commission concluded that priority should be given to Aboriginal-owned programs and services. The Commission is of the view that community justice groups may develop programs and services for Aboriginal offenders and that these programs and services could be incorporated into community-based sentencing options. It may also be appropriate for members of a community justice group to be involved in the administration of community-based sentencing options; for example, by assisting with community education about the fines enforcement system and, with adequate resources, assisting with the collection of fines in remote areas. Similarly, members of a community justice group could supervise community work and development orders or supervise offenders who are subject to a sentencing order imposed by a court.¹³⁴

131. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 8.

132. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 227.

133. See Recommendation 7, above p 86.

134. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 228–29.

The Commission has stressed that Aboriginal people should be involved in the design and delivery of community-based sentencing options

The Commission noted in its Discussion Paper that some Aboriginal communities are already involved in the supervision of both adult and juvenile offenders. These communities have entered into Aboriginal Community Supervision Agreements with the Department of Corrective Services. The Commission observed that these agreements essentially provide that the Aboriginal community takes over the supervision on behalf of the Department.¹³⁵ More flexible supervision arrangements—where Aboriginal customary law processes could be used to rehabilitate and support an offender—could be accommodated by the use of diversionary options or through specific conditions attached to a court order.

The Commission recognises that there may be some Aboriginal offenders who 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 offenders (or particular offenders). For example, the Ngaanyatjarra Council has indicated its opposition to community justice groups being involved in the supervision of offenders because of insufficient resources to effectively take on this task.¹³⁶ Therefore, if a sentencing 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 by their community, it is vital that the court is properly informed of the views of the community (or the community justice group).¹³⁷ When considering the involvement of Aboriginal communities in sentencing orders the Commission also suggested that courts should be flexible, focusing on the outcome of the process from the perspective of the offender, the victim and the community. Any sentencing order providing for the involvement of an Aboriginal community should not be unduly restrictive about the nature of that involvement. At the same time, the court can retain an overall monitoring role by requiring that the offender re-appear in court on a specified day to determine the final outcome, in the light of his or her response to the program or supervision.

The Commission has separately discussed the establishment of Aboriginal courts in Western Australia.¹³⁸ Under the Commission's recommendations in relation to sentencing, any court will be required to consider relevant and known Aboriginal customary law matters and the views of a community justice group. Aboriginal courts will facilitate this process and provide a space within the criminal justice system where all of those involved in the proceedings are fully aware of the issues.

135. *Ibid* 229.

136. Ngaanyatjarra Council, Submission No. 21 (28 April 2006) 42.

137. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 230.

138. See discussion under 'Aboriginal Courts', above pp 124–36.

Practice and Procedure

Since European settlement Aboriginal people have been subject to Australian criminal law. The Commission acknowledged throughout its Discussion Paper that many Aboriginal people feel alienated by the criminal justice system. At the same time, the Commission concluded that in order to ensure the protection of all Australians, including Aboriginal Australians, Aboriginal people must be bound by the general criminal law.¹ 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.²

Juries

The fundamental principle underlying a jury trial is the right of an accused to be judged by his or her peers. Yet for Aboriginal people this is seldom the case: Aboriginal people are under-represented as jurors. The Commission does not consider that it would be appropriate to prevent an Aboriginal accused from having a trial by jury simply because the jury may not include any Aboriginal people. That approach would be discriminatory: an Aboriginal person must be allowed to exercise his or her right to a trial by jury. As previously outlined by the Commission, in circumstances where there may be prejudice, an Aboriginal person could apply for a trial by a judge alone or for a change in the venue of the trial which may affect the make-up of the jury.³

In its Discussion Paper the Commission considered some of the reasons for the under-representation of

Aboriginal people on juries.⁴ One of the reasons is that many courts are long distances from remote locations populated by Aboriginal people. This issue has again been drawn to the Commission's attention.⁵ The Commission has recommended changes to the *Road Traffic Act 1974 (WA)* and the *Fines, Penalties and Infringement Notices Enforcement Act 1994 (WA)* in order to improve the transport options for Aboriginal people living in remote locations.⁶ Under these recommendations the need to attend court, in circumstances where there are no other feasible transport options, can be one basis for an application for an extraordinary drivers licence or an application to cancel a licence suspension order.



1. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 231.
2. The majority of the Commission's recommendations in relation to court procedures can be found in Chapter Nine. This section deals only with procedural matters that are specific to the criminal justice system.
3. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 232. The Commission notes that in July 2006 in Queensland an Aboriginal accused successfully argued for a change of venue of his trial from Townsville to Brisbane. The basis of the application was that a survey conducted of a number of Townsville residents indicated that because of the highly publicised incident that gave rise to the charges a large proportion of the residents were prejudiced against the accused and Aboriginal people in general: see *Wotton v Director of Public Prosecutions* [2006] QDC 202, Skoien ACJ (14 July 2006).
4. LRCWA, *ibid* 231.
5. Department of the Attorney General, Submission No. 34 (11 May 2006) 9; Dr Brian Steels, consultation (28 April 2006).
6. See Recommendations 13 & 14, pp 95–96.

Under Aboriginal customary law some matters can only be heard by women and some can only be heard by men.

Single-gender juries

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 Commission concluded in its Discussion Paper that 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.⁷ In the only two known cases where gender-restricted evidence was relevant, a single-gender jury was obtained by agreement between the parties.⁸ The Commission proposed that where gender-restricted evidence is relevant to the case, the court may order that the jury be comprised of one gender.⁹

The Department of the Attorney General agreed in its submission that it would not be in the interests of justice if relevant gender-restricted evidence could not be given because a jury was comprised of both genders.¹⁰ The Department further commented that it would be necessary to ensure that this proposal did not 'lead to any bias towards the other party'. The requirement under the proposal—that a court can only order that a jury be comprised of one gender, if it is in the interests of justice—is sufficient to ensure that a court will consider all relevant issues when making such a decision. If having a jury of one gender would significantly prejudice the other party then it would be unlikely that a court would find that a single-gender jury was in the interests of justice.

The proposal for single-gender juries was also supported by the Law Council of Australia and the Criminal Lawyers Association.¹¹ In the absence of any submissions

opposing this proposal the Commission is of the view that it is appropriate to recommend that criminal courts have the power in certain circumstances to order that a jury be comprised of one gender. Although the Commission does not consider that such an order would be a regular occurrence, it is important that Aboriginal people are not denied justice in appropriate cases. The Commission has also recommended that an application can be made to the relevant chief judicial officer of each court 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.¹² This recommendation will assist a court in determining whether a single-gender jury should be ordered because that judicial officer will be able to assess the relevance and importance of the gender-restricted evidence.

Recommendation 41

Single-gender juries

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

104A. Application for jury of one gender

- (1) A court may order, upon an application by the accused or the prosecution, that the jury be comprised of one gender.
- (2) A 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.

7. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 232.

8. *Ibid.*

9. *Ibid* 232, Proposal 34.

10. Department of the Attorney General, Submission No. 34 (11 May 2006) 9. The Commission notes that this submission argued that the proposal for single-gender juries may be difficult in practice because of the problems in obtaining juries comprised of Aboriginal people. However, there was no suggestion in the Commission's proposal for single-gender juries that the jury would also have to be wholly comprised of Aboriginal people.

11. Law Council of Australia, Submission No. 41 (29 May 2006) 14; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 3.

12. See Recommendation 114, below p 330.

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.

Fitness to plead on the basis of mental impairment

In its Discussion Paper the Commission briefly referred to the issue of fitness to plead and mental incapacity. It was suggested that the provisions of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) should not be used in circumstances where Aboriginal people are not fit to plead because of language and cultural barriers.¹³

In its submission, the Office of the Public Advocate observed that there are a number of problems with the legislative provisions and processes for dealing with accused people who are mentally impaired.¹⁴ If an accused is held to be unfit to plead because of mental impairment, he or she may either be released or made the subject of a custody order.¹⁵ If a custody order is made, the accused can be placed in an authorised hospital (if he or she has a treatable mental illness), a declared place, a detention centre or a prison.¹⁶

Some of the issues referred to by the Public Advocate include that:

- A number of mentally impaired accused have been in prison for longer than the maximum period for the original offence charged.
- There are currently no declared places under the legislation.
- There is a lack of appropriate programs and services for mentally impaired accused Aboriginal people, in particular, those from remote and regional areas.

- As at April 2006 Aboriginal people comprised 24 per cent of the mentally impaired accused persons.¹⁷

The Public Advocate has mentioned that there are plans by the Western Australian government to address some of these problems. For example, there are plans to set up declared places, to establish declared services and proposals to amend the legislation. The Public Advocate stressed that there must also be adequate programs and services for Aboriginal people who fall under the provisions of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA).¹⁸ The Commission fully supports the need for improved services for Aboriginal people in this context. It also agrees with the suggestion of the Public Advocate that Aboriginal community justice groups (as recommended by the Commission) could play a role in developing these services.¹⁹

Fitness to plead because of cultural and language barriers

The Commission noted its concern in the Discussion Paper 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.²⁰

The relevant law is now contained in the *Criminal Procedure Act 2004* (WA). The Commission 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 ability of the accused to understand the nature and consequences of a plea. It was proposed that s 129 of the *Criminal Procedure Act* should 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

13. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 233.

14. The Office of the Public Advocate, Submission No. 13 (18 April 2006) 6.

15. *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 16 & 19.

16. *Ibid* s 24.

17. The Office of the Public Advocate, Submission No. 13 (18 April 2006) 6. Some of these issues are also discussed in Van der Giezen J & Sacha P, 'Unfit to Plead: Unsented prisoners in Western Australia' (2002) 5(16) *Indigenous Law Bulletin* 10.

18. The Office of the Public Advocate, Submission No. 13 (18 April 2006) 6.

19. The Commission has made a general recommendation about the need for improved and adequate programs and services for Aboriginal people across the entire criminal justice system. See Recommendation 7, above p 86. In that context the Commission has referred to the lack of programs and services for Aboriginal people with decision-making disabilities: see also Office of the Public Advocate, *Report into Programs and Services for People with Decision-Making Disabilities in the Department of Justice in Western Australia* (August 2005).

20. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 233.



its consequences.²¹ The Commission did not consider that there was any justification in limiting the parameters of this provision to Aboriginal people. In fact, 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.²²

In response to this proposal the Department of the Attorney General observed that the judiciary already 'adopts the practice of ensuring that the defendant understands the plea'.²³ It was also argued that making sure that an accused fully understands the consequences of a plea would require sufficient interpreting and support services.²⁴ The Commission noted in its Discussion Paper that if an accused does not understand the consequences of a plea because of language barriers then in practice the court would need to request the services of an interpreter.²⁵ Similarly, where other cultural or communication issues arise the court could arrange for the accused to speak

to a lawyer (if not already represented) or an Aboriginal court liaison officer. Separate recommendations have been made in this regard.²⁶ Given that the proposal has been supported by other submissions²⁷ and the Commission has not received any comments in opposition, it considers that it is appropriate to recommend that the *Criminal Procedure Act* be amended.

Recommendation 42

Fitness to plead

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

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.

21. Ibid 234 and see Proposal 35.

22. Ibid 234.

23. The Department of the Attorney General, Submission No. 34 (11 May 2006) 9.

24. Ibid.

25. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 234.

26. See Recommendations 120 & 127, below pp 340 & 347.

27. M Lester, Submission No. 18 (27 April 2006) 2; Law Council of Australia, Submission No. 41 (29 May 2006) 14; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 3. Also submissions received from Aboriginal people in Broome at community meetings and at the Broome Regional Prison on 7 March 2006 confirmed that Aboriginal people often do not understand the court process.

Historically, Aboriginal people have been subject to oppressive treatment by police. As a consequence, Aboriginal people often distrust and resent police officers. During the Commission's consultations many Aboriginal people complained about their treatment by police. The lack of respect by police for Aboriginal people generally, and for Elders and community leaders, was highlighted.¹ Many Aboriginal people believe that there is extensive racism within the police service.² Lack of sensitivity by police towards Aboriginal victims and lack of appropriate support for victims of family violence were also mentioned.³ Many communities commented that young Aboriginal people were treated poorly by police.⁴ It is clear that relations between Aboriginal people and the police are still extremely strained.

The Commission concluded in its Discussion Paper that over-policing and inappropriate policing of Aboriginal people continues today.⁵ The Commission also observed that because police have wide discretion about who to arrest and charge, as well as where to patrol and which offenders will be targeted, they play a direct role in the over-representation of Aboriginal people in the criminal justice system.⁶ Nonetheless, in order to maintain law and order in Aboriginal communities, cooperation between Aboriginal people and the police is essential. Overall, the Commission found that Aboriginal people wish for greater police presence in their communities.⁷ The Commission acknowledged that there are many police who work well with Aboriginal communities. However, in order to improve the status of police-Aboriginal relations and to ensure more

effective policing of Aboriginal communities, the Commission concluded that reform is necessary.

Police and Aboriginal Customary Law

Traditional punishment

The Commission has recognised that a difficult issue confronting police officers in their dealings with Aboriginal people is the appropriate response to traditional physical punishment that may constitute an offence under Australian law.⁸ There are two important issues – whether police should 'allow' traditional physical punishment to take place and whether police should lay charges against a person who has inflicted traditional punishment pursuant to Aboriginal customary law.

During the Commission's consultations it was emphasised that, when an Aboriginal person has committed an offence against Australian law and has also contravened customary law, it is vital that customary law processes take place first.⁹ Traditional physical punishment under customary law is often required when an Aboriginal person is involved in the death of another Aboriginal person. If the offence is murder or manslaughter under Australian law, once the accused is arrested by police it is extremely unlikely that he or she will be released on bail prior to appearing in court. The decision by a police officer to arrest an accused prior to traditional punishment taking place may have

1. LRCWA, *Thematic Summary of Consultations – Fitzroy Crossing*, 3 March 2004, 42; *Derby*, 4 March 2004, 52.

2. LRCWA, *Thematic Summary of Consultations – Derby*, 4 March 2004, 53; *Mowanjun*, 4 March 2004, 49.

3. LRCWA, *Thematic Summary of Consultations – Midland*, 16 December 2002, 37; *Broome*, 17–19 August 2003, 29; *Fitzroy Crossing*, 3 March 2004, 43; *Derby*, 4 March 2004, 53.

4. LRCWA, *Thematic Summary of Consultations – Carnarvon*, 30–31 July, 2003, 6; *Broome*, 17–19 August 2003, 21; *Mirrabooka*, 4 November 2002, 14; *Albany*, 18 November 2003, 19.

5. One of the most notorious examples of over-policing is the 'trifecta': disorderly conduct, resisting arrest and assaulting a police officer. The Commission observed in its Discussion Paper, that many of the 'trifecta' charges eventuate because police approach Aboriginal people in public spaces for behaviour that would go unnoticed if committed by non-Aboriginal people: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 235. It was also observed that move-on notices pursuant to s 50 of the *Police Act 1892* (WA) appear to be affecting Aboriginal people at a disproportionate rate. See also discussion under 'Move-on notices', below p 208.

6. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 235.

7. *Ibid* 119.

8. The difficulties facing police with respect to traditional punishment were again mentioned during a community meeting in Broome: LRCWA, Discussion Paper community consultation – Broome, 10 March 2006.

9. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 198–99.

Aboriginal people have been subject to oppressive treatment by police ... over-policing and inappropriate policing of Aboriginal people continues today.

dire consequences for the accused, the accused's family and the relevant Aboriginal communities. If the accused is not available for punishment a member of his or her family may be punished instead. The failure of traditional punishment to take its course can also cause disharmony in communities and in some cases lead to ongoing conflict or feuding.

The Western Australia *Police Strategic Policy on Police and Aboriginal People* asserts that 'violent aspects of customary law' are inconsistent with Western Australian criminal law and contravene international human rights standards.¹⁰ On the other hand, it is recognised that there are positive features of non-violent aspects of Aboriginal customary law, such as maintaining the 'social structure of Aboriginal communities'.¹¹ This policy 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 the Commission understands that in some instances police officers have been present while the punishment took place.¹²

While the Commission acknowledged in its Discussion Paper that many Aboriginal people resent intervention by police that prevents traditional punishment from taking place, it was concluded that it is not appropriate to recommend that police officers should in any way facilitate the infliction of *unlawful* violent traditional

punishment.¹³ However, in this Report the Commission has recommended that the offence of unlawful wounding should be repealed. The principal reason for this recommendation is that the offence is unnecessary and the distinction between unlawful wounding and assault occasioning bodily harm is arbitrary and potentially unfair for all Western Australians.¹⁴ In terms of traditional physical punishment, the effect of this recommendation may be that particular examples of traditional punishment will now be lawful. In order for a spearing to be lawful it would be necessary that the injury was no more serious than bodily harm. It would also be essential that the person receiving the punishment freely and voluntarily consented to the degree of physical punishment imposed.

For Aboriginal people, and for police officers who work closely with Aboriginal communities, a potential benefit of this recommendation is that it may allow police to respond to requests from Aboriginal people to be present during traditional punishment. The Commission understands that Aboriginal people will often request police presence during traditional punishment for safety reasons.¹⁵ Currently, because all spearings are illegal, police (as well as other people such as nurses or community corrections officers) cannot assist or be present while the punishment takes place. The Commission's recommendation may also, in some cases, alleviate the problem that arises when an Aboriginal person is arrested and taken away by police before

10. Western Australia Police Service, *Strategic Policy on Police and Aboriginal People: A strategic approach to working with Aboriginal people in providing equitable and accessible policing services – policy statement and rationale* (2004) 10. The Commission concluded in its Discussion Paper that the question whether traditional punishments under Aboriginal customary law will contravene international human rights standards is undecided, but there are many customary law practices, including some traditional punishments, that will not contravene such standards: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 74 & 170.

11. Western Australia Police Service, *Strategic Policy on Police and Aboriginal People: A strategic approach to working with Aboriginal people in providing equitable and accessible policing services – policy statement and rationale* (2004) 10.

12. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 237–38. In recent years the only case known to the Commission (in a superior court) where an Aboriginal person has been charged with an offence resulting from the infliction of traditional punishment is *R v Judson* (Unreported, District Court of Western Australia, POR No. 26/1995, O'Sullivan J, 26 April 1996). A number of sentencing cases indicate that the police were either present during the punishment or were at the very least aware of it. See, for example, *R v Njana* (Unreported, Supreme Court of Western Australia, No. 162/1997, Scott J, 13 March 1998); *R v Rictor* (Unreported, Supreme Court of Western Australia, No. 34/2002, McClure J, 30 April 2002); *R v Nelson* [2003] NTSC 64 (4 June 2003).

13. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 238.

14. See discussion under 'Consent', above, pp 139–48.

15. Superintendent Steve Robins, Western Australia Police, Kimberley District, telephone consultation, 25 August 2006. The Commission notes that in May 2006 Aboriginal Elders in the Kimberley requested police presence during an arranged fight between members of feuding families. The rules were set by Aboriginal Elders and two men would fight for a specified period of time. It was reported that police decided when the fighting should stop. The Commission recognises the benefits of this approach – an end to the feuding and police assistance to ensure that the fighting does not get out of hand. See Hewitt S, 'Police Let Aboriginals Slug it Out', *The West Australian*, 19 May 2006, 5.

traditional punishment has occurred. In Geraldton, it was suggested that police should wait for a couple of days to allow customary law punishment to take its course.¹⁶ The Aboriginal Legal Service (ALS) Executive Committee believes that, as long as the accused consents, he or she should be allowed to face customary law punishment before being arrested by the police and this would allow the community to heal.¹⁷ If a police officer was satisfied that the proposed traditional punishment would not breach Western Australian law then this may be an appropriate response. However, the Commission maintains its view that where traditional punishment would be unlawful, police should not do anything to encourage or facilitate that punishment.

The decision to charge or prosecute

The Commission has considered whether Aboriginal customary law should be relevant to the decision to charge or prosecute an Aboriginal person. In the same way that customary law may be relevant to sentencing¹⁸ there is no reason in principle to prevent a prosecuting agency from considering customary law when making a decision to charge or prosecute an alleged offender. Of course, the decision will have to balance the seriousness of the offence against any customary law considerations. In its Discussion Paper, the Commission examined the guidelines of the Western Australia Police and the Office of the Director of Public Prosecutions (DPP) that govern decisions to charge and prosecute offenders.¹⁹ 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.²⁰

The Commission concluded 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. The decision not to charge or not to pursue a prosecution should take into account customary law in its broadest sense if there is to be effective diversion away from the criminal justice system for Aboriginal people. In this context, the Commission emphasises that there are many customary law punishments and processes that do not involve violence. The Commission proposed that the Western Australia Police *Commissioner's Orders and Procedures Manual* (COPs Manual) be amended to require consideration of any relevant Aboriginal customary law issues in the decision to charge or prosecute an alleged offender. It was also proposed that the DPP consider making a similar amendment to the *Statement of Prosecution Policy and Guidelines 2005*.²¹

The Western Australia Police responded to this proposal by advising that if there are legislative changes that recognise Aboriginal customary law then the police will accordingly amend the *COPs Manual*.²² The Law Council of Australia supported the proposal and, in particular, agreed that police officers should consider whether an Aboriginal person committed an offence because they were required to engage in the relevant conduct under Aboriginal customary law.²³ The DPP agreed that for the purpose of diversion (for offences that would ordinarily be dealt with in the Magistrates Court) it is appropriate to take Aboriginal customary law into consideration when deciding whether to charge or continue a prosecution.²⁴

In its submission, the DPP explained that the cases which it deals with are usually more serious, such as those involving violence. The DPP did not agree that its guidelines should be amended because customary law considerations are more appropriately taken into account during sentencing. Further, in the context of offences usually dealt with in the District or Supreme Court, the DPP did not believe that customary law considerations could outweigh the need to prosecute such serious offences. The DPP also stated that it is

16. LRCWA, Discussion Paper community consultation – Geraldton, 4 April 2006.

17. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 7.

18. See discussion under 'Aboriginal Customary Law and Sentencing', above pp 178–84.

19. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 238–39.

20. Office of the Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines 2005*, Policy Guideline No. 33, 10; Western Australia Police, *COPs Manual (Public Version)* (25 January 2005) OP-28.1.6.

21. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 239, Proposal 36.

22. The Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 8.

23. Law Council of Australia, Submission No. 41 (29 May 2006) 14 & 17. The example discussed by the Law Council was in relation to trespass – whether an Aboriginal person was following his or her customary laws when entering into particular lands. The Criminal Lawyers Association also supported this proposal: see Criminal Lawyers Association, Submission No. 58 (4 September 2006) 3.

24. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 5.

against any inclusion of Aboriginal customary law in its guidelines because the 'law must be applied equally to all Western Australians'.²⁵ In response to this argument the Commission emphasises that the principle of equality before the law does not mean that all people must be treated in the same manner. Relevant differences should be taken into account in order to ensure that substantive equality is achieved.²⁶

The Commission notes that the DPP guidelines are applicable to all prosecutions including prosecutions in the Magistrates Court and the Children's Court.²⁷ Further, the guidelines stipulate that the DPP may take over the prosecution of summary matters in certain circumstances. Even so, the Commission is of the view that the need to consider Aboriginal customary law processes for the purpose of diversion could possibly arise in the District Court. As a hypothetical example, a 19-year-old Aboriginal male from a remote community is charged by the police with aggravated burglary. The accused entered another person's house at night while he was intoxicated and stole some cash. There was no violence and no one was present at the house when the offence was committed. The accused has no criminal record. Because the charge is aggravated burglary it must be dealt with in District Court.²⁸ The accused lives in a community which has established a community justice group. While the accused has been on bail the community justice group has met with the accused and he agreed to attend a bush camp organised by Elders in the community to receive instruction about traditional law. The community justice group also asked the accused to do some community work, including some maintenance on the house belonging to the victim. In order to attend court this accused will need to travel a long distance to the closest District Court. The community justice group has advised the DPP and the police that the community (including the victim) does not want the accused to leave the community in order to attend court or be further dealt with by the criminal justice system.

The Commission agrees that most matters dealt with in the District Court and the Supreme Court would be



too serious for customary law considerations to lead to a decision not to prosecute. However, the Commission's proposal for Aboriginal customary law to be included in the guidelines does not remove the discretion of the DPP to determine its relevance in any particular case.

The Commission has examined the prosecutorial guidelines in other Australian jurisdictions. In the Northern Territory, the guidelines provide that a decision whether or not to proceed with a prosecution must not be influenced by

the race, religion, sex, national origin or political associations, activities or beliefs of the offender or any other person involved (unless they have special significance to the commission of the particular offence or should otherwise be taken into account objectively).²⁹

Unlike the guidelines in Western Australia, there is no reference to cultural views and the guidelines do allow the consideration of factors which are significant or relevant to the offence. The prosecutorial guidelines in all other Australian jurisdictions do not stipulate that the 'cultural views' of the alleged offender are an irrelevant consideration.³⁰ The Northern Territory guidelines also include a specific guideline in relation to Aboriginal customary law.³¹ This guideline acknowledges that Aboriginal people in the Northern Territory are over-represented in the criminal justice system. Further, it provides information for prosecutors about the importance of customary law for Aboriginal people; the

25. Ibid.

26. See discussion under 'Formal equality vs substantive equality', Chapter One, above pp 8–9.

27. Office of the Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines 2005*, Policy Guideline No. 4.

28. *Criminal Code (WA)* s 401.

29. Northern Territory Office of the Director of Public Prosecutions, *Guidelines*, Guideline 2.7 (1).

30. The Commission notes that the factors included in prosecutorial guidelines appear to be based upon the provisions in equal opportunity legislation. The *Equal Opportunity Act 1984 (WA)* provides that the grounds of discrimination are sex, race, age, family responsibilities, impairment, religious conviction, political conviction, gender history and sexual orientation. The *Racial Discrimination Act 1975 (Cth)* refers to 'race, colour, descent or national or ethnic origin'. There is no reference to 'cultural views' in either of these statutes.

31. Northern Territory Office of the Director of Public Prosecutions, *Guidelines*, Guideline 20.

need to ensure that Aboriginal women are protected from violence; the distinction between traditional payback and family violence and sexual assault; and the need for prosecutors to obtain accurate information about customary law from Aboriginal people and others with necessary expertise.

The prosecutorial guidelines in the Australian Capital Territory are also particularly instructive. It is stated that the decision to prosecute must not be influenced by:

- (a) The race, colour, ethnic origin, social position, marital status, sexual preference, sex, religion or political associations or beliefs or the alleged offender;
- (b) Any personal feelings concerning the alleged offender or victim;
- (c) Any political advantage or disadvantage to the Government or any political group or association; or
- (d) The possible effect of the decision on the personal or professional circumstances of those responsible for the decision.

This rule does not mean that particular sensitivities or other factors relevant to the alleged offender's conduct should be ignored merely because they are related to the race, sex or religion concerned. It may be necessary to take into account a wide range of matters such as whether the person was acting in accordance with a perceived moral duty or religious obligation, whether the conduct was induced by provocation felt more acutely due to racial innuendo or whether it may have been attributable to post natal depression or other medical factors related to the sex of the person.

The rule is intended to ensure that people are not discriminated against. It is not intended to exclude due consideration of factors, which, as a matter of fairness, should be taken into account in assessing their level of culpability.³²

The Commission agrees with this explanation: factors associated with an alleged offender's membership of a particular group may be relevant to an offence. The purpose of such a guideline should be to prevent discrimination against a person solely on the basis of their race or membership of another group. This is entirely consistent with general sentencing principles which require that courts take into account relevant factors associated with an offender's membership of a particular group.³³ The Commission believes that the

prosecutorial guidelines in Western Australia should enable relevant factors to be considered when deciding whether to prosecute an alleged offender for a particular offence. The Commission is also of the view that specific guidelines in relation to Aboriginal customary law would be beneficial. In this regard, it is emphasised that the guidelines in the Northern Territory are focused on informing prosecutors when Aboriginal customary law may or may not be relevant and ensuring that reliable information about customary law is obtained. These guidelines are, in the Commission's opinion, necessary because of the high level of violence and sexual abuse in Aboriginal communities and the misconceptions that such conduct is justified under Aboriginal customary law.³⁴

Recommendation 43

Prosecutorial guidelines

That the Western Australia Police Service, *COPs Manual*, and the Office of the Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines 2005*, should be amended:

1. To remove the reference to 'cultural views' in the list of factors which are stated to be irrelevant to a decision to charge or prosecute.
2. To provide that factors associated with an alleged offenders' membership of a particular race, sex or other group may be taken into account if those factors are relevant to the circumstances of the offence.
3. To include a specific guideline about Aboriginal customary law and that this guideline should contain information about the nature of Aboriginal customary law; the importance of obtaining reliable information or evidence about Aboriginal customary law; and the need to protect Aboriginal victims from family violence and sexual abuse.
4. To provide that any relevant aspect of Aboriginal customary law, including Aboriginal customary law processes for dealing with offenders, be considered when deciding whether to charge or prosecute an alleged offender.

32. Australian Capital Territory Officer of the Director of Public Prosecutions, *Prosecutions Policy*, 2.7.

33. See discussion under 'The Cultural Background of the Offender', above pp 171–73.

34. See discussion under 'Family Violence and Sexual Abuse', Chapter One, above pp 18–30.

Diversion

Diversionary measures aim to redirect offenders away from the formal criminal justice system or, alternatively, away from more punitive options such as imprisonment. The Commission has separately discussed court diversion in the section on sentencing.³⁵ This section focuses on diversion from the criminal justice system. It is well established that the best way to enhance community safety in the long-term is to prevent young offenders from entering the criminal justice system.³⁶ Because police primarily decide who enters the criminal justice system and because Aboriginal children have generally been referred by police to diversionary options less often than non-Aboriginal children, the Commission has focused on ways of achieving greater diversion for Aboriginal children.

Cautions

The Commission has examined the current cautioning scheme for children in Western Australia. A caution is a warning to the young person about allegedly unlawful behaviour. In Western Australia, a caution can only be administered by a police officer.³⁷ The Commission concluded in its Discussion Paper that, 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.³⁸ The Commission proposed that police officers must consider, in relation to an Aboriginal child, 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.³⁹

A number of submissions responded favourably to all of the Commission's proposals that facilitate greater

and more effective diversion for Aboriginal children.⁴⁰ The Western Australia Police expressed support for the Commission's proposal to allow a respected member of the young person's community to administer a caution. However, the Police were concerned about the availability of suitable adults to undertake this role and that this option would increase the amount of time spent by police dealing with young people.⁴¹ The Commission is of the view that the availability of appropriate Aboriginal people to administer a caution will be significantly enhanced by the establishment of community justice groups. Where such a group exists there will be a pool of suitable people in the relevant community. At the same time, the Commission's notes that its recommendation is not mandatory – it only requires that police must consider whether it would be more appropriate for the caution to be administered by a member of the young person's community. If there is no suitable person available, or if it would cause undue delay to wait for a suitable person, then it may be more appropriate for the caution to be administered by a police officer. Nevertheless, the Commission strongly encourages the police to arrange, whenever possible, for a caution to be administered by a member of the young person's community.

Recommendation 44

Cautions

That Part 5, Division 1 of the *Young Offenders Act 1994* (WA) be amended to provide that a police officer must consider, in relation to an Aboriginal young person,⁴² 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.

35. See discussion under 'Sentencing Options', above pp 185–86.

36. Jackson H, 'Juvenile Justice – The West Australian Experience' in Atkinson L & Gerull S (eds), (Paper presented at the National Conference on Juvenile Justice, Australian Institute of Criminology Conference Proceedings No. 22, 1993) 86. The Western Australian Office of the Director of Public Prosecutions acknowledges that special considerations apply to the prosecution of juveniles: see Office of the Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines 2005*, Policy Guideline No. 34, 10. This principle is also recognised in s 7(g) of the *Young Offenders Act 1994* (WA) which provides that non-judicial proceedings for young offenders should be considered providing it would not jeopardise the safety of the community.

37. In New South Wales, Queensland and Tasmania a caution may be administered to a young Aboriginal person by an Elder or a respected member of the young person's community: see *Young Offenders Act 1997* (NSW) s 27(2); *Juvenile Justice Act 1992* (Qld) s 17; *Youth Justice Act 1997* (Tas).

38. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 240.

39. *Ibid* 241, Proposal 37.

40. Marian Lester, Submission No. 18 (27 April 2006) 2; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 7–8; Law Council of Australia, Submission No. 41 (29 May 2005) 14; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 12; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 4. The Department of the Attorney General suggested in its submission that the *Young Offenders Act 1994* (WA) had already been amended to allow for a respected member of the child's community to administer the caution: see Department of the Attorney General, Submission No. 34 (11 May 2006) 9. However, at the time of publication the *Young Offenders Act* provides that a caution can only be given by a police officer.

41. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 8.

42. The *Young Offenders Act 1994* (WA) should be amended to provide a definition of an Aboriginal person to include a Torres Strait Islander person.

The Commission also reviewed the relevant law concerning how a caution may subsequently be used against a young person in the justice system. The *COPs Manual* provides that previous cautions issued to the young person can be included in the instructions to the prosecutor and used in court if required.⁴³ The Commission noted in its Discussion Paper that a practice had developed in the Children's Court where the police prosecutor refers to the number of previous cautions and referrals to a juvenile justice team.⁴⁴ The Commission concluded it was unacceptable for a diversionary option that does not require any proof or admission of guilt to be subsequently used against a young person in court. It was proposed that the *Young Offenders Act* be amended to provide that any previous cautions cannot be used in court against the young person.⁴⁵

The Commission has received support for this proposal.⁴⁶ However, the Department of Corrective Services and the Department of the Attorney General both submitted that the *Young Offenders Act* already provides that previous cautions cannot be used against the young person.⁴⁷ The Commission is aware that the *Young Offenders Act* covers the admissibility of previous cautions in limited circumstances. Section 29 of the *Young Offenders Act* provides that for the purpose of referring a young person to a juvenile justice team, previous cautions cannot be used to determine whether the young person has previously offended against the law. Further, s 22(4) provides that:

If a caution is given any admission made by the person cautioned at or about the time the caution is given is not admissible in civil or other proceedings as evidence of any matter to which the caution refers.

This section refers only to the *admissibility of an admission* made by the young person at the time the caution is administered and not to the fact that a caution has been given. The Commission does not believe that there is anything in the legislation to prevent a court from being told that a young person has previously been cautioned.

The Western Australia Police opposed the Commission's proposal and argued that a court should be able to consider any information including previous cautions to assist in deciding how to deal with a particular matter.⁴⁸ At first glance this general statement appears valid; however, the Commission believes that it is necessary to consider the reason why a previous caution is being referred to. The Western Australia Police stated that a previous caution should be included in the information about the child's previous offending.⁴⁹ The Commission maintains its view that a previous caution should not be used to indicate that the young person has previously committed an offence. Just because a caution has been given does not mean that the young person was guilty of the relevant offence.

Recent cases in Western Australia have demonstrated that there may be a need to refer to previous cautions for purposes other than suggesting the young person committed an offence. In *WO (A Child) v The State of Western Australia*,⁵⁰ the Western Australian Court of Criminal Appeal referred to diversionary options for children and noted that Aboriginal children have been diverted less often than non-Aboriginal children. The court stated that as a consequence of past decisions with respect to diversion (or lack thereof), children appearing before a court may incorrectly be assumed to be the more serious offenders. It was held that it is necessary for the court to closely examine the details of past offences to determine whether that assumption is correct.⁵¹ The Commission has recommended that when a court is considering a term of detention for an Aboriginal child the court must consider the particular circumstances of Aboriginal people.⁵² The Commission emphasised that the particular circumstances of Aboriginal people include systemic bias within the criminal justice system. In relation to children, this bias is demonstrated by the fact that Aboriginal children have generally been diverted less often than non-Aboriginal children.

The Commission now believes that its original proposal may be counter-productive because it may preclude a

43. Western Australia Police, *COPs Manual (Public Version)* (25 January 2005) OP-24.1.3.

44. See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* (2002) 183.

45. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 241, Proposal 38.

46. Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 3; Law Council of Australia, Submission No. 41 (29 May 2005) 14; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 4.

47. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 12; Department of the Attorney General, Submission No. 34 (11 May 2006) 9.

48. The Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 8–9.

49. *Ibid* 9.

50. [2005] WASCA 94. This case is discussed above under 'The relevance of Aboriginality to sentencing', above pp 171–73 and 'Imprisonment – A Sentence of Last Resort', above pp 173–77.

51. *Ibid* [62]. These observations were repeated by Wheeler JA in *TL (A Child) v Western Australia* [2005] WASCA 173 [35]–[37].

52. See Recommendation 37, above p 177.

court from taking into account the fact that a young person has not been cautioned before or has not been given adequate opportunities for diversion. Nevertheless, the Commission remains of the view that previous cautions should not be used *against* a young person – evidence of previous cautions should not be presented to a court to show that the young person has previously offended against the law.

Recommendation 45

Referring to previous cautions in subsequent court proceedings

That the *Young Offenders Act 1994 (WA)* be amended to provide that any previous cautions issued under this Act can only be referred to in court for the purpose of determining whether the young person has previously been given an adequate opportunity for diversion and/or rehabilitation.

Juvenile justice teams

In Western Australia, pursuant to the *Young Offenders Act*, the police (or a court) can refer a young person to be dealt with by a juvenile justice team. The team will usually consist of a coordinator, a police officer, the offender, the victim (if he or she consents) and sometimes an education worker or a representative of the offender's ethnic community.⁵³ At the team meeting participants will recommend an action plan. Successful completion of the action plan will mean that the offender does not receive a criminal conviction for the offence.⁵⁴ In 2005 the *Young Offenders Act* was amended to allow for the involvement of a member of an approved Aboriginal community.⁵⁵

A young person may be referred to a juvenile justice team provided that the offence is not listed in either Schedules 1 or 2 of the *Young Offenders Act*. The young person must accept responsibility for the offence and consent to the referral. The Commission noted in its Discussion Paper that the *Young Offenders Act* suggests that first offenders should generally be referred to a juvenile justice team. The Commission concluded that there should be a stronger direction which would require police to divert a young person to a juvenile justice team unless there are exceptional circumstances. It was proposed 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.⁵⁶

The Commission has received a number of submissions supporting this proposal.⁵⁷ The ALS expressed strong support and contended that there should be less reliance on police discretion in order to ensure that Aboriginal children are diverted away from the criminal justice system.⁵⁸ The Department of Corrective Services suggested in its submission that the Commission's proposal would require compulsory referral for all first offenders. It was noted, therefore, that some serious offenders would have to be referred to a juvenile justice team. Even so, the Department expressed support for the proposal.⁵⁹ However, the Commission's proposal does not mean that every first offender must be referred to a team – there is provision that a police officer does not have to refer a first offender in exceptional circumstances. As the Commission explained in its Discussion Paper, exceptional circumstances 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.

53. *Young Offenders Act 1994 (WA)* s 37(2).

54. *Young Offenders Act 1994 (WA)* s 33(2).

55. *Young Offenders Act 1994 (WA)* ss 36 & 37. An appropriate member of an approved Aboriginal community is nominated by the community council and approved by the CEO of the Department of Corrective Services and the Commissioner of Police.

56. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 242, Proposal 39. The Commission also proposed that the *Young Offenders Act* should provide that when determining whether a young person has previously offended against the law prior cautions cannot be taken into account. The Commission notes that s 29(2) of the *Young Offenders Act* does provide that cautions cannot be taken into account when determining whether a young person has previously offended against the law for the purpose of that section. The Department of the Attorney General stated in its submission that the Commission's proposal is already reflected in the legislation; however, it is apparent that this submission is in reference to the last sentence of the Commission's original proposal rather than the substance of the proposal. The Department did not comment on whether the police should be required to generally divert a first offender to a juvenile justice team. See Department of the Attorney General, Submission No. 34 (11 May 2006) 9.

57. Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 3; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 12–13; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 8; Law Society of Western Australia, Submission No. 36 (16 May 2006) 7; Law Council of Australia, Submission No. 41 (29 May 2006) 14; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 12. The Commission notes that the Aboriginal and Torres Strait Islander Social Justice Commissioner did not directly refer to this proposal but expressed general support for all proposals that promote diversion.

58. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 8.

59. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 12–13.

The Western Australia Police did not support the proposal and argued that it may limit the ability of police to effectively deal with young offenders.⁶⁰ The Western Australia Police referred to s 22B of the *Young Offenders Act* which requires that police must first consider, before commencing proceedings against a young person, whether it would be more appropriate to take no action or to administer a caution. Although not explicitly stated in its submission, the Commission assumes that the Police are concerned that they may have to refer a first offender to a juvenile justice team rather than take no action or administer a caution. In order to remove any doubt, the Commission has included in its recommendation that the obligation to refer a first offender to a juvenile justice team does not arise until after a police officer has first decided that it is inappropriate to take no action or to administer a caution. The Commission is of the view that its recommendation should apply to all young people. The main objective is to ensure that Aboriginal children are diverted in the same circumstances as non-Aboriginal children.

Recommendation 46

Referral by police to a juvenile justice team

1. That s 29 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.⁶¹
2. That this section only applies if the police officer has first determined that it is not appropriate to take no action or to administer a caution pursuant to s 22 B of the *Young Offenders Act 1994* (WA).

The Commission also concluded in its Discussion Paper that the categories of offences listed in Schedules 1 and 2 of the *Young Offenders Act* (which are excluded from the operation of juvenile justice teams) are unduly restrictive. It was observed that in some circumstances particular offences contained in the schedules may be of a less serious nature and therefore diversion to a juvenile justice team would be appropriate. The Commission proposed 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.⁶² All submissions received in response to this proposal were supportive.⁶³ It was noted by the Department of the Attorney General and the Department of Corrective Services that the Western Australian government is already considering a review of the offences listed in the schedules.⁶⁴ It appears that this review has been underway since 2004. The Commission therefore considers that the review should be completed as a matter of priority.

Recommendation 47

Review categories of offences in Schedule 1 and Schedule 2 of the *Young Offenders Act 1994* (WA)

That the Western Australian government's review of the categories of offences listed in Schedule 1 and Schedule 2 of the *Young Offenders Act 1994* (WA) be immediately completed to enhance the availability of diversion to juvenile justice teams.

The Commission concluded, for the same reasons discussed in relation to cautions, that a referral to a juvenile justice team should not later be used against a young person as part of his or her previous history of offending. Although a young person must accept responsibility for the alleged offence and consent to the referral, this is not the same as proof of guilt. A person may accept responsibility without being aware that a defence to the charge was available. For some Aboriginal children, an acceptance of responsibility may

60. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 9.

61. The Commission notes that s 29(2) should remain in its current form to provide, among other things, that a young person should not be taken to have previously offended against the law merely because he or she has been previously cautioned.

62. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 242, Proposal 40.

63. Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 3; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 13; Department of the Attorney General, Submission No. 34 (11 May 2006) 9; Law Council of Australia, Submission No. 41 (29 May 2006) 14; Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 9; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 12; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 4. The Aboriginal and Torres Strait Islander Social Justice Commissioner expressed general support for all proposals that promote diversion.

64. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 13; Department of the Attorney General, Submission No. 34 (11 May 2006) 9.

be based on customary law notions of collective responsibility. For example, a young Aboriginal person may accept responsibility for an offence because he or she was merely present while others committed the crime. Therefore, the Commission proposed that previous referrals to a juvenile justice team cannot later be used in court against the young person. It was acknowledged that an exception should be provided where a court requires information about a past referral by police to a juvenile justice team in order to determine whether there should be another referral by the court.⁶⁵

Overall, the Commission received a positive response to this proposal.⁶⁶ However, as discussed above in relation to cautions, the Commission now recognises that it may be necessary for a court to be informed about previous referrals to a juvenile justice team in order to determine whether a young person has been given adequate opportunities for diversion and rehabilitation. In other words, it may be important for a court sentencing a young person to be fully apprised of how that young person has previously been dealt with. Again, the Commission emphasises that a previous referral to a juvenile justice team is not proof that the young person committed the offence.



Recommendation 48

Referring to previous referrals to a juvenile justice team in subsequent court proceedings

That the *Young Offenders Act 1994 (WA)* be amended to provide that any previous referrals to a juvenile justice team under this Act can only be referred to in court for the purposes of determining:

1. whether the young person has previously been given an adequate opportunity for diversion and/or rehabilitation; and/or
2. whether the young person should again be referred to a juvenile justice team.

Attending court without arrest

In Western Australia a police officer can institute criminal proceedings against a young person either by way of arrest or by issuing a notice to attend court. The choice of arrest is the more punitive option because it requires the young person to be taken to a police station, processed and either released on bail or remanded in custody. Section 42 of the *Young Offenders Act* provides that unless inappropriate, a notice to attend court is the preferred option. The *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 child is not arrested; if it will prevent further offending; if it will ensure attendance at court; or if there is no other appropriate course of action.⁶⁷

In its Discussion Paper, the Commission proposed that the relevant criteria for arrest should be set out in legislation in Western Australia.⁶⁸ The Commission has received widespread support for this proposal.⁶⁹ However, the Western Australia Police opposed the

65. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 242, Proposal 41.

66. Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 3; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 13; Law Council of Australia, Submission No. 41 (29 May 2006) 14; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 4. The Department of the Attorney General stated that the *Young Offenders Act* already provides that previous referrals to a team cannot be used in court: see Department of the Attorney General, Submission No. 34 (11 May 2006) 10. However, the Commission is not aware of any provision in the legislation that prevents a court from being informed about a previous team referral other than for the purposes of s 29. The Western Australia Police opposed the Commission's proposal: see Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 9.

67. Western Australian Police Service, *COPs Manual (Public Version)* (25 January 2005) OP-24.4.

68. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 243, Proposal 42.

69. Marian Lester, Submission No. 18 (27 April 2006); Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 3; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 14; Department of the Attorney General, Submission No. 34 (11 May 2006) 10; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 8; Law Council of Australia, Submission No. 41 (29 May 2006) 14; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 12. Again the Commission notes that the Aboriginal and Torres Strait Islander Social Justice Commissioner expressed general support for all proposals that promote diversion.

proposal and argued that the inclusion of the criteria in the *COPs Manual*, in addition to s 7(h) of the *Young Offenders Act*, 'ensures compliance'.⁷⁰ Section 7(h) provides that 'detaining a young person in custody for an offence, whether before or after the person is found to have committed the offence, should only be used as a last resort and, if required, is only to be for as short a time as is necessary'. Yet, as explained by the Department of Corrective Services:

The high number of admissions to Rangeview Remand Centre and the very few young people sentenced to detention or high end community based orders indicates over-reliance on arrest by Police.⁷¹

Moreover, the Commission is of the view that legislative amendment is necessary even if police do currently comply with the relevant criteria. If police routinely follow the guidelines in the *COPs Manual*, then including the criteria for arrest in legislation should cause no difficulty to police in practice.

Recommendation 49

Legislative criteria for the decision to arrest a young person

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

Diversion to a community justice group

In its Discussion Paper, the Commission expressed strong support for the development of Aboriginal-controlled diversionary programs and, in particular, programs or processes determined by a community justice group.⁷² The Commission explained that, where a community justice group exists, the members of the group may decide to deal with a possible breach of Western Australian criminal law. This approach would mean that there is no involvement in the criminal justice system at all. The Commission compared this to a family

discovering that their child is using drugs and deciding to deal with it without recourse to the criminal law. Similarly, children may be involved in behaviour at school, that strictly speaking constitutes an offence, but the authorities and those involved make a choice to deal with it internally. Of course, in any such case a victim may choose to report the matter to the police, irrespective of the views of the community justice group. For Aboriginal children who have committed minor offences, the Commission strongly encourages a community justice group to deal with the matter without recourse to the criminal justice system. For serious offences, such as violence or sexual assault, the Commission considers it is vital that Aboriginal people are fully informed of their rights under Australian law and supported by criminal justice agencies to report the offence and have it dealt with by the criminal justice system.⁷³

In many cases a matter may come to the attention of the police (via the victim, a member of the community, or directly as a result of witnessing the behaviour). In this situation the police must consider whether referral to a community justice group or Aboriginal diversionary program would be appropriate. The Commission proposed the establishment of a pilot diversionary scheme for young Aboriginal offenders that involves referral by the police to community justice groups.⁷⁴ It was also proposed that any diversion to a community justice group should not be used against a young person in court. The Commission has explained that it is not appropriate for previous cautions and referrals to a juvenile justice team to be used to establish that a young person has previously offended. Similarly, diversion to a community justice group should not be used against a young person because referral to a community justice group does not mean that the young person is guilty of an offence. What it means is that the young person has agreed to be dealt with by the community justice group instead of being formally charged. However, as discussed in relation to cautions and referrals to a juvenile justice team, a court may wish to be informed of a previous referral to a community justice group if it is considering another

70. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 9. The Commission is of the view that the case referred to by the media as the 'ice-cream boy' and which was referred to by the Commission in its Discussion Paper, suggests that in practice the current guidelines in the *COPs Manual* are not being adequately complied with: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 240.

71. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 14.

72. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 243. For a detailed discussion of the Commission's recommendation for the establishment of community justice groups, see 'Aboriginal Community Justice Groups', above p 97–113.

73. See Recommendation 90, below p 286.

74. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 234–44, Proposal 43.

The Commission's view is that there should be diversion to Aboriginal-owned or Aboriginal-controlled processes.

referral or to determine if the young person has been given adequate opportunities for diversion.

The Commission has received a number of submissions in support of its proposal for diversion to a community justice group.⁷⁵ Both the Department of Corrective Services and the Department of the Attorney General stressed the need for adequate resources in order for the implementation of this proposal to be effective.⁷⁶ The Western Australia Police, however, opposed the proposal on the basis that diversionary schemes already exist for children in Western Australia. In particular, the Western Australia Police referred to the amendments to the *Young Offenders Act* in 2005 which provided that a member of an approved Aboriginal community may replace either or both the police representative or coordinator of a juvenile justice team.⁷⁷ As the Commission indicated in its Discussion Paper, these amendments should improve the effectiveness of juvenile justice teams for Aboriginal children.⁷⁸ However, the Commission also emphasised that the successful engagement of Aboriginal children and their families in the team process may be hindered by the fear and distrust of police and other government agencies.⁷⁹ There is no requirement that a member of an Aboriginal community must replace the police representative or coordinator of the team – it is only an option that may be utilised if the relevant justice agencies consider it to be appropriate. The Commission's view is that there should be diversion to Aboriginal-owned or Aboriginal-controlled processes. Further, the juvenile justice team process is subject to the requirements of the *Young Offenders Act*. For example, certain offences cannot be referred to a juvenile justice team. The Commission's aim is to establish a flexible diversionary process with greater involvement of the relevant Aboriginal community.

The Aboriginal and Torres Strait Islander Social Justice Commissioner expressed strong support for diversionary processes. His submission referred to a number of necessary principles for best diversionary practice.⁸⁰ These principles are applicable to all forms of diversion. In the context of the Commission's proposal for diversion by the police to Aboriginal community justice groups, the following principles are particularly relevant:

- The need for adequate resources.
- The need for adequate consultation with Aboriginal communities and the requirement that diversionary processes be reflective of local needs and circumstances.
- That a young person should not obtain a criminal record as a consequence of participating in a diversionary process and previous diversion should not prevent subsequent referrals.
- That the referral to the diversionary process must require the informed consent of the young person and his or her parents.
- That diversionary options for Aboriginal children should be culturally appropriate.
- That the decision to divert a young person should be based upon established criteria.
- That diversionary options include sufficient procedural safeguards such as the right to silence, access to legal representation, access to an interpreter and the right to have a parent present.
- That a young person who has been referred to a diversionary option has the right to make a complaint about his or her treatment during the diversionary process.
- That diversionary options should be regularly monitored and evaluated.

75. Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006); Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 14; Law Council of Australia, Submission No. 41 (29 May 2006) 14; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 12; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 4; LRCWA, Discussion Paper community consultation – Broome, 10 March 2006.

76. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 14; Department of the Attorney General, Submission No. 34 (11 May 2006) 10.

77. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 9–10.

78. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 225–26.

79. Blagg H, 'A Just Measure of Shame: Aboriginal youth and conferencing in Australia' (1997) 37 *British Journal of Criminology* 481, 496.

80. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 12–14. The best practice principles are discussed in detail in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* (Sydney: Human Rights and Equal Opportunity Commission, 2001) 135.

The Commission is of the view that these principles should be taken into account when developing diversionary processes to a community justice group. However, the requirement for procedural safeguards should be balanced against the need to ensure that Aboriginal-controlled processes are not unduly restricted by western legal procedures. Accordingly, the Commission has included certain procedural safeguards to be followed by the police at the time a decision is made to refer a young person, but not during the actual diversionary process itself. The Commission stresses that its recommendation is to develop a diversionary scheme: the precise details and applicable procedures will need to be determined in consultation with Aboriginal communities and relevant justice agencies, such as the police. Further, the Commission has recommended that there should be ongoing evaluation and monitoring of any diversionary options for Aboriginal people and, therefore, any future need for procedural changes or legislative amendments should be determined at this stage.⁸¹

Recommendation 50

Diversion to a community justice group

1. That the Western Australian government establish a diversionary scheme for young Aboriginal people to be referred by the police to a community justice group.
2. That the Western Australian government provide adequate resources to community justice groups in order that they may develop and operate diversionary programs.
3. That the diversionary scheme be flexible and allow different communities to develop their own processes and procedures.
4. That the police fully explain to the young person (and responsible adult) the nature of the alleged offence and, that the young person has the right to seek legal advice before agreeing to participate in the diversionary scheme.

5. That the police ensure that the young person fully understands his or her options, if necessary by providing the services of an interpreter.
6. That any admissions made by the young person during the diversionary process cannot be used as evidence against the young person.
7. That a young person and an appropriate responsible adult must consent to any referral by the police to a diversionary scheme operated by a community justice group.
8. That, if the young person does not consent to be referred to a community justice group, 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.
9. That the diversionary scheme provide that a referral to a community justice group does not count as a conviction against the young person and can only be referred to in a court for the purpose of considering whether the young person should again be referred to a community justice group or to determine if the young person has previously been given adequate opportunities for diversion and/or rehabilitation.

The Commission is of the view that any existing and future diversionary programs for Aboriginal people (whether they are government-controlled or Aboriginal-controlled) should be monitored and evaluated.⁸² The Commission has recommended the establishment of an independent Commissioner for Indigenous Affairs. In evaluating diversionary options the Commissioner for Indigenous Affairs should determine whether Aboriginal people are receiving equitable access to and appropriate treatment during any diversionary options and whether any legislative changes are required in the long-term.

81. See Recommendation 51, below p 205.

82. The Aboriginal and Torres Strait Islander Social Justice Commissioner, in his submission, outlined the minimum requirements of any diversionary scheme and these included the need for ongoing monitoring and evaluation: see Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 12–14.

Aboriginal people under police interrogation may be disadvantaged by language, communication and cultural barriers.

Recommendation 51

Evaluation of diversionary options for Aboriginal people

That the Commissioner for Indigenous Affairs regularly review and evaluate all diversionary options available in Western Australia for Aboriginal people to determine whether:

1. There are effective diversionary options for Aboriginal people and, if not, the Commissioner for Indigenous Affairs should make recommendations to ensure that there are effective diversionary programs.
2. Aboriginal people are being diverted at the same rate as non-Aboriginal people.
3. Any legislative or procedural changes are required to ensure the effective diversion of Aboriginal people from the criminal justice system.

Police Interrogations

In its Discussion Paper the Commission considered the vulnerability of Aboriginal suspects who are being questioned in police custody.⁸³ Aboriginal people under police interrogation may be disadvantaged by language, communication and cultural barriers. Further, Aboriginal people may be particularly susceptible to making false or unreliable confessions in police custody because of the long-standing fear and mistrust of police. The Commission also noted that Aboriginal people may be more likely to agree with propositions put to them by police even when these propositions are false (this is known as 'gratuitous concurrence').⁸⁴ Miscommunication can undoubtedly occur between a police officer and the suspect where English is not the suspect's first language. Further, some Aboriginal people

may find it difficult to understand the concept of guilt under Australian law. Under customary law the concept of responsibility is much broader and collectively based. Thus a simple assertion by an Aboriginal person that he or she is guilty or responsible for the alleged crime must be viewed cautiously. 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.

Minimum requirements for police interviews

The Commission has examined in detail the law throughout Australia in relation to the questioning of suspects by police.⁸⁵ In particular, the Commission considered the Criminal Investigation Bill 2005 which is currently before the Western Australian Parliament. Although covering some of the important issues, it is the Commission's opinion that this Bill does not go far enough. 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. In summary, these requirements are that:

- A caution must be issued and questioning cannot commence unless the police officer is satisfied that the suspect understands the meaning of the caution. In order to be satisfied the 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 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.

83. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 224–45. The lack of understanding by Aboriginal people about police interviews and the right to silence was confirmed by prisoners during the Commission consultation at Broome Regional Prison: LRCWA, Discussion Paper community consultation – Broome Regional Prison, 7 March 2006.

84. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 398–99.

85. *Ibid* 245–48.

- 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, the police officer is to notify the ALS and provide a reasonable opportunity for a representative of the ALS to speak with the suspect prior to the commencement of the interview.
- That where a suspect does not wish for a representative of the ALS 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.

It was also proposed that, unless there are exceptional circumstances, failure to comply with these provisions will cause the interview to be inadmissible in court. The Commission suggested that the legislation should provide for appropriate exceptions, such as the interviewing officer would not be required to delay questioning if to do so would potentially jeopardise the safety of any person.⁸⁶

The ALS fully supported the Commission's proposal and submitted that it should be implemented immediately.⁸⁷ The proposal was also supported by the Department of the Attorney General.⁸⁸ The Western Australia Police did not support the proposal because relevant principles are already well established by case law.⁸⁹ However, as the Commission concluded in its Discussion Paper, legislative provisions which set out the requirements for police questioning would constitute a stronger direction to police officers and courts of the *minimum* requirements for a fair interview.⁹⁰

The Western Australia Police specifically opposed the requirement in the Commission's proposal that they should *notify* the ALS prior to interviewing an Aboriginal suspect. It was argued that this requirement could cause significant delays in circumstances where a suspect is taken into custody after normal working hours or in regional and remote areas.⁹¹ However, the Commission's recommendation only requires that the

police notify the ALS and provide a reasonable opportunity for a representative from the ALS to attend. The recommendation does not require that police must unreasonably hold a suspect in custody in circumstances where a representative from the ALS is unavailable. The ALS has submitted to the Standing Committee on Legislation that the Criminal Investigation Bill 2005 should include a requirement that the ALS should be notified if an Aboriginal person is taken into police custody.⁹² In this submission, the ALS emphasised that such a requirement would ensure that the legal rights of Aboriginal people were upheld and would also assist the police by preventing confessional evidence from being subsequently excluded from the evidence in court because those rights were not respected. The Commission agrees and maintains its view that the minimum requirements for interviewing suspects should be set out in legislation – not only for the benefit of Aboriginal people but for all Western Australians.

Recommendation 52

Legislative requirements for interviewing suspects

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

1. 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 police officer must ask the suspect to explain the caution in his or her own words.
2. If the suspect does not speak English with reasonable fluency the interviewing police 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.

86. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 248–50, Proposal 45.

87. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 15.

88. Department of the Attorney General, Submission No. 34 (11 May 2006) 10.

89. Office of the Commissioner of the Police, Submission No. 46 (7 June 2006) 11.

90. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 250.

91. Office of the Commissioner of the Police, Submission No. 46 (7 June 2006) 12.

92. Aboriginal Legal Service (WA), Submission: Criminal Investigation Bill 2005 (July 2006) 5–6.

The Commission maintains its view that the minimum requirements for interviewing suspects should be set out in legislation.

3. 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.
4. In the case of a suspect who is an Aboriginal person the interviewing police officer 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. The interviewing police officer must provide a reasonable opportunity for a representative of the Aboriginal Legal Service to communicate with the suspect. The interviewing police 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.
5. If the suspect does not wish for a representative of the Aboriginal Legal Service to attend or there is no representative available, the interviewing police officer must allow a reasonable opportunity for an interview friend to attend prior to commencing the interview. The interviewing police officer does not have to comply with this requirement if it has been expressly waived by the suspect.
6. That appropriate exceptions be included, such as an interviewing police 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.

Interpreters

As recommended above (and provided for in the Criminal Investigation Bill 2005), a suspect should have a right to an interpreter if he or she does not speak or understand English with reasonable fluency. However, the Commission explained in its Discussion Paper that in practice it is not always easy to recognise when an Aboriginal person who may speak English to a limited extent requires the services of an interpreter. In this context it is vital to take into account the difference between Standard English and Aboriginal English.⁹³ The Commission proposed that in addition to a statutory requirement that an interpreter should be provided prior to police questioning, the Western Australia Police, in conjunction with appropriate Aboriginal interpreters, should develop a set of protocols for the purpose of determining whether an Aboriginal person requires the services of an interpreter.⁹⁴

The Western Australia Police claimed in their submission that they already have a set of protocols to cover this issue. However, the matters referred to in the submission deal with procedures for police interviews. These procedures do not cover how a police officer should determine whether an Aboriginal person does not speak English sufficiently and therefore requires the services of an interpreter.⁹⁵ The Commission believes that there should be linguistic guidelines (developed in conjunction with Aboriginal interpreter services) to assist police. The Commission has made similar recommendations with respect to lawyers and courts.⁹⁶ Although the protocols for each agency would necessarily differ, the linguistic guidelines could be used or adapted for use by each agency.⁹⁷ Therefore, the Commission suggests that there should be collaboration between relevant justice agencies in relation to the implementation of these recommendations.

93. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 249 & 397–98.

94. *Ibid* 249, Proposal 44. This proposal was supported by the Criminal Lawyers Association, Submission No. 58 (4 September 2006) 4.

95. Office of the Commissioner for Police, Submission No. 46 (7 June 2006) 10. The Commission notes that the procedures mentioned in the submission include reference to s 49 of the *Aboriginal Affairs Planning Authority Act 1972* (WA). This section has been repealed and therefore the Commission suggests that the Western Australia Police should review and update its procedures for interviewing Aboriginal people.

96. See Recommendation 10, above p 91 and Recommendation 122, below p 341.

97. This was noted by the Department of the Attorney General: see Department of the Attorney General, Submission No. 34 (11 May 2006) 10.

Recommendation 53

Police protocols for determining whether an Aboriginal person requires an interpreter

That the Western Australia Police, in conjunction with relevant Aboriginal interpreter services, develop a set of protocols (including linguistic guidelines) for the purpose of considering whether an Aboriginal person requires an interpreter during an interview.

Policing Aboriginal Communities and Aboriginal Involvement in Policing

In its Discussion Paper, the Commission referred to the lack of police presence in many Aboriginal communities and other policing options such as Aboriginal wardens and Aboriginal Police Liaison Officers (APLOs). 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 indicated its support for the government's plan to establish a permanent police presence in nine remote locations.⁹⁸

It was also observed that the role of APLOs was the subject of mixed views during the Commission's consultations. Aboriginal people were concerned that the role of APLOs had changed over time: it is now focused on 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 have implemented a voluntary transition program for APLOs. Under this program APLOs can make the transition to mainstream police officers. The Commission understands that about 90 of the existing

144 APLOs have indicated that they wish to make the transition to mainstream police.⁹⁹

The Commission supports the transition program; however, it is also necessary that there is a strategy in place to ensure that the original community liaison role is addressed. The Commission understands that the Western Australia Police are considering the employment of civilian liaison officers to assist in liaison between the police and various ethnic groups in the community.¹⁰⁰ The Commission strongly encourages the Western Australia Police to engage with community justice groups because members of a community justice group could potentially take on a liaison role. Unlike Aboriginal police officers, who are responsible to the Western Australia Police, Aboriginal community members can maintain accountability to their community.

Move-on notices

As stated earlier, the Commission is of the view that inappropriate policing of Aboriginal people continues today. While this continues to take place, it will be difficult for the police to establish a positive relationship with Aboriginal communities. Following its Discussion Paper, the Commission has received complaints from Aboriginal people about the move-on laws.¹⁰¹ The move-on laws are set out in s 50 of the *Police Act 1892 (WA)* which provides that a police officer has the power to order that a person leave a public place for up to 24 hours if the officer reasonably suspects (among other things) that the person is committing a breach of the peace or intends to commit an offence. This section came into operation in June 2005.¹⁰² Failure to comply with the order, without a reasonable excuse, is an offence and the penalty is a maximum of 12 months' imprisonment. More than 120 'move-on notices' were issued in the first two weeks that these provisions came into operation. It was reported that 36 per cent of these 'move-on notices' were issued to Aboriginal people.¹⁰³

From one perspective, the provision for move-on notices, as an alternative to laying a substantive charge, may reduce the number of Aboriginal people charged

98. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 250–51. The nine locations are Warburton, Kalumburu, Balgo, Jigalong, Dampier Peninsula, Bidyadanga, Warmun, Wakakurna (Docker River) and Kintore (the latter is a multi-jurisdiction project with the Northern Territory and South Australia).

99. Western Australia Police, Aboriginal Corporate Development Team, consultation (26 June 2006).

100. *Ibid.*

101. LRCWA, Discussion Paper community consultation – Kalgoorlie, 28 February 2006.

102. The Commission notes that this provision is included in clause 27 of the Criminal Investigation Bill 2005 (WA).

103. Morfesse L, 'Youth Targeted in New Orders to Move Along', *The West Australian*, 13 June 2005, 11.

There are numerous accounts to suggest that move-on notices are being issued to Aboriginal people in inappropriate circumstances.

with an offence and detained in custody.¹⁰⁴ For example, a person may be issued with a move-on notice rather than being charged with an offence such as disorderly conduct.¹⁰⁵ However, there are numerous accounts to suggest that move-on notices are being issued to Aboriginal people in inappropriate circumstances and that Aboriginal people are being disproportionately affected by this law.¹⁰⁶ It appears that in some cases Aboriginal people are being targeted by the police for congregating in large groups in public areas even though no one is doing anything wrong. In Kalgoorlie, the Commission was told that if there are one or two troublemakers in a group, the police issue move-on orders to all present rather than just the people who were causing problems.¹⁰⁷ It was also reported that homeless Aboriginal women are moved on from well lit areas and forced to stay in unsafe locations.¹⁰⁸ The ALS has submitted that the move-on laws should be immediately repealed.¹⁰⁹

The Commission is very concerned about the apparent discriminatory treatment of Aboriginal people with respect to move-on notices. If move-on notices are issued too readily or in circumstances where it is inappropriate or impossible to expect compliance, then any benefit obtained from not charging the person with a substantive criminal offence will inevitably be lost. The person will end up being charged with breaching the move-on notice. The ALS has highlighted that because a move-on notice can be issued when a police officer reasonably suspects that the person is

likely to commit an offence there is a large scope for misuse of police discretion.¹¹⁰ However, because the laws have only been in operation for just over one year, the Commission is of the view that it is premature to recommend that the laws be repealed. The Commission strongly encourages the Western Australia Police to review its practice with respect to issuing move-on notices, and to provide appropriate training and direction to police officers about how they should exercise their discretion in relation to Aboriginal people.

The Commission has concluded that it is necessary that the move-on laws are independently reviewed and evaluated within two years from their commencement. In particular, this review should consider whether the move-on laws could be amended to operate more justly for Aboriginal people (and others) or whether the laws should be repealed. If it is found that the move-on laws are required then the Commission suggests that consideration should be given to amending the laws to provide a wider defence. Such a defence could include: that the person did not have the capacity to understand the direction to leave the area or the request for an explanation; that the person did give a reasonable explanation; or that the person had a reasonable excuse for not leaving the area or returning to the area during the prohibited time. It may also be appropriate for the legislation to provide that the police must provide a reasonable opportunity for the person to leave the area. Further, a move-on notice could be given with appropriate exceptions – such as that the

104. The Commission recommended in 1992 that s 43(1) of the *Police Act 1892* (WA) should be repealed because it created an offence where a person was suspected of being about to commit an offence and failing to give a satisfactory account of oneself: see LRCWA, *Police Act Offences*, Report No. 85 (August 1992) [4.17] & [4.21]. The Commission made a recommendation for move-on powers; however, the defence suggested by the Commission was broader than what is currently contained in the *Police Act*. It was recommended that there should be a defence if the person did not have the capacity to understand the direction or give a reasonable explanation; or that the person gave a reasonable explanation.

105. Steve Sharrat SM, consultation (4 April 2006)

106. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 13; Steve Sharrat SM, consultation (4 April 2006); LRCWA, Discussion Paper community consultation – Kalgoorlie, 28 February 2006; Penn S, 'McGinty Hits Move-on Orders' *West Australian*, 8 May 2006, 7; Calverley A, 'Court List Supports Move-on Criticism,' *West Australian*, 10 May 2006, 46.

107. LRCWA, Discussion Paper community consultation – Kalgoorlie, 28 February 2006.

108. *Ibid.*

109. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 13.

110. Aboriginal Legal Service (WA), Submission: Criminal Investigation Bill 2005 (July 2006) – Appendix: Submission to the Attorney General (2 March 2006) 3. This submission contains a number of case examples which demonstrate the particular problems for Aboriginal people. These problems include a lack of understanding of the requirement of the order due to language or communication barriers; inadequate time provided for the person to leave the relevant area; inappropriate use of police discretion when deciding to charge a person for breaching a move-on notice where the circumstances did not appear to suggest that the person was doing anything wrong; the use of move-on notices against very young children; the imposition of the maximum period of 24 hours rather than a lesser period; and failure to consider the usual place of residence of the person when issuing the moved-on notice.

person is entitled to return to the prohibited area for the purpose of employment or to go to their usual place of residence.

Recommendation 54

Review of move-on laws

1. That the Commissioner for Indigenous Affairs review and evaluate the move-on laws after two years of operation.
2. That the Commissioner for Indigenous Affairs consider and report to the Western Australian government about whether the laws should be amended or repealed.

Northbridge curfew

Another area of policing that disproportionately impacts upon Aboriginal people, is the Western Australian government's Young People in Northbridge Policy (also known as the 'Northbridge curfew'). This policy came into effect on 28 June 2003.¹¹¹ The policy directs police officers to use existing powers to remove unsupervised children from the Northbridge entertainment precinct. The policy stipulates that children of certain age groups are not entitled to be in Northbridge unsupervised after hours.¹¹² At the time the Northbridge curfew was introduced it relied upon an existing power to remove children under s 138B of the *Child Welfare Act 1947* (WA). This section authorised a police officer to apprehend an unsupervised child who was 'away from their usual place of residence' if the police officer believed that the child was 'in physical or moral danger, misbehaving or truanting from school'.¹¹³ The child could then be returned to his or her place of residence or school or detained until a responsible person could be

found. The *Child Welfare Act* was repealed on 1 March 2006 and the relevant power to apprehend a child is now found under s 41 of the *Children and Community Services Act 2004* (WA). Section 41 authorises a police officer (or authorised officer) to move an unsupervised child to a safe place if that officer reasonably believes, that there is a 'risk to the well-being of the child because of the nature of the place where the child is found, the behaviour or vulnerability of the child at that place or any other circumstance'. The Commission notes that basis for removing a child under the new provision appears to be wider than the previous section – a 'risk to the well-being' of a child is arguably broader than 'physical or moral danger'.

While ostensibly the Northbridge curfew applies equally to all children, statistics show that the majority of children dealt with pursuant to the curfew policy are Aboriginal. For example, 88 per cent of children dealt with by police in 2004 were Aboriginal.¹¹⁴ It has also been reported that the largest single category of contacts were young Aboriginal females aged between 13 and 15 years.¹¹⁵ It has been argued that the curfew policy may be discriminatory because it disproportionately affects Aboriginal people.¹¹⁶

In the context of the history of the negative relationship between police and Aboriginal people, the Commission is concerned that the curfew policy may unnecessarily bring Aboriginal youth into contact with the police. Aboriginal people consulted by the Commission were concerned that young Aboriginal people were treated poorly by police.¹¹⁷ In its Discussion Paper, the Commission observed that some Aboriginal people react negatively when police approach them for behaviour in public spaces that would generally go unnoticed if committed by non-Aboriginal people.¹¹⁸ The Human Rights and Equal Opportunity Commission observed that the:

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111. Office of Crime Prevention, Western Australia Department of Premier and Cabinet, *Young People in Northbridge Policy: One Year On* (June 2004) 2–3.
 112. The policy states that children under the age of 12 years must leave Northbridge during the hours of darkness; that children aged between 13 and 15 years must leave Northbridge by 10 pm; and that children between the ages of 15 and 18 years may be apprehended by police at any time if by their 'anti-social, offending or health-compromising behaviour' they are placing themselves and/or others at risk of harm: see Office of Crime Prevention, Western Australia Department of Premier and Cabinet, *Young People in Northbridge Policy* (2003) 3–4.
 113. An authorised officer from the Department of Community Development was also entitled to exercise the powers in s 138B of the *Child Welfare Act 1947* (WA).
 114. Office of Crime Prevention, Western Australia Department of Premier and Cabinet, *Young People in Northbridge Policy: One Year On* (June 2004) 5.
 115. *Ibid* 6. This raises an interesting question: are more Aboriginal girls being dealt with than Aboriginal boys because there are more Aboriginal girls in Northbridge or do the police perceive girls to be 'at risk' more readily?
 116. Rayner M, 'Northbridge Curfew' (2003) 5(27) *Indigenous Law Bulletin* 9, 10 where it was stated that '[i]t may be that police are merely acting in response to the proportions of Aboriginal and non-Aboriginal young people on Northbridge streets, but since nobody is evaluating the policy it is impossible to say. The other possibility is worrying. Youth groups have anecdotes of police using their discretion to stop, question and direct young people out of the entertainment precinct who are neither under age nor misbehaving, but apparently 'Aboriginal'. See also Lombard K, 'Northbridge Curfew' (2004) 1 *Metior* 21; Koch T, 'Aboriginal Legal Service' (2003) 5(27) *Indigenous Law Bulletin* 7.
 117. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 236.

While ostensibly the Northbridge curfew applies equally to all children, statistics show that the majority of children dealt with pursuant to the curfew policy are Aboriginal.

Enforcement of curfews imposes on children and young people all the risks associated with contact with police (including the risk of provoked offences such as offensive language) and with police custody (including the risk of self-harm).¹¹⁹

More broadly, the policy has been criticised for violating the rights of children and young people such as the right to access public space and the right to freedom of association.¹²⁰ The Western Australian government's report, *Young People in Northbridge Policy: One Year On*, stated that an 'independent review' of the Northbridge curfew had 'recently been commissioned'.¹²¹ However, as far as the Commission is aware this review has not yet been undertaken.¹²²

In the absence of an independent review of the curfew policy, it is difficult to judge the effectiveness of the policy in terms of protecting young people and whether in practice the policy is operating unfairly on Aboriginal young people. Therefore, the Commission recommends that the Northbridge curfew policy be reviewed as a matter of priority. The Commission is of the view that the Commissioner for Indigenous Affairs would be an appropriate body to undertake this review; however, the Western Australian government has proposed to establish an independent Commissioner for Children and Young People.¹²³ Because the curfew relates only to children and young people it would also be an appropriate body to review the curfew.

Recommendation 55

Review of the Northbridge curfew policy

That the Commissioner for Indigenous Affairs or the Commissioner for Children and Young People (whichever office is established sooner) review and evaluate the Western Australian government's Northbridge curfew policy as a matter of priority.

Cultural awareness training

The Commission acknowledged in its Discussion Paper that the Western Australia Police provide cultural awareness training programs for its officers; however, many Aboriginal people consulted by the Commission argued that better cultural awareness training for police is required. The Commission 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.¹²⁴ This proposal received extensive support.¹²⁵ In its submission the Western Australia Police advised that all police recruits participate in training about the role and functions of APLOs and Aboriginal-police relations. Police officers who are selected to work in the new remote multi-functional police stations also receive specific cultural awareness training. The Western Australia Police also acknowledged the need to consult

118. Ibid 235

119. Human Rights and Equal Opportunity Commission, *Annual Report 2002-2003*, Ch 7 'Race Discrimination', <http://www.hreoc.gov.au/annrep02--_03/chap7.html>.

120. Human Rights and Equal Opportunity Commission, *ibid*: Youth Affairs Council of Western Australia, Submission to the Office of Crime Prevention on 'Preventing Violence: The State Community Violence Prevention Strategy 2005' (2006) 4

121. Office of Crime Prevention, Western Australia Department of Premier and Cabinet, *Young People in Northbridge Policy: One Year On* (June 2004) 7.

122. David Ray, Acting Director of the Office of Crime Prevention, telephone consultation (8 September 2006). The Commission was advised that the Office of Crime Prevention will be preparing a report about the curfew's first three years of operation.

123. Commissioner for Children and Young People Bill 2005.

124. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 253, Proposal 46.

125. Kimberly Aboriginal Law and Culture Centre, Submission No. 17 (17 April 2006) 8; Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2; Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 14; Department of the Attorney General, Submission No. 34 (11 May 2006) 10; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 3; Law Society of Western Australia, Submission No. 36 (16 May 2006) 1; Indigenous Women's Congress, Submission No. 49 (15 June 2006) 1; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 4. See also LRCWA, Discussion Paper community consultations, Warburton, 27 February 2006; Kalgoorlie, 28 February 2006; Fitzroy Crossing, 9 March 2006.

with local Aboriginal groups to ensure that this training is locally based.¹²⁶ The Department of Corrective Services submitted that all police officers should be required to participate in cultural awareness training and, therefore, the Commission's proposal should be extended beyond just those officers who work in an Aboriginal community.¹²⁷ The Commission is concerned about the nature of training for police recruits. Bearing in mind that the role of APLOs is now nearly defunct, it appears that the training would necessarily be limited to Aboriginal-police relations. Therefore, the Commission agrees that it is appropriate to recommend that all Western Australian police officers should be required to participate in Aboriginal cultural awareness training.

Recommendation 56

Cultural awareness training for police officers

1. That the Western Australian government provide adequate resources to ensure that every police officer in Western Australia participates in Aboriginal cultural awareness training.
2. That every police officer who is stationed at a police station that services an Aboriginal community participates in relevant and locally based Aboriginal cultural awareness training.
3. That Aboriginal cultural awareness training should be presented by local Aboriginal people including, if appropriate, members of a community justice group.

Recording ethnicity

In its submission, the Department of Indigenous Affairs raised an important point in relation to the recording of ethnicity by the Western Australia Police.¹²⁸ It was explained that in recent years the recording of victim ethnicity has substantially declined. Research by the Crime Research Centre indicates that:

For the second year running there was a large and significant increase in the number of offences against



the person with unknown victim Indigenous status (from 3.4 percent in 2002 to 76.8 percent in 2004) and, consequently, the victimisation rates for Indigenous people for violent offences were not obtainable in 2004, nor were the relative risks of victimisation for Indigenous women.¹²⁹

It has been observed that the poor quality of Indigenous data in relation to certain aspects of the criminal justice system is because some justice agencies do not 'ask explicitly for a person's Indigenous status'.¹³⁰ For another person to determine whether a person is Aboriginal or not, solely on the basis of physical appearance, is obviously not appropriate.

The Department of Indigenous Affairs highlighted that insufficient or inaccurate recording of victim ethnicity will make it difficult for Western Australia to determine its 'progress in providing safe communities for its Indigenous people' and provide adequate assistance to victims of family violence. Given the unacceptable level of family violence and sexual abuse in Aboriginal communities the Commission considers it is essential that accurate statistics are kept. The Department also referred to problems in recoding ethnicity for people who may be considered 'offenders' unless they are actually taken into police custody. Therefore, accurate statistics are not retained for procedures such as move-on notices.¹³¹ Bearing in mind the extent of disadvantage and discrimination experienced by

126. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 12.

127. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 14.

128. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 12.

129. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2004* (Perth: Crime Research Centre, 2005) vi.

130. Australian Government Productivity Commission, *Review of Government Service Provision: Indigenous Compendium 2006*, <<http://www.pc.gov.au/gsp/reports/rogs/compendium2006>>.

131. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 13.

Aboriginal people in the Western Australian criminal justice system, the Commission is of the view that police should be required to ask all victims and alleged 'offenders' to state their ethnicity (including people who are issued with a move-on notice or otherwise dealt with without being formally charged). However, it should not be compulsory for the person to answer this question.

Recommendation 57

Recording of ethnicity by police

1. That the Western Australia Police ask all victims and alleged 'offenders' to state their ethnicity (including people who are issued with a move-on notice or otherwise dealt with without being formally charged) and, if a response is provided, appropriately record that response.
2. That police officers inform the person of the reason they wish to record the person's ethnicity (that is, to enable accurate statistics to be kept) and advise that a response is voluntary.

The future of police and Aboriginal relations

The Commission noted in its Discussion Paper that in November 2005 the Aboriginal and Policy Services Unit was amalgamated with the Strategic Policy and Development Unit. The Commission had been advised that this amalgamation was designed to improve the effectiveness of policy and services concerning Aboriginal people. However, it was noted that the failure to maintain a separate Aboriginal unit within the police service is contrary to the recommendations of the RCIADIC.¹³² The Commission observed that the incorporation of Aboriginal policy into a mainstream policy unit runs the risk that the momentum to improve Aboriginal police relations will be lost. However, bearing in mind that the amalgamation had only just taken place, the Commission invited submissions as to whether the former Aboriginal Policy and Services Unit should be

reinstated and provided with additional resources.¹³³

The Commission has only received two submissions in response to this invitation. The Catholic Social Justice Council stated that there should be a separate Aboriginal unit within the Western Australia Police as recommended by the RCIADIC.¹³⁴ It appears that since the publication of the Commission's Discussion Paper further changes have been made. The Western Australia Police explained that there is currently an Aboriginal Corporate Development Team which reports directly, through the Assistant Director, to the Commissioner's delegate (Executive Director).¹³⁵ The Commission has been advised that the primary role of the Aboriginal Corporate Development Team has changed. Previously, the Aboriginal unit was involved in day-to-day issues. It is now considered appropriate that the team take on a strategic role: directing and overseeing other police in their dealings with Aboriginal people and communities. This role is designed to improve accountability; that is, to ensure that police officers on the ground are working more effectively with Aboriginal communities. The Commission has been advised that once the transition program for APLOs is completed, the Aboriginal Corporate Development Team may consider the development of guidelines for police about dealing with Aboriginal people.¹³⁶

While the Commission is of the view that the changes described above appear to be appropriate, there is a need to improve transparency. Given the name of the team and the lack of public information about its role, it would be easy to assume that the Western Australia Police do not have a sufficient focus on Aboriginal issues. In this regard, the Commission notes that the Western Australia Police website is inadequate.¹³⁷ For most of 2005 until mid-2006, the 'Aboriginal Policy and Service' link was continually described as 'under construction'. At the time of publication of this report, the only information available was the address and contact details of the unit. The Commission is of the view that the website should immediately be updated and contain information for Aboriginal people about the role of the Aboriginal Corporate Development Team, staff details and other information such as policies and guidelines that are relevant to Aboriginal people.

132. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 253–54.

133. *Ibid.*, Invitation to Submit 8.

134. Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 3.

135. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 14–15.

136. Western Australia Police, Aboriginal Corporate Development Team, consultation (26 June 2006).

137. See <<http://www.police.wa.gov.au>>, 'Aboriginal Policy and Services'.

Recommendation 58

Western Australia Police website

That the Western Australia Police immediately update its website to include:

1. The current name and contact details of the Aboriginal Corporate Development Team.
2. The contact details for all staff who work for the Aboriginal Corporate Development Team.
3. The roles and responsibilities of the Aboriginal Corporate Development Team.
4. Relevant policies, guidelines and publications.

The Commission believes that its recommendation for community justice groups will be far more effective if there is a good working relationship between community justice group members and police. In this regard, the Commission suggests that the Aboriginal

Corporate Development Team develop policies and/or guidelines for how police officers should engage and work with community justice groups. These policies and guidelines should be developed in conjunction with community justice groups. In consultation with community justice groups, the Aboriginal Corporate Development Team should also establish appropriate benchmarks to ensure that police officers working on the ground follow the relevant policies and guidelines. For example, it could be provided that the local police station must regularly report to the Aboriginal Corporate Development Team about how often and in what circumstances their police officers have met with and consulted local community justice group members.¹³⁸ The Commission strongly encourages the Western Australia Police to work with Aboriginal community justice groups and Aboriginal people generally to improve the relationship between Aboriginal people and the police, and as a consequence improve the justice outcomes of Aboriginal people in this state.

138. The Commission notes that Aboriginal people in Warburton suggested that if a person from Warburton is arrested in another location the police should notify the Warburton community justice group so that it can make appropriate submissions or provide information to the court where the person will appear: see LRCWA, Discussion Paper community consultation – Warburton, 27 February 2006.

Prisons

Aboriginal people in Western Australia are disproportionately over-represented in prison and detention centres. The extent and causes of this over-representation were discussed at length by the Commission in its Discussion Paper.¹ While many of the Commission's recommendations are designed to reduce the unacceptable number of Aboriginal people in custody, any significant reduction in the level of over-representation will not happen immediately. Therefore, it remains a priority for those responsible for the management of custodial facilities to acknowledge the detrimental impact of custody upon Aboriginal people and to provide culturally appropriate programs, activities and services for Aboriginal prisoners.

Since June 2000 the Western Australian Office of the Inspector of Custodial Services (the Inspector) 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.² Recently, the Inspector has reiterated that inspections have 'continued to find Aboriginal prisoners facing conditions markedly inferior to non-Aboriginal prisoners'.³ In 2005 the *Inquiry into the Management of Offenders in Custody and in the Community* (the Mahoney Inquiry) considered in detail the current state of custodial management in Western Australia. Both the Mahoney Inquiry and the Inspectors' *Directed Review of the Management of Offenders in*

Custody addressed the position with respect to Aboriginal prisoners.⁴ In its Discussion Paper the Commission concluded that it is not appropriate or necessary to re-examine all of these issues in detail. As a result the Commission has confined its examination of prison issues primarily to those matters raised during its consultations with Aboriginal people.⁵

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.⁶ The Commission observed in its Discussion Paper that 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.⁷

Specific concerns expressed to the Commission during its consultations with Aboriginal people 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

1. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 95–99. See also 'Over-representation in the Criminal justice system', above p 82.
2. In June 2006 the Inspector published a report which sets out the recommendations and observations made with respect to Aboriginal prisoners during the period from 2000 to 2005: see Office of Inspector of Custodial Services, *Digest of Aboriginality in Western Australian Prisons as Reported in Published Inspection Reports 2000–2005* (June 2006).
3. *Ibid* 2.
4. For example, the Mahoney Inquiry recommended that the relevant legislation should require the Department of Corrective Services to 'specifically contemplate the unique cultural needs of Indigenous offenders in the development, delivery and evaluation of policies, programs and services' (Recommendation 85); that the 'planning for all custodial facilities should ensure appropriate consideration is given to the needs of Indigenous offenders' (Recommendation 86); that there should be a new custodial facility in the Kimberley and the Eastern Goldfields (Recommendations 90 & 91); and that any new custodial facilities with a large proportion of Aboriginal prisoners should be constructed with the needs of Aboriginal offenders in mind (Recommendation 89): see Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) [9.59] & [9.77].
5. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 255.
6. *Ibid* 256. The Commission notes that in 2002 approximately 75 per cent of Aboriginal people reported having attended a cultural event in the last 12 months and that the most commonly reported events were funerals (62 per cent). Nearly 90 per cent of Aboriginal people living in remote areas reported attending a cultural event in the last 12 months: see Australian Bureau of Statistics, *Selected Statistics for Aboriginal and Torres Strait Islander people in Western Australia* (June 2006).
7. *Ibid* 256. In a submission it was noted that Aboriginal prisoners become very distressed if they are not able to attend a funeral and some prisoners may even face punishment under customary law for non-attendance: see Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 4.

handcuffs and shackles) is inappropriate and unnecessary.⁸

Application process and defining family relationships

Pursuant to s 83 of the *Prisons Act 1981* (WA) a prisoner may be granted a permit of absence in order to attend a funeral of a near relative.⁹ The Commission has examined the application process and policies governing prisoner funeral attendance for both adult and juvenile prisoners. In its Discussion Paper, the Commission found that these policies reflect Western lineal relationships (such as parents, grandparents and children) and do not take sufficient account of Aboriginal kinship structures.¹⁰ Therefore, the Commission proposed that these policies be revised to include recognition of Aboriginal kinship and other important cultural relationships.¹¹

The Commission has received support for this proposal from the Aboriginal Legal Service, the Law Society, the Inspector and the Criminal Lawyers Association.¹² The Department of Corrective Services indicated in its submission that it supports a review of the policy applicable for juvenile detainees.¹³ This policy, *Juvenile Custodial Rule 802* (JC Rule 802), refers to the cultural significance of the relationship between the deceased and the detainee. But as noted by the Department, it does not expressly recognise 'Aboriginal kinship and other important Aboriginal cultural relationships'.¹⁴ Bearing in mind that approximately 70 per cent of juvenile detainees in Western Australia are Aboriginal, it is crucial that the juvenile policy deals explicitly with Aboriginal kinship.

In respect to adult prisoners, the Department of Corrective Services does not state whether it supports or opposes the Commission's proposal. The Department indicated that in 2004 there was a review of *Policy Directive 9* (PD 9) and, as a result of this review, administrative procedures were changed.¹⁵ In

its submission the Department suggested that PD 9 currently includes reference to kinship by expressly including 'blood relationship, marriage/defaulto relationship and other culturally important relationships'. But while relationships of grandparents, parents, siblings, children and spouses are stated in PD 9 to be sufficient to allow funeral attendance, the status of other relationships is not so clear:

Where there has been an emotional, psychological or cultural significance attached to the relationship between the prisoner and the deceased but this relationship is not as described above, for example:

- Where there has been an extensive history of contact between the prisoner and the deceased of a significant nature.
- Where there has been a demonstrated commitment by either the prisoner or the deceased to their shared relationship.
- Where either the prisoner or the deceased have significant community and/or tribal standing necessitating an obligation for attendance of the prisoner at the funeral.
- Where there will be significant negative consequences resulting either to the prisoner, his family or community because of non-attendance of the prisoner at the funeral.
- Where the relationship (between prisoner and deceased) has been that of foster child, foster parent or substitute caregiver.
- The above includes the recognition of a cross-cultural relationship where prisoners of non-aboriginal descent have a recognised standing in the aboriginal community, to attend a funeral of an aboriginal person.

This policy does not expressly recognise Aboriginal kinship relationships. As discussed in Chapter Four, Aboriginal people use a 'classificatory kinship system'.¹⁶ For example, a person who would be described as an 'uncle' under the Western lineal system may be considered a 'father' under an Aboriginal kinship system. Similarly, a 'cousin' could be described as a 'sister' or 'brother'. The funeral policy refers to relationships which

8. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 256.

9. The Commission understands that the Department of Corrective Services intends to rename Policy Directive 9 to 'Grant of Permit': see Beck A, Deputy Commissioner, Adult Custodial, Department of Corrective Services, letter (27 July 2006).

10. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 256–57.

11. *Ibid* 259, Proposal 48.

12. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 10; Law Society of Western Australia, Submission No. 36 (16 May 2006) 7; Office of Inspector of Custodial Services, Submission No. 44 (2 June 2006) 1; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 4.

13. Department of Corrective Services (WA), Submission No. 31 (May 2006) 15.

14. *Ibid*.

15. *Ibid*. The Commission notes although this review has resulted in administrative changes as well as recommendations in respect to the Department's funeral policy, Policy Directive 9 has not been amended since May 2001: see Mike Reindl, Acting Manager Policy and Standards, Department of Corrective Services, email (12 July 2006).

16. See discussion under 'The role of kinship in Aboriginal society', Chapter Four, above p 66.

have 'cultural significance' and then provides examples of the types of relationships that would satisfy that description. Although these examples do include matters that are relevant to Aboriginal prisoners (such as the tribal standing of the deceased or the prisoner and the fact that there may be negative consequences for the prisoner if he or she cannot attend the funeral) in the Commission's opinion these factors are not adequate to cover the importance of classificatory kinship structures. In its Discussion Paper the Commission stated that if a prisoner was to describe the deceased as his uncle (which may occur because the person assisting the prisoner to make the application frames the question in Western lineal terms) then the prison authorities may not appreciate the cultural significance of the relationship. Other examples listed in PD 9 may also work against Aboriginal prisoners. For example, the level of contact or commitment between the prisoner and the deceased may not have been significant and this may result from factors such as remoteness, lack of transport or lack of access to a telephone. Nevertheless, the relationship may be extremely significant from a cultural perspective.

The Inspector has argued that the funeral attendance policy is 'out of step with Aboriginal notions of family' and has suggested that the Department should rewrite the policy to ensure that it meets the 'specific needs and expectations of Aboriginal people'.¹⁷ In its submission the Inspector also stated that the funeral policy is the 'single most important issue for most Aboriginal prisoners in the state'.¹⁸ These observations are consistent with the vast majority of views expressed by Aboriginal people to the Commission during its consultations.¹⁹

Since receiving its submission, the Department of Corrective Services has advised the Commission that a number of recommendations to amend PD 9 were

made during the review in 2004. Importantly, one recommendation is that PD 9 should include Aboriginal kinship as a separate criterion when deciding if a prisoner is eligible to attend a funeral.²⁰ It is anticipated that PD 9 will be amended to incorporate this recommendation (as well as other recommendations made during the review) in early 2007.²¹ The Commission welcomes the proposed amendment to PD 9 but emphasises that it is also essential that the policy for juveniles is immediately reviewed. In relation to the policy for adults, the Commission wishes to express support for the Department's proposed change and indicate that this change should be considered a high priority.

Recommendation 59

Prison funeral attendance policies

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

Aboriginal communities consulted by the Commission also complained that the application procedures for funeral attendance 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.²² In its Discussion Paper the Commission referred to the staff resource manual produced at the Roebourne Regional Prison and suggested that it was a useful model for other prisons.²³ This manual is designed to advise prison officers of relevant cultural considerations and to suggest appropriate ways of confirming information provided by prisoners in their application.²⁴ The Commission proposed that the Department of

17. Office of Inspector of Custodial Services, *Directed Review of the Management of Offenders in Custody*, Report No. 30 (November 2005) 45. The Inspector has suggested that the policy in Queensland is a useful model because it is more inclusive of Aboriginal kinship relations: see Office of Inspector of Custodial Services, *Report of an Announced Inspection of Roebourne Regional Prison – April 2002*, Report No. 14 (2003) 82. See also Queensland Department of Corrective Services' *Funeral Attendance by Indigenous Prisoners Policy* (undated) [3.1].
18. Office of Inspector of Custodial Services, Submission No. 44 (2 June 2006) 1
19. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 257.
20. Beck A, Deputy Commissioner, Adult Custodial, Department of Corrective Services, letter (27 July 2006).
21. The Commission understands that two recommendations require legislative amendment and that these amendments are expected to pass through Parliament in late 2006. The Department has advised that once these legislative amendments are passed the other changes to Policy Directive 9 will be implemented: see Beck A, Deputy Commissioner, Adult Custodial, Department of Corrective Services, letter (27 July 2006).
22. The Department of Corrective Services has told the Commission that it provides regular 'cross-cultural' training to new recruits as well as additional training at regional prisons. The Department has indicated that this training is adequate to cover the recommendation (made during the review of Policy Directive 9 in 2004) that cross-cultural training should include information about the significance of Aboriginal kinship: see Beck A, Deputy Commissioner, Adult Custodial, Department of Corrective Services, letter (27 July 2006).
23. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 258.
24. Department of Justice, *Roebourne Regional Prison Funeral Applications: Staff resource manual* (undated).

Corrective Services, in conjunction with Aboriginal communities, develop culturally appropriate policy and procedure manuals for all prisons to assist prison officers and prisoners with applications for attendance at funerals. The Commission further proposed that consideration be given to the potential role of 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.²⁵

The Inspector expressed support for the above proposal but also suggested that the application process should be developed in consultation with prisoners as well as Aboriginal community representatives.²⁶ The Commission agrees that any changes to the application process should take into account the views of Aboriginal prisoners because they are well placed to explain any deficiencies under the current procedures. The Department of Corrective Services agreed, in its submission, that local advice about the significance of the relationship between the prisoner and the deceased would assist prison authorities when making decisions about funeral attendance and indicated its support for the Commission's proposal.²⁷ The Department has also subsequently advised that during the review of PD 9 a number of recommendations were made with respect to the application process for funeral attendance. These recommendations included that the approval of an application to attend a funeral should be made by the Superintendent of each prison; that cultural awareness training about the importance of Aboriginal kinship should be provided to each prison; that each prison should have a resource booklet containing relevant local contacts and procedures; and that each prison should access its own local reference group when considering applications for funeral attendance.²⁸ While these recommendations are consistent with the Commission's approach it is necessary to emphasise the need to consult with both Aboriginal prisoners and communities

when developing policy and procedure manuals. Further, the Commission considers that community justice groups have a potential role to play in advising prison authorities and assisting prisoners.

Recommendation 60

Application process for funeral attendance

1. That the Department of Corrective Services, in conjunction with Aboriginal prisoners and Aboriginal communities, develop culturally appropriate policy and procedure manuals for all prisons to assist prisoners and prison officers with applications for attendance at funerals.
2. In drafting these manuals consideration be given to the potential role of community justice groups in assisting prisoners with the application process. In addition, 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.

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. Many Aboriginal people consulted by the Commission complained about the practice of restraining prisoners during funerals.²⁹ In its Discussion Paper the Commission acknowledged that community safety and the prevention of escapes is of paramount importance but

25. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 258, Proposal 47.

26. Office of Inspector of Custodial Services, Submission No. 44 (2 June 2006) 1. This proposal was also supported by the Aboriginal Legal Service and the Criminal Lawyers Association: see Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 10; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 4.

27. Department of Corrective Services (WA), Submission No. 31 (May 2006) 15. The Catholic Social Justice Council suggested, in its submission, that where there is a limit on the number of prisoners who can attend a particular funeral the decision as to who is permitted to attend should be made by the prisoners and not the family of the deceased: see Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 4. The Commission is of the view that decisions of this nature should be made in consultation with all relevant parties: the prisoners, the family of the deceased and the relevant Aboriginal community.

28. Beck A, Deputy Commissioner, Adult Custodial, Department of Corrective Services, letter (27 July 2006). The Department of Corrective Services also stated that over the past two years prisons have established 'community/stakeholder reference groups to discuss and provide advice on a range of prisoner management issues'.

29. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 259. The Commission notes that in 2006 an Aboriginal accused applied for bail and one reason put forward in support of his application was that if he was escorted to his mother's funeral while in custody he would be physically restrained. It was also suggested that the use of handcuffs would impede his ability to act as a pall bearer: see *Morrison v State of Western Australia* (Unreported, Supreme Court of Western Australia, MCR 9 of 2006, Miller J, 8 March 2006) 10.

also concluded that the current policy and practice regarding the use of physical restraints during funeral attendances should be reviewed. The Commission argued in its Discussion Paper that certain prisoners, in particular those who are classified as minimum-security, should not generally be restrained at funerals. Further, the Commission contended that 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.³⁰ The Commission proposed that the Department of Corrective Services 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.³¹

In its submission the Department of Corrective Services outlined the current practice with respect to the use of restraints when escorting prisoners to funerals. When adult prisoners are escorted by the Department, prisoners with a medium, maximum or high-security classification are restrained. Minimum-security prisoners are not generally restrained but restraints are readily available. In the case of those prisoners who are escorted by the private contractor (Australian Integrated Management Services (AIMS) Corporation) all prisoners, irrespective of their security rating, are double handcuffed. All juvenile detainees are required to be restrained at funerals.³² The Department expressed support for a review of the relevant policies but noted that in relation to juveniles it is necessary to take into account that young detainees can be impulsive and that the safety of the detainee, the staff and the community must be recognised.³³

All submissions received by the Commission with respect to this proposal were supportive.³⁴ In one submission it was observed that when a prisoner is double handcuffed it can cause great difficulty for the prisoner and the family during the funeral. For example, if the prisoner is required to address the family, act as a pallbearer or 'throw a handful of soil or saltwater' it is distressing that these activities have to be undertaken



while the prisoner is handcuffed to an officer. This submission suggested that flexibility is required and one option is for a prisoner to be single handcuffed to an appropriate Elder or family member or for the handcuffs to be removed for certain purposes.³⁵ Similarly, in another submission the Commission was told that to watch a prisoner with both wrists handcuffed together and handcuffed to another person, while trying to mourn, was 'extremely disturbing for everyone'.³⁶

The Aboriginal Legal Service (ALS) supported a review of the policy concerning physical restraints but expressed reservations about one aspect of the Commission's proposal, namely, that physical restraints should only be used as a last resort. The ALS agreed that physical restraints should be as unobtrusive as possible but suggested that a prisoner should be handcuffed by one hand. Some Aboriginal people consulted by the ALS were concerned that if a prisoner did escape during a funeral this would cause additional stress to the family.³⁷ The Law Society suggested that if physical restraints were required they should be minimal and that the type of restraint used should reflect the risk of escape and the risk, if the prisoner did escape, to the community.³⁸

30. LRCWA, *ibid.*

31. *Ibid* 260, Proposal 49.

32. Department of Corrective Services (WA), Submission No. 31 (May 2006) 16.

33. *Ibid.*

34. Marian Lester, Submission No. 18 (27 April 2006) 2; Department of Corrective Services (WA), Submission No. 31 (May 2006) 16; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 10; Law Society of Western Australia, Submission No. 36 (16 May 2006) 7; Office of Inspector of Custodial Services, Submission No. 44 (2 June 2006) 1; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 4.

35. Marian Lester, Submission No. 18 (27 April 2006) 2.

36. Bill Marchant, Submission No. 1 (10 February 2006) 1.

37. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 10.

38. Law Society of Western Australia, Submission No. 36 (16 May 2006) 8.

The Commission now considers that its proposal requiring physical restraints to only be used as a last resort may not be appropriate in all circumstances. However, the Commission remains very concerned that minimum-security prisoners being escorted by staff from AIMS Corporation are required to be double handcuffed. The Commission understands that the majority of adult prisoners are escorted by AIMS Corporation. Only minimum-security prisoners at Karnet, Wooroloo and Boronia custodial facilities are escorted by custodial staff.³⁹ Bearing in mind that some minimum-security prisoners are granted home leave from prison,⁴⁰ it is unacceptable that there is no discretion with this category of prisoners. The Commission remains of the view that minimum-security prisoners should not generally be restrained while attending a funeral.

The Commission understands that AIMS Corporation is subject to contractual obligations that may result in financial penalties for an escape by a prisoner in custody.⁴¹ Nevertheless, it is unjust that those minimum-security prisoners being escorted by AIMS Corporation are double handcuffed while those being escorted by the Department are not restrained at all.

The Commission is of the view that the Department of Corrective Services must ensure that the policy concerning physical restraints allows a degree of flexibility and that the necessity for restraints is determined with reference to the risk of escape by the prisoner and any risk to the safety of the public. If necessary, the Department should renegotiate its contract with AIMS Corporation to ensure that minimum-security prisoners are not physically restrained unless there is a significant risk to the safety of the public.⁴² The Department could, for example, after assessing the prisoner's risk and determining that there is no significant risk to the safety of the public, provide an undertaking to AIMS Corporation that an escape by that prisoner will not result in a financial penalty being incurred.

Recommendation 61

Use of physical restraints on prisoners attending funerals

1. That the Department of Corrective Services review and revise its current policy in relation to the use of physical restraints on prisoners during funeral attendances. The revised policy should recognise the importance of Aboriginal prisoners attending funerals in a dignified and respectful manner. The policy should also provide that any decision about the use of physical restraints should take into account any risk of the prisoner escaping or absconding during the funeral and any risk to the safety of the public. The policy should state that, if required, restraints should be as unobtrusive and as minimal as possible in all the circumstances.
2. That the Department of Corrective Services ensure that its policy in relation to the use of physical restraints on prisoners during funeral attendances provides that, unless there is a significant risk to the safety of the public, all minimum-security prisoners should not be physically restrained while attending a funeral. If necessary, the Department of Corrective Services should renegotiate its contract with AIMS Corporation to reflect this policy.

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. In its Discussion Paper the Commission considered observations made by the Inspector and initiatives in this area in other parts of Australia.⁴³ For example, the Department of Corrective

39. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 260.

40. Department of Corrective Services, Director General's Rule 16 [16.4]. Under this rule prisoners can only be considered for home leave if they have a minimum-security rating and if they only pose a minimum risk to the security of the public.

41. Hooker R, *Inquiry into the Escape of Persons Held in Custody at the Supreme Court of Western Australia on 10 June 2004* (July 2004) 28. The Commission notes that on 30 July 2005 the contract between AIMS Corporation and the Department of Corrective Services was extended for an additional three years: see Department of Justice, *Contract for the Provision of Court Security and Custodial Services Annual Report 2004–2005* (September 2005) 1.

42. The Commission understands that pregnant female prisoners who are classified as minimum-security must not be restrained. But this policy necessarily reflects that pregnant prisoners generally pose less risk than they would otherwise because of their physical condition. For medium and maximum security pregnant prisoners the relevant policy provides that mechanical restraints are not to be used unless there is a significant risk of a compromise to public safety: see Department of Corrective Services, Policy Directive 44.

43. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 260.

Services in South Australia has entered into agreements which enable local Indigenous people to supervise prisoners who are attending funerals on their lands.⁴⁴ In Queensland, the relevant policy states that wherever possible Indigenous custodial officers should be used to escort a prisoner to a funeral.⁴⁵

The Commission proposed in its Discussion Paper that the policy and practice concerning the escort of prisoners and detainees to funerals should be revised in consultation with Aboriginal communities. The Commission emphasised that this process should pay 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.⁴⁶ This proposal has been supported in a number of submissions.⁴⁷ The Department of Corrective Services advised that the policy for juvenile detainees provides that, as far as possible, the escorting officer should be a person of Aboriginal descent.⁴⁸ The 2004 review of PD 9 also recommended that minimum-security prisoners at minimum-security custodial facilities should be entitled to attend a funeral escorted by a person other than a prison officer such as a 'prominent community member'.⁴⁹ The Department has advised that this recommendation will require legislative amendment and this is expected to occur by the end of 2006. However, the Department has not proceeded with a recommendation that escorts conducted by prison officers or contracted staff should be carried out in a sensitive manner and where possible civilian clothing should be worn.⁵⁰ While the Commission supports the option of minimum-security prisoners being escorted by respected community members, it also considers that the policy for all other prisoners needs to be reconsidered.

Recommendation 62

Escorting prisoners and detainees to funerals

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

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 a juvenile offender, on a supervised release order. The decision whether to allow the offender to be released is made by the Parole Board⁵¹ (for adults) or by the Supervised Release Review Board (for juveniles). In its Discussion Paper the Commission observed that 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.⁵² In order to encourage more reliable information about Aboriginal customary law and cultural issues the Commission proposed that the Parole Board and the Supervised Release Review Board should be able to receive information from Elders or members of a community justice group.⁵³ The Commission received support for this proposal from the Department of Corrective Services and the Department of the Attorney General.⁵⁴ In addition, during community

44. This type of approach was supported by Elders on the Catholic Social Justice Council who suggested that for minimum-security prisoners the family of the prisoner should be allowed to escort the prisoner to the funeral and return them to the prison the same day: see Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 4.
45. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 260.
46. *Ibid*, Proposal 50.
47. Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006); Department of Corrective Services (WA), Submission No. 31 (May 2006) 16; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 10; Law Society of Western Australia, Submission No. 36 (16 May 2006) 7; Office of Inspector of Custodial Services, Submission No. 44 (2 June 2006) 1; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 4. The Commission notes that the ALS supported a review of the policy but expressed general concern about the possibility of escapes during a funeral.
48. Department of Corrective Services, Submission No. 31 (May 2006) 16.
49. Beck A, Deputy Commissioner, Adult Custodial, Department of Corrective Services, letter (27 July 2006).
50. *Ibid*.
51. The Commission notes that the Parole and Sentencing Legislation Amendment Bill 2006 (WA) is currently before Parliament and if passed the name of the Parole Board will change to the Prisoners Review Board.
52. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 261. The Department of Corrective Services advised in its submission that the Supervised Release Review Board currently consults with relevant Aboriginal communities when developing a release plan for juvenile detainees: see Department of Corrective Services (WA), Submission No. 31 (May 2006) 17.
53. *Ibid*, Proposal 51.
54. Department of Corrective Services (WA), Submission No. 31 (May 2006) 17; Department of the Attorney General, Submission No. 34 (11 May 2006) 10. The proposal was also supported by the Catholic Social Justice Council and the Criminal Lawyers Association: see Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 4.

meetings Aboriginal people emphasised that the views of the Aboriginal community should be taken into account when deciding whether an offender on parole should return to that community or when determining any conditions that should be imposed on the offender while subject to a release order.⁵⁵

The Department of Corrective Services suggested that the question of who should speak on behalf of the community and any potential conflict of interest should be further considered.⁵⁶ The potential for conflicts of interest was also raised by the Department of the Attorney General in its submission.⁵⁷ The Commission agrees and throughout this chapter it has taken into account the potential for a conflict of interest whenever a member of an Aboriginal community is providing information or advice about an offender (or a victim) to criminal justice agencies.⁵⁸ It is necessary, in the Commission's view, that any Elder, respected person or member of a community justice group should disclose their relationship to the offender or the victim. This may not necessarily weaken the relevance of the information put forward but it is important that whoever is relying on the information is appraised of any potential conflicts of interest. Community justice groups will consist of an equal number of members from all relevant family and social groupings in the community. Therefore, if necessary, the Parole Board and Supervised Release Review Board would be able to request evidence or information from a member of the community justice group that comes from a different family group to the offender (or the victim).



Recommendation 63

Parole Board and Supervised Release Review Board

1. 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 Review Board can request information or reports from an Elder, respected person or member of a community justice group from the offender's community and/or the victim's community.
2. That the *Sentence Administration Act 2003* (WA) and the *Young Offenders Act 1994* (WA) be amended to provide that when an Elder, respected person or member of a community justice group provides information to the relevant board that he or she must advise the relevant board of any relationship to the offender and/or the victim.

Lack of programs and services

In its Discussion Paper the Commission emphasised the lack of suitable programs and services available for Aboriginal prisoners.⁵⁹ In some cases the only way for an Aboriginal prisoner to access programs is to transfer to another prison, which could be a long distance from his or her community. This adds to cultural and community dislocation.⁶⁰ The extent to which a prisoner has engaged in programs while in prison is a consideration for the Parole Board in their determinations.⁶¹ The Commission highlighted in its Discussion Paper that the lack of Aboriginal-specific programs and services in prisons may therefore cause delays in Aboriginal prisoners being released on parole.⁶² The Commission has recommended that the Western Australian government should ensure there are adequate and culturally appropriate programs and services available for Aboriginal people in all stages of the criminal justice system.⁶³

55. LRCWA, Discussion Paper community consultations – Kalgoorlie, 28 February 2006; Geraldton, 3 April 2006.

56. Department of Corrective Services (WA), Submission No. 31 (May 2006) 17.

57. The Department of the Attorney General, Submission No. 34 (11 May 2006) 10.

58. See discussion under 'Bail – Conflict of interest', above p 167 and 'Evidence of Aboriginal customary law in sentencing', above p 183.

59. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 261. This issue was again referred to during a community meeting in Geraldton: see LRCWA, Discussion Paper community consultation – Geraldton, 3 April 2006.

60. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 261.

61. Morgan N & Motteram J, 'Aboriginal People and Justice Services: Plans, programs and delivery' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94, (January 2006) 235, 300.

62. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 261.

63. See Recommendation 7, above p 86.

The lack of Aboriginal-specific programs and services in prisons may cause delays in Aboriginal prisoners being released on 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.⁶⁴ A similar view has been expressed by the Kimberley Aboriginal Reference Group which has recently published a report on the design and delivery of programs for Aboriginal prisoners.⁶⁵ This report emphasises the importance of involving community leaders and utilising 'Aboriginal cultural and customary practices'.⁶⁶ The Commission is of the view that its recommendation for community justice groups will provide one method whereby Aboriginal communities can become more directly involved in the provision of programs and services for Aboriginal prisoners and detainees.

Transport arrangements for prisoners when released from custody

There are a large number of Aboriginal prisoners who are sent to prisons which are not the closest available prison to their home community.⁶⁷ Therefore, some Aboriginal prisoners have been required to find their own transport back to their community even where the community is a long distance from the place of release.⁶⁸ Morgan and Motteram observed, in their background paper for this reference, that travel arrangements are a significant concern to the Parole Board and in some cases release may be delayed until satisfactory arrangements can be made.⁶⁹ The Commission was again told during community meetings following the release of its Discussion Paper that

prisoners may be released from prison without any assistance to return to their community.⁷⁰

Both the Mahoney Inquiry and the Inspector have recommended that strategies should be developed 'to assist prisoners, particularly from regional and remote areas, to return home following their release from custody'.⁷¹ In order to minimise the risk of reoffending by prisoners it is clearly preferable that assistance is given to ensure that they return to a community that is willing to offer support to the prisoner rather than being stranded in a town or location without any support structures in place. The Commission is aware that the Department of Corrective Services is currently working on a pilot project in Roebourne and Kalgoorlie to assist prisoners with travel arrangements when released from custody.⁷² The Commission commends this initiative but considers that it is essential for travel arrangements to be made for all prisoners who are released from custody long distances from their home communities. Therefore, the Commission is of the view that the Department of Corrective Services should continue to develop, and provide resources for similar strategies throughout Western Australia.

Recommendation 64

Transport arrangements for prisoners when released from custody

That the Department of Corrective Services continue to develop, and provide adequate resources for, strategies to assist prisoners to return to their home communities upon release from custody.

64. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 261.

65. Kimberley Aboriginal Reference Group, *The Kimberley Custodial Plan: An Aboriginal perspective* (February 2006) 6.

66. *Ibid* 24.

67. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 262.

68. LRCWA, Project No. 94, *Thematic Summary of Consultations – Warburton*, 3–4 March 2003, 5; *Cosmo Newbery*, 6 March 2003, 20; *Kalgoorlie*, 25 March 2003, 27; *Pilbara* 11 April 2003 16.

69. Morgan N & Motteram J, 'Aboriginal People and Justice Services: Plans, programs and delivery' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 235, 307.

70. LRCWA, Discussion Paper community consultations – Kalgoorlie, 28 February 2006; Broome, 7 March 2006.

71. Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) [20.11] (Recommendations 146). See also Office of Inspector of Custodial Services, *Directed Review of the Management of Offenders in Custody*, Report No. 30 (November 2005) 134.

72. Robert Mills, Manager Aboriginal Services, Offender Services Directorate, Department of Corrective Services, telephone consultation (21 July 2006).

Aboriginal community-based alternatives to prison

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.⁷³ The Mahoney Inquiry as well as the Inspector recommended the development of additional custodial facilities in specific regional areas, including Aboriginal community-based facilities for low risk offenders.⁷⁴ 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.⁷⁵ In its Discussion Paper the Commission supported 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. Recently, the Kimberley Aboriginal Reference Group argued that Aboriginal people should be 'empowered and enabled to have control in the management of custodial issues through the exercise of customary authority'.⁷⁶ The Commission remains of the view that community justice groups could undertake a direct role in the design and implementation of alternative community-based custodial facilities.⁷⁷

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73. 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: see Kimberley Aboriginal Reference Group, *Kimberley Aboriginal Reference Group's initial recommendations toward the Kimberley Custodial Plan* (October 2005) 4.
74. Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) [9.78] (Recommendations 89–91); Office of Inspector of Custodial Services, *Directed Review of the Management of Offenders in Custody*, Report No. 30 (November 2005). The Commission is aware that the Department of Corrective Services is in the process of developing two new regional juvenile remand centres, one in Kalgoorlie and one in Geraldton. It is expected that the building of these facilities will commence in late 2007: see Department of Corrective Services, *Kalgoorlie-Boulder Juvenile Remand Centre: Community update* (March 2006); *Geraldton Juvenile Remand Centre: Community update* (March 2006).
75. For example, it would assist in overcoming transport difficulties for prisoners that are released long distances from their home communities. In addition, funeral applications for Aboriginal prisoners may also be more readily approved if the prisoner does not have to be transported long distances to attend.
76. Kimberley Aboriginal Reference Group, *The Kimberley Custodial Plan: An Aboriginal perspective* (February 2006) 4.
77. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 262.

Chapter Six

Aboriginal Customary Law and the Civil Law System

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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.¹ 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.

An Aboriginal Customary Law of Tort?

The position under Aboriginal law differs markedly to that under Australian law. In Aboriginal society the notion of kinship² governs duties owed to others. Many duties which may appear to Western eyes to be unenforceable social obligations will carry significant consequences under customary law.³ These duties include the duty to care for and support kin; the duty 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 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.⁴ 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.⁵

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). However, 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.

The Commission's consultations and relevant anthropological research revealed that the object of responses at customary law to the breach of kinship obligations appears to be 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, as noted in the Commission's Discussion Paper, 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 to exact 'revenge' for the harm suffered.⁶

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1. There are certain recognised categories of relationship where a positive duty of care attaches; for example, parent-child, doctor-patient and teacher-student.
 2. For a fuller explanation of kinship, see discussion under 'The role of kinship in Aboriginal society', Chapter Four, above p 66.
 3. For further discussion, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 269.
 4. *Ibid* 270–71.
 5. *Ibid* 271.
 6. *Ibid* 272.

In Aboriginal society many duties which may appear to Western eyes to be unenforceable social obligations will carry significant consequences under customary law.

Recognition of Aboriginal kinship obligations

In its Discussion Paper the Commission made a number of proposals for the recognition of Aboriginal kinship obligations in Western Australian law.⁷ However, in respect of tortious acts and omissions the Commission was of the opinion that the content of Aboriginal kinship obligations (and responses to their breach) is a matter for Aboriginal people alone and should not be subjected to unnecessary interference by the general law. In reaching this conclusion the Commission noted that 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.⁸ The Commission received no submissions in relation to tortious acts or omissions and no new evidence has arisen to persuade the Commission of the need for recognition of Aboriginal customary laws in this area. The Commission therefore confirms the conclusions reached in its Discussion Paper and declines to make recommendations for reform in this area.



7. See, for example, proposals to recognise classificatory kin relations in relation to distribution of Aboriginal intestate estates (Proposal 52); provision for dependants (Proposal 55); cultural objections to autopsy (Proposal 58); prisoner attendance at funerals (Proposal 47); adoption (Proposal 67); and foster care and alternative child welfare placement (Proposal 68): *ibid.*

8. *Ibid.* 272. The Commission also took into account the fact that in cases concerning Aboriginal people and torts committed against them, courts traditionally recognise matters specific to the Aboriginality of the victim. 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.

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.¹

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. In its Discussion Paper, the Commission determined 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. In the absence of any submissions to the contrary the Commission reiterates its view that no statutory intervention is required to direct courts to have regard to customary law in this area.²

Protecting Aboriginal Consumers

In arriving at its conclusion the Commission was influenced by the fact that the majority of contracts entered into by Aboriginal 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.

In its Discussion Paper the Commission examined relevant consumer legislation and looked at some of the specific issues facing Aboriginal consumers in Western Australia.³ The Commission found that there was 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. Western Australia's Department of Consumer and Employment Protection (DOCEP) has sought to address the special needs of Aboriginal consumers in Western Australia by the employment of Aboriginal educators, who are working closely with regional offices and Aboriginal advocates and Elders to create a framework for the appropriate delivery of consumer protection advice and services to Aboriginal communities. One finding of the Aboriginal educators was the lack of regional DOCEP presence in the Kimberley. The government has moved quickly to

1. See, LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 274–76.

2. *Ibid* 276–77.



remedy this problem by establishing a regional office in Kununurra which will focus on Aboriginal consumer issues.⁴ DOCEP is also currently working on a separate Indigenous consumer website to provide accessible information about Western Australian protection programs for Aboriginal consumers including programs dealing with improvement of financial literacy among Aboriginal consumers; awareness of tenancy rights; and problems regarding the practice of 'book up' in rural and remote communities.⁵

Book up

Book up is a type of informal credit system which operates with or without attached fees or interest and allows consumers to buy goods now and pay for them later. Book up can benefit consumers by helping them to manage their money between pay-days⁶ and by allowing cash withdrawals where there are no banking facilities or where a person might otherwise have no access to credit. However, most stores that offer a book up facility require some form of security and in many cases a consumer's bank debit card or passbook will be retained. As highlighted in the Commission's Discussion Paper, there is a disturbingly common practice of the retention by traders of PIN

numbers with the cards of Aboriginal consumers.⁷ This practice not only poses a serious risk of fraud and increases the potential for exploitation of Aboriginal consumers, but also gives traders primary control over their customers' accounts. As outlined in the Discussion Paper, the Commission heard stories where trader access to accounts has resulted in the totality of a consumer's income being withdrawn fortnightly to settle part of a debt leaving the consumer with no access to funds until the debt is fully paid. There have also been several cases of theft of cards and personal identification numbers (PINs) from stores or other traders. In circumstances where no local banking facilities exist, the theft or loss of cards can leave consumers without access to their accounts for some time. There is also the potential for consumer liability for any unauthorised transactions resulting from theft because of the previous disclosure of the consumer's PIN. Another problem with stores retaining cards as security is that when a store is closed (including for lengthy periods over holidays) consumers have no access to their funds.⁸

Apart from problems caused by the retention of PINs with customer debit cards, book up can also cause problems for Aboriginal consumers when it is not

3. Ibid 277–80.

4. Department of Consumer and Employment Protection (WA), Submission No. 48 (14 June 2006).

5. The website will also host the National Indigenous Consumer Strategy for which DOCEP is the lead agency.

6. This allows some Aboriginal families to manage the cycle of 'feast and famine': see Westbury N, *Feast, Famine and Fraud: Considerations in the delivery of banking and financial services to remote Indigenous communities*, Centre for Aboriginal Economic Policy Research, Discussion Paper 187 (1999).

7. National Indigenous Consumer Strategy Working Party, *Taking Action, Gaining Trust: A national Indigenous consumer action plan 2005–2010*, Consultation Document (undated) 12–13.

8. Renouf G, *Book Up: Some consumer problems*, ASIC (2002) 5.

As highlighted in the Commission's Discussion Paper, there is a disturbingly common practice of the retention by traders of PIN numbers with the cards of Aboriginal consumers.

managed well or where traders or others take advantage of the system.⁹ Book up can encourage over-buying, particularly where no credit limit is set by the trader.¹⁰ This can lock people into a debt spiral and promote dependency on a particular store.¹¹ Other problematic trading conduct associated with the use of book up in Aboriginal communities includes traders charging higher prices for goods and services (even in circumstances where a book up fee is also charged); allowing relatives to book up on an individual's account without authorisation; and failing to provide accounts to customers, making it difficult to keep track of expenditure.

In response to these problems the Australian Securities and Investments Commission (in association with Australian consumer protection agencies) created a book up kit which was launched in Kalgoorlie in December 2005. The kit is designed to assist traders in implementing responsible book up practices and to support Aboriginal consumers in identifying and addressing problems with book up in their communities. It offers consumer advice on such things as negotiating payment plans, registering complaints and taking action against traders. It also sets out alternatives to book up,¹² and details successful financial management and book up practices instituted in other communities. DOCEP advised the Commission that it has distributed over 200 copies of this resource guide to community groups in Western Australia, but that

[d]espite concerns over book up, Consumer Protection has received no formal complaints in relation to book up which could form the basis of an investigation. It is, therefore, not possible to determine if the distribution of this resource guide has had a specific impact on book up practices in Western Australia. However, it is a specific, targeted, attempt to increase awareness in the Indigenous community of the pitfalls that can accompany book up and best practices for the conduct of book up.¹³

DOCEP also advised that financial institutions, including major banks, have recently 'agreed to implement changes to their merchant EFTPOS agreements to prohibit the retention and/or requesting of PINs from consumers',¹⁴ which is seen as a significant commitment by that industry to improving book up practices in Australia. DOCEP is closely monitoring the proposed introduction of a mandatory code of practice for book up in the Northern Territory¹⁵ and, if found to be effective, will investigate its potential in Western Australia.

The Commission is hopeful that these measures, along with the implementation of the comprehensive National Indigenous Consumer Strategy, will make significant inroads into the consumer issues identified in the Discussion Paper. Given the attention that these issues are currently receiving from DOCEP, the Commission has not felt it necessary to make any recommendations in this regard.

9. See McDonald I, *Good Bookup, Bad Bookup* (Perth: Financial Counsellor's Resource Project WA, 2002).

10. Westcombe R, 'Bad Money Business' (1991) 2(50) *Aboriginal Law Bulletin* 6, 7. See also Renouf G, *Book Up: Some consumer problems*, ASIC (2002) 5-6.

11. Westcombe, *ibid*.

12. Such as voucher systems, money-fax systems, community banks and credit unions, phone or internet banking transfers, and the Centrepay system provided by Centrelink.

13. Department of Consumer and Employment Protection (WA), Submission No. 48 (14 June 2006) 5.

14. *Ibid*. Australian Bankers' Association, 'Banking sector to assist government and regulator to improve book up practice', media statement (23 March 2006).

15. Announced on 9 June 2006.

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.¹

Customary Law Distribution of Property upon Death: Continuing Application

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 individual accumulation of material possessions. During its consultations with Aboriginal people, the Commission heard that some families and groups still follow traditional customary laws of property distribution (or a modified version of them) upon the death of a family member.

As outlined in the Commission's Discussion Paper, relevant customary laws still practised in Western Australia 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.²

Some groups reported conflict where the deceased's intentions regarding property distribution upon death were not written down or widely known or where customary law required a system of distribution that did not satisfy immediate kin.³ Many Aboriginal people appeared to accept 'white' inheritance practices in relation to personal and real property; however, 'customs surrounding the inheritance of intellectual property, kinship obligations, sacred objects and cultural custodianship remained significant to most Aboriginal people consulted on this matter'.⁴

Aboriginal Intestacy Laws in Western Australia

In Western Australia the *Aboriginal Affairs Planning Authority Act 1972* (WA) (AAPA Act) governs the distribution of the estate of an Aboriginal person who dies without a valid will.⁵ The AAPA Act and associated Regulations (the AAPA scheme) provide 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).⁶ 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'.⁷

1. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 281–82.

2. Ibid 282–83.

3. Ibid 283, citing the Commission's consultations in Geraldton, Bunbury and Broome in 2003.

4. Hands TL, 'Recognition of Aboriginal Customary Laws in WA' (2006) 33(2) *Brief: Journal of the Law Society of Western Australia* 25, 26.

5. For a full discussion of the application of the current provisions of the *Aboriginal Affairs Planning Authority Act 1972* (WA), see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 284–88.

6. These provisions, found in Part II of the *Administration Act 1903* (WA), apply to all intestate estates in Western Australia and provide for the order of distribution of an intestate deceased's property. Distribution of Aboriginal intestate estates under the specific provisions of the AAPA scheme is only realised if no person of entitlement can be found under the general provisions.

7. *Aboriginal Affairs Planning Authority Regulations 1972* (WA) reg 9(1).

The AAPA scheme further provides 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. A moral claim may be made by a person who has, for instance, had primary care of the deceased throughout his or her life or, perhaps, by someone who is in a special classificatory relationship with the deceased. The procedure relating to applications for moral claims to an intestate Aboriginal estate under s 35(3) of the AAPA Act are found in regs 9(5) and 9(6) of the AAPA Regulations. Under those regulations an application must be made to the Public Trustee who is required to cause the claim to be investigated and report in writing to the Minister of Indigenous Affairs. The Minister then makes a recommendation to the Governor in respect of the order that should be made in relation to the moral claim. If no person with a claim to the deceased estate can be found and if no moral claims are lodged or approved, the estate will vest in the Aboriginal Affairs Planning Authority to be held in trust for the benefit of 'persons of Aboriginal descent'.⁸

Criticisms of the AAPA scheme

Although the AAPA scheme was established to specifically cater for Aboriginal people and recognise their customary laws in the distribution of their estates, the operation of the scheme and its cultural appropriateness has been subject to substantial criticism. In its Discussion Paper the Commission outlined a number of criticisms including:

- That the AAPA scheme discriminated against Aboriginal people because the automatic vesting of an estate in the Public Trustee may deny the right of families to administer the estate of a deceased Aboriginal relative.⁹
- That the qualification requirement in s 33 of the AAPA Act which limits application of the scheme to Aboriginal people of at least 'one-fourth of the full blood' was difficult to apply in practice and may require extensive genealogical research (the costs of which will usually be subtracted from the estate).

- That the qualification requirement denied the rights of customary law marriage partners of a deceased person who has lived within and identified with a particular Aboriginal community, but who is less than one-fourth Aboriginal blood.¹⁰
- That the 'protection era' terminology of the definition of 'Aboriginal' in s 33 of the Act was likely to cause offence to some Aboriginal people and may be contrary to s 10 of the *Racial Discrimination Act 1975* (Cth).
- That the AAPA scheme cannot apply to an Aboriginal person married according to Australian law.¹¹
- That despite claims to recognition of Aboriginal customary law the emphasis in the AAPA scheme remained on lineal relationships (reflecting a non-Aboriginal notion of kinship) rather than collateral or classificatory relationships.
- That the AAPA scheme evidenced significant bias toward male relatives, which does not accurately reflect the customary laws of all Western Australian Aboriginal groups.
- That entitlement under the AAPA scheme (in particular under reg 9) was difficult to prove and that claims will often, therefore, progress immediately to the moral claim process.¹²

Reform of Aboriginal Intestacy Laws

In considering reform of the law in this area, the Commission 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.¹³ The Commission proposed changes to the current scheme to address the criticisms observed above, to rectify problems with the practical application of the AAPA scheme, and to import positive aspects of schemes operating in other jurisdictions. Among other things the Commission proposed that:

8. *Aboriginal Affairs Planning Authority Act 1972* (WA) s 35(3). For the past two financial years intestate receipts have averaged approximately \$8,500: Aboriginal Affairs Planning Authority, *Annual Report 2004–2005* (2005) 91.

9. Although this provision has never been challenged before a court, it may nonetheless be in contravention of the *Racial Discrimination Act 1975* (Cth).

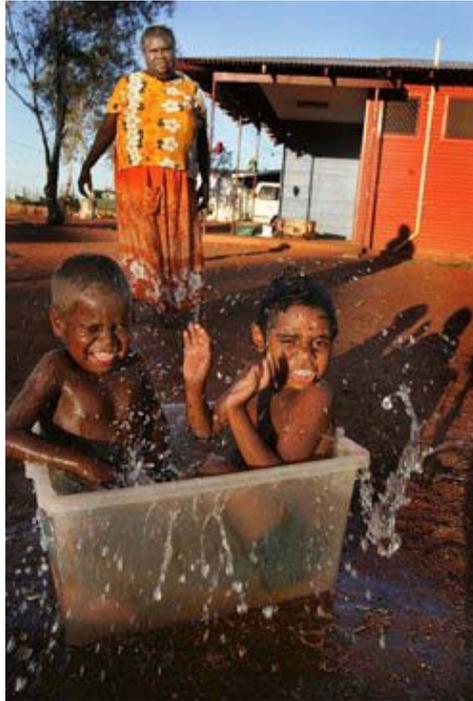
10. These persons will have their property distributed according to the *Administration Act 1903* (WA) which does recognise de facto relationships if certain conditions are met.

11. *Aboriginal Affairs Planning Authority Regulations 1972* (WA) reg 9(1)(b).

12. Many of these issues were brought to the Commission's attention by the Office of the Public Trustee which strongly supported reform of the law in this area. The Commission wishes to thank the Public Trustee's Principal Legal Officer, Michael Bowyer, for his valuable assistance during this reference.

13. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 288–91.

- the offensive definition of 'person of Aboriginal descent' in s 33 of the AAPA Act be replaced with a new standard definition;¹⁴
- the discriminatory provision automatically vesting Aboriginal deceased estates in the Public Trustee be repealed;
- traditional Aboriginal marriage be recognised as a marriage and children of a traditional Aboriginal marriage be recognised as issue of a marriage for the purposes of the *Administration Act*;
- the moral claims process under the AAPA scheme be retained so that 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*; and
- that sub-regs 9(1)–(4) of the AAPA Regulations be repealed.¹⁵



All submissions received on the Commission's proposals for reform of the AAPA scheme were supportive of the proposed changes. However, the Public Trustee drew the Commission's attention to the expense of Supreme Court proceedings in determining whether a person should succeed to an estate as classificatory kin, suggesting that such claims could instead follow the moral claims process.¹⁶ The Public Trustee also provided submissions on how to improve the current moral claims process. Having considered the submissions in detail the Commission accepts that classificatory kin entitlements may be dealt with fairly in the moral claims process and without the expense of a Supreme Court action, which in the case of a small estate could be a considerable portion of the beneficiaries' inheritance.¹⁷

The Commission further acknowledges the Public Trustee's experience in dealing with moral claims and accepts the Trustee's advice on improving aspects of the current moral claims process, including creating capacity for the Minister of Indigenous Affairs to compel documents relevant to determining the claim and to direct the Department of Indigenous Affairs to undertake any investigations it thinks fit. These changes are reflected in the Commission's final recommendation to Parliament.

Although not referring specifically to claims of classificatory kin, the Aboriginal Legal Service (ALS) also expressed concern about the costs and accessibility of administration proceedings in the Supreme Court. The ALS submitted that lower courts should have the power to deal with intestate estates and probate in cases where the value of the estate falls within the court's civil jurisdiction.¹⁸ The Commission understands the motivation behind this submission; however, it notes that the Supreme Court possesses invaluable experience in the probate jurisdiction and that this may, in fact, work to the advantage of applicants by reducing court time and associated legal costs. Nonetheless the Commission believes that, in consultation with the Supreme Court, provision should be made¹⁹ to ensure that proceedings in relation to an intestate estate with a value of less than \$100,000, or an amount otherwise prescribed, be conducted speedily and with as little formality and technicality as is possible, in order to minimise the costs to the parties. The Commission has therefore amended its recommendation to Parliament accordingly.

14. For the text of the standard definition recommended for Western Australian written laws, see Recommendation 4, above p 63.

15. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 291–92, Proposal 52.

16. Department of the Attorney General, Submission No. 34 (11 May 2006), Appendix 1 (Public Trustee) 19.

17. In discussions with the Public Trustee the Commission expressed some reservations about allowing an intestate Aboriginal estate of large monetary value to be distributed via moral claim, which is essentially an executive process. However, the Public Trustee advised that it would be very unlikely that such an estate would reach the moral claims process because the size of the estate would enable very thorough genealogical research to be undertaken to identify a beneficiary entitled under s 14 of the *Administration Act 1903* (WA).

18. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 11–12.

19. Whether by amendment to specific legislation, amendment to the *Supreme Court (General) Rules 2005* (WA) or by a practice direction of the Supreme Court.

Recommendation 65

Administration of intestate Aboriginal estates

1. That the present definition of 'person of Aboriginal descent' contained in s 33 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) be deleted and that the standard definitions of 'Aboriginal person' and 'Torres Strait Islander person' contained in Recommendation 4 of this Report apply.
2. That the requirement in ss 34 and 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).
3. That s 35(2) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) be repealed so 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).
4. That sub-regs 9(1)–(4) of the *Aboriginal Affairs Planning Authority Act Regulations 1972* (WA) be deleted and that any other consequential amendments be made.
5. 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).
6. That, in consultation with the Supreme Court, provision be made that proceedings in relation to an intestate estate with a value of less than \$100,000, or an amount otherwise prescribed, be conducted speedily and with as little formality and technicality as is possible, and so as to minimise the costs to the parties.

Moral claims against intestate Aboriginal estates

7. That s 35(3) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) dealing with moral claims be amended to read:

Where there is no person entitled to succeed to the estate of the deceased under s 14 of the *Administration Act 1903* (WA), and no valid claim is made to the balance of the estate within two years after the date of

death of the deceased, the Governor may, on application, order that such balance be distributed beneficially amongst any persons having a moral claim thereto.

8. There should be legislative provision that, without limiting the factors to be taken into account in determining whether a moral claim exists, the Minister for Indigenous Affairs may consider as relevant that the applicant was in a classificatory kin relationship with the deceased under the deceased's customary law.
9. That sub-reg 9(5) of the *Aboriginal Affairs Planning Authority Act Regulations 1972* (WA) be amended to provide that a person alleging a moral claim against an undistributed Aboriginal deceased estate pursuant to s 35(3) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) may apply to the administrator²⁰ for an order for distribution of the whole estate or a portion of the estate.
10. That sub-reg 9(6) of the *Aboriginal Affairs Planning Authority Act Regulations 1972* (WA) be amended to provide that as soon as reasonably practicable after receiving an application referred to in sub-reg 9(5), the administrator shall provide a written report to the Minister for Indigenous Affairs in respect of the moral claim. In making a decision on the moral claim the Minister may request further information from the applicant or the administrator, compel any person, financial institution or government agency to produce relevant records or direct the Department of Indigenous Affairs to undertake any investigations it thinks fit. If satisfied that an order of distribution should be made in relation to the moral claim, the Minister shall make such recommendation to the Governor.
11. That a new s 35(4) be inserted into the *Aboriginal Affairs Planning Authority Act 1972* (WA) to read:

Where, after a period of four years of the date of grant of letters of administration for the deceased's estate, no order is made under s 35(3) or where such order is made in respect of a portion of the balance of the estate only, the administrator of the estate shall thereupon vest the estate in the Authority²¹ upon trust that it shall be used for the benefit of persons of Aboriginal descent.

Implementation of Recommendation 65 will remove the discriminatory measures found in the current AAPA scheme while allowing for greater recognition of important classificatory kin relationships through the moral claims process.

Obligation to administer Aboriginal intestate estates

As discussed above, the current system vests Aboriginal intestate estates that qualify under the *Aboriginal Affairs Planning Authority Act 1972* (WA) in the Public Trustee for administration. While this is, as noted above, discriminatory in that it denies the right of families to apply for letters of administration in respect of these estates, it nonetheless provides an important community service for Aboriginal people, particularly in relation to small estates. The Commission is aware that the *Public Trustee Act 1941* (WA) is currently under review and that the Public Trustee is seeking changes to the Act to allow it to become self-funding.²² This may mean that more money is available to the Public Trustee to provide better services to its clients, but it may also mean that the Public Trustee will be under a more commercial imperative in regard to the estates that it chooses to administer.

While it is likely that the Public Trustee will continue to administer small intestate Aboriginal estates as part of its community service role, if the above recommendation is implemented it will no longer be obliged to do so. The Commission is concerned that Aboriginal people may have little experience in these matters and, because of the Public Trustee's longstanding role in administering estates under the AAPA scheme, some may have come to depend on the Trustee to handle affairs relating to administration of an estate following a death. The Commission also notes that the ALS is currently not adequately resourced to assist Aboriginal people to apply for letters of administration or support them in discharging the duties of an administrator. In these

circumstances the Commission recommends that the Public Trustee be obliged to administer small intestate Aboriginal estates when it is expedient to do so or when the family of the deceased requests it. In harmony with Recommendation 65, the Commission has set the definition of 'small estate' at \$100,000.

Recommendation 66

Obligation to administer Aboriginal intestate estates

That, as part of its community service role, the Public Trustee be obliged to administer intestate Aboriginal estates valued at less than \$100,000 when it is expedient to do so or when the family of the deceased requests it.

Proof of relationship to an Aboriginal deceased

The Commission believes that implementation of Recommendation 65 will remove the discriminatory measures found in the current AAPA scheme while allowing for greater recognition of important classificatory kin relationships through the moral claims process. However, the Commission acknowledges that issues may still exist in relation to proof of entitlement under s 14 of the *Administration Act*, particularly where an Aboriginal person's birth was not registered under Australian law²³ or where that person was removed from his or her family pursuant to previous government policies in Western Australia.²⁴ In its Discussion Paper the Commission invited submissions on whether a

20. It is acknowledged that in most moral claim cases the administrator will be the Public Trustee (because those entitled to administer the estate are generally beneficiaries of the estate in which case the estate would be fully distributed and not subject to the moral claim process); however, under s 25 of the *Administration Act 1903* (WA) a creditor may apply to administer an estate in certain circumstances and could therefore be obliged to find beneficiaries for the remainder of the estate, possibly by way of the moral claims process.

21. The Aboriginal Affairs Planning Authority referred to in the *Aboriginal Affairs Planning Authority Act 1972* (WA) s 8.

22. Department of the Attorney General, Submission No. 34 (11 May 2006), Appendix 1 (Public Trustee) 26.

23. It is apparent that prior to 1970 not all births of Aboriginal people were recorded and registered.

24. For example, pursuant to protection and assimilation legislation such as the *Aborigines Protection Act 1905* (WA). Children taken from their parents pursuant to these policies ultimately became known as the 'stolen generation'.

relaxed standard of proof should apply in these circumstances. As it appears that the procedures attached to the moral claim process under the AAPA Act are currently working well, the Commission suggested that a similar process²⁵ may be implemented to determine the entitlement of an Aboriginal person of unregistered birth to an Aboriginal intestate estate.

Submissions received by the Commission supported a recommendation for a relaxed standard of proof in these circumstances. The Department of Indigenous Affairs submitted that, subject to the appropriate funding, its Aboriginal History Research Unit (AHRU) would be in a position to undertake the required investigations on behalf of the Minister.²⁶ The department submitted that:

The AHRU has an extensive network of contacts with other government agencies (particularly the Family Information Record Bureau located within the Department of Community Development), genealogical services, Native Title Representative Bodies, link-up services, and Aboriginal organisations.²⁷

Noting the support for the Commission's recommendation to 'free-up' intestate Aboriginal estates allowing Aboriginal people to apply for letters of administration in the normal way, the Commission now believes that a 'certificate' issued by the executive as conclusive evidence of entitlement to succeed to an estate is not appropriate. However, it does accept that there is a need for a means of proving one's identity or relationship to a deceased in circumstances where the Aboriginal claimant is of unregistered birth or was a member of the stolen generation and perhaps assumed a new identity. The Commission has therefore recommended the following application process for written notice of proof of relationship to a deceased so that an administrator of an estate or the Supreme Court can take the person's claim into account in any decision relating to distribution of an intestate estate or application for letters of administration of an intestate estate.

The Commission believes that the costs of proving relationship to a deceased in the circumstances described should be borne by the state. It would be unreasonable to expect such costs to be deducted from the estate of an Aboriginal deceased or charged

to the applicant where the lack of proof of identity was due to previous government policy. The Commission suggests that the following provisions be incorporated into a new s 35(6) of the *Aboriginal Affairs Planning Authority Act 1972* (WA).

Recommendation 67

Proof of relationship to an Aboriginal deceased

That a new s 35(6) be inserted into the *Aboriginal Affairs Planning Authority Act 1972* (WA) to provide:

1. That in circumstances where an Aboriginal person claims entitlement to distribution of an intestate Aboriginal estate under s 14 of the *Administration Act 1903* (WA) 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 notice in writing from the Minister for Indigenous Affairs should be taken as conclusive evidence of the claimant's identity and relationship to the deceased.
2. That an application for proof of relationship should be made to the administrator of the estate who shall provide a written report to the Minister for Indigenous Affairs in respect of the claim. In making a decision on the claim the Minister may request further information from the applicant or the administrator of the estate or, in case of partial intestacy, the executor or administrator with the will annexed, compel any person or organisation to produce relevant records, or direct the Department of Indigenous Affairs to undertake any investigations it thinks fit. If satisfied that the applicant is who he or she claims to be, the Minister shall produce a written notice to that effect.
3. That an application under (2) above may only be made in respect of an intestate Aboriginal estate of less than \$100,000 value at the date of the application.

25. The process is similar; however, since the process does not enable succession to an intestate estate the Commission felt that the extra step of approval by the Governor, which is an important safeguard in the moral claims process, was not required for proof of relationship to an Aboriginal deceased.

26. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 15.

27. Ibid 2.

Release of funds of intestate estates by financial institutions

In making its recommendations for reform, the Commission was mindful of the fact that the application of the AAPA scheme is limited in practice by the need for intestate Aboriginal estates to be brought to the notice of authorities.²⁸ In some cases there is capacity for kin to apply customary law to the distribution of a deceased's personal property without legislative or government interference; for example, where the deceased did not individually own any real property (that is, land or residential property) or have significant material or cash assets.²⁹ In other cases the costs of administration may be such that they would significantly diminish the size of the estate, perhaps rendering it worthless. The Public Trustee has advised the Commission that most intestate Aboriginal estates that it administers are relatively modest, generally averaging around \$8,000.³⁰

Under s 139 of the *Administration Act 1903 (WA)* kin may claim cash held in financial institutions for funeral and associated expenses without formal letters of administration. Set in 1983, the gazetted amount permitted for release under this section is \$6,000; however, financial institutions regularly exceed that amount, sometimes paying out up to \$50,000 to meet the immediate needs of bereaved families.³¹ These institutions appear to be acting without legal authority and could potentially be held liable for the discretionary release of funds over the prescribed amount, particularly if released to the wrong person.³² In these circumstances, and in recognition of the importance of this provision in facilitating the distribution of small estates of intestate Aboriginal deceased persons,³³ the

Commission proposed that the gazetted amount be reviewed and updated.³⁴ This reiterates a similar recommendation of the Commission in its 1990 review of the *Administration Act*.³⁵ All submissions on this matter were in support and the Commission therefore makes the following recommendation.

Recommendation 68

Release of funds of intestate estates by financial institutions

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.

The Importance of Wills

Education

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 with 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,³⁶ and can deal with a range of customary obligations.

28. As detailed in the Commission's Discussion Paper, the Public Trustee must first become aware of the death before the property of the deceased will vest in that authority for distribution under the scheme. The Commission also noted that in the case of very small estates, and even in the absence of automatic vesting in the Public Trustee, some families may ignore the legislative requirement of formal letters of administration: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 285.

29. In some cases property will be owned in joint tenancy with a spouse and money may be invested jointly allowing the spouse to access funds without the necessity of formal administration.

30. Michael Bowyer, Principal Legal Officer, Public Trustee (WA), email (2 June 2006). There are, however, some notable exceptions with large estates often resulting from awards of compensation for personal injury.

32. According to anecdotal information provided by the Public Trustee's Client Services Centre, at least one Western Australian bank will release up to \$50,000 under s 139 of the *Administration Act* while another two will release up to \$20,000.

32. Section 139 of the *Administration Act 1903 (WA)* permits a manager of a financial institution to release the prescribed amount to 'any person *who appears to the satisfaction of the manager* of the [bank] to be the widower, widow, parent or child' or de facto partner of the deceased'. (Emphasis added.)

33. In relation to small estates consisting of cash, this recommendation may effectively avoid the need for invoking the formal distribution scheme.

34. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 293, Proposal 53. As mentioned in the Discussion Paper, the Public Trustee submitted that an amount of \$30,000 would be appropriate in consideration of analogous provisions in other Acts. In recognition of the use of s 139 to distribute small estates, the Commission itself recommended that the amount be increased to \$15,000 in its *Review of the Administration Act 1903 (WA)*, Report No. 88 (1990) Recommendation 7. In view of the passage of time since the Commission's last consideration of this matter, the Commission agrees that the Public Trustee's suggested figure of \$30,000 is appropriate.

35. LRCWA, *Review of the Administration Act 1903 (WA)*, Report No. 88 (1990) Recommendation 7. See previous footnote for detail.

36. Although currently a testator's wishes regarding burial can be ignored by an executor this can assist in reducing family conflict regarding place of burial following a death. For further discussion and recommendation on this point, see Recommendation 78, below p 262.

The Commission believes that more can 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 therefore proposed that 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 be established.³⁷ This proposal received strong support, both from Aboriginal people and from relevant government agencies.³⁸

Recommendation 69

Wills education

1. That the Department of Indigenous Affairs be 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.
2. That in devising this program the Department of Indigenous Affairs seek advice from the Public Trustee, the Aboriginal Legal Service and other relevant organisations and individuals.

Will-making

In its submission the Public Trustee observed that '[i]t is only worth educating people about making wills if they then have access to professionals who can prepare wills for them'.³⁹ The Public Trustee advised that it currently prepares wills for free where it is appointed an executor,⁴⁰ but that it is not funded to visit people outside of the Perth metropolitan area. Although it has a greater regional presence, the Aboriginal Legal Service is not currently sufficiently funded to undertake the task of drafting wills for Aboriginal people; nonetheless, it expressed strong support for the

educative initiative and suggested that will-making should be made a 'priority'.⁴¹ The Commission agrees.

Since the release of the Commission's Discussion Paper a Bill has been introduced into Parliament to amend the *Wills Act 1970* (WA) to provide for, among other things, the relaxation of formal execution requirements where the Supreme Court is satisfied that a document embodies the testamentary intentions of a deceased. The definition of 'document' for this purpose includes video or sound recordings, informal records of information and electronic documents.⁴² The Bill also allows the Supreme Court to have regard to extrinsic material, such as statements made by a deceased about his or her intentions.⁴³ In its submission the Department of Indigenous Affairs (DIA) suggested that 'video wills' would be a useful tool in recording the testamentary intentions of Aboriginal people:

An oral or visual method of recording a testator's wishes may be more suitable than a written will, and may have the added benefit of reducing family disputes during the administration of an estate if family members are able to see the deceased person making provisions for the distribution of his or her estate. DIA also notes that traditional Aboriginal practice may have allowed a person's word or oral instructions to be sufficient to decide who inherits. A 'video will' could support this traditional practice.⁴⁴

While formal wills are to be encouraged (in particular, for ease of grant of probate) the Commission sees enormous potential for informal or 'video wills' to increase the incidence of will-making among Aboriginal people in Western Australia. It may also significantly reduce the costs associated with the making of formal wills. Nonetheless, the Commission believes that efforts must be made to ensure that informal wills are recorded in a controlled environment and preferably with independent legal advice to increase the probability of acceptance by the Supreme Court as the uncoerced testamentary wishes of the deceased. Consideration should also be given to appropriate storage of informal wills.

37. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 294, Proposal 54.

38. Dr Dawn Casey, Submission No. 24 (1 May 2006) 2; Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2; Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 14; Department of the Attorney General, Submission No. 34 (11 May 2006), Appendix 1 (Public Trustee) 21; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 11. This proposal also received strong support in the Commissioner's consultations with Aboriginal people.

39. Department of the Attorney General, Submission No. 34 (11 May 2006), Appendix 1 (Public Trustee) 21.

40. Either directly or where a spouse or de facto partner is appointed executor with the Public Trustee appointed as executor or co-executor in default.

41. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 11.

42. *Wills Amendment Bill 2006* (WA) cl 23(1).

43. *Wills Amendment Bill 2006* (WA) cl 22.

44. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 14.



The *Aboriginal Affairs Planning Authority Annual Report 2004–2005* shows that money received from intestate Aboriginal estates is currently held by the Authority ‘for the benefit of persons of Aboriginal descent’.⁴⁵ The Commission sees significant congruence in applying funds gained by the non-existence of wills of Aboriginal people to the cause of ensuring that those Aboriginal people who wish to make a will are funded to do so. It is the Commission’s recommendation, therefore, that funds held in the Authority’s Intestate Trust Account should be committed to ‘kick-start’ a will-making initiative to be headed by the Department of Indigenous Affairs in consultation with the Aboriginal Legal Service, the Public Trustee and regional legal practitioners.

Recommendation 70

Will-making initiative

1. That the Department of Indigenous Affairs—in consultation with the Aboriginal Legal Service, the Public Trustee and regional legal practitioners—establish a will-making initiative for Aboriginal people in Western Australia.
2. That consideration be given to committing to this initiative the funds held in the Aboriginal Affairs Planning Authority’s Intestate Trust Account by virtue of the operation of the intestate provisions of the *Aboriginal Affairs Planning Authority Act 1972 (WA)*.

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 Dependants 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.⁴⁶

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.⁴⁷ 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.

In its Discussion Paper, the Commission proposed amendment to the list of persons who may claim for

45. Department of Indigenous Affairs, *Aboriginal Affairs Planning Authority Annual Report 2004–2005* (2005) 91. Under s 35(3) of the *Aboriginal Affairs Planning Authority Act 1972 (WA)* where no person can be found to succeed to an intestate Aboriginal estate, such money is vested in the Authority ‘upon trust that it shall be used for the benefit of persons of Aboriginal descent’.

46. *Inheritance (Family and Dependants Provision) Act 1972 (WA)* s 6.

47. The list of persons who may claim for family provision from an estate is found in *Inheritance (Family and Dependants Provision) Act 1972 (WA)* s 7. For further discussion, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 294–95.

Aboriginal people take their kinship obligations very seriously and these may include the provision of housing, financial assistance or general support of persons in a classificatory kin relationship.

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.⁴⁸ The Public Trustee has indicated its support for this proposal and no submissions have been received that oppose it.⁴⁹ The Commission therefore proceeds with its recommendation.

As with the recommendations for reform of Aboriginal intestacy laws (above), the Commission is concerned that the average Aboriginal estate may be too modest to sustain the costs associated with an application for family provision. The Commission has therefore recommended that, in consultation with the Supreme Court, provision should be made⁵⁰ to ensure that proceedings in relation to an intestate estate with a value of less than \$100,000, or an amount otherwise

prescribed, be conducted speedily and with as little formality and technicality as is possible, and so as to minimise the costs to the parties.

Recommendation 71

Claims for family provision against an Aboriginal estate

1. 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.
2. 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 *Inheritance (Family and Dependants Provision) Act 1972* (WA).⁵¹
3. That, in consultation with the Supreme Court, provision be made that proceedings in relation to an intestate estate with a value of less than \$100,000, or an amount otherwise prescribed, be conducted speedily and with as little formality and technicality as is possible, and so as to minimise the costs to the parties.



48. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 295, Proposal 55.

49. Department of the Attorney General, Submission No. 34 (11 May 2006), Appendix 1 (Public Trustee) 22.

50. Whether by amendment to specific legislation, amendment to the *Supreme Court (General) Rules 2005* (WA) or by a practice direction of the Supreme Court.

51. For specific detail of the Commission's recommendation for recognition of Aboriginal traditional marriage in Western Australian legislation, see Recommendation 83, below p 274.

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 and these are detailed in the Commission's Discussion Paper.¹

Improving Guardianship and Administration Services to Aboriginal People

Office of the Public Advocate

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 Office of the Public Advocate has implemented a number of strategies 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. These strategies appear to be assessed and developed on a regular basis. In her submission, the Public Advocate indicated that one of her 'key priorities'

is to improve how her Office responds to Aboriginal people with decision-making disabilities.²

The Commission commends the Office of the Public Advocate for its work in increasing the visibility of and access to relevant services for Aboriginal people. In particular, the Commission notes the Office's recent report on elder abuse in Aboriginal communities which has raised awareness of this phenomenon in Western Australia.³ The Commission hopes that protecting elderly Aboriginal people from physical, financial and psychological abuse will continue to remain a high priority for the Public Advocate and for government. This issue is discussed further in Chapter Seven: Aboriginal Customary Law and the Family.

State Administrative Tribunal

The State Administrative Tribunal, established in January 2005, hears applications for guardianship and administration. In its Discussion Paper the Commission 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.⁴ The State Administrative Tribunal has responded that it agrees with the Commission's proposal and that it has taken steps to implement it.⁵ While the Commission does not think it necessary that its proposal that the State Administrative Tribunal assess the appropriateness of its procedures in relation to Aboriginal people be formalised in a recommendation to Parliament, it strongly suggests that the tribunal consult with the Public Advocate, the Public Trustee and relevant Aboriginal organisations in devising culturally appropriate procedures and guidelines for the management of hearings involving Aboriginal people. In particular, the Commission draws the tribunal's attention to the matters discussed below in relation to assessment of

1. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 297–98.

2. Office of the Public Advocate, Submission No. 13 (18 April 2006) 1.

3. Office of the Public Advocate, *Mistreatment of Older People in Aboriginal Communities Project* (2005).

4. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 298, Proposal 56.

5. State Administrative Tribunal, Submission No. 15 (24 April 2006) 1.

capacity and the need for specific protocols to be established to ensure that cultural aspects of competency are considered.

Office of the Public Trustee

In its Discussion Paper the Commission observed that, 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 (whether real or apparent) 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). The Commission therefore proposed that Aboriginal beneficiaries of deceased estates administered by the Public Trustee should be 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.⁶

In its submission on this matter the Public Trustee commented that it would be extremely rare for a beneficiary to appoint the Public Trustee to administer their financial affairs and that this usually occurs only where the beneficiary is the subject of an administration order (where the Public Trustee is appointed as the administrator by a court or tribunal), where the beneficiary is under 18 years of age, or where there are legal reasons for delaying distribution of the estate.⁷ The Commission accepts this advice. Furthermore, the Commission notes that in the event that its recommendations in relation to Aboriginal intestate succession in Western Australia are implemented by Parliament, the administration of Aboriginal intestate estates by the Public Trustee will be significantly less and so too will the potential for any conflict of interest. Nonetheless, given the past institutionalisation of Aboriginal people (in particular those of the stolen generation) and a history of Aboriginal dependency on state-controlled services, the Commission has decided to confirm its recommendation in the interests of promoting the financial independence of Aboriginal people. The Commission has, however, recast its

recommendation to take into account circumstances where the Public Trustee is required by law or duty to hold a beneficiary's money in trust.

Recommendation 72

Financial management protocols

1. That where an Aboriginal person who is beneficiary of a deceased estate administered by the Public Trustee seeks voluntarily to place the management of their financial and/or legal affairs or of their inheritance in the hands of the Public Trustee, the Public Trustee must, before accepting such management:
 - (a) ensure that the person is made aware of alternatives for the financial management of their inheritance by communicating this in a culturally appropriate way, with the assistance of an interpreter if required; and
 - (b) encourage the person to seek independent legal and/or financial advice and refer the person to appropriate agencies or organisations such as the Aboriginal Legal Service, Legal Aid, the Financial Counsellors Resource Project and the Department of Consumer and Employment Protection.
2. That the same protocol should apply to the Public Trustee in regard to accepting an enduring power of attorney on behalf of an Aboriginal person.

Other Matters

In its Discussion Paper, the Commission invited submissions on the capacity of the guardianship and administration system to adequately meet the needs of Aboriginal people and on the system's interaction with Aboriginal customary laws and cultural beliefs.⁸ Outlined below are some of the important matters brought to the Commission's attention by responses to its invitation to submit.

6. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 299, Proposal 57.

7. Department of the Attorney General, Submission No. 34 (11 May 2006), Appendix 1 (Public Trustee) 23.

8. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 299, Invitation to Submit 10.

The Commission hopes that protecting elderly Aboriginal people from physical, financial and psychological abuse will continue to remain a high priority for government.

Assessment of capacity: appointment of a guardian or administrator

A decision to appoint a guardian or administrator is a course of action which is taken by the State Administrative Tribunal as a last resort. An order will not be made if the needs of the person could be met 'by other means less restrictive of the person's freedom of decision and action'.⁹ Under the *Guardianship and Administration Act*, the State Administrative Tribunal can appoint a guardian or administrator only if it is satisfied that a person lacks the capacity to make reasoned decisions about his or her person or estate. In determining capacity the State Administrative Tribunal will usually have regard to evidence from a psychiatrist, psychologist or other medical expert, as well as the views of those people who have an interest in the life of the person with the decision-making disability and, where possible, the person the subject of the hearing. In its submissions to this reference the Office of the Public Advocate has expressed concern that these capacity assessments often have no regard to a person's Aboriginality and that this may work to the disadvantage of Aboriginal people.

Often the assessment of an Aboriginal person's capacity is done from a non-Aboriginal perspective and does not fully consider cultural aspects of competency. Aboriginal people, particularly those from traditional backgrounds who come into contact with the guardianship and administration system can be severely disadvantaged because they do not understand the concepts of guardianship and administration.¹⁰

For example, the Commission was told by the Public Advocate that in one case an Aboriginal person assessed as having delusions using mainstream psychological methods was found by an Indigenous mental health expert not to be delusional when regard was had to the person's culture and belief system. In these

circumstances it may be appropriate, before making a decision regarding capacity, for the tribunal to cause cultural issues to be investigated further. The Public Advocate has urged wide consultation with an individual's family and community and culturally appropriate medical assessment; however, she notes that 'the public mental health and aged care sectors have limited capacity to fully assess a person's capacity in their cultural context and need to develop more appropriate assessment tools and expertise'.¹¹

The Commission notes the observations of the Public Advocate and supports greater government resourcing for the development of culturally appropriate assessment methods in the public health sector. In the meantime, the Commission's widely supported recommendation¹² that all employees, contractors and sub-contractors of Western Australian government



9. *Guardianship and Administration Act 1990 (WA)* s 4.

10. Office of the Public Advocate, Submission No. 13 (18 April 2006) 3.

11. *Ibid.*

12. See Recommendation 2, above p 51.

agencies be required to undertake appropriately adapted cultural awareness training (which includes protocols and information specific to the role of the individual undertaking the training) should assist in improving the cultural knowledge of public sector healthcare professionals. The Commission has further recommended that all court and tribunal staff (including decision-makers) undertake similar training.¹³ As part of the State Administrative Tribunal's current assessment of its procedures and protocols for dealing with hearings involving Aboriginal people, the Commission urges that the tribunal take steps to ensure that members are aware of and take into account Aboriginal perspectives in the process of assessing the decision-making capacity of an Aboriginal person.

Recommendation 73

Assessment of decision-making capacity of an Aboriginal person

That, as part of its assessment of its procedures and protocols for dealing with hearings involving Aboriginal people, the State Administrative Tribunal take steps to ensure that members are aware of Aboriginal perspectives in the process of assessing the decision-making capacity of an Aboriginal person who may be the subject of an order for guardianship or administration.

Cultural obligation to share

As observed in the Discussion Paper, some Aboriginal people have cultural obligations to kin and this can extend to sharing money or assets.¹⁴ The Public Trustee submitted that this obligation can conflict with the duties of an administrator under the *Guardianship and Administration Act*. Section 72(3)(a) of that Act requires that an administrator seek the approval of the State Administrative Tribunal to 'make a payment or disposition of a charitable, benevolent or ex gratia nature' or to 'make a payment in respect of a debt or demand that the represented person is not obliged by law to pay'. An administrator will therefore (in the absence of previous authorisation by the tribunal) need to make an application to the tribunal to approve any requests to share money or assets pursuant to an Aboriginal person's cultural obligations.

While this section does limit the payments that the Public Trustee or other appointed administrator can make on behalf of an Aboriginal client, it is important (as the Public Trustee points out in its submission)¹⁵ to protect Aboriginal people with decision-making disabilities from financial abuse. As noted earlier, the Public Advocate's recent report into the mistreatment of older people in Aboriginal communities has highlighted financial abuse as a significant issue in Western Australia.

Some elderly people, particularly from traditional communities, appear to have no 'western' concept of money and they give monies to relatives because they have a cultural obligation to share. Sometimes this type of relationship can be taken advantage of by perpetrators for their own financial gain.¹⁶

In these circumstances the Commission believes that, despite the potential conflict between the requirements of s 73(3)(a) of the *Guardianship and Administration Act* and Aboriginal customary laws or cultural beliefs, the interests of Aboriginal people with decision-making disabilities are best served by retaining the provision in its current form.

Serving Aboriginal people in regional areas

Regional visibility

Both the Office of the Public Advocate and the Office of the Public Trustee made submissions about the difficulty of serving clients in rural and regional areas. These offices are Perth-based and are generally only resourced to visit clients if the client's funds allow it or the special circumstances of the case demand it. It is the Commission's opinion that a greater regional and rural presence of the Public Advocate and Public Trustee would help Aboriginal people to become aware of the services offered and to develop greater trust in these institutions. It would also assist them to tailor their services in consultation with communities. Such presence needn't be permanent. Once contact has been established, annual or biannual visits to key regions would probably suffice to maintain a degree of visibility of these offices in regional Western Australia. The Commission commends the Public Advocate's initiative to develop protocols with agencies that have a regional presence and work with Aboriginal people. This is an

13. See Recommendation 128, below p 348.

14. See, for example, LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 38 'Obligation to accommodate kin'; 269 'Obligation to care for and support kin'.

15. Department of the Attorney General, Submission No. 34 (11 May 2006), Appendix 1 (Public Trustee) 25.

16. Office of the Public Advocate, *Mistreatment of Older People in Aboriginal Communities Project* (2005) 25.

important manifestation of the whole-of-government approach embraced by governments at state and federal levels and endorsed by the Commission in this Report.¹⁷

Need for local cultural consultants

Both the Office of the Public Trustee and the Office of the Public Advocate also drew the Commission's attention to the need for cultural consultants to assist them in dealing with individual Aboriginal clients in a culturally appropriate manner.¹⁸ The Commission notes that both offices already provide cultural awareness training delivered by Indigenous consultants and that this has gone some way to helping their staff to better engage with their Aboriginal clients. However, Perth-based public officers are often given more general cultural awareness training and cannot be expected to know the local protocols that the diversity of Aboriginal people and cultures across the state necessarily demand in regional-based officers.¹⁹ The existence of cultural consultants with knowledge specific to the locality in which the client is based would, in these circumstances, be very helpful. As mentioned in the Commission's Discussion Paper, the proposed community justice groups (Recommendation 17) will, when established, provide a useful source of local cultural knowledge for agencies such as the Public Trustee and Public Advocate. The Commission encourages these agencies to establish links and develop partnerships with community justice groups and local Aboriginal-owned or Aboriginal-run organisations to assist in acquiring necessary cultural information to better serve their clients.

Recommendation 74

Regional partnerships

That the Office of the Public Advocate and the Public Trustee establish links and develop partnerships with community justice groups and local Aboriginal-owned or run organisations to assist in acquiring necessary cultural information to better serve their clients.

Importance of maintaining cultural environment

Section 51(2)(h) of the *Guardianship and Administration Act* requires guardians to act 'in such a way as to maintain the represented person's familiar cultural, linguistic and religious environment'. In light of the history of removal of Aboriginal people from their culture, the importance of supporting Aboriginal people with decision-making disabilities within their own communities to maintain their social, cultural, religious and linguistic connections cannot be overstated. However, the Public Advocate reported that this was often not possible because of the lack of specialised services in many communities, in particular alternative accommodation.²⁰ The Commission has elsewhere noted that the lack of appropriately resourced specialised services extends even to major regional centres.

What this means in practice is that where, for example, an Aboriginal person has an acquired brain injury (as a result of prolonged abuse of volatile substances for instance) or has some organic brain dysfunction, there is often no choice for the guardian but to place the person in a mental health or aged care facility. Similarly, a hostel or nursing home may be the only place where a person with severe physical disabilities can be accommodated. These environments may not only be inappropriate to the person's disability, but can also be a long distance from the person's community and may accommodate few, if any, other Aboriginal people. At the very least, placement in such a facility will remove the person from their usual environment and in many cases their connection to culture will be lost. The Commission reiterates its comments in Chapters Two and Three of this Report about the need for improved government service delivery, and increased resourcing for community-owned and culturally appropriate programs and services to Aboriginal communities.

17. See Recommendation 1, above p 48.

18. Office of the Public Advocate, Submission No. 13 (18 April 2006) 3; Department of the Attorney General, Submission No. 34 (11 May 2006) Appendix 1 (Public Trustee) 27.

19. See discussion under 'Cultural Awareness', Chapter Three, above pp 49–51.

20. Michelle Scott, Public Advocate, telephone consultation (7 June 2006).

Coronial Inquests

Anthropological studies have shown that various forms of inquiries into cause of death were performed in traditional Aboriginal societies.¹ In Western Australia traditional 'inquests' included examination of bones of an exhumed body,² interpretation of signs on the ground surrounding a grave³ and the use of 'inquest' stones, each representing a possible 'murderer', which were set up around a grave. Traditional Aboriginal people believed that drops of blood would pass from the buried body to a stone, indicating the person or group responsible for the death.⁴ The purpose of a traditional Aboriginal inquest was to explain the death and allow the family of the deceased to consider whether they wished to take matters further⁵ – either by initiating revenge or by demanding compensation to settle the grievance.⁶

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. Research indicates that, while some groups may still practise a form of cultural inquiry following a death, the body itself would most likely be dealt with according to Australian law (that is, applying general mortuary and burial practices).⁷ The Commission's consultations suggested that Aboriginal people are generally accepting of white institutional involvement in deaths; however, there were concerns about the cultural appropriateness of this involvement in some instances. In particular, some Aboriginal people reported that they felt their customary law was misunderstood or ignored

when white authorities became involved in investigating the death of an Aboriginal person. The Commission was therefore obliged to consider whether current coronial investigation processes in Western Australia were sufficiently culturally appropriate and respectful of the customary law of a deceased and the deceased's family.

Improving Coronial Processes for Aboriginal People

The Commission's Discussion Paper examined the role of investigations into deaths in traditional Aboriginal societies and that of coronial investigations under current Western Australian law. Certain conflicts, both actual and potential, between the general law and Aboriginal customary law were identified; in particular, issues surrounding cultural objections to autopsy of a deceased and the definition of 'senior next of kin' in the *Coroners Act 1996 (WA)*. The Commission carefully considered the desirability and need for changes to the general law to recognise Aboriginal customary laws and other special needs of Aboriginal people in the coronial process. Having regard to the important role of the coroner in the investigation of suspicious deaths and in making recommendations for the prevention of further deaths, the Commission concluded that it was not appropriate to recommend the wholesale recognition of Aboriginal customary laws in respect of coronial matters. Nonetheless, the Commission

1. For a more detailed discussion, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 300–301.
2. Prevalent in the western desert area of Western Australia: Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 354; Tonkinson R, *The Mardudjara Aborigines: Living the dream in Australia's desert* (New York: Holt, Rinehart and Winston, 1978) 85–86.
3. Common in the south-west of the state: Elkin AP, *The Australian Aborigines* (Sydney: Angus & Robertson, 4th ed., 1974) 349. See also Berndt & Berndt, *ibid* 474: 'Native doctors look for the presence of signs, which they can interpret: a small hole, for instance, or the tracks of some animals, bird or reptile. They may not specify a particular person, but merely locate a murderer "socially".'
4. This practice was common in the north Kimberley: Elkin, *ibid* 346; Berndt & Berndt, *ibid* 353, 475. In the southern-central Kimberley region this practice is recounted in traditional narratives; however, in that region the corpse was typically raised on a tree platform below which was placed a circle of 'named' stones. When the juices of the decomposing body fell on the stones, the native doctor is said to have been able to discern the person responsible for the death or alternatively from which direction the sorcery—which resulted in the death—originated: Bohemia J & McGregor W, 'Death Practices in the North West of Australia' (1991) 15(1) *Aboriginal History* 86, 102.
5. Berndt & Berndt, *ibid* 354.
6. Elkin AP, *The Australian Aborigines* (Sydney: Angus & Robertson, 4th ed., 1974) 344. The Commission's consultations in Wiluna reported that 99 per cent of deaths involve payback punishment delivered at the funeral gathering. It was not clear how responsibility was established for a death but it was said that it was usually 'due to "blame" or some past event'. See LRCWA, Project No. 94, *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, 26.
7. Bohemia J & McGregor W, 'Death Practices in the North West of Australia' (1991) 15(1) *Aboriginal History* 86, 104. Bohemia and McGregor state that inquests are no longer held by the Gooniyandi and that deaths are dealt with by white institutions; although there is some suggestion that traditional inquests (without full rites) are still held by the desert peoples of Fitzroy Crossing.

proposed some changes to address the perceived conflicts and to assist in easing cultural concerns of grieving Aboriginal families in relation to coronial processes.

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. A senior next of kin is defined in s 37(5) of the *Coroners Act* to include (in order of priority) a person who was living with the deceased immediately before the death and was either legally married to the deceased or over the age of 18 years and in a marriage-like relationship with the deceased (including same-sex relationships); a person who was, immediately before the death, legally married to the deceased (but not necessarily living with the deceased); a child of the deceased (over the age of 18 years); a parent of the deceased; a sibling of the deceased (over the age of 18 years); an executor or guardian; or a person nominated by the deceased to be contacted in case of emergency.

As observed in the Commission's Discussion Paper, the above definition of senior next of kin follows 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.⁸ It was noted that the Coroners Acts of the Australian Capital Territory, Queensland, Tasmanian and Northern Territory embrace a broader concept of family, providing specifically for Aboriginal and Torres Strait Islander cultural concepts of kin.⁹

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 received limited submissions on this matter in regard to coronial issues. The Commission therefore invited submissions from interested parties on whether there was a need to amend the definition of senior next of kin in the

Coroners Act to allow for a person to apply to the coroner to be recognised as senior next of kin having regard to the Aboriginal customary law of the deceased.¹⁰

As outlined in the Discussion Paper, this is not the first time that an amendment to the definition of senior next of kin to accommodate Aboriginal customary law has been touted in Western Australia. The Commission's invitation to submit was based on a recommendation of the 1999 Chivell review of the *Coroners Act*.¹¹ The State Coroner argued against amendment at that time on the basis that any legislative change to the definition of senior next of kin could have significant negative impact upon the certainty of the current system; however, he indicated that he would seek the views of Aboriginal people and organisations in this regard.¹² The State Coroner's submission to the Commission indicates that he did seek these views, but that the response he consistently received was that the list provided in the s 37(5) definition was considered to be acceptable. He stated that he 'received no indication from any person to the effect that the list should be changed or that there was an important need to recognise a different person in the order of priority'.¹³

It was also pointed out by the State Coroner that:

It is usually only in cases where there is a dispute among family members when there is a significance in determining who is to be the senior next of kin and in these cases there is often a dispute as to the extent to which customary law applies.¹⁴

The Commission agrees that a change to the legislative definition to accommodate persons of significance under the deceased's customary law would not assist in resolving intra-family conflict and may indeed inflame such disputes at a time of heightened emotions associated with grief. The Commission is convinced by submissions received from both the State Coroner and the Deputy State Coroner that the Coroner's Court appreciates the nature of the Aboriginal kinship system and that, in practice, the views of extended family

8. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 306–307.

9. *Coroners Act 1997* (ACT) s 3; *Coroners Act 2003* (Qld) sch 2; *Coroners Act 1995* (Tas) s 3; *Coroners Act 1993* (NT) s 3.

10. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 307, Invitation to Submit 11. The Commission stressed that the senior next of kin identified in relation to coronial matters may be different to the person identified as having burial rights to the body of a deceased (although it appears that a body will usually be released to a senior next of kin where the coroner has no knowledge of the existence of a will). The Commission has made a number of recommendation regarding burial rights and these are dealt with in the following section.

11. Chivell W, *Report on Review of the Coroners Act 1996 (WA)* (May 1999) 23.

12. Office of the State Coroner, 'Response to Report on the Review of the *Coroners Act 1996 (WA)*' (30 August 1999) 3.

13. Alastair Hope, State Coroner, Submission No. 6 (7 March 2006) 4.

14. *Ibid* 5.

members are taken into account.¹⁵ The Commission also recognises the importance of having legislative certainty about the identity of the senior next of kin to facilitate police in advising the right person of a death¹⁶ and in ensuring that that person is aware of his or her rights in the coronial process. Since it received no submissions from Aboriginal people in respect of this matter, the Commission has determined that it is not appropriate to recommend amendment to the definition of senior next of kin.

Cultural objections to autopsy

Although post-mortem examination of internal organs for the purposes of inquiring into the cause of a death is not unheard of in traditional Aboriginal societies, such practices were largely confined to the eastern parts of Australia.¹⁷ The mortuary practices of traditional Aboriginal people in Western Australia indicate a widely held belief that a body must be buried intact to ensure that the spirit 'enters the dreamtime'. This belief has also featured in a number of contemporary cases in Western Australia where courts have been called upon to decide a dispute where an Aboriginal family has objected to an autopsy on cultural grounds but the coroner has overruled those objections.¹⁸ Before discussing the outcome of the Commission's investigation into cultural objections to autopsy of an Aboriginal deceased, it is necessary to outline the objection process and submissions received in respect of the need for improvements to that process.

The objection process

Where a person has died of unnatural causes, or where the cause of death is unknown, that death must be reported to the coroner.¹⁹ The deceased's family are advised of the death by police and are given a

brochure—'When a Person Dies Suddenly'—which gives the family basic information about the coronial process. Section 37 of the *Coroners Act 1996* (WA) gives a deceased's senior next of kin the right to object to a coronial post-mortem examination. There is no period specified in the Act, but the brochure states that an objection must be lodged within 24 hours of receiving the brochure.²⁰

If the senior next of kin objects to post-mortem examination, then the coroner will make a decision whether a post-mortem is necessary and communicate that decision in writing to the family. If the coroner overrules the objection and the family wish to pursue the matter, then they have two clear working days (after being advised of the coroner's ruling) to apply to the Supreme Court for an order that no post-mortem examination be performed on the deceased.²¹ Under Supreme Court Practice Direction 2/1997 every endeavour will be made to list an application within three days of filing.²² Applications are heard on affidavit evidence,²³ reducing the need for parties in rural or remote areas to travel to the hearing, and an order is generally made at the conclusion of the hearing or the following day.

Time for objection to coroner

The Commission heard from Aboriginal people in Fitzroy Crossing that the time limit of 24 hours in which to make objection to the coroner was too short. Although all families will experience grief at a close relative's passing and many may not be in a position to contemplate the possibility of post-mortem of their loved one, it is arguable that in respect of Aboriginal families the cultural aspects of grief are even more disabling. For example, in the Kimberley area when an Aboriginal person dies, close relatives will immediately

15. Ibid 4–5; Evelyn Vicker SM, Deputy State Coroner, Submission No. 19 (27 April 2006) 8–10. The Commission also notes that, although only the senior next of kin may object to an autopsy, other family members listed under s 37(5) of the *Coroners Act 1997* (WA) have rights, such as the right to be informed of certain matters.

16. Although in relation to Aboriginal people living under customary law it is important that the police seek the advice of a more distant relative or Aboriginal liaison officer to assist in advising the next of kin about a death. See discussion under 'Time for objection to coroner', below pp 250–52. See also cultural advice in notification of a death provided by Karrayili Adult Education Centre (Fitzroy Crossing), *Tell Me More About the People I Work With* (undated) 25.

17. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 353; Elkin AP, *The Australian Aborigines* (Sydney: Angus & Robertson, 4th ed., 1974) 349.

18. See, for example, Western Australian cases: *Ronan v The State Coroner* [2000] WASC 260; *Jones v The Coroner, Albany* [2005] WASC 134 (13 June 2005); *Re the Death of Unchango (Jr)* (1997) 95 A Crim R 65. There have also been a number of cases in other Australian jurisdictions which make similar cultural and spiritual claims, notably *Green v Johnstone* [1995] 2 VR 176.

19. *Coroners Act 1996* (WA) s 17.

20. According to the Coroner's Court website, an objection received after 24 hours will be acted upon if possible, but after that period the post-mortem examination may have already commenced. Guidelines direct coroners, in cases where a post-mortem is not required to be performed immediately, to ensure that none is conducted 'until a period of at least 24 hours including a full working day has elapsed from the time when the Coroner's Brochure has been provided to a next of kin': State Coroner of Western Australia, 'Guidelines for Coroners' (undated) Guideline 9.

21. *Coroners Act 1996* (WA) s 37(2). The Supreme Court may grant an extension of time for application under s 37(3a).

22. Although, the Commission is advised that in practice such applications are dealt with in less than the three days specified in the practice direction.

23. Although Practice Direction 2/1997 states that in exceptional circumstances the court may dispense with the requirement for filing of an affidavit and permit oral evidence to be given in support of the Notice of Motion.

Mortuary practices of traditional Aboriginal people in Western Australia indicate a widely held belief that a body must be buried intact to ensure that the spirit ‘enters the dreamtime’.

show their grief by ‘hitting themselves with a billy can, rock or bottle until they make themselves bleed’.²⁴ This practice shows respect for the dead person, but can also affect a person’s emotional and physical state, so much so that they cannot make an informed decision about whether or not they should object to a post-mortem examination of their deceased relative. In these circumstances relatives may fail to register, within the allotted time of 24 hours, an objection to post-mortem based on their genuinely held cultural or spiritual beliefs. The fact that the immediate family is overwhelmed by grief and may not take in the information contained in the coroner’s brochure may be compounded by language difficulties.

The Coroners’ Guidelines direct police officers notifying a next of kin of a death to explain the person’s rights and to take all reasonable steps to ensure that the person understands them,²⁵ but this may be extremely difficult in the circumstances described above.²⁶ The Coronial Counselling Service offers grief counselling and can help families to understand more about the post-mortem procedure and their rights. However, according to a submission received from the Deputy State Coroner, coronial counsellors are currently not adequately available to bereaved families in remote or rural areas,²⁷ which would appear to limit the impact of coronial counselling in these circumstances, particularly within the first 24 hours.

The Commission believes that it is important that people are given sufficient opportunity to make an informed decision about whether or not they wish to object to a post-mortem examination of their deceased relative. This includes being made aware of the benefits to be

gained by the post-mortem process in regard to finding an explanation for the death. Of course, there are, in some cases, good reasons for ordering an examination without delay; for example, in circumstances where vital evidence is likely to deteriorate in the case of a suspicious death or where there is evidence of a severe and potentially dangerous infection.²⁸ In other cases, there may be no need for haste and an extension of time to allow for the possibility of objection, particularly where the family’s culture or religion is likely to impact upon the decision, could be provided. Currently the Coroners’ Guidelines direct coroners to ensure that a post-mortem is not conducted (unless immediately necessary) ‘until a period of at least 24 hours including a full working day has elapsed from the time that the Coroner’s Brochure has been provided to the next of kin’.²⁹ It would seem a small thing to ask that this period be extended to 48 hours including a full working day to accommodate grieving families and to give them time to access the Coronial Counselling Service should they wish to.

In making this recommendation the Commission stresses that at all times the coroner retains the discretion to order that the post-mortem be performed if he or she believes that it must be done without delay. The Commission also notes that such extension of time will not unduly affect those families who have no objection to post-mortem examination and/or wish to have the body released as soon as possible for burial. In these cases the Coroners’ Guidelines direct that the coroner should have written confirmation (or be otherwise satisfied) that the senior next of kin does not object before ordering the post-mortem which can then be performed without delay.³⁰

24. Karrayili Adult Education Centre (Fitzroy Crossing), *Tell Me More About the People I Work With* (undated) 25.

25. State Coroner of Western Australia, ‘Guidelines for Police’ (undated) Guideline 5.

26. For this reason those notifying Aboriginal people of a death should take advice from Aboriginal non-relatives to ensure that the right person is told about the death and in circumstances where they cannot harm themselves: see Karrayili Adult Education Centre (Fitzroy Crossing), *Tell Me More About the People I Work With* (undated) 25.

27. Evelyn Vicker SM, Deputy State Coroner, Submission No. 19 (27 April 2006) 10. See also Recommendation 75, below p 251, regarding improved resourcing for the Coronial Counselling Service.

28. See State Coroner of Western Australia, ‘Guidelines for Coroners’ (undated) Guideline 8. The Commission notes the evidence of Dr Cooke in *Re the Death of ‘MRG’ deceased; ex parte Curtin* (Unreported, Supreme Court of Western Australia, BC9702404, Owen J, 29 May 1997) which states that the difficulty of identifying subtle causes of death, such as infection or metabolic causes, increases as the time interval between death and autopsy lengthens.

29. *Ibid*, Guideline 9.

30. *Ibid*.

Recommendation 75

Time for objection to post-mortem examination

1. That the *Guidelines for Coroners (WA)* be amended to state that in cases where a post-mortem examination does not have to be conducted immediately, a coroner should ensure that no post mortem examination is conducted until at least a period of 48 hours including one full working day has elapsed from the time when the coroner's brochure 'When a Person Dies Suddenly' has been provided to a next of kin to allow for any objections to be made pursuant to s 37 of the *Coroners Act 1996 (WA)*.
2. That the coroner's brochure 'When a Person Dies Suddenly' be amended to reflect the increase in time for objection to 48 hours.

Time for filing of application under s 37(3)

In its submission the Aboriginal Legal Service (ALS) claimed that the time limit of two days in which to file an application in the Supreme Court for an order that no post-mortem examination be performed was too short.³¹ In support of this claim the ALS noted that some Aboriginal people have to travel great distances to access the legal advice necessary for an application. The ALS suggested that the time specified in s 37(3) of the *Coroners Act* should be extended to 72 hours. The Commission notes that in all other Australian jurisdictions where a right exists to apply to a court for an order that a post mortem examination not be performed, the time allowed is 48 hours from notification of the coroner's decision.³² The wording of the Western Australian Act—that is, two clear working days—would seem to allow potentially more than the 48 hours available in other jurisdictions. In fact, according to s 61(f) of the *Interpretation Act 1984 (WA)* the two clear working days will not include the day on which the coroner's decision is received or the day on which the application is filed with the

Supreme Court. In addition the Supreme Court may, on application of the senior next of kin, grant an extension of time for filing if 'it is satisfied that exceptional circumstances exist so that it is necessary and desirable in the interests of justice to grant the extension'.³³ The Second Reading Speech introducing these provisions indicates that they were made in cognisance of the difficulties of family members in remote or rural locations accessing the Supreme Court.³⁴ Indeed the amendments to the Act followed a 1997 case where a remote Aboriginal applicant seeking to challenge an autopsy order on cultural grounds was denied the order as a result of an out-of-time application.³⁵

While sympathising with the difficulties of remote Aboriginal people in accessing legal advice, the Commission notes that the matter has already been considered by Parliament and feels that the amendments to the Act adequately address the problem. The Commission encourages the ALS to assist a senior next of kin to apply for an extension of time where circumstances warrant it, even where the ALS is not itself in a position to appear for the applicant.

Appropriate forum for hearing of application under s 37(3)

The ALS further submitted that, for reasons of accessibility, the Magistrates Court should be empowered to hear applications for an order not to perform a post-mortem under s 37(3) of the *Coroners Act*.³⁶ Again the point was made that it is difficult for people in rural and remote areas to access the Supreme Court, particularly in light of the time limit placed on applications in these matters. The Commission appreciates the rationale behind the ALS submission; however, it notes that in rural and remote areas the local magistrate also acts as coroner. The Commission considers that it would be impossible in these circumstances for a magistrate to apply an independent mind to the question whether or not an order that the magistrate made as coroner should stand. In the interests of applicants receiving a fair and unbiased hearing and also in the interests of finality of proceedings, the Commission has declined to

31. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 11.

32. See, for example, *Coroners Act 1980 (NSW)* s 48A(6); *Coroners Act 1993 (NT)* s 23(3); *Coroners Act 1995 (Tas)* s 38(3); *Coroners Act 1985 (Vic)* s 29(3).

33. *Coroners Act 1996 (WA)* s 37(3a).

34. Western Australia, *Parliamentary Debates*, Legislative Council, 22 April 1999, 7556 (Mr Peter Foss, Attorney General).

35. *Re the Death of 'MRG' deceased; ex parte Curtin* (Unreported, Supreme Court of Western Australia, BC9702404, Owen J, 29 May 1997). Justice Owen's remarks in this judgment urge Parliament to address the time allowed for filing.

36. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 11.

recommend a change of forum from the Supreme Court to the Magistrates Court in relation to applications for an order that a post-mortem examination not be performed.

Appropriate recognition of cultural and spiritual beliefs in the objection process

The Commission's consultations in the Gascoyne region revealed that there were concerns in the Aboriginal community about autopsy practices and genuinely held fears that body parts or organs removed from a body might not be returned.³⁷ In its Discussion Paper the Commission examined a number of cases where the Supreme Court had been called upon to decide whether or not to order a post-mortem examination on an Aboriginal deceased in the face of a cultural objection that had been overruled by a coroner.³⁸ In these instances the court is required to weigh the public interest in identifying the cause of death³⁹ against the interest of the family to preserve the deceased's body. The authorities show that, where there are no public health concerns or suspicious circumstances surrounding a death, or where cause of death can be reasonably determined by an external examination and the circumstances of the death without an invasive autopsy, a court will generally uphold a cultural objection and no post-mortem examination will be authorised.⁴⁰

In 1991 the Royal Commission into Aboriginal Deaths in Custody noted the legitimacy of Aboriginal cultural objections to autopsy. It recommended that protocols be developed by state coroners to ensure that Aboriginal cultural beliefs and traditional rites are

respected, and that coroners investigating Aboriginal deaths should make 'all reasonable efforts to obtain advice from the family and community of the deceased in consultation with relevant Aboriginal organisations'.⁴¹ Other jurisdictions, notably Queensland,⁴² the Australian Capital Territory⁴³ and New Zealand,⁴⁴ have legislative provisions that direct coroners to have regard to the cultural sensitivities and customary beliefs of families in making a decision whether or not to order a post-mortem examination of a deceased.

As discussed earlier, in Western Australia s 37 of the *Coroners Act* provides a process where the deceased's senior next of kin can object to a post-mortem examination. However, as the Commission noted in its Discussion Paper, s 37 does not oblige the coroner to consider cultural sensitivities in making a decision whether or not to order a post-mortem examination and in any event an objection can be overruled by the coroner.⁴⁵ Although the State Coroner has issued guidelines to assist coronial staff in making decisions about post-mortem (either before or after an objection), there is no direction that cultural, spiritual or, in the case of an Aboriginal deceased, customary law beliefs are taken into account in the decision-making process. The guidelines direct a coroner to consider 'the views of the senior next of kin of the deceased'⁴⁶ 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.⁴⁷ It has been suggested by the State Coroner that in the context of an Aboriginal deceased, this guideline requires a coroner to take into

37. LRCWA, Project No. 94, *Thematic Summaries of Consultations – Carnarvon*, 30–31 July 2003, 7.

38. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 304.

39. This would include such matters as the need to investigate the precise causes of unexpected deaths in babies that may otherwise be unascertainable or attributed to sudden infant death syndrome. The State Coroner's submission highlighted the disturbing statistics of infant deaths among Australia's Aboriginal population and the importance of post-mortem and coronial investigation data in identifying and addressing Aboriginal health issues that contribute to infant death: Alastair Hope, State Coroner, Submission No. 6 (7 March 2006) 1–2 and attached charts.

40. See, for example, *Ronan v The State Coroner of Western Australia* [2000] WASC 260; *Re the Death of Unchango (Jr)* (1997) 95 A Crim R 65; *Jones v The Coroner, Albany* [2005] WASC 134 (13 June 2005); *Saunders v State Coroner of Victoria* [2005] VSC 460 (18 November 2005); *Green v Johnstone* [1995] 2 VR 176 (all cases involving Aboriginal cultural concerns regarding autopsy). *Wuridjal v The Coroner* [2001] NTSC 99 (9 November 2001) shows that where suspicious circumstances surround a death the genuinely held cultural beliefs of Aboriginal people will not, when properly balanced against the public interest, justify an order that no autopsy be performed.

41. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) Recommendation 38. The RCIADIC further recommended that any protocols developed in response to this recommendation be extended to apply to all Aboriginal deaths reported to the coroner (Recommendation 39).

42. In Queensland, coroners must have regard to any concerns raised by a family member or any distress which may be suffered due to cultural traditions or spiritual beliefs: *Coroners Act 2003* (Qld) s 19(4).

43. In the ACT, coroners must have regard to 'the desirability of minimising the causing of distress or offence to persons who, because of their cultural attitudes or spiritual beliefs, could reasonably be expected to be distressed or offended by the making of that decision': *Coroners Act 1997* (ACT) s 28.

44. In New Zealand in determining whether to perform an autopsy the coroner must have regard to customary beliefs requiring expeditious burial or customary beliefs that consider post-mortem examination of bodies offensive: *Coroners Act 1988* (NZ) s 8.

45. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 304–306. See also Vines P & McFarlane O, 'Investigating to Save Lives: Coroners and Aboriginal deaths in custody' (2000) 4(27) *Indigenous Law Bulletin* 8, 10. Vines and McFarlane argue that a clear protocol in relation to Aboriginal deaths would be 'greatly preferable' to the current general provision for objection and that such protocols should be entrenched in legislation 'to establish rights rather than expectations, rules rather than discretions': *ibid* 13.

46. State Coroner of Western Australia, 'Guidelines for Coroners' (undated) Guideline 12.

47. *Ibid*, Guideline 13.

account the views of the extended family, which may be considered important under Aboriginal customary law.⁴⁸

Commentators have stressed that internal administrative guidelines such as the ones relied upon in Western Australia are not acceptable because they 'may easily be changed without public knowledge'.⁴⁹ In support of this contention, it should be noted that the Commission could find no information readily available to the public that indicated the content or indeed the existence of guidelines governing the performance of coronial duties in Western Australia. The Commission notes that the public inaccessibility of coronial guidelines has also been the subject of recent complaint in Victoria.⁵⁰ While the Commission's earlier recommendation for a dedicated publicly accessible internet site has been independently implemented by the Coroner's Court, access to coronial guidelines remains restricted and at the date of writing there was no reference to the existence of these guidelines on the site.⁵¹

In the Commission's opinion, these observations provide sufficient argument for a more publicly transparent procedure for coronial decisions in respect of post-mortems. Section 59 of the *Coroners Act* expressly provides that the *Coroners Regulations 1997 (WA)* may 'specify the matters to be taken into account when considering whether or not a post-mortem examination should be performed'. The Commission can see no reason why guidelines directing a coroner to have regard to cultural matters in making a decision to order a post-mortem examination should not be posited in legislative form in the *Coroners Regulations*. To this end the Commission proposed the following amendment to the regulations modelled on s 28 of the *Coroners Act 1997 (ACT)*:

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.⁵²

The Commission received four submissions in response to this proposal. The submissions of the Aboriginal Legal Service and the Law Society of Western Australia supported legislative direction to coroners to take account of cultural, spiritual and customary beliefs in making a decision to order a post-mortem examination.⁵³ The submission of the State Coroner made no comment against legislative direction to consider cultural beliefs, although it did raise the point that the suggested formulation places an onus on the coroner investigating the death to consult more extensively with families than is currently the case.⁵⁴ The State Coroner observed that this would affect, in practice, the timely release of a body for burial and that this might impact negatively on those whose cultural beliefs demand that the deceased be buried expeditiously.⁵⁵ In view of the fact that objection on the basis of cultural and spiritual matters is expressly noted on the autopsy objection form filled out by families, the Commission accepts that cultural concerns will usually be communicated to a coroner and, subject to allowing extra time for objection as recommended above (Recommendation 75), the onus should remain with the family to make these concerns known. The Commission has therefore amended its recommendation to clarify the matter. Nonetheless, the Commission notes that in many cases coroners will—by virtue of their experience with Aboriginal families, cultural awareness training and familiarity with cases decided by the Supreme Court—have sufficient knowledge of the cultural concerns of Aboriginal people and should be expected to take these matters into account in deciding whether or not to order a post-mortem examination of an Aboriginal deceased.

48. State Coroner of Western Australia, 'Recognition of the Rights of Aboriginal People in the Coronial Process', letter (4 July 2005) 1.

49. Vines P & McFarlane O, 'Investigating to Save Lives: Coroners and Aboriginal deaths in custody' (2000) 4(27) *Indigenous Law Bulletin* 8, 12.

50. Victorian Parliament Law Reform Committee, *Inquiry into the Coroners Act 1985*, public hearings (22 August 2005) 3, Mr G Bond; (20 September 2005) 205, Dr I Freckleton.

51. <www.coronerscourt.wa.gov.au>. See discussion under 'Accessibility of coronial guidelines and findings', below pp 254–55.

52. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 306, Proposal 58.

53. The Law Society argued that the legislative direction should be entrenched in the *Coroners Act* rather than in regulations to provide 'a more visible indication of respect for Aboriginal customary law, and thus [be] more accessible to relevant stakeholders, including Aboriginal communities'. The Commission has considered this argument, but believes that it is sufficient for the direction to be contained in the regulations as contemplated by s 59 of the *Coroners Act 1996 (WA)*.

54. Alastair Hope, State Coroner, Submission No. 6 (7 March 2006) 3.

55. As mentioned in the Commission's Discussion Paper, some Aboriginal groups believe that unreasonable delay in burial of a body may affect the ability of a deceased's spirit to 'be at rest': see Freckleton I, 'Autopsy Law: Multiculturalism working successfully' (1998) 6 *Journal of Law and Medicine* 5. The Commission did, however, hear from Aboriginal people in Fitzroy Crossing that expeditious burial was not a priority for Aboriginal people of that area. Of more concern was ensuring that the deceased's relatives were able to be contacted to attend the funeral and the family would hold burial until relatives were assembled.

In her submission the Deputy State Coroner rejected a legislative direction to coroners to take account of cultural beliefs of a deceased's relatives, arguing that this provides for less flexibility in the exercise of the coroner's discretion to order a post-mortem examination.⁵⁶ The submission suggested that coroners already take these beliefs into account and that legislation would unnecessarily complicate the negotiation process surrounding an objection. As the Commission stated in its Discussion Paper, it has no doubt that cultural and spiritual concerns, including Aboriginal customary beliefs, are taken seriously by coroners in considering objections to autopsy. However, as the Commission also made clear it believes, for the reasons stated earlier, that

it is nevertheless desirable to make this consideration explicit in Western Australia. If nothing else, a legislative direction to a coroner to take cultural matters into account in ordering an autopsy of an Aboriginal deceased will make it clear to the family of a deceased that their cultural beliefs have been considered in the decision-making process. Currently, a family must pursue an overruled objection to autopsy through the Supreme Court to obtain the same assurance.⁵⁷

The Deputy State Coroner also argued that the Commission's proposal unreasonably discriminated in favour of Aboriginal people by being specific about Aboriginal customary laws and cultural beliefs in its formulation.⁵⁸ The Commission did pre-empt this argument in its Discussion Paper by stating:

Although constrained by its Terms of Reference to consideration of Aboriginal customary laws, the Commission can see no reason why the above proposal should be limited in application to Aboriginal deceased persons. The Commission applauds the State Coroner's efforts to ensure that 'the coronial process treats people equally irrespective of race, colour or creed'.⁵⁹ The Commission would therefore support a general provision of this nature if it were considered appropriate by the State Coroner.⁶⁰

As there appears to be no objection to a more general provision, the Commission has reformulated its recommendation to ensure that it is culturally and spiritually inclusive.

As a final comment, the Commission notes the remarks of the State Coroner in that Office's 2004–2005 Annual Report that:

Where objections are made, every effort is taken to attempt to ascertain the extent to which the cause of death can be determined without an internal post mortem examination. *It is a rare case in which there are no external factors which would give some insight into a likely cause of death.*⁶¹

That report shows that of 128 objections received in the year 2004–2005, 44 were withdrawn before decision and 70 were accepted by the coroner and no post-mortem examination was ordered. Only 14 objections were overruled by the coroner. These figures may indicate that coronial authorities are sensitive, in the face of an objection, to the cultural, spiritual and emotional concerns of families in preserving the integrity of their deceased relative's body. However, they may also show that post-mortem examinations are being ordered in many more cases than is strictly necessary to properly discharge the duties of the office.

Recommendation 76

Cultural, spiritual or customary beliefs to be taken into account in deciding whether to order post-mortem examination

That the *Coroners Regulations 1997 (WA)* be amended to provide that in making a decision whether or not to order a post-mortem examination of a deceased a coroner must take into account any known or communicated cultural, spiritual or customary beliefs of the deceased's family.

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

56. Evelyn Vicker SM, Deputy State Coroner, Submission No. 19 (27 April 2006) 3 & 7.

57. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 306. The Commission notes the concerns expressed by coronial counsellors in a 1999 review of the *Coroners Act 1996 (WA)* that 'financial reasons may prevent the "vast majority" of Western Australians from exercising their right to pursue a case if an objection [to autopsy] is overruled': Chivell W, *Report on Review of the Coroners Act 1996 (WA)* (May 1999) 34.

58. Evelyn Vicker SM, Deputy State Coroner, Submission No. 19 (27 April 2006) 3–4.

59. State Coroner of Western Australia, 'Recognition of the Rights of Aboriginal People in the Coronial Process', letter (4 July 2005) 1.

60. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 306.

61. Office of the State Coroner, *Annual Report 2004–2005* (2005) 5 (emphasis added).

transparency of coronial processes which, especially in relation to deaths in custody, is of utmost importance. The Commission therefore proposed that the Department of Justice (now the Department of the Attorney General) 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.⁶² This proposal was supported by all submissions received on this matter, notably the State Coroner, Deputy State Coroner and the Law Society of Western Australia.

The Commission is delighted to report that the Coroner's Court now has a functioning website⁶³ which features plain English information about coronial processes and counselling services as well as coronial findings. The Commission notes, however, that there is no access to the *Coroners Act*, *Coroners Regulations* or *Coroners' Guidelines* on this site. While the website is a significant improvement on the availability of information about coronial processes in Western Australia, the Commission does not believe that it sufficiently addresses the concerns regarding transparency outlined in its Discussion Paper. The State Coroner indicated in his submission that coronial guidelines will be available on the site 'in the near future'.⁶⁴ Undoubtedly there is a need to update the guidelines and this is the reason for the delay. The Commission is satisfied that access to coronial guidelines will be available on the Coroner's Court website in the near future and suggests that a link to relevant legislation on the State Law Publisher's website also be included. The Commission does not feel that it is necessary to formalise its proposal in light of these developments.

Increased coronial counselling services in regional areas

In her submission the Deputy State Coroner indicated a need for the provision of additional coronial counsellors in regional areas with resourcing to travel to remote areas where required.⁶⁵ As mentioned earlier, this is a vital service that is currently not adequately available to bereaved families located outside the metropolitan

area. The Commission agrees with the Deputy State Coroner's suggestion and recommends that resourcing for expansion of the coronial counselling service in rural areas be investigated. The Commission further recommends that an Aboriginal counsellor/educator be employed on a full-time basis to assist the Coroner's Court in providing cultural awareness training to all coroners, including magistrates who act as coroners in country areas. Cultural awareness training should be provided to coroners in the relevant region and with specific advice from local Aboriginal communities. While travelling to the regions for the purposes of providing training to coroners, the Aboriginal counsellor/educator should take the opportunity to forge links with the local community and provide education sessions about coronial processes to local police, prisons, hospitals, Aboriginal organisations and funeral directors. Such education sessions need not be Aboriginal-specific, but should include information to assist people in dealing with bereaved Aboriginal families.

Recommendation 77

Expansion of Coronial Counselling Service to rural areas

1. That resourcing for expansion of the Coronial Counselling Service in rural areas be investigated.

Employment of Aboriginal coronial counsellor/educator

2. That an Aboriginal counsellor/educator be employed on a full-time basis to assist the Coroner's Court in providing locally based and locally informed Aboriginal cultural awareness training to all coroners, including magistrates who act as coroners in country areas.
3. That the Aboriginal counsellor/educator be tasked to improve education about coronial processes in regional and remote areas and that this education include information about Aboriginal culture and customs relevant to the specific area.

62. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 308, Proposal 59.

63. See <www.coronerscourt.wa.gov.au>.

64. Alastair Hope, State Coroner, Submission No. 6 (7 March 2006) 5.

65. Evelyn Vicker SM, Deputy State Coroner, Submission No. 19 (27 April 2006) 10.

Funerary Practices and Burial Rights

Aboriginal Funerary Practices 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 examined traditional and contemporary Aboriginal funerary practices in Western Australia¹ and found that the current 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.² The Commission 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.³ The Commission has therefore not seen any need to make recommendations in relation to the practice of funerary rites in Western Australia.

Aboriginal Burial Rights and the Laws of Western Australia

Burial (as opposed to cremation) is the most common Aboriginal mortuary practice in Western Australia.⁴ Being able to die and be buried in one's traditional homelands was very important in traditional Aboriginal societies.⁵ As Robert Tonkinson explains, 'old people who feel that their lives may be coming to an end prefer to die close to their birthplace so that their spirit will be spared

a long journey back to its original home'.⁶ Although many Aboriginal people believe that a deceased's body should be returned to the land from which it originated, this is not always the case. Sometimes Aboriginal people prefer to be buried in the place they grew up or where they lived prior to their death or in the same resting place of a pre-deceased spouse or family member.⁷ Nonetheless, there appears to be widespread acceptance of customary laws dictating burial of a deceased in his or her spiritual homeland. The Commission's consultations with Aboriginal communities in Western Australia revealed that burial in one's place of birth or traditional 'country' was, and remains, the custom for many Aboriginal people.⁸

Right to dispose of a deceased's body

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.⁹ 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 executor of the deceased's will or, in the absence of a will, 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) of the deceased followed by the children of the deceased, the deceased's parents, the deceased's siblings, then other specified family members.¹⁰ Where two people have an equally ranking entitlement to

1. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 310–11.

2. *Ibid* 312–13.

3. *Ibid* 313.

4. Cremation was a customary practice that was traditionally confined to the eastern half of the continent. According to the Funeral Directors' Association of Western Australia, very few Aboriginal people in Western Australia today choose to be cremated.

5. Byrnes J, 'A Comparison of Aboriginal and Non-Aboriginal Values' (2000) 3 *Dissent* 6, 10.

6. Tonkinson R, *The Mardudjara Aborigines: Living the dream in Australia's desert* (New York: Holt, Rinehart and Winston, 1978) 104. Piddington has observed in respect of the Karadjeri group of the north-west that a person always 'wishes to return to his horde territory to die, for it is to this land that he is bound by material, social and religious ties': Piddington R, *An Introduction to Social Anthropology* (Edinburgh: Oliver & Boyd, vol 1, 1950) 289. While in *In the Matter of the Estate of Bellotti* (Unreported, Supreme Court of Western Australia, Lib. No. 970594, Bredmeyer M, 7 November 1997) burial in one's country was said to be the custom of the Yamatji peoples of the Carnarvon area. This custom was confirmed by Aboriginal people in a number of different areas around Western Australia during the Commission's initial consultations.

7. Queensland Law Reform Commission, *Review of the Law in Relation to the Final Disposal of a Dead Body*, Information Paper (June 2004) [5.5].

8. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 311–12.

9. *Ibid* 311–14.

10. See *Administration Act 1903* (WA) ss 14 & 15. The de facto partner must have been living with the deceased for two years immediately preceding the death.

administration—for example, the parents of a deceased child—the right to bury will be decided according to the practicalities of burial without unreasonable delay.¹¹ Courts have routinely rejected cultural arguments as irrelevant when deciding who has the right to bury a deceased.¹²

Resolving conflict between Aboriginal law and Australian law in burial disputes

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.¹³ 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 or where the burial should take place.¹⁴ In its Discussion Paper the Commission discussed in some detail the various problems arising in this area and examined the laws of other jurisdictions, including Canada and the United States. The Commission concluded that without further submissions on this issue it was not in a position to offer a firm proposal. Submissions were therefore invited on the following matters:

1. 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?
2. What would be the appropriate protocol to apply in cases where there are genuinely held but

competing cultural and spiritual beliefs?

3. What, if any, significance should be placed on the deceased's wishes regarding burial if embodied in a signed document (not necessarily a will)?
4. 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?¹⁵

The Commission's Conclusion

Seeking to maximise submissions from Aboriginal people, the Commission designed a plain English pamphlet on this issue which was distributed and discussed during its return consultation visits to Aboriginal communities around the state. The Commission received a number of submissions from Aboriginal respondents at those meetings as well as written submissions from the Aboriginal Legal Service and the Law Society of Western Australia.

Should cultural beliefs be considered by courts in resolving burial disputes?

As observed in the Commission's Discussion Paper, the resolution of burial disputes is always a difficult challenge for courts. Not only is the subject matter emotionally charged, but the claims of both parties are often of equal merit and the cultural and spiritual beliefs of the parties genuinely held. It has been mentioned above that courts apply the 'highest entitlement principle' in resolving burial disputes and that cultural arguments are usually held to be irrelevant to the determination of a matter. The Commission therefore posed the question: should cultural beliefs be considered by courts in resolving burial disputes?

11. See *Calma v Sesar* (1992) 106 FLR 446 where there was a burial dispute between both Aboriginal parents of a deceased born in Port Hedland, Western Australia. The mother (who lived in Alice Springs) made arrangements for a Roman Catholic burial in Darwin where the deceased had been killed, while the deceased's father (who lived in Port Hedland) made arrangements for burial in the deceased's birthplace – his 'country' under the deceased's Aboriginal customary law. Because an equal right to administration existed, the court decided on the basis of practicalities, including the need for expeditious burial. The court therefore held in favour of the mother because the deceased's body was in Darwin and suitable arrangements had already been made for burial there.

12. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 314–15. But note *Jones v Dodd*, discussed below.

13. The Aboriginal Legal Service confirmed this view, submitting that such disputes are 'particularly common amongst Aboriginal peoples': Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 11.

14. See, for example *In the Matter of the Estate of Bellotti* (Unreported, Supreme Court of Western Australia, Lib. No. 970594, Bredmeyer M, 7 November 1997) where a the deceased's family (of Yamatji descent) and the spouse (of Nyongar descent) had competing beliefs about place of burial. See also *Milanka Sullivan v Public Trustee for the Northern Territory of Australia* (Unreported, Supreme Court of the Northern Territory, 107 of 2002, Gallop AJ, 24 July 2002) where the deceased's testamentary wish to be buried in his 'borning place' was disputed by the family who said that his customary law required him to be buried in his 'father's father's country' which was in a different area.

15. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 317, Invitation to Submit 12.

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 pointed out various arguments against the introduction of legislation directing courts to consider Aboriginal customary law in relation to burial disputes over an Aboriginal deceased, including:

- That the wishes or cultural beliefs of non-traditional Aboriginal people may be overridden by the wishes or cultural beliefs of traditional family members. This is most often the case where a deceased has lived in an urban or non-Aboriginal environment for a long period, but family members still observe traditional customs.
- That burial may be unnecessarily delayed because evidence of cultural beliefs and customary laws would be required to decide the dispute and often parties are unrepresented by counsel.¹⁶
- That there may be an increase in litigation of burial disputes.
- That, where a decision is made against the person with the highest claim to entitlement, the impact of a decision in relation to expenses associated with the funeral and transport of the body may significantly erode the deceased's estate.¹⁷⁵
- That there is a high likelihood of increased appeals against first instance decisions where there is conflicting evidence of the deceased's cultural and spiritual beliefs or the deceased's wishes regarding burial or where the competing customs or spiritual beliefs of the parties are taken into account.¹⁸

The Commission formed the preliminary view that although the current approach may limit the court's ability to take into account cultural factors such as Aboriginal customary law, it would be impractical to resolve burial disputes through considering the

competing customs and beliefs of the deceased's family members. This would require courts to make difficult value judgements about which party's cultural or spiritual beliefs were more valid. In these circumstances, courts have commented that the only course that is feasibly open to them is to decide the matter according to the law; that is, that the person entitled to administer the estate has the right to conduct the funeral.¹⁹

The Law Society of Western Australia was the only submission to address this issue. The Society submitted that although it would be inappropriate to provide a legislative prescription for how burial disputes should be resolved

respect for the cultural and spiritual beliefs of Aboriginal peoples requires that the determination of burial rights must include consideration of the relevant Aboriginal customary law and the circumstances of the deceased, including his/her cultural and spiritual values. Cases ought to be decided on a case-by-case basis.²⁰



16. Griggs L & Mackie K, 'Burial Rights: The contemporary Australian position' (2000) 7 *Journal of Law and Medicine* 404, 404–405. The Commission has been informed that the Aboriginal Legal Service does not usually represent parties to Aboriginal burial disputes: Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 11.

17. Since a legislative direction would—in order to conform to the *Racial Discrimination Act 1975* (Cth)—have to apply to all cultures, transport and funeral expenses could be significant where an order for burial in another state or country was made.

18. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 316.

19. *Holtham v Arnold* (1986) BMLR 123, 125; *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997) 5.

20. Law Society of Western Australia, Submission No. 36 (16 May 2006) 10.



The Law Society did not address the matter of what significance should be attached to cultural and spiritual values of the parties or what protocol the court should apply where the parties' cultural beliefs are genuinely held but nonetheless conflict. Instead, the submission focused solely (and perhaps appropriately) on the beliefs of the deceased. As will become clear below, the Commission is in favour of honouring, where practicable, a deceased's burial wishes where embodied in a signed document or authenticated audio or video recording. However, in the absence of clear direction from the deceased in terms of Recommendation 78, the Commission feels that the benefits of the current common law approach (in particular, the promotion of judicial expediency in resolving burial disputes) may be unnecessarily forfeited by legislative direction to consider cultural and spiritual values.

As noted in the Commission's Discussion Paper, in *Jones v Dodd*²¹ the Full Court of the Supreme Court of South Australia questioned the applicability of the highest entitlement principle in circumstances where an Aboriginal deceased had died intestate and had left no estate to administer. In that case the court held that it would be unrealistic to apply the principle to resolve the dispute and that the proper approach was

to have regard to the practical circumstances, which will vary considerably between cases, and the need to

have regard to the sensitivity of the feelings of the various relatives and others who might have a claim to bury the deceased, bearing in mind also any religious, cultural or spiritual matters which might touch upon the question.²²

The Commission sees significant appeal in the approach of the court in *Jones v Dodd*; however, this does not affect the Commission's present resolution against legislatively directing courts to consider cultural matters. The Commission believes that, as common law precedent, courts will take the decision in *Jones v Dodd* into account in determining cases where no estate exists or where there is no likelihood of an application for a grant of administration in intestacy ever being made.²³

Apart from the immediate question, there are a number of matters that concern the Commission in relation to the treatment and final disposal of deceased remains in Western Australia that have come to light during this reference. The Commission suggests that an inquiry into matters relating to the final disposal of a deceased's body including coronial, cultural, burial and health-related matters be undertaken in Western Australia and that this inquiry should feature wide public consultation.

Should a deceased's burial instructions be determinative?

Although, as can be seen from the above, there is a form of possessory right over a deceased body which lies with the deceased's executor or next of kin, it has long been a tenet of common law that there is no 'property' in a body.²⁴ Practically this means that a testator's instructions regarding disposal of his or her bodily remains are not binding on the deceased's executor²⁵ and that 'a person has no right to dictate what will happen to his or her body' after death.²⁶ It has been argued that the 'no property' rule, as it has come to be known, rests on questionable legal foundations, denies the fundamental premise of testamentary freedom and is difficult to reconcile with certain statutory rights (such as organ and tissue

21. *Jones v Dodd* [1999] SASC 125.

22. *Ibid* [51] per Perry J, Millhouse and Nyland JJ concurring.

23. *Ibid* [50].

24. *Williams v Williams* (1882) 20 Ch D 659, confirmed in Australia by the High Court in *Doodeward v Spence* (1908) 6 CLR 406.

25. Atherton R, 'Who owns your body?' (2003) 77 *Australian Law Journal* 178, 184.

26. *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 693 (Young J).

Aboriginal people expressed support for a deceased being able to give instructions about burial wishes in a will or other signed document.

donation)²⁷ which allow a person to have legally binding control of their bodily remains after death.²⁸

Also somewhat contrary to the no property rule, in most Australian jurisdictions a person can, in a will or other written document, express a wish to be (or not to be) cremated and that wish must be respected. For example, in Western Australia s 13 of the *Cremation Act 1929* places administrators under a statutory duty to use all reasonable endeavours to ensure that a person's written wishes regarding cremation are carried into effect. In *Manktelow v The Public Trustee*,²⁹ the Supreme Court of Western Australia held that this provision³⁰ will require an executor or administrator to endeavour to give effect to a deceased's wish to be buried over the family's or the administrator's wish that the deceased be cremated.³¹ However, the Commission knows of no Australian case where a deceased's written instructions regarding place of burial or funeral arrangements (as opposed to burial vs cremation) have been judicially enforced against an executor or administrator of a deceased estate.

In the United States, courts have rejected the no property rule and have consistently upheld the deceased's directions (whether contained in a will, a written document or substantiated oral statements) in relation to disposal of his or her bodily remains.³² Further, provided that it is not unreasonably wasteful of the estate's resources,³³ 'absurd, indecent or

generally contrary to public policy'³⁴ a United States court will uphold a deceased's directions in regard to the place of burial, nature of burial and funeral arrangements.

Aboriginal people consulted for this reference expressed support for a deceased being able to give instructions about burial wishes in a will or other signed document, indicating that such instructions would usually be respected. In view of the Commission's widely supported recommendation for initiatives to encourage will-making among Aboriginal people,³⁵ and subject to the implementation and success of these initiatives, a legislative direction requiring a deceased's personal representative³⁶ to carry out burial instructions might have the effect of reducing disputes between family members about the place of burial of an Aboriginal deceased. For example, regardless of who has the right to dispose of a body, that person would be required to respect a deceased's directions as to how and where his or her bodily remains should be buried. In the case of an Aboriginal deceased this could include a direction that the deceased be buried 'on country' and that such burial be accompanied by funerary rites according to his or her customary law. The Commission has further received a number of submissions that were made by individuals and organisations to the Queensland Law Reform Commission's reference on the final disposal of dead bodies in that state.³⁷ Submissions received

27. See, for example the *Human Tissue and Transplant Act 1982* (WA). See also Griggs L & Mackie K, 'Burial Rights: The contemporary Australian position' (2000) 7 *Journal of Law and Medicine* 404, 408.

28. Conway H, 'Dead, But Not Buried: Bodies, burial and family conflicts' (2003) 23 *Legal Studies* 423, 432–33.

29. [2001] WASC 290 (19 October 2001).

30. Along with s 8A(b) of the *Cremation Act 1929* (WA) which provides that a medical referee shall not issue a permit for cremation where a person has left a written direction that his or her body should not be cremated.

31. [2001] WASC 290 (19 October 2001) [8].

32. Griggs L & Mackie K, 'Burial Rights: The contemporary Australian position' (2000) 7 *Journal of Law and Medicine* 404, 408–409; Conway H, 'Dead, But Not Buried: Bodies, burial and family conflicts' (2003) 23 *Legal Studies* 423, 433.

33. Griggs & Mackie, *ibid* 408.

34. Conway H, 'Dead, But Not Buried: Bodies, burial and family conflicts' (2003) 23 *Legal Studies* 423, 434.

35. Recommendations 69 & 70, above pp 239–40.

36. By 'personal representative' the Commission refers to the executor, administrator or potential administrator of the deceased's estate. The Commission notes that, in practice, there will generally not be time enough for a court to grant of probate or letters of administration prior to burial of a deceased. In releasing a body for burial and in the absence of a known will, coronial courts, hospitals or funeral directors generally rely on the evidence at hand to establish next-of-kin – usually the person with the highest entitlement to administration.

37. Queensland Law Reform Commission, Submission No. 50 (June 2006). Submissions were provided by the Queensland Law Reform Commission with the consent of the parties involved. Submissions were received from InvoCare Ltd; Queensland State Coroner; Funeral Directors' Association of Queensland; Queensland Bioethics Centre for the Queensland Catholic Dioceses; Reverend Les Percy, Minister of the Presbyterian Church (Qld); Queensland Cemeteries and Crematoria Association; the Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane; the Baha'i Council for Queensland; the Public Trustee of Queensland; Cape York Land Council; the Society of Trust and Estate Practitioners (Qld); Margaret Dillon, Registered Nurse; and the Queensland Police Service.



supported the idea that a deceased should have power to stipulate the method of disposal of his or her bodily remains and that whoever disposes of the body should be legally bound by those directions.³⁸ The Commission therefore recommends that Parliament legislate for observance of the burial wishes of a deceased.

Having regard to the wording of the analogous provision in the *Cremation Act*, the Commission suggests that any signed and attested written document should be enough to indicate a deceased's wishes. The Commission also notes that the *Wills Amendment Bill 2006 (WA)*, currently before Parliament, provides for the Supreme Court to accept informal wills, including video and audio recordings and that burial wishes contained in such recordings should also be acceptable for the purposes of establishing the deceased's directions. The Commission considers that Part IV of the *Cemeteries Act 1986 (WA)* 'Burials and conduct of funerals' would be an appropriate legislative vehicle for a direction to observe a deceased's burial instructions.

The Commission observes that the *Cemeteries Act* and certain by-laws and regulations govern the conduct of funerals and the health and legal requirements of burial of human remains (including place of burial) in Western Australia. The Commission has therefore made the

carrying out of a deceased's burial wishes subject to any written laws of Western Australia that may preclude the precise wishes of the deceased from being carried out. Further, because expenditure for burial of a deceased will usually be recouped from the deceased's estate, the Commission suggests that if complying with the deceased's burial instructions would be unreasonably wasteful of the estate's resources, the executor or administrator may apply to the Supreme Court pursuant to s 45 of the *Administration Act 1903 (WA)* for directions.³⁹

Recommendation 78

Burial instructions of deceased to be observed

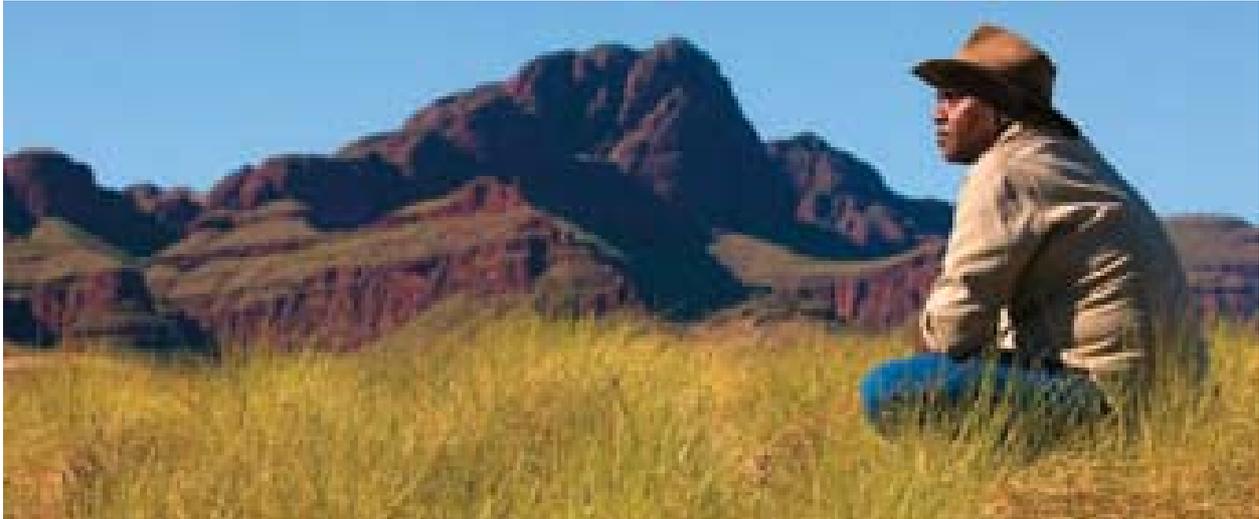
That the following section be inserted into Part IV of the *Cemeteries Act 1986 (WA)*:

13A Deceased's burial instructions to be observed

- (1) Provided they are not unlawful or against public policy, it shall be the duty of an executor or administrator of a deceased person's estate to use all reasonable endeavours to give effect to the burial instructions contained or expressed in a will, including a codicil or any testamentary instrument or disposition.
- (2) If, having regard to the value and liabilities of the deceased's estate, the executor or administrator believes that carrying out the deceased's burial instructions would be unreasonable, the executor or administrator may apply to the Supreme Court for directions pursuant to s 45 of the *Administration Act 1903 (WA)*.
- (3) For the purposes of s 13(1) the term 'will' shall be taken to include any such instrument accepted by the Supreme Court as an informal will under the *Wills Act 1970 (WA)*.

38. Ibid. The Queensland Bioethics Centre for the Queensland Catholic Dioceses submitted that people should be encouraged to make their wishes known regarding disposal of remains, but that these wishes should not be legally binding. However, this position was contra to the Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane who argued that directions regarding the disposal of a deceased's remains should be legally binding provided they are not unlawful and the deceased's estate permits.

39. Similar restrictions to the binding nature of burial wishes of a deceased were expressed in submissions to the Queensland Law Reform Commission's reference on final disposal of dead bodies in that state: see Queensland Law Reform Commission, Submission No. 50 (June 2006).



What is the appropriate forum for burial disputes?

Submissions from Aboriginal people rejected the notion of courts determining disputes over who has the right to bury an Aboriginal deceased. A strong preference for mediation between the parties was expressed. The Commission agrees with this approach; however, it recognises that there will always be cases that cannot be mediated and these will fall to a court to decide.

Both the Aboriginal Legal Service and the Law Society of Western Australia supported retaining a court process, but each argued strongly that the court process must be more accessible.⁴⁰ The Magistrates Court was thought to be the more appropriate forum for determination of burial disputes. The Commission agrees that provision should be made for the Magistrates Court to deal with burial disputes where no written burial instructions pursuant to Recommendation 78 have been left by the deceased.⁴¹

The Law Society submitted that any court process should be preceded by compulsory mediation between the parties facilitated by the Department of the Attorney General's Alternative Dispute Resolution Unit.⁴²

In light of the submissions of Aboriginal people, outlined above, and the need to find quick and accessible resolutions to burial disputes, the Commission agrees that mediation is a fitting point of departure.⁴³ The Commission does, however, question whether the Department's Alternative Dispute Resolution Unit is the appropriate body to conduct such mediation. The Commission believes that the Department of the Attorney General should undertake consultation with Aboriginal communities, the Aboriginal Legal Service and other relevant stakeholders to establish which organisation/s might be best equipped to offer culturally appropriate dispute resolution to parties in such times of grief. The need for burial disputes to be decided quickly must be taken into account in determining whether an organisation is equipped to offer such mediation. Therefore, the accessibility and regional availability of the service should be considered. The Commission is also concerned that the vast distances between parties in some cases may preclude useful mediation. It may, therefore, be necessary to consider an organisation's access to video-link facilities (available in most regional centres) and whether experience in handling mediation between distant parties is required.

40. Law Society of Western Australia, Submission No. 36 (16 May 2006) 10; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 11.

41. A change in forum from the Supreme Court to the Magistrates Court was also supported by the Queensland State Coroner in response to the same question posed by the Queensland Law Reform Commission. Interestingly, in relation to coronial matters the Coroner submitted that the Coroner's Court would be an appropriate place for resolution of a dispute: Queensland Law Reform Commission, Submission No. 50 (June 2006) Queensland State Coroner.

42. Law Society of Western Australia, Submission No. 36 (16 May 2006) 10. The Public Trustee of Queensland submitted that mediation resolves almost all disputes faced by that office, even where cultural issues are involved. They submitted that they were not aware of any application to a court in Queensland to resolve a burial dispute in the past 30 years in which the Public Trustee was involved. This point takes especial significance in light of the approximately 22,000 wills that the Trustee draws up for Queenslanders each year. Queensland Law Reform Commission, Submission No. 50 (June 2006) Public Trustee of Queensland.

43. The Commission notes that where a dispute over burial is brought to the attention of coronial authorities (where the body of the deceased is in coronial care), parties are referred to counselling and alternative dispute resolution to resolve the issue. Where a dispute cannot be resolved between the parties the body is released to the senior next of kin (determined on the evidence available to the coroner). Aggrieved parties may then turn to court processes. Evelyn Vicker SM, Deputy State Coroner, Submission No. 19 (27 April 2006) 9.

Recommendation 79

Forum for dealing with burial disputes

1. That provision be made for the Magistrates Court to deal with burial disputes where no burial instructions contained in a will (whether formal or informal) or other signed and attested written document have been left by the deceased.

Mediation between parties to burial disputes

2. That the hearing of burial disputes be preceded, wherever practicable, by mediation between the parties.
3. That the Department of the Attorney General undertake consultation with Aboriginal communities, the Aboriginal Legal Service and other relevant stakeholders to establish which organisation/s might be best equipped to offer culturally appropriate and immediate mediation to parties to a burial dispute in respect of an Aboriginal deceased.

Other alternatives

Because burial is in essence a final act, it is difficult to imagine compromise where parties present with genuinely held but competing cultural, spiritual or familial claims to disposal of a deceased's body. The Commission has, however, heard of instances where alternatives have been found to substitute for burial in one's own country and to assist the spirit of the deceased to find its way to its homelands. For example, in Broome the Commission was told that soil from a deceased's country was commonly used to mix with the soil from the gravesite where burial in a deceased's homelands was not possible.⁴⁴ This might be in circumstances where no designated cemetery exists in the deceased's homelands or where there is family dispute about the place of burial which would in all likelihood be resolved by a court in favour of the spouse. The Commission commends these efforts.

44. LRCWA, Project No. 94, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, 25.

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.



Protecting Indigenous Cultural and Intellectual Property in Western Australia

In its Discussion Paper the Commission acknowledged the significance of culture to Aboriginal communities and the often communal nature¹ of the ownership of Indigenous cultural and intellectual property. It also 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.² The Commission found that, although intellectual property laws remain the jurisdiction of the Commonwealth government, there are certain administrative measures that can be taken by the Western Australian government to better educate the public about protecting Indigenous cultural and intellectual property.

Indigenous arts and cultural heritage

The Commission 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.³ All submissions received on this matter endorsed the Commission's proposal. The Commission notes in particular the endorsement of the Department of Culture and Arts⁴ which has, through its *Cultural Commitments* strategy described in the Commission's Discussion Paper, already begun to develop local protocols to protect Aboriginal artists and to promote Aboriginal arts development.⁵ The Department of

1. The Commission acknowledges the submission of Dr Dawn Casey of the Western Australian Museum who argued strongly that in Western Australia there are 'tiers or hierarchies of ownership of a range of knowledge and iconography'. Dr Casey stressed that it is important to never assume 'that community is the base-line of ownership': Dr Dawn Casey, Submission No. 24 (1 May 2006) 2.
2. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 320–27.
3. *Ibid* 365, Proposal 60.
4. Department of Culture and the Arts (WA), Submission No. 32 (8 May 2006).
5. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 324–25, citing Department of Culture and the Arts (WA), *Cultural Commitments: Indigenous Policy Statement and Action Plan* (June 2004).

Corrective Services advised the Commission that it had also introduced guidelines to regulate the sale and use of art and craft produced by Aboriginal prisoners and to protect prisoners' intellectual property rights.⁶ The Aboriginal Legal Service noted that protection of the integrity of Aboriginal cultural heritage requires appropriate recognition by government and non-government agencies of cultural diversity.⁷ The Commission strongly agrees with this approach and has amended its recommendation to reflect this.

Recommendation 80

Protocols for protection of Indigenous cultural and intellectual property

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 Indigenous artists and the observance of these protocols by all Western Australian industries, companies and individuals should be actively encouraged by government. The protocols should recognise and appropriately reflect the cultural diversity of Aboriginal peoples in Western Australia and should be developed in close consultation with Aboriginal artists and communities.

Indigenous intellectual property in the regulation of resources

An area of considerable concern to Western Australian Aboriginal communities is the 'bioprospecting' of Indigenous knowledge. Bioprospecting refers to the exploration of biodiversity (that is, plant-related substances) for commercially valuable genetic and biochemical resources, with particular reference to the pharmaceutical, biotechnological and agricultural industries.⁸ In 2002 the Commonwealth, state and territory governments committed to a 'Nationally

Consistent Approach for Access to and Utilisation of Australia's Native Genetic and Biochemical Resources'. This agreement is intended to give effect to Australia's obligations to ecological sustainability under the international *Convention on Biodiversity* and encourage the type of bio-investment in Australia described in the example above.⁹ Article 8(j) of the *Convention on Biodiversity* encourages signatories to:

[R]espect, preserve and maintain traditional knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.¹⁰

In 1999 the Commonwealth government enacted the *Environment Protection and Biodiversity Act 1999* (Cth). This Act essentially implements the Convention in respect of Commonwealth landholdings and includes references to matters contained in Article 8(j). Western Australia has committed to introducing biodiversity conservation legislation that introduces a terrestrial bioprospecting licensing regime to ensure that:

- biological resources are used in an ecologically sustainable manner and biodiversity is protected;
- benefits arising from exploitation of Western Australia's biological resources are shared with the Western Australian community; and
- Aboriginal people's native title and intellectual property rights are recognised and protected.¹¹

In December 2004 the Department of Conservation and Land Management released a discussion paper seeking public submissions on the subject of a state biodiversity conservation strategy and is apparently in the process of analysing those submissions. The Minister for the Environment has indicated that the final biodiversity conservation strategy and accompanying Bill will be introduced into Parliament in 2006.¹² The

6. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 17.

7. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 12. The ALS referred to the concept of 'cultural security' as a model for protection of cultural heritage and recognition of cultural diversity. Cultural security is a concept currently used in delivery of health services and is discussed in this context in the Commission's Discussion Paper: LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 23–24.

8. Posey DA, 'Indigenous Peoples and Traditional Resource Rights: A basis for equitable relationships?' in *Ecopolitics IX Conference Papers and Resolutions: Perspectives on Indigenous Peoples Management of Environment Resources*, (Darwin: Northern Territory University, 1–3 September 1995) 43, 46. See also Davis M, *Biological Diversity and Indigenous Knowledge*, Parliament of Australia Research Paper No. 17 (29 June 1998).

9. Ibid 61–62.

10. *Convention on Biological Diversity 1992*, Article 8(j). Australia ratified the Convention in 1993.

11. Western Australian Government, *Biodiversity Conservation Act Consultation Paper* (December 2002), <http://www.naturebase.net/biocon_act_consult_text.html>.

12. Western Australia, *Parliamentary Debates*, Legislative Council, 7 April 2005, 493b (Mr Kim Chance representing the Minister for the Environment).

Unregulated bioprospecting could represent a lost opportunity for some Aboriginal communities to capitalise on their traditional knowledge and to develop the community's economic base.

Commission has been advised that the first draft of the Bill has not yet been completed.

Although the Commission acknowledges the complexity of this task and applauds the government's consultative processes in relation to development of Western Australia's biodiversity conservation strategy, it is concerned that traditional Aboriginal knowledge the subject of bioprospecting meanwhile remains unprotected. The Commission understands that this issue is important to Aboriginal people and that unregulated bioprospecting could represent a lost opportunity for some Aboriginal communities to capitalise on their traditional knowledge and to develop the community's economic base.¹³ The Commission reiterates the concerns outlined in its Discussion Paper regarding the need for the immediate development of protocols to guide government agencies and Western Australian industries in dealing with biological resources and to ensure that consultation (and, where relevant, benefit-sharing) is undertaken with Aboriginal communities as a matter of course. It is the Commission's opinion that these protocols should especially be followed in relation to relevant agreements entered into under the 'business undertakings' power in s 34A of the *Conservation and Land Management Act 1984* (WA).¹⁴

The Commission therefore confirms its recommendation that the Western Australian government develop protocols aimed at those issues arising from the 'bioprospecting' of Aboriginal medical and ecological knowledge in the exploration of biodiversity for commercially valuable genetic and biochemical resources.¹⁵ The Department of Indigenous Affairs has submitted that it would welcome the opportunity to be involved in the development of these protocols.¹⁶

Recommendation 81

Protocols to regulate 'bioprospecting' of Aboriginal knowledge

That, at the earliest opportunity, the Western Australian government develop protocols aimed at addressing issues that arise from the 'bioprospecting' of Aboriginal 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:

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

13. It should be noted that these rights are expressly protected under Article 29 of the *United Nations Declaration of the Rights of Indigenous Peoples*. The Declaration was adopted by the Human Rights Council in June 2006 and forwarded for resolution by the United Nations General Assembly.

14. In particular agreements 'to promote and encourage the use of flora for therapeutic, scientific or horticultural purposes for the good of people in this State or elsewhere, and to undertake any project or operation relating to the use of flora for such a purpose': *Conservation and Land Management Act 1984* (WA) s 33(1)(ca).

15. Ibid 327, Proposal 61.

16. Department of Indigenous Affairs (WA), Submission No. 29 (2 May 2006) 14.

Promotion of Indigenous Cultural and Intellectual Property Interests

Western Australia's Minister for Culture and the Arts, Sheila McHale MLA, has noted the importance of the diverse Indigenous cultural contribution to the state's arts, ecology and tourism sectors, and to the overall economy.¹⁷ The state government has also announced its commitment to the recognition and support of 'Indigenous ownership of their cultural material and intellectual property' and to facilitating 'a better understanding of Indigenous intellectual property and copyright – with respect to the law and Indigenous protocols'.¹⁸ Nonetheless, the theft and misuse of Indigenous intellectual and cultural property in Western Australia continues.

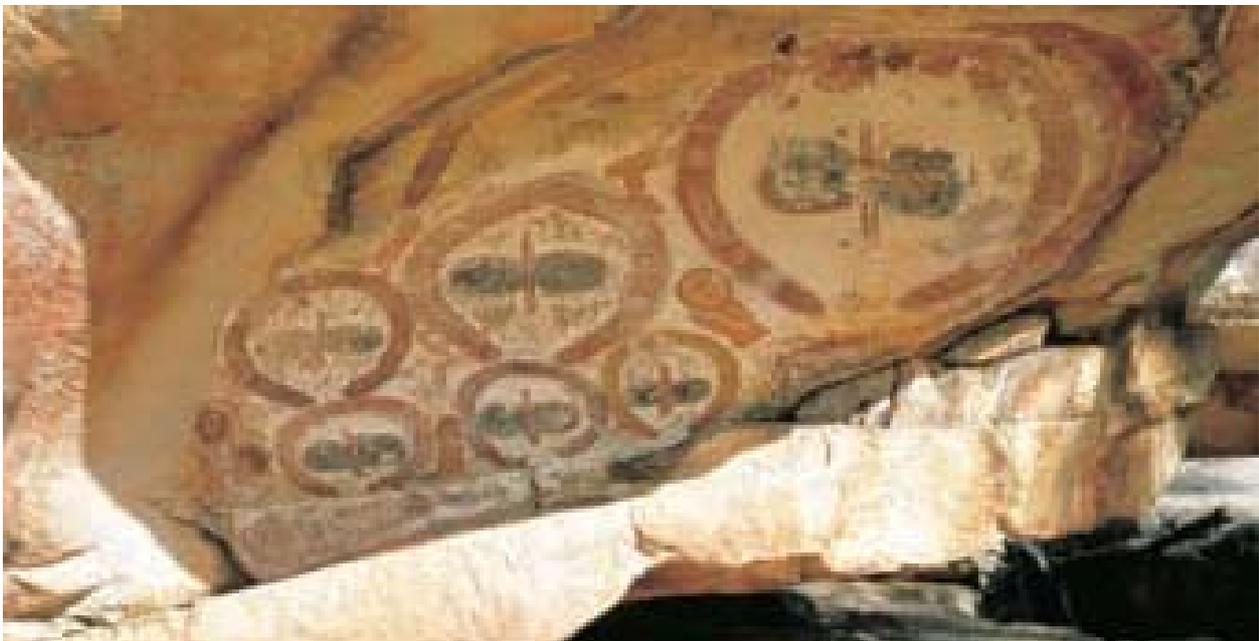
Because the protection of intellectual property is in many respects beyond the legislative competence of the Western Australian Parliament it might be thought that the state's efforts to improve recognition of

Indigenous cultural and intellectual property are limited to the establishment of administrative protocols and guidelines of the type proposed above. However, the state can also impact positively upon the lives of Indigenous artists and intellectual property holders by lending its vocal support to the review of intellectual property laws at the Commonwealth level to better protect Indigenous cultural and intellectual property. Submissions, including that of the Department of Culture and the Arts, supported the Commission's proposal to this effect.¹⁹

Recommendation 82

State support for enhanced protection of Indigenous cultural and intellectual property

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.



17. Department of Culture and the Arts for Western Australia, *Cultural Commitments: Indigenous Policy Statement and Action Plan* (June 2004) i.

18. *Ibid* 8.

19. Department of Culture and the Arts (WA), Submission No. 32 (8 May 2006); Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 12.

Chapter Seven

Aboriginal Customary Law and the Family

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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.¹

Traditional Aboriginal Marriage

In its Discussion Paper the Commission examined the concept of traditional Aboriginal marriage and marriage rules that exist under Aboriginal customary law. These rules differ across Aboriginal Australia, but generally an Aboriginal person's moiety or 'skin group' dictates who that 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.²

Promised marriages

Promised marriages are marriages negotiated by kin and take the form of a contract (or at least an exchange of promises) between the families of the betrothed or between the girl's family and the prospective husband. As outlined in the Commission's Discussion Paper, a girl would usually be betrothed as an infant or young child, sometimes to a youth but more often to an older man.³ Generally gifts are exchanged to establish and maintain the marriage contract until such time as the girl has reached puberty or the families believe that the girl is ready to follow through with confirming the marriage.⁴ Sometimes the prospective husband has responsibilities such as providing food to the girl's family during the betrothal period, which may be many years.⁵ In other cases the girl may go to live with the prospective husband's clan for a period of time before cohabiting with the husband.⁶

The practice of promised marriage 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 criminal⁷ and family law⁸ chapters. The Commission's consultations revealed that the practice of promised marriage has considerably declined in

1. For further elaboration and detailed references, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 331.
2. Ibid 332.
3. Ibid. See also ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [224]. It should be noted that a man was not considered ready for marriage until he had undergone 'a substantial portion of [his] initiation process' which would often mean that a prospective husband would be in his late twenties. See Tonkinson R, *The Jigalong Mob: Aboriginal victors of the desert crusade* (California: Cummings Publishing Co., 1974) 47.
4. Tonkinson R, *The Mardudjara Aborigines: Living the dream in Australia's desert* (New York: Holt, Rinehart and Winston, 1978) 80.
5. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986). See also Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life, past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 122.
6. Kimm J, *A Fatal Conjunction: Two laws, two cultures* (Sydney: Federation Press, 2004) 65.
7. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 217–19 'Aboriginal customary law as the reason or explanation for an offence: promised brides'.
8. Ibid 332–33 'Promised marriages'; 333–34 'Recognition of promised marriage contracts'; 359–60 'Customary law promised marriages and child sexual abuse'.

Western Australia and, although it is still practised in some remote communities in the Western Desert, promised marriage contracts are not always strictly enforced. 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 by the community if they adhere strictly to traditional marriage rules.⁹

Recognition of promised marriage contracts

In its Discussion Paper, the Commission concluded that Australia's international obligations (which require the free and full consent of parties to a marriage and deny legal effect to child betrothals)¹⁰ preclude recognition of non-consensual or underage customary law marriage. Promised marriage contracts which do not meet international law standards are therefore unenforceable. Regardless of the decline in this practice, the Commission accepts that promised marriages between young girls and older men are still a reality in some Aboriginal communities and remains concerned that the imbalance of power relations between the parties to a promised marriage can infringe the rights of a vulnerable girl child to be free from violence and non-consensual sexual relations.

In its Discussion Paper the Commission noted that the mere denial of recognition of a promised marriage contract does little to practically enhance the rights of young Aboriginal girls, who may be the subject of a customary law promise to marry. According to the Human Rights and Equal Opportunity Commission, Australia's obligations at international law require governments to take active measures to prevent non-consensual traditional marriage and non-consensual sexual relations within all marriages.¹¹ The Commission 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 and education about the criminality of acts of sexual relations with children under the age of 16 regardless of marriage status under Aboriginal customary law.¹²

Responses to this proposal were favourable and the Commission has confirmed its proposal in Recommendation 90 below.¹³ In light of a submission from the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Commission has enhanced its recommendation to address education about the legal rights of women and children in the context of family violence and child sexual abuse or neglect, and the legal and related services available to assist them in exercising their rights. This recommendation is discussed later in this chapter under the heading 'Family Violence and the Protection of Aboriginal Women and Children'.¹⁴

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 partners. 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, consensually and with regard for customary marriage rules.¹⁵

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. In its Discussion Paper the Commission 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

9. That is, that the match is not considered a 'wrong way' or 'wrong skin' match. Ibid 333–34.

10. See, for example, the *International Covenant on Civil and Political Rights* Art 23(3); the *International Covenant on Economic, Social and Cultural Rights* Art 10(1); and the *Convention on the Elimination of All Forms of Discrimination Against Women* Art 16(2); *Universal Declaration of Human Rights* Art 16(2).

11. Human Rights and Equal Opportunity Commission, Sex Discrimination Commissioner, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (May 2003) 21.

12. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 334, Proposal 63.

13. See below p 286.

14. Ibid.

15. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 334–35.

The Commission concluded that Australia's international obligations preclude recognition of non-consensual or underage customary law marriage.

- 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.¹⁶ The Commission has therefore pursued the course of 'functional recognition' recommended by the Australian Law Reform Commission in its 1986 report *The Recognition of Aboriginal Customary Laws*.¹⁷

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.¹⁸

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 was noted that in 2003 the Northern Territory Law Reform Committee suggested that relevant legislation and policy be reviewed to take account of traditional Aboriginal polygamous marriages in that jurisdiction.¹⁹ The Commission therefore invited submissions on the extent to which polygamy is practised in Western Australian Aboriginal communities.²⁰ While the Commission received only two submissions on this issue they were from significant sources. The Department of Indigenous Affairs indicated that they had anecdotal evidence of polygamy being practised in Western Australia²¹ and the Aboriginal Legal Service's executive committee (which is made up of 16 Indigenous officers elected from each of the eight former ATSIC regions in Western Australia) advised that polygamy still occurred in Western Australia.²² The Aboriginal Legal Service submitted that a polygamous marriage would be recognised as a traditional Aboriginal marriage as defined by the Commission in Proposal 64 of its Discussion Paper. The Commission agrees that a polygamous marriage could fall under this definition and that multiple traditional spouses would therefore be treated in the same manner as a single traditional spouse.²³

Defining traditional Aboriginal marriage for the purposes of legislative recognition in WA

In research for its Discussion Paper the Commission considered the potential legal and social problems that may arise from the failure to recognise traditional Aboriginal marriage for the purpose of Western Australian laws. It concluded that explicit recognition of Aboriginal traditional marriage would be desirable for

16. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [245].

17. *Ibid* [257].

18. That is, where a man has more than one wife under traditional law, usually of varying ages: *ibid* [258]–[260]. See also discussion in LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 336.

19. NTLRC, *Legal Recognition of Aboriginal Customary Law*, Background Paper No. 3 (2003) 18.

20. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 337, Invitation to Submit 13.

21. Department of Indigenous Affairs (DIA), Submission No. 29 (2 May 2006) 16.

22. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 11.

23. Including in the administration of intestate estates, a matter raised by the Department of Indigenous Affairs in its submission.

the purposes of all written laws in Western Australia.²⁴ The Commission therefore proposed that a definition of traditional Aboriginal marriage be inserted into s 5 of the *Interpretation Act 1984* (WA).²⁵ In order to ensure that promised marriages of young teenagers were precluded from recognition, the Commission's proposed definition (which is confirmed in Recommendation 83) restricted recognition of traditional Aboriginal marriage to Aboriginal persons over the age of 18 years.

The recognition of traditional Aboriginal marriage between consenting adults was supported by submissions received by the Commission. The Catholic Social Justice Council 'applauded' the Commission's proposals for endorsing freedom of choice in marriage and for reinforcing the criminality of sexual relations with children.²⁶ The Department of Indigenous Affairs (DIA) and the Law Society of Western Australia agreed with the wording of the definition and the restriction to persons over the age of 18 years.²⁷ There was some question, raised in submissions from the Department of the Attorney General and DIA, about how a traditional marriage would be evidenced.²⁸ DIA suggested that 'recognition by Elders of the relevant community, evidenced through written confirmation by the local Aboriginal organisation, should be given substantial weight in assessing whether a traditional Aboriginal marriage existed'.²⁹ The Commission has considered this matter and believes that the present formulation of the definition is sufficient to address evidential concerns. Aboriginal persons alleging a traditional Aboriginal marriage must prove that their relationship is a marriage 'according to the customs and traditions of the particular community of Aboriginals with which either person identifies'. The evidence of customs and traditions will vary on a case-by-case basis and will very likely include evidence from community Elders. The Commission also believes that evidence

from members of a community justice group (Recommendation 17) would satisfy the evidential burden.

Recommendation 83

Definition of 'traditional Aboriginal marriage'

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.

In order to properly recognise traditional Aboriginal marriage in Western Australia the Commission 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.³⁰ Because the Commonwealth has already legislated on matters relating to marriage, Western Australia has no jurisdiction to effect change in this area to accommodate traditional Aboriginal marriages in the Family Court of Western Australia. For this reason the above definition of traditional Aboriginal marriage has been held not to apply to the *Family Court Act 1997* (WA) for which the Commonwealth definition of 'marriage'—that is a lawful marriage under the *Marriage Act 1961* (Cth)—otherwise applies. This proposal met with no objection in submissions and has been confirmed by the Commission in the following recommendation.³¹

24. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 337.

25. *Ibid* 337, Proposal 64.

26. Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 4.

27. DIA, Submission No. 29 (2 May 2006) 13; Law Society of Western Australia, Submission No. 36 (16 May 2006) 10.

28. DIA, *ibid*; Department of the Attorney General, Submission No. 34 (11 May 2006) 12. It is noted that the Department of the Attorney General submitted that the 'provisions around de facto marriages are wide enough to take in "traditional Aboriginal marriages" with no modification'. However, this is not in fact the case. While the definition of 'de facto relationship' under the *Interpretation Act 1984* (WA) is quite broad and would (as noted in the Discussion Paper) appear to cover the typical features of a traditional Aboriginal marriage, to qualify as a de facto marriage in the Family Court of Western Australia the relationship must have been in existence for at least two years. That means that partners to a traditional Aboriginal marriage under two years duration would be treated differently to those in a de facto relationship. For this reason the Commission proposed that the *Family Court Act 1997* (WA) be amended to accommodate traditional Aboriginal marriages in the de facto provisions. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 338, Proposal 66, confirmed as Recommendation 85, below p 275.

29. DIA, *ibid* 14.

30. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 337, Proposal 65.

31. This proposal was endorsed by the Law Society of Western Australia, Submission No. 36 (16 May 2006) 10.

Recommendation 84

Traditional Aboriginal marriage and other domestic relationships

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).

Spousal Maintenance and Property Settlement

Although, as mentioned above, the Commonwealth has already legislated on matters of spousal maintenance and property settlement in relation to a lawful marriage under the *Marriage Act 1961* (Cth), 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 sought to address this anomaly 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.³² There were no objections to this proposal; the Commission therefore confirms the following recommendation.³³

Recommendation 85

Part 5A of the *Family Court Act 1997* (WA) applies to traditional Aboriginal marriages

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.

32. Ibid 338, Proposal 66.

33. This proposal was endorsed by the Law Society of Western Australia, Submission No. 36 (16 May 2006) 10.

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 shown in Chapter Four, kinship systems in Australian Aboriginal societies are constructed differently to those in Western (or European) societies.¹ 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.²

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 (the 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: placement within the child's extended family; placement within the child's Aboriginal community; and, failing that, placement with other Aboriginal people.³ In recent years the Principle has included, as a last resort, placement of an Aboriginal child with a non-Aboriginal person; however, that person must be capable of preserving the child's ongoing affiliation with his or her culture and family.

The 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.⁴ The legislative form of the Principle varies from jurisdiction to jurisdiction but each form shares the objective of maintaining an Aboriginal child's cultural connection with its Aboriginal community. Western Australia was the last state to legislatively implement the Principle in its child custody legislation in 2002–2004; although it has apparently been observed as policy in this state since 1984.⁵

'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*.⁶ It requires that in all actions concerning

1. See 'The role of kinship in Aboriginal society', Chapter Four, above p 66.

2. For further discussion, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 339–40.

3. NSWLRC, *The Aboriginal Child Placement Principle*, Research Report No. 7 (March 1997) 50.

4. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [366].

5. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 341.

6. The requirements of the *Convention on the Rights of the Child* and other conventions outlining Australia's international obligations in relation to children, in general, and Indigenous children, in particular, are discussed in more detail in *ibid* 340.

The family unit in Aboriginal societies is extended with many relatives, and often whole communities, sharing child-rearing responsibilities with the biological parents.

children (and in all child welfare and custody legislation) the child's best interests are a 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.⁷

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.⁸ 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.⁹

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.¹⁰ 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 proposed 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.¹¹

The Commission received two submissions on this proposal. The Law Society of Western Australia endorsed the proposal as

a step towards ensuring that relevant Aboriginal customary practice is reflected in a child's placement within the Aboriginal community and thus in that sense the child's cultural and psychological development may be maximised.¹²

7. For matters that have been considered relevant by Australian courts to the determination of the best interests of an Aboriginal child, see *ibid* 342.
8. For example, John Dewar has noted that the 'child-rearing practices regarded as normal and desirable in Indigenous society may be considered aberrant and harmful by dominant conceptions of children's best interests': Dewar J, 'Indigenous Children and Family Law' (1997) 19 *Adelaide Law Review* 217, 230.
9. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 342.
10. It should be noted that this is not the case for Torres Strait Islander families where adoption is recognised as a common customary practice. See Ban P, 'Developments in the Legal Recognition of Torres Strait Islander Customary Adoption' (1996) 78(3) *Aboriginal Law Bulletin* 14–15; Ban P, 'Would a Formal Treaty Help Torres Strait Islanders Achieve Legal Recognition of their Customary Adoption Practice?' (2006) 6(19) *Indigenous Law Bulletin* 17.
11. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 343, Proposal 67.
12. Law Society of Western Australia, Submission No. 36 (16 May 2006) 11.

In contrast, the submission of the Department for Community Development (DCD)—the agency responsible for adoption services in Western Australia—did not support the proposal. DCD advised the Commission that many of the Aboriginal pregnancies that they deal with and which lead to adoption are ‘hidden’; that is, that the birth mother wants to keep the birth secret and does not want the child placed in her home community.¹³ The submission continued:

There are usually very good reasons why this is so and these often relate to serious safety concerns for the child and the mother. Many of the adoptions within Indigenous communities are the subject of conflict and many have the potential for violence and in cases payback.¹⁴

Although no examples were given to support this statement, the Commission has nonetheless considered this submission carefully. The Commission notes that the *Adoption Act* contains an offence for breach of confidentiality or disclosure of information¹⁵ and that DCD acknowledges that ‘if the birth mother wishes [the birth] to be kept secret from her kin and family, this must be respected’.¹⁶ The Commission recognises that consultation with kin and extended family should not override the wishes of the birth mother to maintain secrecy regarding the birth. The Commission has therefore amended its recommendation to reflect this. Nonetheless, the legislative requirement that regard be had to local customary practice remains and must be satisfied prior to placement of the child.

DCD further argued that the Commission’s proposal would require wider consultation that would delay the adoption process and that this delay would not be in the child’s best interests.¹⁷ The Commission does not accept this argument. As pointed out in the Discussion Paper (and in the DCD submission itself) the Director General has a duty to consult with an Aboriginal child welfare agency regarding the adoption of a particular Aboriginal child.¹⁸ The Commission believes that in order for the Director General, the chosen Aboriginal agency

and the Department to be satisfied that the child is placed ‘in accordance with local customary practice’ as demanded by Schedule 2A of the Act, consultation with extended family must take place where possible. The Commission sees no barrier to making this clear by the following amendment to the *Adoption Act*.

Recommendation 86

Consultation with child’s extended family in consideration of adoption

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. Subject to the birth mother’s signed direction to the contrary, this must include consultations 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.

Foster Care and Alternative Child Welfare Placement

The recently proclaimed¹⁹ *Children and Community Services Act 2004* (WA) (CCS Act) was enacted partly in response to the findings of the Gordon Inquiry which reported serious abuse and neglect of children in some Aboriginal communities and highlighted the need for updated child protection legislation.²⁰ The CCS Act provides for a number of different types of child protection orders²¹ and for placement arrangements at the behest of parents where parents cannot adequately provide for their children.²² The ‘best

13. Department for Community Development, Submission No. 51 (27 June 2006) 3.

14. *Ibid.*

15. *Adoption Act 1994* (WA) s 127.

16. Department for Community Development, Submission No. 51 (27 June 2006) 3.

17. *Ibid.*

18. *Adoption Act 1994* (WA) s 16A.

19. Although ss 3 and 102 of the Act were proclaimed in January 2005, the Act only became fully operational on 11 March 2006.

20. Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 December 2003, 14244 (Ms SM McHale).

21. Ranging from supervision and time limited orders to enduring parental responsibility orders and orders giving the CEO of the Department parental responsibility for the child until the age of 18: see *Children and Community Services Act 2004* (WA) Division 3. Protection orders are applied to ensure the welfare of a child where the child is found to have suffered or is likely to suffer abuse, harm or neglect or where the child’s parents have been incapacitated or have died or have abandoned the child: see *Children and Community Services Act 2004* (WA) s 28.

22. In such circumstances the parents retain legal parental responsibility for the child. Such arrangements will only, however, be made in cases where protection issues exist.

interests of the child' is the determining factor in all arrangements made under the Act²³ and the child has a right to participate in decisions regarding his or her own placement or care.²⁴

Division 3 of the CCS Act embraces the Aboriginal Child Placement Principle in relation to arrangements made for the care and protection of Indigenous children.²⁵ As observed in the Commission's Discussion Paper, the need for such clear statement of principle is not academic. Statistics from June 2004 show that 13.8 per cent of Aboriginal children subject to foster care placements were placed with non-Aboriginal carers.²⁶ This number is significant; however, as with adoption, the principle of the best interests of the child is the paramount consideration governing the placement of a child under care and protection legislation. In this respect it is important to note that placement within a child's extended family or community may not, for reasons of dysfunction, be in the best interests of a particular child.²⁷

During consultations with Aboriginal people, particularly in the Pilbara region, government practices of child placement were severely criticised.²⁸ In particular, there were complaints that DCD 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.²⁹ Further, it was said that laws relating to care arrangements 'involve too much paperwork and insufficient support [including financial support] for Aboriginal people'.³⁰



In its Discussion Paper, the Commission observed 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 DCD. In those cases, carers will not necessarily be aware of support services available to them. The Commission therefore proposed that DCD 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.³¹

The Commission received wide support for this proposal.³² During its return consultations, Aboriginal communities in the Western Desert reiterated the financial burden placed on grandparents in particular in relation to the care of grandchildren.³³ This phenomenon is not confined to the Aboriginal community.³⁴ Studies have shown that most developed

23. *Children and Community Services Act 2004* (WA) s 8.

24. *Children and Community Services Act 2004* (WA) s 10.

25. Provision is also made for consultation with an Aboriginal child welfare agency and the involvement at all stages of an Aboriginal case officer in cases involving placement of an Aboriginal child: see *Children and Community Services Act 2004* (WA) s 81.

26. Western Australia, *Parliamentary Debates*, Legislative Assembly, 27 August 2004, 5807 (Ms Ljiljana Ravlich).

27. NSWLRC, *The Aboriginal Child Placement Principle*, Research Report No. 7 (March 1997) 169–70. The inability of some communities to care for children was also noted by Aboriginal respondents to the Commission's consultations in the Pilbara. In the Pilbara it was noted that '[r]eference was made to the conditions of drunkenness, drugs and offending in town from which people in the community would wish to remove children or grandchildren. However, the European system did not support such removal': LRCWA, Project No. 94, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 18.

28. See, LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 345.

29. *Ibid.*

30. *Ibid.*

31. *Ibid.*, Proposal 68.

32. Reynold Indich (Jumdingi), Submission No. 4 (16 February 2006); Dr Dawn Casey, Western Australian Museum, Submission No. 24 (1 May 2006); Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006); Department of the Attorney General, Submission No. 34 (11 May 2006); Law Society of Western Australia, Submission No. 36 (16 May 2006); Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006). It should be noted that the proposal was not opposed by the Department for Community Development.

33. In particular in the Commission's return visits: LRCWA, Discussion Paper community consultations – Kalgoorlie, 28 February 2006; Warburton, 27 February 2006.

34. Recent studies have been undertaken across Australia: see Fitzpatrick M, *Australian Issues in Ageing: Grandparents raising grandchildren* (Melbourne: Council of the Ageing, July 2003).

countries are experiencing a rapid rise in the number of grandparents raising grandchildren.³⁵ A 2004 report on this subject commissioned by the federal Council of the Ageing makes a host of recommendations, including educating grandparents about support services and financial benefits available to them under state and Commonwealth laws. The Commission considers that such information should be made available to all extended family carers, including classificatory kin,³⁶ and should be delivered in a culturally appropriate manner.

Recommendation 87

Culturally appropriate information about services and benefits for extended family carers

That, 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 (including classificatory kin) where necessary for the proper care and protection of the child, the Department for Community Development should make available to Aboriginal communities culturally appropriate information about support services and government benefits or subsidies (whether Commonwealth or state) to assist extended family carers.

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 Aboriginal employment strategy; the provision of interpreters; the sponsoring of local level Aboriginal community networks; the development of an Aboriginal family law database; the facilitation of research into Aboriginal customary law and family issues; and the development—in partnership with Aboriginal

communities—of narrative therapy and Aboriginal 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 separating couples to participate in primary dispute resolution. In these circumstances, the lack of culturally appropriate dispute resolution services for Aboriginal clients represents a significant problem.

In its Discussion Paper the Commission observed that the government could do more to meet the needs of Aboriginal clients in the Family Court of Western Australia. The Commission indicated its support for the recommendation of the Family Law Pathways Advisory Group and proposed that the Western Australian government seek federal funding in whole or in part for its immediate implementation in the Family Court of Western Australia.³⁷ The Commission received supportive submissions in respect of this proposal including, importantly, from the Family Court.³⁸ The Family Court's submission appended a report of an internal committee on the need for, and advantages of, having Aboriginal family liaison officers appointed to the court. The report cited the Commission's proposal with approval and concluded by recommending the appointment of two full-time Aboriginal family liaison officers (one male and one female) based in Perth but resourced to travel to remote areas when necessary.³⁹ The recommendation of the committee has been internally funded.⁴⁰

The Commission believes that this is a significant and positive step towards enhancing culturally appropriate service delivery in the Family Court of Western Australia and applauds the court's initiative. However, the appointment of Aboriginal family liaison officers will not necessarily meet all the needs identified by the Family Law Pathways Advisory Group or the Commission's Discussion Paper.⁴¹ In particular there are concerns surrounding the lack of Aboriginal language interpreters and Aboriginal counsellors available in the Family Court. The Commission has made specific and independent recommendations about the provision of Aboriginal language interpreting services in Western Australian

35. Ibid 12.

36. The submission of Dr Dawn Casey suggested that 'extended family carers' did not adequately cover classificatory kin. The Commission does not believe that this necessarily changes the recommendation but seeks to make it clear that classificatory kin are included in the Aboriginal cultural concept of extended family: Dr Dawn Casey, Western Australian Museum, Submission No. 24 (1 May 2006).

37. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 346, Proposal 69.

38. Family Court of Western Australia, Submission No. 57 (26 July 2006). See also Department of the Attorney General, Submission No. 34 (11 May 2006); Law Society of Western Australia, Submission No. 36 (16 May 2006).

39. Family Court of Western Australia, *Report of Aboriginal and Torres Strait Islander Family Consultants Committee* (August 2006).

40. Ibid 9.

41. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 346.

courts in Chapter Nine of this Report and it hopes these recommendations will be implemented by the Family Court of Western Australia. In the meantime the Commission confirms its recommendation for full and immediate implementation of Recommendation 23 of the Family Law Pathways Advisory Group's Report *Out of the Maze – Pathways to the Future for Families Experiencing Separation*.⁴²

Recommendation 88

Enhance culturally appropriate service delivery in the Family Court of Western Australia

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.

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.⁴³

The Family Law Council has recently examined this issue.⁴⁴ 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 family tax benefits or child support and to be able to give consent for medical treatment or to enrol a child in school.⁴⁵ The Council recommended that governments (state and federal) investigate the creation of 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.⁴⁶

The Commission strongly supported this recommendation; however, in the interests of maintaining equality in relation to ex-nuptial and nuptial children in Western Australia, the Commission was 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. Since the publication of the Commission's Discussion Paper, Western Australia has enacted the *Family Legislation Amendment Act 2006* (WA).⁴⁷ That Act implements a number of the Family Law Council's recommendations and ensures that the unique Aboriginal kinship obligations and child-rearing practices (such as the involvement of a child's extended family) are recognised by a court when making decisions about parenting of an Aboriginal child.⁴⁸ While the Commission is convinced that this will have a beneficial impact on Aboriginal people accessing Family Court services in Western Australia, the creation of a registration procedure for persons with primary parental responsibility remains outstanding.

It appears that this is not simply an issue in Aboriginal families, but also an issue for the wider community. As

42. Family Law Pathways Advisory Group (Cth), *Out of the Maze – Pathways to the Future for Families Experiencing Separation* (August 2001) 91. The full recommendation and accompanying text is reproduced in Buti T & Young L, 'Family Law and Customary Law', *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 143, 165.

43. The Commission notes that there may be other laws in Western Australia that do not take into account the customary practice of extended family placement. For example, the definition of a close relative pursuant to s 35 of the *Criminal Injuries Compensation Act 2003* (WA) may not be wide enough to include people who have cared for a child but are not the biological parents, grandparents or step-parents of the child. The Commission encourages the Western Australian government to consider whether the customary practice of extended family placements should be recognised in other laws and policies.

44. Family Law Council, *Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices: Response to Recommendation 22 of the Pathways Report* (December 2004) 18.

45. This point was also made in the report commissioned by the Council of the Ageing where the high incidence of informal care or guardianship arrangements was noted: see Fitzpatrick M, *Australian Issues in Ageing: Grandparents raising grandchildren* (Melbourne: Council of the Ageing, July 2003) 14.

46. *Ibid*, Recommendation 2.

47. Assented to 4 July 2006.

48. *Family Court Act 1997* (WA) ss 66C(2)(h), 71A, 202(L)(3).



observed earlier, a rapid rise in the number of grandparents raising grandchildren has been reported in Australia, often as a consequence of substance abuse by the child's parents.⁴⁹ Grandparents have complained that while they have been given the grandchildren they have no legal guardianship and their position as carers is precarious.⁵⁰ Without formal parenting orders they are unable to make everyday decisions concerning the children,⁵¹ yet many are reluctant to undertake formal proceedings in the Family Court for fear of alienating their own children who may also be in need.⁵² The cost of such proceedings is also a significant factor.

While the Commission will not—in the interests of maintaining equality between nuptial and ex-nuptial children—propose unilateral amendment of the *Family Court Act 1997* (WA) without similar amendment to the Commonwealth *Family Law Act 1975*, it does believe that this is an issue that should be addressed at the earliest opportunity. The Commission therefore recommends that the Western Australian government

actively promote, at the national level, the cause of functional recognition of non-biological parents who have parental responsibility or primary care for a child, whether of Aboriginal or non-Aboriginal descent. This recommendation aligns with option 2, which precedes Recommendation 2 of the Family Law Council's report on recognition of traditional Aboriginal and Torres Strait Islander child-rearing practices.⁵³

Recommendation 89

Functional recognition of non-biological primary carers

That the Western Australian government actively promote, at the national level, the cause of functional recognition of non-biological parents who have parental responsibility or primary care for a child, whether of Aboriginal or non-Aboriginal descent.

49. Fitzpatrick M, *Australian Issues in Ageing: Grandparents raising grandchildren* (Melbourne: Council of the Ageing, July 2003) 12.

50. *Ibid* 22.

51. Such as, for example, giving consent to medical procedures, obtaining the child's identification documents, claiming Medicare or health benefits on behalf of the child, and enrolling the child in school.

52. *Ibid* 21–37.

53. Family Law Council, *Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices: Response to Recommendation 22 of the Pathways Report* (December 2004) 19.

Family Violence and the Protection of Aboriginal Women and Children

Family Violence and Sexual Abuse in Western Australian Aboriginal Communities

During consultations for this reference, the Commission received a great number of submissions suggesting that family violence and child abuse (including sexual abuse) was of considerable concern to Aboriginal communities, and particularly to Aboriginal women.¹ Over the past two decades the escalating problem of interpersonal or family violence in Aboriginal communities has become increasingly apparent. In 2001 the Western Australian government established a committee, led by Magistrate Sue Gordon, to inquire into the response by government agencies into complaints of family violence and child abuse in Aboriginal communities. In 2002 the Gordon Inquiry published its findings and 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’.²

More recently, a great deal of media attention has been paid to the high occurrence of sexually transmitted diseases in young Aboriginal children and of family violence in Western Australian Aboriginal communities.³ Media claims that customary law permits Aboriginal men to excuse or defend violent domestic behaviour and child abuse have also reappeared.⁴ 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, condoned or excused by customary law.⁵ This is also the Commission’s position

on the issue. This is not only made clear in the Commission’s Discussion Paper, but is also firmly restated and enlarged upon in Chapter One of this report in the context of challenging the misconceptions upon which these claims are founded.⁶

Causes of family violence and sexual abuse in Aboriginal communities

When discussing the issue of violence in Aboriginal communities it is important to note that Aboriginal people generally prefer the term ‘family violence’ to domestic violence because it encompasses a much broader range of conduct. The Aboriginal and Torres Strait Islander Social Justice Commissioner has described family violence in the following manner:

Family violence involves any use of force, be it physical or non-physical which is aimed at controlling another family or community member and which undermines that person’s well-being. It can be directed towards an individual, family, community or particular group. Family violence is not limited to physical forms of abuse, and also included cultural and spiritual abuse. There are interconnecting and trans-generational experiences of violence within Indigenous families and communities.⁷

The causes of Aboriginal family violence were examined in the Commission’s Discussion Paper⁸ and are also addressed in Chapter One of this Report.⁹ Briefly, these include the breakdown of community kinship systems and customary law; alcohol and drug abuse; the effects

1. This accords with the observations of the Department for Community Development’s Office for Women’s Policy which has observed that ‘[a]lmost one in four Indigenous women perceive family violence as a problem in their community’: *Indigenous Women’s Report Card 2005* (August 2005) 57.
2. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into responses by government agencies to complaints of family violence and child abuse in Aboriginal communities* (July 2002) xxiii (Gordon Inquiry).
3. See, for example, Barrass T & Emery R, ‘STD Cases on Rise in Black Children’, *The Australian*, 23 June 2006, 4 where it was revealed that of 708 notifications of sexually transmitted diseases in children under 14 in Western Australia, 554 concerned Aboriginal children.
4. For more detail on these claims, see discussion in Chapter One, above p 18–30.
5. See, LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 357–60.
6. See above pp 18–30.
7. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001–2006* (June 2006) 6.
8. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) Part VII.
9. See above pp 23–24.

of institutionalisation and previous government removal policies; and entrenched poverty.¹⁰ The problem of overcrowding in many Aboriginal households (discussed at length in Part II of the Discussion Paper)¹¹ has also been recognised as a significant contributing factor to problems of family or interpersonal violence.¹² 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. In its Discussion Paper, the Commission expressed the view that government strategies to prevent Aboriginal family violence can be significantly enhanced by addressing the issue of overcrowding in Aboriginal households.¹³ The Commission reiterates that view here.

Under-reporting of family violence and sexual abuse

In its submission the Office of the Director of Public Prosecutions identified under-reporting of 'intra-Aboriginal offending' as a significant 'cultural' issue.¹⁴ The under-reporting of sexual abuse and family violence occurs in all cultures and communities;¹⁵ however, it is acknowledged that the level of under-reporting by Aboriginal victims may be more pronounced.¹⁶ Some of the reasons for the under-reporting of family violence and sexual abuse by Aboriginal victims are discussed below.

Distrust and fear of the police

Historically, Aboriginal people have been subject to oppressive treatment by the police. Sharon Payne has asserted that the role of the police in carrying out assimilation policies and removing Aboriginal children has had particular impact on Aboriginal women.¹⁷ Research reports have consistently identified distrust, intimidation and fear of police as a significant reason for the reluctance of Aboriginal people to report sexual and violent offences.¹⁸ Some Aboriginal women and children may also be reluctant to report abuse to the police because they fear that they will be arrested for unpaid fines or outstanding bench warrants.¹⁹ The Gordon Inquiry found that distrust of Western Australia police officers was a 'key barrier' to Aboriginal communities making complaints about family violence and child abuse.²⁰ Further, Aboriginal women may be deterred from reporting abuse because of past inaction or ineffective responses by police and other government agencies.²¹

Distrust and fear of the criminal justice system and other government agencies

As the Commission noted in its Discussion Paper, the history of the relationship between Aboriginal people and the criminal justice system is one that has been 'marred by discrimination, over-regulation and unfair treatment'.²² Aboriginal women have often felt

10. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 350–51.

11. *Ibid* 38–42.

12. As detailed in the supporting evidence to Western Australia's Gordon Inquiry: Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into responses by government agencies to complaints of family violence and child abuse in Aboriginal communities* (July 2002). See also Trees K, 'Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – A Case Study' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 213.

13. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 351.

14. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 7.

15. Keel M, *Family Violence and Sexual Assault in Indigenous Communities: Walking the talk*, Australian Institute of Family Studies, Briefing Paper No. 4, (2004) 7.

16. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 351. The Commission notes that *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* estimated that in Queensland 88 per cent of rape cases were unreported in Aboriginal communities: see Queensland Government, Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*, (March 2000) [3.4].

17. Payne S, 'Aboriginal Women and the Law' in Easta P & McKillop S (eds), *Women and the Law*, Australian Institute of Criminology Proceedings No. 16 (Canberra, 1993) 69.

18. Atkinson J, 'Violence Against Aboriginal Women: Reconstitution of Community Law – The Way Forward' (2001) 5(11) *Indigenous Law Bulletin* 19. See Keel M, *Family Violence and Sexual Assault in Indigenous Communities: Walking the talk*, Australian Institute of Family Studies, Briefing Paper No. 4 (2004) 7; Victorian Law Reform Commission (VLRC), *Sexual Offences*, Interim Report (2003) [3.24]; Queensland Government, Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*, (March 2000) [4.7.3]; Keating N, *Review of Services to Victims of Crime and Crown Witnesses Provided by the Officer of the Director of Public Prosecutions for Western Australia* (April 2001) 113; Sex Discrimination Commissioner of the Human Rights and Equal Opportunity Commission, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal customary law in the Northern Territory* (May 2003) [3.2].

19. Thomas C, 'Sexual Assault: Issues for Aboriginal Women' in Easta P (ed), *Without Consent: Confronting adult sexual violence*, Australian Institute of Criminology Conference Proceedings No. 20 (1993) 141; Keating, *ibid* 113.

20. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities* (2002) 207. The Western Australia Police have acknowledged that many Aboriginal people distrust the police: see Western Australia Police, Submission No. 46 (7 June 2006) 3.

21. Queensland Government, Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (March 2000) [3.5].

22. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 94.

intimidated by the proceedings in court.²³ It has been observed that when Aboriginal women have negative experiences with criminal justice agencies they may discourage other Aboriginal women from making complaints.²⁴ Fear and mistrust of the criminal justice system and its agencies has been consistently mentioned as one of the reasons Aboriginal women do not report sexual abuse and violence.²⁵

Aboriginal women may also be disinclined to report sexual abuse and violence because they fear that their men will be imprisoned.²⁶ It is generally understood that Aboriginal women want violence and abuse to stop but do not necessarily want their men to be incarcerated.²⁷ 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.²⁸

Lack of police presence

In many remote communities it is probably irrelevant whether the victim is afraid to report the matter to the police because there are simply no police available or no transport to attend the nearest police station.²⁹ The federal Minister for Indigenous Affairs, Mal Brough, recently highlighted that across central Australia only eight out of 40 Aboriginal communities have some form of police presence.³⁰ The lack of police presence in many Western Australian Aboriginal communities was

acknowledged when the state government announced its plan to establish a permanent police presence in nine remote locations in response to the Gordon Inquiry.³¹

Language and communication barriers

The Commission has emphasised throughout this Report and its Discussion Paper that many Aboriginal people face language and communication barriers when dealing with the criminal justice system.³² A Western Australian report prepared by the Office of the Director of Public Prosecutions has acknowledged the need for interpreters for Aboriginal victims.³³ If an Aboriginal woman is already traumatised because of sexual abuse or violence it is understandable that she may not seek assistance from government agencies if she is unable to adequately speak or understand English.

Lack of knowledge about legal rights and legal services available

It has also been suggested that some Aboriginal women may be unaware of their legal rights and legal services that are available to them.³⁴ In particular, Aboriginal women living in remote areas may not be in a position to access these services or exercise their rights under Australian law.³⁵ This factor has been recently recognised by the Council of Australian Governments which agreed that additional resources should be provided for community legal education to ensure that Aboriginal women are informed of their legal rights,

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23. Queensland Government, Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (March 2000) [4.7.5].
 24. *Ibid* [3.4].
 25. Atkinson J, 'Violence Against Aboriginal Women: Reconstitution of Community Law – The Way Forward' (2001) 5(11) *Indigenous Law Bulletin* 19; Thomas C, 'Sexual Assault: Issues for Aboriginal women' in Easta P (ed), *Without Consent: Confronting adult sexual violence*, Australian Institute of Criminology Conference Proceedings No. 20 (1993) 142; Keel M, *Family Violence and Sexual Assault in Indigenous Communities: Walking the talk*, Australian Institute of Family Studies, Briefing Paper No. 4 (2004) 7; VLRC, *Sexual Offences*, Interim Report (2003) [3.24]; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission*, 2001–2006 (June 2006) 108.
 26. See Keel, *ibid* 7; Domestic Violence Prevention Unit, *Best Practice Model: For the provision of programs for victims of domestic violence in Western Australia* (June 2000) 12. In some cases there may also be a fear of deaths in custody: see Stanley J, Tomison A & Pocock J, 'Child Abuse and Neglect in Indigenous Australian Communities' (2003) 19 *National Child Protection Clearinghouse, Child Abuse Prevention Issues* 5.
 27. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 352–53.
 28. *Ibid* 352.
 29. Stanley J, Tomison A & Pocock J, 'Child Abuse and Neglect in Indigenous Australian Communities' (2003) 19 *National Child Protection Clearinghouse, Child Abuse Prevention Issues* 5; Dodson M, 'Violence, Dysfunction, Aboriginality', (National Press Club, 11 June 2003) 8.
 30. Smith S, 'Paper reveals sexual abuse, violence in NT Indigenous communities', *Lateline*, Transcript of Interview, 15 May 2006, 2.
 31. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 251. It has similarly been acknowledged by the Commonwealth government by agreeing to provide additional funding for police resources in remote areas. COAG meeting, 14 July 2006 see <<http://www.coag.gov.au/meetings/140706/index.htm#indigenous>>. But this funding is conditional on state and territory governments legislating to ensure that customary law cannot be used to excuse or lessen the seriousness of family violence and sexual abuse.
 32. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 396–416.
 33. Keating N, *Review of Services to Victims of Crime and Crown Witnesses Provided by the Officer of the Director of Public Prosecutions for Western Australia* (April 2001) 112–13.
 34. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission*, 2001–2006 (June 2006) 108.
 35. Domestic Violence Prevention Unit, *Best Practice Model: For the provision of programs for victims of domestic violence in Western Australia* (June 2000) 12.

and encouraged to report family violence and sexual abuse.³⁶

In its Discussion Paper the Commission considered the need for education about the rights and responsibilities of Aboriginal people in the context of promised marriages. Although there is scant evidence pointing to the contemporary practice of promised marriages in Western Australia,³⁷ in its Discussion Paper the Commission took a strong stance against recognition of such practice.³⁸ It is the Commission's opinion that Australia's international obligations preclude the recognition of non-consensual or underage customary law marriage and that any such recognition would result in the denial of fundamental human rights to Aboriginal women and children.³⁹ However, the Commission also noted that the mere denial of recognition by Australian legal authorities would do little to practically enhance the rights of young Aboriginal girls who were the subject of a customary law promise to marry.⁴⁰

Proposal 63 of the Commission's Discussion Paper therefore recommended that educative initiatives planned in response to the Gordon Inquiry⁴¹ include 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.⁴² Submissions showed support for this proposal; however, the Aboriginal and Torres Strait Islander Social Justice Commissioner indicated that the proposal could be usefully widened to highlight the

critical need for community education programmes to be developed with the full participation of Indigenous peoples to inform Indigenous communities about conflicts between customary law, human rights and the general application of the criminal law.⁴³

The Commission agrees with this approach and, as well as providing a separate recommendation for educative initiatives in relation to the interaction between Aboriginal customary law and Western Australian criminal law, it has broadened its recommendation in relation to family violence and child sexual relations accordingly.

Recommendation 90

Education about legal rights of women and children and criminality of child sexual abuse

1. That the Western Australian government include in the educative initiatives planned in response to the Gordon Inquiry:
 - (a) information about the requirements under Australian law and international law of freedom of choice in marriage partners and the requirement of informed consent to marriage;
 - (b) information about the criminality of acts of sexual relations with children under the age of 16 regardless of marriage status under Aboriginal customary law; and
 - (c) information about the legal rights of women and children in the context of family violence and child sexual abuse or neglect and about the legal and related services available to assist women and children to exercise these rights.
2. That these initiatives be developed with the full and effective participation of Aboriginal people.

36. COAG meeting, 14 July 2006 see <<http://www.coag.gov.au/meetings/140706/index.htm#indigenous>>. But once again the Commission notes that this funding is conditional on state and territory governments legislating to ensure that customary law cannot be used to excuse or lessen the seriousness of family violence and sexual abuse.

37. See discussion in LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 332–34.

38. *Ibid.*

39. In arriving at its decision not to support recognition of non-consensual or underage marriage as a cultural right of Aboriginal peoples, the Commission has been informed by the test propounded by the United Nations Human Rights Committee in *Lovelace v Canada* (HRC 24/77), as discussed in *ibid* 67–76.

40. *Ibid* 334.

41. Current education and awareness raising strategies proposed in response to the Gordon Inquiry include promoting positive images of women and familial relationships; promoting a belief that Aboriginal people have the ability to change abuse and family violence; reinforcing that the safety of women and children is a priority; promoting the importance of valuing children; and promoting culturally sensitive child protection and protective behaviour and information. See Government of Western Australia, *Putting People First: The Western Australian State Government's Action Plan for Addressing Family Violence and Child Abuse in Aboriginal Communities* (November 2002) 20.

42. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 334, Proposal 63.

43. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 8. The Catholic Social Justice Council also expressed strong support for all of the Commission's 'proposals requiring Aboriginal people to be informed of their legal rights through education': Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2.

Lack of appropriate support services for Aboriginal victims

The lack of culturally appropriate support services for Aboriginal victims of family violence and sexual abuse has been raised often as a reason for the failure to report crimes of this nature.⁴⁴ According to the Department of Indigenous Affairs this was one of the main issues that arose during the project *Breaking the Silence on Sexual Abuse: My body belongs to me*.⁴⁵ The Gordon Inquiry also noted that one reason for under-reporting of child abuse in Aboriginal communities was that in remote and rural areas there is minimal contact with child health and welfare workers.⁴⁶ The Commission has been advised that there is an urgent need for more Aboriginal victim support workers.⁴⁷

The ability of Aboriginal women to exercise their legal rights is also inhibited by barriers to accessing Aboriginal legal services.⁴⁸ Such barriers exist because these services are generally under-funded and because there is a tendency for legal services to represent the alleged perpetrator of the abuse.⁴⁹ The Aboriginal and Torres Strait Islander Social Justice Commissioner has stressed that additional resources must be provided to Aboriginal Legal Services and other Indigenous legal service

providers in order to ensure that Aboriginal women have appropriate access to legal services.⁵⁰

Cultural factors

It has been argued that there may be barriers under customary law that prevent or discourage the victim or their family from informing authorities about violence or abuse.⁵¹ In this context it has been observed that some Aboriginal women may be hesitant in reporting an incident of sexual abuse to a male person.⁵² Similarly, Lloyd and Rogers have stated that Aboriginal women may come from a cultural background where 'sexual matters are not referred to in mixed company let alone in the presence of court personnel'.⁵³ On the other hand, anthropological accounts do not suggest that there were any constraints in traditional Aboriginal societies about discussing matters of a sexual nature.⁵⁴ Berndt and Berndt have observed that the 'whole subject of sex is treated frankly, as a normal and natural factor in human life'.⁵⁵

Customary law has also been linked to under-reporting by commentators contending that Aboriginal victims do not speak out about abuse because of the fear of payback or retaliation from the perpetrator or the

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44. Thomas C, 'Sexual Assault: Issues for Aboriginal Women' in Easteal P (ed), *Without Consent: Confronting Adult Sexual Violence*, Australian Institute of Criminology Conference Proceedings No. 20 (1993) 142–43; VLRC, *Sexual Offences*, Interim Report (2003) [3.24]; Queensland Government, Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*, (March 2000) [4.7.3.2]; Keating N, *Review of Services to Victims of Crime and Crown Witnesses Provided by the Officer of the Director of Public Prosecutions for Western Australia* (April 2001) 113.
 45. Department of Indigenous Affairs, *Breaking the Silence on Sexual Abuse: My body belongs to me* (August 2002) 6.
 46. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities* (2002) 40.
 47. Submission No. 55 (30 June 2006) (submission provided in confidence). It has also been observed that the lack of Aboriginal staff working with relevant criminal justice agencies is a barrier for Aboriginal women in accessing the criminal justice system: see Law S, Queensland Office of the Director of Public Prosecutions, *Indigenous Women within the Criminal Justice System Report* (1996) as cited in Keating N, *Review of Services to Victims of Crime and Crown Witnesses Provided by the Officer of the Director of Public Prosecutions for Western Australia* (April 2001) 115.
 48. Queensland Government, Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (March 2000) [4.7.3.2]; Sex Discrimination Commissioner of the Human Rights and Equal Opportunity Commission, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (May 2003) [3.3].
 49. Legal services will generally represent the alleged offender because they come into contact with the accused first. They may then be prevented from representing the victim because there is a conflict of interest.
 50. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001–2006* (June 2006) 13. See Chapter Five 'Aboriginal People and the Criminal Justice System – Programs and Services', above pp 82–96.
 51. Lloyd J, 'Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Welcomes State and Territory Legislation that will Protect Aboriginal Children from Abuse' (2004) 6(1) *Indigenous Law Bulletin* 28; Stanley J, Tomison A & Pocock J, 'Child Abuse and Neglect in Indigenous Australian Communities' (2003) 19 *National Child Protection Clearinghouse, Child Abuse Prevention Issues* 5.
 52. Thomas C, 'Sexual Assault: Issues for Aboriginal Women' in Easteal P (ed) *Without Consent: Confronting Adult Sexual Violence*, Australian Institute of Criminology Conference Proceedings No. 20 (1993) 141; Sex Discrimination Commissioner of the Human Rights and Equal Opportunity Commission, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (May 2003) [3.3].
 53. Lloyd J & Rogers N, 'Crossing the Last Frontier: Problems facing Aboriginal women victims of rape in central Australia', in Easteal P (ed) *Without Consent: Confronting adult sexual violence*, Australian Institute of Criminology Conference Proceedings No. 20 (1993) 153. It has also been noted that discussing sexual matters with the opposite sex may be considered shameful in some Aboriginal communities: see Tonkinson M, *Domestic Violence Among Aborigines*, Domestic Violence Task Force Discussion Paper (1985) 299 as cited in Stanley J, Tomison A & Pocock J, 'Child Abuse and Neglect in Indigenous Australian Communities' (2003) 19 *National Child Protection Clearinghouse, Child Abuse Prevention Issues* 14. During her recent interview Rogers referred to a case where a young Aboriginal girl was sexually abused. The victim's grandmother apparently told the police that under Aboriginal law she would not have been able to talk about the incident but that the perpetrator would have been punished: see Jones T, 'Crown Prosecutor Speaks Out About Abuse in Central Australia' *Lateline*, Transcript of Interview, 15 May 2006.
 54. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal Traditional Life Past and Present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 164.
 55. *Ibid* 189–90.

perpetrator's family.⁵⁶ In its submission to the Commission's Discussion Paper, the Office of the Director of Public Prosecutions recited comments made by Northern Territory prosecutor Nanette Rogers during a television interview that:

[V]iolence is entrenched in a lot of aspects of Aboriginal society ... Aboriginal society is very punitive, so that if a report is made or a statement made implicating an offender then that potential witness is subject to harassment, intimidation and sometimes physical assault if the offender gets into trouble because of that report or police statement.⁵⁷

The Commission is concerned about the potential for comments of this nature to perpetuate myths about Aboriginal customary law and culture condoning family violence and child abuse.⁵⁸ Certainly there are cultural dynamics within close-knit Aboriginal communities that may discourage victims from speaking out; but it must be acknowledged that *any* victim of sexual abuse or violence, whether Aboriginal or not, may be fearful of the perpetrator or their family.⁵⁹ Fear, shame and distrust are part of every culture and many women and children who are victims of sexual or physical abuse by family members suffer from these emotions, coupled with the very real concern that the criminal justice system cannot meet their needs or protect them.⁶⁰

Stewart O'Connell (an experienced Northern Territory Aboriginal Legal Service lawyer) has observed that the relevance of culture in the context of Aboriginal family violence is not so much about customary law as the life circumstances of many Aboriginal victims.⁶¹ The appalling state of Aboriginal housing and the extent of

overcrowding have already been mentioned as a significant contributing factor to Aboriginal family violence; but because many Aboriginal people live in close proximity to one another, any fear of retribution (coupled with loyalty to one's family or community) may well be compounded.⁶² Fear of reporting violence may also be exacerbated by the lack of appropriate support services for many Aboriginal women:⁶³ if there is nowhere to seek refuge it is obviously more difficult to overcome fear and report abuse.

The Commission acknowledges that cultural issues may play a part in the under-reporting of sexual and violent offences against Aboriginal women and children. But clearly there are numerous other and arguably more compelling reasons why Aboriginal women and children do not speak out about the abuse to government justice and welfare agencies. In its Discussion Paper the Commission underlined the need for Aboriginal women to be able to rely upon the protection of Australian law in relation to family violence.⁶⁴ The Commission has made practical recommendations to overcome problems in the criminal justice system that contribute to under-reporting, including cultural awareness training for police, government officers and support staff;⁶⁵ improvements to special witness facilities in regional courts;⁶⁶ greater access to Aboriginal language interpreters;⁶⁷ single-gender juries;⁶⁸ and Aboriginal liaison officers in courts to assist Aboriginal witnesses.⁶⁹ These are discussed in Chapters Five and Nine. This chapter makes recommendations—which build on those made by the Gordon Inquiry—to address family violence and child abuse issues at the front line in a culturally appropriate way.

56. Stanley J, Tomison A & Pocock J, 'Child Abuse and Neglect in Indigenous Australian Communities' (2003) 19 *National Child Protection Clearinghouse, Child Abuse Prevention Issues* 5. See Keel M, *Family Violence and Sexual Assault in Indigenous Communities: Walking the talk*, Australian Institute of Family Studies, Briefing Paper No. 4 (2004) 7; Keating N, *Review of Services to Victims of Crime and Crown Witnesses Provided by the Officer of the Director of Public Prosecutions for Western Australia* (April 2001) 113.

57. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 6 citing *Lateline*, Transcript of Interview with Nanette Rogers (15 May 2006).

58. The Commission has addressed these matters in detail in Chapter One of this report: see above pp 18–30.

59. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001–2006* (June 2006) 108.

60. As Gillen J has stated in the context of domestic violence in the United Kingdom: 'Well-founded concerns for their personal safety, fear of the economic costs of separation, financial dependence on the violent partner, a determination to remain in the relationship for the sake of the children and a desire to see their violent partner treated rather than punished may appear to be all perfectly rational reasons why the victim should [fail to report domestic violence]': Justice Gillen, 'Domestic Violence – In What Direction?' (2005) *International Family Law* 194, 195.

61. O'Connell S, 'The Deculturalisation of Indigenous Australia' (unpublished paper, 2006) 8.

62. *Ibid.* See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001–2006* (June 2006) 108.

63. O'Connell, *ibid.*

64. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 361.

65. See Recommendations 2, 11, 12, 56 & 128.

66. See Recommendation 110.

67. See Recommendation 117 & 120.

68. See Recommendation 41.

69. See Recommendation 127.

The relevance of culture in the context of Aboriginal family violence is not so much about customary law as the life circumstances of many Aboriginal victims.

Addressing Family Violence and Sexual Abuse in Aboriginal Communities

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

As discussed above, certain factors impact upon an Aboriginal woman's decision not to report family violence. Such factors include fear of community reprisal or shame, the relationship and kinship obligations between the victim and the perpetrator of family violence, the complex (and sometimes alien) nature of Western legal processes and historical distrust and fear of police and government authorities all. These factors indicate the need for more culturally appropriate processes for responding to, intervening in and preventing family violence in Aboriginal communities.⁷⁰

In its Discussion Paper the Commission described successful models to prevent family violence, which are already operating in Aboriginal communities in Western Australia. These models rejected a criminogenic approach, instead emphasising family and

community healing.⁷¹ The use of traditional healing methods was supported in submissions from the Aboriginal and Torres Strait Islander Social Justice Commissioner and from Aboriginal people consulted for the reference.⁷² Respondents to the Commission's community consultations also argued that non-violent strategies such as shaming, family conferencing and dispute resolution led by Elders or respected community members may be more effective in addressing violent behaviour and rehabilitating offenders than measures under the criminal law.⁷³ These comments indicate that there is a place for Aboriginal customary law and cultural responses to work in tandem with treatment, prevention and protection strategies provided for under Australian law.⁷⁴

The Commission's research found that the success of family violence intervention and treatment programs will often depend on whether there is significant local Aboriginal involvement in the delivery of the program. The Commission therefore proposed that the Western Australian government actively encourage and resource the development of community-based and community-owned Aboriginal family violence intervention and treatment programs that are designed to respond to the particular conditions and cultural dynamics of the host community.⁷⁵

70. As the *Western Australian Family and Domestic Violence State Strategic Plan 2004–2008* makes clear: 'Family and domestic violence affects women and children of all ages, cultures, backgrounds and life experiences. Thus, it is important that the diversity of individual women's needs and experiences and perceptions are taken into account in developing initiatives in the area of family and domestic violence': 6.

71. See, for example, the Derby Family Violence Prevention Project model, which is highly responsive to the particular needs and cultural sensibilities of its constituent community, discussed in Blagg H, 'A New Way of Doing Justice Business? Community Governance Mechanisms and Sustainable Governance in Western Australia' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 317, 325. This approach was also endorsed by the submission of the Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 15.

72. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 15. The point was also made very clear during the Commission's return consultation visit in Broome: LRCWA, Discussion Paper community consultation – Broome, 7 March 2006; and initial consultations: see LRCWA, *Thematic Summary of Consultations – Manguri*, 4 November 2002; Midland, 16 December 2002; Carnarvon, 30–31 July 2003; and Pilbara, 6–11 April 2003.

73. Dr Brian Steels, Mawarnkarra Health Service Roebourne, consultation (28 April 2006); LRCWA, Project No. 94, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003; Broome, 17–19 August 2003; LRCWA, Discussion Paper community consultation – Broome, 7 March 2006. It should be noted that the submission of the Office of the Director of Public Prosecutions (DPP) argued that 'there is no evidence that the application of customary law within communities actually prevents or avoids abuse' and suggested that 'often community traditions perpetrate abuse'. The DPP supported these allegations with reference to a single newspaper report dealing with Queensland and did not provide any evidence to support these claims from Western Australia (despite, as a prosecuting authority, presumably being in a position to provide such evidence). The Commission's Discussion Paper describes several successful community-owned and community-based programs addressing family violence in Aboriginal communities. It does not in any way suggest that Aboriginal cultural and customary law prevention and treatment strategies are the whole answer to this very complex problem; however, as the DPP's own submission acknowledges, appropriate responses to family violence and abuse in Aboriginal communities must include 'the rejection of criminalisation as the main strategy to deal with family violence'. See Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 5 & 8.

74. It is the Commission's opinion that community justice groups may be an appropriate vehicle for non-violent customary law strategies to address family violence. The requirement that these groups have equal representation of men and women and of family or skin groups will assist in establishing the cultural authority necessary for the success of customary law sanctions, particularly in regard to violence perpetrated against women. Importantly, the existence of these groups will not preclude a victim from seeking redress under Australian law. See Recommendation 17, above pp 112–13.

75. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 353, Proposal 70.

Submissions received both from government agencies and Aboriginal people supported this proposal.⁷⁶ In its consultations with Aboriginal communities, respondents stressed that where there was a choice, Aboriginal family violence programs, shelters and refuges were more patronised than non-Aboriginal initiatives.⁷⁷ However, as the Commission's Discussion Paper made clear in relation to community governance, different communities have different capacities to address community needs.⁷⁸ There are some communities that—for a variety of reasons, many historical—are dysfunctional or have significant internal conflict.⁷⁹ In order to enable the establishment of successful community initiatives that respond appropriately to family violence, some communities will therefore require more than encouragement and government resourcing. They will require ongoing support and training to build capacity among individuals to anchor and facilitate delivery of programs and services within the community.⁸⁰

The Commission's initial consultations suggested that, although well-resourced, government-run programs were often ad hoc and faced difficulty establishing credibility and trust within the community.⁸¹ In contrast, Aboriginal people complained that Aboriginal-owned, community-based programs often have to be abandoned after initial establishment grants run out.⁸² For some programs significant outcomes may not be able to be demonstrated in the time-period ascribed to the funding; in others, funding may be reallocated

to generic government-run programs. It appears that this may be the case even where a program or facility has been successful in addressing family violence and its underlying causes. The constant need to secure funding by application for grants or tenders is an obvious drain on the limited resources of community programs and is an issue that must be addressed by government.⁸³

Recommendation 91

Community-based and community-owned Aboriginal family violence intervention and treatment programs

1. That the Western Australian government actively encourage, support and resource the development of community-based and community-owned Aboriginal family violence intervention and treatment programs that are designed to respond to the particular conditions and cultural dynamics of the host community.
2. That, where community-based and community-owned Aboriginal family violence intervention and treatment programs can demonstrate appropriate outcomes within the host community in a reasonable timeframe, the Western Australian government commit to ongoing resourcing of such programs in preference to generic government-run programs.

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76. Department of Indigenous Affairs, Submission No. 29 (2 May 2006); Department of Corrective Services (WA), Submission No. 31 (4 May 2006); Department of the Attorney General, Submission No. 34 (11 May 2006); Department for Community Development, Submission No. 51 (27 June 2006); Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006); Dr Brian Steels, Mawarnkarra Health Service Aboriginal Corporation, consultation (28 April 2006); LRCWA, Discussion Paper community consultations – Kalgoorlie, 28 February 2006; Broome, 7 March 2006; Fitzroy Crossing, 9 March 2006; Geraldton, 3 April 2006.
77. For example, Aboriginal staff at Thungula Goothada Family Support Legal Centre in Kalgoorlie, which offers culturally appropriate family violence support services, stated that the other programs in the area were not well-patronised by Aboriginal people. This puts significant pressure on Aboriginal-run programs where need is great. LRCWA, Discussion Paper community consultation – Kalgoorlie, 28 February 2006. Similar comments were made in relation to alcohol programs and sobering-up shelters in the mid-west during the Commission's initial consultations.
78. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 425–30. This point was also highlighted in the context of family violence in Department of Corrective Services, Submission No. 31 (4 May 2006) 18.
79. As stated in the Commission's Discussion Paper: 'Most contemporary Aboriginal communities can be said to have emerged through the process of colonisation, dislocation and the amalgamation of tribes or peoples that may have no historical connection. Many Aboriginal people no longer live on their ancestral lands and social organisation within some communities may have only tenuous ties to traditional Aboriginal society. While these factors do not necessarily dilute the force of Aboriginal culture and laws, they may contribute to social conflict or dysfunction and the factionalisation of governing institutions within communities.' LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 427.
80. In its submission the Department of Indigenous Affairs referred to the need for a 'whole-of-life approach' that will 'allow programs to take into account the intergenerational reconciliation that also needs to occur in many communities'. The Commission believes that such an approach requires strong community involvement and that capacity building of individuals is crucial to its success and to carrying the message across generations. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 15.
81. LRCWA, Project No. 94, *Thematic Summaries of Consultations – Meekatharra*, 28 August 2003.
82. A group of women Elders with whom the Commission met in Fitzroy Crossing on 9 March 2006 were bewildered that effective community programs that were in place were under-resourced or unresourced while the Department for Community Development resourced new department-run generic programs. A similar complaint was made by Dr Brian Steels who said: 'When programs are done *with* the community the funding is not ongoing; when they are done *to* the community (ie: by government departments) they don't work': Dr Brian Steels, Mawarnkarra Health Service Aboriginal Corporation, consultation (28 April 2006).
83. Again this complaint was heard from Aboriginal women consulted in Fitzroy Crossing: LRCWA, Discussion Paper community consultation – Fitzroy Crossing, 9 March 2006. It was also heard at other Aboriginal community meetings: LRCWA, Discussion Paper community consultations – Broome, 10 March 2006; Bunbury, 17 March 2006; Kalgoorlie, 28 February 2006; Geraldton, 3 April 2006. See also Dr Brian Steels, Mawarnkarra Health Service Aboriginal Corporation, consultation (28 April 2006).

Meeting the needs of male perpetrators of family violence

While it is important that community responses to family violence do not deprive Aboriginal women of their ability to seek protection or initiate criminal proceedings under Australian law, 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). Although the creation of protection strategies for women and children is a strong feature of the government's Gordon Inquiry response, the Commission's community consultations revealed concern among Aboriginal people that there are not enough family violence initiatives or support mechanisms for men.⁸⁴ This issue has also been noted in connection with family violence in the broader community. The Australian Council of the Ageing has stated that:

Violent males are usually ignored by services aimed at protecting and supporting children. In fact there is a lack of support generally for men. If an appropriate response is provided at times of crisis, then the ongoing trauma, cost, the time that the person or family need to resolve their issues and move on are all minimised.⁸⁵

The Commission has noted the concerns of Aboriginal people and other commentators and urges that the needs of male perpetrators (and male victims) of Aboriginal family violence be given due consideration by government. In particular, there is a need for resourcing of men's groups, sobering-up shelters, men-only centres, treatment programs (including for prisoners and those on release from prison for violent offences) and culturally appropriate counselling and education. As highlighted in the Commission's Discussion Paper, the establishment of 24- and 72-hour police restraining orders, which deny men (and sometimes women) access to homes, underline the need for short-term crisis accommodation for men in Aboriginal communities and regional town centres.⁸⁶ There is also a need for men-only 'cooling-off' or drop-in centres to allow men immediate access to counselling or activities

on neutral territory to resolve tension that may otherwise lead to family violence.

This is not to say that there are not excellent services already available in some areas. The Men's Outreach Service in Broome, for example, appears to do a wonderful job with very limited funding to provide men in Broome with counselling and a place of temporary refuge. It also provides counselling and other services to men incarcerated in Broome Regional Prison and conducts outreach programs for outlying communities. The problem appears to be a lack of funding to facilitate centres that are open 24 hours a day, especially on weekend nights and pension days when high levels of alcohol are consumed and these services are most needed.⁸⁷ In order to properly address Aboriginal family violence and child abuse, better provision and resourcing of men's services in regional town centres and remote communities is required. Ideally, services should be provided in a single location to enable men to access counselling, activities, education, accommodation and treatment in a single visit without referral.

Recommendation 92

Better provision and resourcing of men's counselling, education, treatment and accommodation services

1. That the Western Australian government actively pursue the provision of new services, and better resourcing of existing services, for the counselling, education, treatment and short-term crisis accommodation of Aboriginal men in regional town centres and remote communities.
2. That, where possible, such services be provided in the same location to enable men to access counselling, activities, education, accommodation and treatment in a single visit without referral and be resourced to operate on a 24-hour basis.

84. These comments featured both in the initial stages of the reference and on the Commission's return visits to discuss its Discussion Paper and proposals: LRCWA, *Thematic Summary of Consultations – Manguri*, 4 November 2002; *Pilbara*, 6–11 April 2003; *Geraldton*, 26–27 May 2003; *Carnarvon*, 30–31 July 2003; *Bunbury*, 28–29 October 2003; *Albany*, 18 November 2003; LRCWA, Discussion Paper community consultations – Carnarvon, 16 February 2004; Broome, 7 March 2006; Bunbury, 17 March 2006; Geraldton, 3 April 2006.

85. Fitzpatrick M, *Australian Issues in Ageing: Grandparents raising grandchildren* (Melbourne: Council of the Ageing, July 2003) 20.

86. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 357.

87. For example, the Men's Outreach Service in Broome is currently only funded to open from 8.00 am till 4.00 pm six days per week. The Commission also heard that in Geraldton the sobering-up centre is only resourced to open four days per week and not on a Saturday when most drinking and associated violence occurs.

Ongoing monitoring and evaluation of initiatives

As mentioned earlier, the Gordon Inquiry was established 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. In response the government moved quickly to introduce an action plan, *Putting People First*, to implement the recommendations of the Gordon Inquiry.⁸⁸

In its Discussion Paper the Commission indicated its support for the recommendations of the Gordon Inquiry and applauded the state government's willingness to quickly respond to the issue of family violence and child abuse in Aboriginal communities. However, the Commission also noted 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'.⁸⁹ 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 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. The Commission therefore 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.⁹⁰

Submissions from agencies taking a lead role in the implementation of Gordon Inquiry initiatives were extremely supportive of this proposal.⁹¹ In his submission the Aboriginal and Torres Strait Islander Social Justice Commissioner urged a whole-of-government approach to ensure consistency and coordination in addressing family violence.⁹² The Western Australian government has, of course, embraced this approach as a key recommendation of the Gordon Inquiry. However, it has recently identified problems with inter-agency coordination and has sought to address this issue by improving funding arrangements for more coordinated agency responses to family and domestic violence.⁹³ The Office of the Auditor General for Western Australia (OAG) has also highlighted inadequacies with the central reporting and monitoring of the Gordon Inquiry response *Putting People First* action plan.⁹⁴ The OAG's recommendation for the design of an evaluation framework and implementation of authoritative monitoring practices of all Gordon Inquiry initiatives is currently being pursued by the Department of Indigenous Affairs.⁹⁵ As yet, there is no indication whether the evaluation framework will adequately emphasise community consultation, outcomes and regional differences as proposed by the Commission. The Commission therefore confirms its recommendation.

Recommendation 93

Ongoing progress reporting and consultative evaluation of family violence initiatives

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.

88. Government of Western Australia, *Putting People First: The Western Australian state government's action plan for addressing family violence and child abuse in Aboriginal communities* (November 2002). See discussion in LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 351–52.
89. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, Law Reform Commission of Western Australia, Project No. 94, Background Paper No. 7 (December 2004) 235, 312.
90. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 355, Proposal 71.
91. Department of Indigenous Affairs, Submission No. 29 (2 May 2006); Department of Corrective Services (WA), Submission No. 31 (4 May 2006); Department for Community Development, Submission No. 51 (27 June 2006).
92. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 15. The whole-of-government approach is also recommended by the Commission in Recommendation 1 of this Report.
93. Family and Domestic violence Unit, Department for Community Development, *Review of the Regional Family and Domestic Violence Committee Model: Final Report* (May 2006).
94. Office of the Auditor General for Western Australia, *Progress with Implementing the Response to the Gordon Inquiry*, Report No. 11 (November 2005).
95. David Waters, Senior Policy Officer, Gordon Implementation Unit, Department of Indigenous Affairs, telephone consultation (27 July 2006).

Working with Children Check

Since publication of the Commission's Discussion Paper the Working with Children Check (WWCC) regime has come into place in Western Australia.⁹⁶ The WWCC is essentially a criminal history record check which anyone involved in child-related work in either a volunteer (more than five days per year) or paid capacity is required to undertake. Child-related work is work where the usual duties involve, or are likely to involve, contact with a child.⁹⁷ It includes contact with children in the context of clubs or associations (including of a sporting, cultural or recreational nature) and overnight camps. Parents are exempt from the WWCC regime in most cases of volunteer work if their own child is also participating in the activity.⁹⁸ Informal domestic or private arrangements such as babysitting or accommodation with a relative are not subject to the WWCC regime. The term 'relative' includes those people who are considered the child's parent, grandparent, aunt, uncle, sister or brother under Aboriginal customary law;⁹⁹ however, parental exemptions only apply to biological or step-parents (and their de facto partners) or legal guardians.

It is the responsibility of anyone working with children to apply for a WWCC. The application process includes filling out an application form and providing identification.¹⁰⁰ Applications are assessed by the Working with Children Screening Unit and successful applicants are issued with a photo identification card that is valid for three years. Only certain criminal records will result in a negative assessment – these include sex offences, homicides (including infanticide), grievous bodily harm, pornography-related offences, kidnapping and killing an unborn child. Additionally, if a person has been charged with a relevant offence but never convicted he or she may also receive a negative assessment.¹⁰¹

During its return consultation visits in Fitzroy Crossing the Commission was alerted to issues with the stringency of WWCC requirements in that community. In its written submission, the Kimberley Aboriginal Law



and Culture Centre (KALACC) stated that WWCC requirements impact negatively on Aboriginal people undertaking positive programs for Aboriginal youth, such as community festivals and large organised bush trips where, among other activities, Elders teach youth cultural ways.¹⁰² The emphasis on community-owned processes and initiatives in the Commission's recommendations in this report may mean that more Aboriginal people will require a WWCC. For this reason the Commission has examined the WWCC requirements and assessed the regime's impact on Aboriginal people.

Identification requirements

The Commission's examination found that the identification requirements to gain a WWCC may be extremely difficult to meet for some Aboriginal people. Currently the WWCC requires that you provide a birth certificate, a passport or a drivers licence, as well as one to three of the following forms of identification: rates notice, Centrelink card, Medicare card, lease agreement, credit card, bank statement with residential address, or a utilities account. As discussed in relation to the laws of succession in Chapter Six above,¹⁰³ some Aboriginal people born before 1970 do not have birth certificates because their births were not always officially registered prior to that date. Further, relatively few Aboriginal people, particularly in remote areas, would

96. *Working with Children (Criminal Record Checking) Act 2004 (WA)*. The Act came into operation on 1 January 2006. The WWCC is being phased in over a period of five years.

97. For greater detail see *Working with Children (Criminal Record Checking) Act 2004 (WA)* s 6.

98. This exemption does not, however, apply to overnight camps.

99. *Working with Children (Criminal Record Checking) Act 2004 (WA)* s 4.

100. Applications are lodged through Australia Post Offices and must be lodged in person so that a photograph of the applicant may be taken. Identification will also be verified at lodgement.

101. The circumstances of the person's need for a WWCC is taken into account in the assessment and there is a right of appeal to the State Administrative Tribunal.

102. KALACC has also independently raised this issue with the Working With Children Screening Unit.

103. See discussion under 'Proof of relationship to an Aboriginal deceased', Chapter Six, above pp 237–38.

have passports, many may not have a drivers licence and many may not have a permanent address. Therefore quite a few Aboriginal people could be denied a WWCC on the basis of insufficient identification.

The Commission appreciates the need of the Working with Children Screening Unit to maintain the integrity of identification verification procedures to protect children from potential harm. The Commission understands that the unit will, on a case-by-case basis consider alternative methods of identification where an applicant is unable to furnish the 100 points of identification required for the check.¹⁰⁴ The Commission considers that this is an appropriate response to the circumstances of those Aboriginal people who are affected by the stringent identification requirements of the WWCC.

Cost and administrative burden of WWCC application

Currently the cost of applying for a WWCC is \$10 for volunteers and \$50 for paid workers.¹⁰⁵ In most cases the cost will be covered by employers, but in others the cost must be borne by the applicant. In its submission KALACC explained that for large cultural festivals—where up to 20 people may be employed in a paid capacity that would involve working with children—the cost of meeting the WWCC requirements may be very high, both in the costs of application and the costs of administration to the body. KALACC submitted that the government should assist community groups and not-for-profit organisations to meet the costs of complying with the legislative requirements.¹⁰⁶

The Commission agrees with KALACC's submission. Child abuse has been identified by the Gordon Inquiry as a particular problem in Aboriginal communities and, in the Commission's opinion, if the government is serious about addressing these issues it should provide required checks at no cost to staff and volunteers of not-for-profit Aboriginal community organisations and Aboriginal community initiatives such as community justice groups,¹⁰⁷ school truancy patrols, drop-in centres and safe-houses.

Recommendation 94

Working with children check

That working with children checks be provided at no cost to staff and volunteers of not-for-profit Aboriginal community organisations and Aboriginal community initiatives such as community justice groups, school truancy patrols, drop-in centres and safe-houses.

Education and training

The Working with Children Screening Unit has advised the Commission that they have worked closely with the Department for Community Development's Indigenous Policy Directorate and have formed an Indigenous reference group to assist in advising the unit on how the WWCC will affect Aboriginal people.¹⁰⁸ Education strategies and resources aimed at informing Aboriginal people about the need for a WWCC are currently in production.¹⁰⁹ The Commission suggests that consideration be given to producing materials aimed at informing Aboriginal people about the administrative requirements of the WWCC and training relevant people in Aboriginal community organisations to assist people to fill out WWCC applications. It is the Commission's view that some of the administrative barriers to the WWCC for Aboriginal people could be removed by such attention to education and training.

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.¹¹⁰

104. Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, letter to KALACC, 21 March 2006 [sic May] (provided to the Commission by KALACC).

105. The Commission was advised by the Working with Children Screening Unit that where a person is only paid a nominal fee or works on the basis of reimbursement of expenses the \$10 fee will be applied.

106. Kimberley Aboriginal Law and Culture Centre, Submission No. 17 (17 April 2006).

107. See Recommendation 17, above pp 112–13.

108. Anne Oades, Working with Children Screening Unit, email (17 May 2006).

109. These include a video, posters and brochures. Ibid.

110. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 355.

Elder abuse encompasses not only physical or sexual violence toward an older person, but also psychological abuse, neglect and financial exploitation.

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 Part 2, 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 invited submissions on its effectiveness in relation to controlling family violence in Aboriginal communities so that it could consider recommendations for reform in this area.¹¹¹

The Commission received very few submissions on this matter. The Department of Indigenous Affairs noted that without police recording the statistics of ethnicity of family violence victims and offenders it was very difficult to obtain an accurate picture of whether women are being adequately protected by the police order regime.¹¹² The Commission's consultations in Broome revealed some concern about lack of information and education among Aboriginal people of the new regime; while in Kalgoorlie it was said that

more women were being removed under the regime than men.

It was noted in the Commission's Discussion Paper that the police order provisions are subject to statutory review after two years of operation.¹¹³ This review will likely be conducted sometime in early 2007.¹¹⁴ Given the poor response to the Commission's invitation for submissions it does not feel justified in recommending changes to the police order regime. However, the Commission is concerned that Aboriginal voices may not be adequately heard in the ministerial review¹¹⁵ of the regime and therefore strongly recommends that extensive consultation with Aboriginal communities be undertaken as part of the review.

Recommendation 95

Consultation with Aboriginal communities in review of the police order regime

That, in undertaking the statutory review of Part 2, Division 3A of the *Restraining Orders Act 1997* (WA), the responsible Minister ensure that Aboriginal people are sufficiently consulted to gauge the effectiveness of the police order regime in addressing family violence in Aboriginal communities.

Elder abuse

Another form of family violence is elder abuse. As explained in the Commission's Discussion Paper, elder abuse encompasses not only physical or sexual violence toward an older person, but also psychological abuse, neglect and financial exploitation.¹¹⁶ Elder abuse may

111. Ibid 357, Invitation to Submit 14.

112. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 16. This position was supported in discussions with the Aboriginal Legal Service who appeared to be divided about the effectiveness of the regime. The Commission has recommended that police record ethnicity of victims and offenders to overcome this problem: see Recommendation 57, above p 213.

113. *Restraining Orders Act 1997* (WA) s 30I.

114. The amendments were effective from 1 December 2004. Therefore the two-year period will expire on 1 December 2006. The submission of the Western Australia Police suggests that the Department of the Attorney General is currently contracting a consultant to undertake the evaluation of the amendments: see Office of Commissioner of Police, Submission No. 46 (7 June 2006) 15.

115. The Minister responsible for administering the *Restraining Orders Act 1997* (WA) is the Attorney General.

116. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 349.

be committed by an adult or child toward a parent or elderly relative where there is an 'implication of trust, which results in harm to an older person'.¹¹⁷

A recent report by the Office of the Public Advocate into the impact of elder abuse in Aboriginal communities in Western Australia has brought the prevalence of elder abuse into greater focus in this state.¹¹⁸ Although other types of abuse were reported,¹¹⁹ the Public Advocate found that financial abuse was the most common form of elder abuse reported in consultations with Aboriginal community health workers and community members.¹²⁰ It was noted that 'some elderly people, particularly from traditional communities, appear to have no "western" concept of money' and can amass large sums in their accounts from pension payments making them vulnerable when they go to town.¹²¹ It was reported that elderly Aboriginal people living closer to towns are also preyed upon on pension days and in some cases their family members will keep their bank key cards and raid accounts leaving only a small amount of money to cover the elderly person's daily expenses.¹²²

The cultural obligation to share is a major factor in understanding the reasons behind the vulnerability of elderly Aboriginal people in relation to financial abuse. As noted in the previous chapter, Aboriginal people have cultural obligations to kin and this can extend to sharing money or assets.¹²³ As the Public Advocate report explains:

In almost all cases where there are reported incidences of abuse against an older person, kinship is the determining factor of that particular relationship, and it appears the perpetrator has used this relationship to abuse that older person.¹²⁴

Grandparents, in particular grandmothers, have significant cultural obligations toward grandchildren and are often left to care for grandchildren when parents

are unable to because of imprisonment or drug and alcohol abuse. 'In many cases', the Public Advocate reports, grandparents are caring for their adult children as well as their grandchildren and extended family who are itinerant or homeless for varying periods'.¹²⁵ This cultural obligation cannot be ignored, but can place significant financial burdens on elderly Aboriginal people and make them more vulnerable to abuse. The Commission has earlier recommended that the Department for Community Development make information available to Aboriginal communities about government benefits available to assist grandparents in their care for grandchildren.¹²⁶ However, it is noted by the Public Advocate that in some cases grandparents are

unwilling to claim Centrelink payments for grandchildren in their care, for fear of abuse from the children's parents. Abuse came in the form of physical abuse, psychological abuse, and threats from the parents if their payments were 'cut off', limiting their access to money to purchase alcohol and drugs.¹²⁷

The Public Advocate has recommended 15 strategies for dealing with the issues of mistreatment and abuse of older people in Aboriginal communities. Some of these strategies interact or duplicate some of the recommendations made in this Report. In particular strategies to enhance cultural awareness training among government agencies and service providers, initiatives to enhance cultural authority of Elders; support for grandparents raising grandchildren; and culturally appropriate services for perpetrators of violence are dealt with in this Report. Other strategies of the Public Advocate that are specifically pitched to developing awareness of elder abuse and improving care of elderly Aboriginal people (including by way of appropriate housing and aged care facilities) are strongly supported by the Commission.

117. Australian Network for the Prevention of Elder Abuse (1999) as cited in Office of the Public Advocate, *Mistreatment of Older People in Aboriginal Communities Project* (2005) 11.

118. Office of the Public Advocate, *ibid.*

119. Including physical abuse of older people (although possibly also related to financial abuse); neglect of elderly people in the paid care of a relative; and, infrequently, sexual abuse (which was generally found to occur when the perpetrator is affected by alcohol): *ibid.* 27 & 41–42.

120. *Ibid.* 25.

121. *Ibid.*

122. *Ibid.*

123. See 'Cultural Obligation to Share', Chapter Six, above p 246. See also LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 38 'Obligation to accommodate kin'; 269 'Obligation to care for and support kin'.

124. Office of the Public Advocate, *Mistreatment of Older People in Aboriginal Communities Project* (2005) 29.

125. Office of the Public Advocate, *ibid.*

126. See Recommendation 87, below p 280.

127. Office of the Public Advocate, *Mistreatment of Older People in Aboriginal Communities Project* (2005) 37.

Other Recommendations that Will Assist in Addressing Family Violence and Child Abuse in Aboriginal Communities

In addition to the recommendations made in this chapter, the Commission has made a number of recommendations that will directly or indirectly assist in addressing family violence and child abuse in Western Australian Aboriginal communities. These include:

Recommendation 1

Whole-of-government approach to service delivery

The Commission believes that improved service delivery by government agencies will assist in dealing with many of the underlying factors which contribute to family violence and sexual offending.

Recommendations 2, 11, 12, 56 and 128

Cultural awareness training for all agencies involved in the criminal justice system

The Commission is of the view that people who work within the criminal justice system should be better informed about Aboriginal law and culture. In the context of family violence and sexual abuse this will assist criminal justice and welfare agencies when dealing with Aboriginal victims.

Recommendation 3

Establish an Office of the Commissioner of Indigenous Affairs

The Commissioner will be required to independently monitor the implementation of the recommendations in this Report including those recommendations that are designed to reduce the level of family violence and sexual abuse in Aboriginal communities.

Recommendation 5

Recognition of customary law to be consistent with international human rights standards

The Commission has recommended that, in all aspects of the recognition process, particular attention should be paid to the rights of women and children and the right not to be subject to inhuman, cruel or unusual treatment or punishment under international law.

Recommendation 7

The development of more culturally appropriate programs and services for Aboriginal people (both victims and offenders) in the criminal justice system

The Commission has recommended that the Western Australian government ensure that there are adequate and accessible culturally appropriate services for victims of family violence and sexual abuse.



Recommendation 16

The right of a community council in a discrete Aboriginal community to refuse entry to a person or to ask a person to leave the community

This power could be used to prevent a person who has committed a serious violent or sexual offence from remaining in the community for a specified period of time.

Recommendation 17

Establish community justice groups

Community justice groups have the potential to provide Aboriginal people with more effective methods of controlling social and justice issues in their communities. With adequate resources, community justice groups may engage in crime prevention, rehabilitation and diversionary programs and provide support to victims of crime.

Recommendation 24

Establish Aboriginal courts

While Aboriginal courts will not necessarily hear cases involving serious sexual abuse these courts have the potential to reduce Aboriginal offending in general. Culturally appropriate court processes may assist in the overall rehabilitation of offenders even where the actual case before the court is not directly related to sexual abuse or serious forms of violence.

Recommendations 34, 38 and 39

Allow courts to consider relevant Aboriginal customary law during sentencing and bail proceedings and to be properly informed about customary law from Aboriginal people (both men and women)

These recommendations will enable courts to take into account relevant customary law or cultural issues that will assist in the rehabilitation of an offender. Further, because courts will be informed about Aboriginal law and culture from members of a community justice group, they will receive information about the offender as well as the views of the victim and any relevant community to which the offender or victim belong.

Recommendations 41 and 114

Single-gender juries and convening a court with a judicial officer of a particular gender

These recommendations will allow a court to consider any evidence that is gender-restricted if it is necessary in the interests of justice.

Recommendation 43

Prosecutorial guidelines

The Commission has recommended the inclusion of a guideline for police and prosecutors that emphasises the importance of protecting Aboriginal victims from violence and sexual abuse. Further, it is recommended that the guidelines include the need to obtain reliable evidence or information about customary law. In the context of false claims that Aboriginal customary law condones family violence or sexual abuse the need for reliable evidence is essential.

Recommendation 111

Special witness provisions

This recommendation will assist Aboriginal witnesses in circumstances where for cultural reasons they are unable to give evidence in the normal manner.

Recommendations 112 and 113

Power for a court to prohibit reference to or publication of evidence that may be offensive under Aboriginal customary law

These recommendations may also assist witnesses who feel constrained by obligations under customary law when giving evidence about certain matters, including violence or abuse.

Recommendation 116

Evidence taken 'on country'

This recommendation is designed to assist Aboriginal witnesses to feel more comfortable about giving evidence to a court.

Recommendations 120 and 121

Greater access to Aboriginal language interpreters

These recommendations will assist Aboriginal victims of family violence or abuse to deal with criminal justice agencies without the disadvantages posed by language and communication barriers.

Recommendation 125

Evidence in narrative form

Allowing a witness to tell their story uninterrupted by confusing or intimidating questions may assist victims of family violence and sexual abuse to provide more accurate and reliable evidence to courts.

Recommendation 127

Aboriginal liaison officers to assist Aboriginal witnesses

Aboriginal liaison officers will provide additional and culturally appropriate support for Aboriginal victims when appearing in court.

Chapter Eight

Customary Hunting, Fishing and Gathering Rights

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Customary Hunting, Fishing and Gathering Rights

The ability to engage in customary harvesting of natural food resources is important to Aboriginal people in myriad respects. The Aboriginal and Torres Strait Islander Commission has stressed that:

Hunting, fishing and gathering are fundamental to our peoples' contemporary and traditional cultures, help to define our identity, and are at the root of our relationship to the land. Hunting, fishing and gathering continue to provide a significant part of the diet of many of our people, and also provide a range of raw materials. As cultural activities hunting, gathering and fishing are important vehicles for education, and help demonstrate to our succeeding generations our understandings of our place in the world.¹

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'.² Those who possess the right to harvest resources are also vested with obligations to conserve resources and respect the land.³ For this reason (and others), restrictions will sometimes be placed on entitlements to harvest natural resources. As explained more fully in the Commission's Discussion Paper, these restrictions define such matters as:

- 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.⁴

The Continuing Significance of Customary Harvesting Activities

It was observed in the Commission's Discussion Paper that, 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.⁵ It has been noted that harvesting 'expresses the vital linkage of [Aboriginal] people to their country, reinforces their spiritual beliefs governing their existence and responsibility for their land and provides a means for passing on social and cultural knowledge to their children'.⁶ 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.⁷

As was seen earlier in the context of discussion of Indigenous cultural and intellectual property,⁸ harvesting of natural resources also has economic significance to

1. ATSIAC, *Aboriginal and Torres Strait Islander Commission Environmental Policy* (1994) 5, as cited in Department of Fisheries, *Aboriginal Fishing Strategy: Report to the Minister for Agriculture, Forestry and Fisheries by the Hon EM Franklyn QC, Chairman of the Aboriginal Fishing Strategy Working Group*, Fisheries Management Paper No. 168 (May 2003) 25.

2. See Sutton P, *Kinds of Rights in Country: Recognising customary rights as incidents of native title*, Occasional Paper No. 2 (Perth: National Native Title Tribunal, 2001).

3. *Ibid* 31–32.

4. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 365–67.

5. Davies J, Higginbottom K, Noack D, Ross H & Young E, *Sustaining Eden: Indigenous community wildlife management in Australia* (International Institute for Environment and Development, 1999) 19 & 37.

6. *Ibid* 38.

7. Sackett L, 'The Pursuit of Prominence: Hunting in an Australian Aboriginal community' (1979) as cited in ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [882].

8. For instance in relation to the significant economic opportunities attaching to 'bioprospecting' of plants and natural materials on the basis of traditional Indigenous medicinal knowledge. See 'Indigenous intellectual property in the regulation of resources', Chapter Six, above pp 266–67; see also LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 325–27.

Aboriginal peoples. This significance may be found in the provision of an economic base for a community by exploitation of traditional plant or mineral knowledge or in relation to day-to-day subsistence. Regrettably, there is little data to enable quantification of the economic significance of subsistence harvesting to Western Australian Aboriginal peoples,⁹ or indeed of the extent to which harvesting of bush foods occurs today.¹⁰ However, studies undertaken in some discrete Aboriginal groups in Northern Australia, Cape York and the Torres Strait indicate that subsistence harvesting contributes significantly to the diets of some Aboriginal people and that this has a correlative positive economic impact on incomes.¹¹ Small-scale bartering or exchange of harvested foods can also add to the local economy, as well as introduce some variety to the diets of Aboriginal people.

But perhaps the most important consequence of subsistence harvesting is its direct health benefits for Aboriginal people. The consumption of fish, wildlife and other bush foods can enhance the nutritional values of diets that might otherwise consist of processed store-bought foods with high fat, sugar and sodium contents. The act of harvesting also encourages physical exercise that can be undertaken in a social



way, enhancing social and cultural wellbeing. It has been noted that many of the diseases prevalent in Indigenous society—such as heart disease, diabetes and obesity—would benefit from a more varied and nutritionally sound dietary intake and increased exercise.¹² For these reasons alone, the rights of Aboriginal people to subsistence harvest (where there are no competing conservation priorities) should be recognised and encouraged.

Recognising Aboriginal Customary Laws in 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.¹³ Indeed, as highlighted in the Discussion Paper, 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.¹⁴ In these circumstances the Commission determined that it was desirable that any recognition of customary law harvesting rights should include legislative recognition.

As noted in the Discussion Paper, Aboriginal rights to hunt, fish and forage have been recognised by statute since the early days of colonial government in Western Australia.¹⁵ Currently, the statutes that govern wildlife conservation¹⁶ (including hunting of animals and taking of bush flora) and the management of fish resources¹⁷ provide exemptions

9. Davies et al, *Sustaining Eden: Indigenous community wildlife management in Australia* (International Institute for Environment and Development, 1999) 38; English AJ, ‘Terrestrial Hunting and Gathering by Aboriginal People in New South Wales’ (1998) 14 *Environmental and Planning Law Journal* 437, 440.
10. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [887].
11. Davies et al, *Sustaining Eden: Indigenous community wildlife management in Australia* (International Institute for Environment and Development, 1999) 38–39.
12. *Ibid* 39.
13. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 369.
14. *Ibid* 371–72.
15. See, for example, *Preservation of Game Act 1874* (WA) s 13; *Fisheries Act 1899* (WA) s 11 (which permitted subsistence fishing by traditional Aboriginal methods); and *Land Act 1898* (WA) s 106 (which permitted customary subsistence harvesting upon and access to all unimproved parts of pastoral leases, whether enclosed or otherwise). More recently Aboriginal hunting and fishing rights have been governed by the *Fauna Protection Act 1950* (WA) s 23; *Fisheries Act 1905* (WA) s 56(1) (which permitted subsistence fishing by Aboriginal people subject to certain gazetted restrictions including the size and species of catch and the use of certain devices); and *Land Act 1933* (WA) s 106(2) (which permitted customary subsistence harvesting of resources on unenclosed, unimproved parts of pastoral leases).
16. *Wildlife Conservation Act 1950* (WA) s 23.
17. *Fish Resources Management Act 1994* (WA) s 6.

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.

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.¹⁸

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.¹⁹ 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 WA

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 shown in Part IV of the Discussion Paper, 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 Aboriginal people. In its 1986 report *The Recognition of Aboriginal Customary Laws*, the Australian Law Reform Commission 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.²⁰

In its Discussion Paper the Commission expressed support for this hierarchy of priorities. It 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.²¹

The Commission received four submissions that commented directly on this proposal²² and one submission that indirectly commented.²³ The Australian Property Institute indicated concern that placing conservation above existing Aboriginal rights and interests may 'unwittingly' expose the state to compensation liability – presumably under the *Native Title Act 1993* (Cth).²⁴ Although it is not necessary to go into detail here, the Commission has considered this submission with careful regard to the future act provisions of the *Native Title Act*.²⁵ Under the *Native Title Act* a 'future act' includes the making, amendment

18. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 372–74.

19. *Ibid* 369–71.

20. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [1001].

21. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 374, Proposal 72.

22. Australian Property Institute, Submission 11 (21 April 2006); Gascoyne Development Commission, Submission No. 38 (11 May 2006); Pilbara Development Commission, Submission No. 39 (19 May 2006); Department of Fisheries, Submission No. 42 (25 May 2006).

23. The Aboriginal Legal Service (ALS) made general comments about customary hunting, fishing and gathering rights in its submission. From its comments in opposition to 'extensive harvesting' it can be inferred that those consulted by the ALS were concerned about conservation of natural resources: Aboriginal Legal Service, Submission No. 35 (12 May 2006) 12.

24. Australian Property Institute, Submission No. 11 (21 April 2006) 1–2.

25. *Native Title Act 1993* (Cth) Division 3, Part 2.

or repeal of legislation (after 1 July 1993) which affects native title by extinguishing native title rights or by being inconsistent with their continued existence, enjoyment or exercise.²⁶ In the Commission's opinion, because the prioritisation of conservation over traditional Aboriginal harvesting interests reflects the conservation priority of current²⁷ (and indeed previous)²⁸ Western Australian legislation relevant to use of natural resources, the Commission's recommendation, if implemented, would not be likely to impair existing native title rights in breach of the *Native Title Act*. Nonetheless, the Commission acknowledges that any changes to current legislation in this area and, in particular, any enactment of new legislation (such as the proposed Biodiversity Conservation Act)²⁹ must be done with careful regard to the maintenance and protection of existing native title rights and interests.

Significantly, the Commission received no submissions opposing the prioritisation of Aboriginal customary harvesting interests above recreational and commercial interests in the same biological resources.³⁰ The Department of Fisheries noted that the Commission's proposal reflected the priority shown in the Department's own Aboriginal Fishing Strategy, which seeks to recognise customary fishing as a distinct fishing sector with priority over all other fishing access, including commercial and recreational fishing.³¹ It is the Commission's opinion that the prioritisation of Aboriginal interests over commercial and recreational interests in biological resources, subject to the interests of conservation and sustainability of those resources, represents an ethical balancing of interests in this area.

Recommendation 96

Conservation to remain a priority in statutory recognition of customary harvesting

That the statutory recognition of Aboriginal customary laws relating to hunting, fishing and gathering remain subject to the 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.

Aboriginal involvement in conservation of land and biological resources

In its Discussion Paper the Commission noted that, given Aboriginal peoples' long history of managing their lands in a sustainable way, it would be unlikely that Aboriginal people would object to the prioritisation of conservation in regard to land and natural resources.³² The Commission considered that Western Australia could learn from its Aboriginal people in this regard. It is also the Commission's opinion that Aboriginal people should be involved in decision-making that may affect their rights and interests.³³ The application of conservation programs to land and natural resources is clearly a matter that affects Aboriginal rights and interests, in particular those Aboriginal people recognised as traditional owners. To that end, the Commission proposed that in the development and 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.³⁴

26. *Native Title Act 1993* (Cth) s 227.

27. For example, as pointed out in the Commission's Discussion Paper, s 23 of the *Wildlife Conservation Act 1950* (WA) empowers the Governor to impose restrictions on, or even to indefinitely suspend, the Aboriginal customary harvesting exemption where it is considered that certain species of flora or fauna are in danger of becoming unduly depleted. Further, in relation to fish resources, the exemption given to Aboriginal people under s 6 of the *Fish Resources Management Act 1994* (WA) only applies to the need to obtain a recreational fishing licence. Aboriginal people operating under this exemption are still subject to the fishing regulations regarding such matters as bag limit, size of catch, protected species and conservation areas which are intended to conserve fish, protect their environment and ensure that exploitation of fish resources is carried out in a sustainable manner. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 372–73.

28. Conservation and protection of fauna, flora and fish have also been priorities of previous state legislation where customary harvesting under certain conditions has been recognised. See, for instance, *Preservation of Game Act 1874* (WA); *Fisheries Act 1899* (WA); *Land Act 1898* (WA); *Fauna Protection Act 1950* (WA); and *Fisheries Act 1905* (WA).

29. See Western Australian Government, *Biodiversity Conservation Act Consultation Paper* (December 2002), <http://www.naturebase.net/biocon_act_consult_text.html>.

30. The Pilbara Development Commission supported a higher priority of Aboriginal interests in principle, but indicated that it would welcome a framework where all interests could be balanced: Pilbara Development Commission, Submission No. 39 (19 May 2006) 3.

31. Department of Fisheries, Submission No. 42 (25 May 2006) 2. See also Department of Fisheries, *Proposed Amendments to the Fish Resources Management Act 1994: Discussion Paper*, Fisheries Management Paper No. 208 (April 2006).

32. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 374. Indeed conservation and protection of the environment and the productive capacity of lands and biological resources is a right protected under the revised draft of the *Declaration of the Rights of Indigenous Peoples* (Article 28) which is currently being considered for resolution by the United Nations General Assembly. For further information see 'Recognition and the relevance of international law', Chapter Four, above pp 67–69.

33. This right is also protected by the revised draft of the *Declaration of the Rights of Indigenous Peoples* Articles 18 & 19. See *ibid*.

34. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 374, Proposal 72. It is noted by the Commission that there will be a role for Aboriginal language interpreters in this area. The Kimberley Interpreting Service has observed that: 'The use of interpreters

Submissions were strongly supportive of this proposal and the Commission therefore confirms this recommendation.³⁵

Recommendation 97

Government to consult, engage with and involve Aboriginal people in relation to conservation programs

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

The need for clarity in the legislative recognition of customary harvesting

As mentioned earlier, Aboriginal people can rely on customary harvesting exemptions under the statutes 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.³⁶ The Commission proposed in its Discussion Paper 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.³⁷

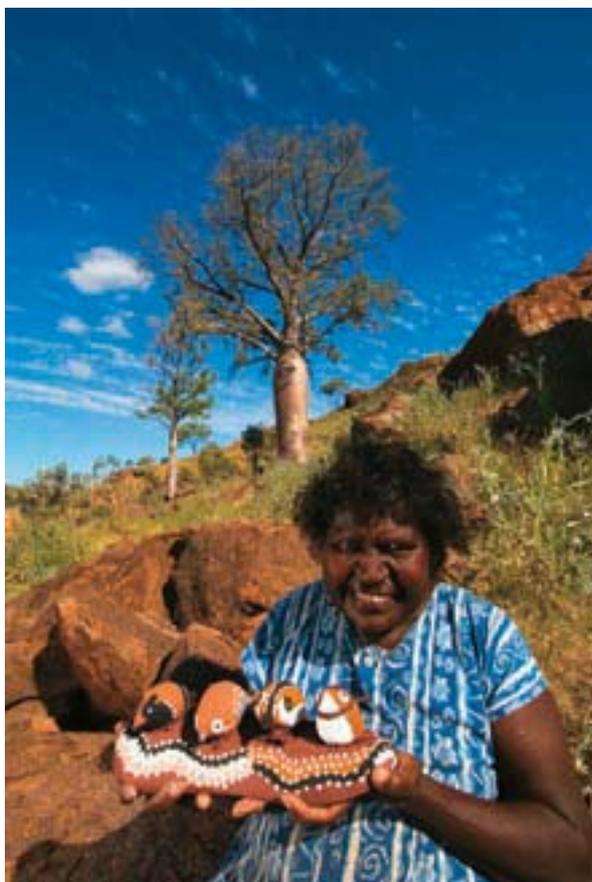
Submissions were strongly supportive of this proposal.³⁸ The Australian Property Institute considered that the communication of restrictions to Aboriginal harvesting exemptions would also assist in raising awareness of the existence of Aboriginal exemptions among non-Aboriginal people involved in recreational or commercial harvesting activities.³⁹ The need for all parties to be aware of harvesting activities was also raised by the Gascoyne Development Commission.⁴⁰ In the interests of minimising interference with Aboriginal people in the act of customary harvesting, the Commission agrees that it is important that other parties engaging in relevant harvesting activities also be made aware that Aboriginal people have a right to harvest biological resources in certain areas without a licence. The Commission has therefore added to its recommendation that the government consider means of raising awareness of Aboriginal harvesting rights among non-Aboriginal people.⁴¹



contributes to the sustainability of Australia's cultural and natural heritage, through language maintenance and preservation of ecological knowledge. This in turn assists natural resource managers and ensures Indigenous people remain involved in the management of the country: Kimberley Interpreting Service, *Indigenous Language Interpreting Services*, Discussion Paper (June 2004) 3. A statewide Aboriginal language interpreting service is proposed by the Commission: see Recommendation 117, below p 337.

35. Australian Property Institute, Submission No. 11 (21 April 2006); Gascoyne Development Commission, Submission No. 38 (11 May 2006); Pilbara Development Commission, Submission No. 39 (19 May 2006); Department of Fisheries, Submission No. 42 (25 May 2006). It is also noted that the Western Australian government's draft biodiversity strategy recognises that 'Indigenous knowledge is important to complement conservation programs. It is also important to maintain this knowledge in order to help reconnect indigenous people with their country'. See Department of Conservation and Land Management (WA), 'Towards a Biodiversity Conservation Strategy for Western Australia' (2004), <http://www.naturebase.net/haveyoursay/pdf_files/biodiversity_draft_lores.pdf> 30.
36. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 375.
37. *Ibid* 376, Proposal 73.
38. The Department of Fisheries drew the Commission's attention to the fact that under its proposed Aboriginal Fishing Strategy, customary fishing is a distinct right and a separate fishing activity, rather than an exemption as currently provided for under s 6 of the *Fish Resources Management Act 1994* (WA). The Commission has therefore expanded its recommendation to include 'rights' as well as exemptions. Department of Fisheries, Submission No. 42 (25 May 2006) 2.
39. Australian Property Institute, Submission No. 11 (21 April 2006) 2.
40. Gascoyne Development Commission, Submission No. 38 (11 May 2006) 4. The Gascoyne Development Commission suggested that there be continuous review of all harvesting activities in consultation with Aboriginal and non-Aboriginal harvesters.
41. In relation to fishing, for example, this might be achieved by notation on commercial and recreational fishing licences or by signage in popular fishing areas.

In its Discussion Paper the Commission suggested that communication of these matters might be best achieved by establishing a dedicated section on relevant departmental websites,⁴² as well as providing notices and information to Aboriginal communities through Aboriginal community councils, Aboriginal land councils, Aboriginal radio stations, Aboriginal cultural organisations, native title working groups and community justice groups.⁴³ While the Commission believes that these bodies will be well-placed to disseminate information, it is of the opinion that government should consult with local Aboriginal people and relevant community groups and organisations to determine the best and most culturally appropriate means of raising awareness of harvesting exemptions and restrictions within Aboriginal communities.



Recommendation 98

Enhancing communication of Aboriginal customary harvesting exemptions and restrictions

1. That the Department of Fisheries and the Department of Environment and Conservation, in collaboration and consultation with the Department of Indigenous Affairs, take all reasonable steps to enhance communication of harvesting exemptions or rights of Aboriginal people and of any restrictions placed from time-to-time upon those exemptions or rights.
2. That these authorities consult with local Aboriginal people, groups and organisations to establish culturally and regionally appropriate methods and means of communicating this information to Aboriginal people.
3. That these authorities also consider means of raising awareness of Aboriginal harvesting exemptions and rights among non-Aboriginal people, particularly those engaging in similar harvesting activities under recreational or commercial licences.

Improving recognition – hunting and gathering

Expanding the current customary harvesting exemption for fauna and flora

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.⁴⁴ Currently the Act does not provide exemption for fauna, flora or natural products taken for other customary purposes. The Commission therefore proposed that the exemption be expanded to include the taking of

42. That is, the Department of Indigenous Affairs, the Department of Environment and Conservation and the Department of Fisheries.
 43. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 376. The Pilbara Development Commission endorsed the Commission's proposal and agreed that changes to legislation or subordinate legislation relating to the suspension of rights or restrictions placed on Aboriginal customary harvesting should be published and promoted prominently in all Indigenous media so as to increase awareness of restrictions at the community level: Pilbara Development Commission, Submission No. 39 (19 May 2006) 3.
 44. As explained in the Commission's Discussion Paper, this exemption is subject to certain restrictions such as the need to gain consent from the occupier of occupied lands, including private land. It is also subject to qualification—or even indefinite suspension—where the Governor considers that any species of flora or fauna taken under the authority of this section are in danger of becoming unduly depleted or that the rights protected by the section are otherwise being abused. On 14 August 2001 the government indefinitely suspended Aboriginal people's rights to hunt dugong, six varieties of turtles, and saltwater and fresh water crocodiles, and to take all flora declared 'rare'. As at 23 June 2006, 246 species of flora were declared 'rare' under the *Wildlife Conservation Regulations 1950*.

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.⁴⁵

As noted in the Commission's Discussion Paper, a similar expansion of the current Aboriginal customary harvesting exemption has already been mooted by the Western Australian government in its 2002 consultation paper for a new Biodiversity Conservation Act.⁴⁶ Submissions to the Commission's Discussion Paper indicated support for a more liberal designation of customary uses of flora and fauna harvested pursuant to Aboriginal customary harvesting exemptions.⁴⁷ The Commission notes that the Aboriginal Fishing Strategy has recommended a definition of customary fishing that refers to educational, ceremonial, personal, domestic and non-commercial purposes.⁴⁸ These purposes closely align with the Commission's own recommendation. The Commission suggests that there may be some utility in harmonising the permitted purposes in Aboriginal customary fishing and hunting provisions in the future.

Recommendation 99

Aboriginal customary harvesting exemption expanded to include taking of flora and fauna for other customary purposes

That the Aboriginal customary harvesting 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.

The *Conservation and Land Management Act 1984* (WA) (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.⁴⁹ 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 examined this issue in its Discussion Paper and proposed that the above expanded exemption also apply to CALM Act land, subject to the provisions of conservation management plans over such land.⁵⁰ This proposal received no opposition from respondents to the Discussion Paper.

Recommendation 100

Aboriginal customary harvesting exemption to apply to land designated under the *Conservation and Land Management Act 1984* (WA)

That the Aboriginal customary harvesting exemption currently provided by s 23 of the *Wildlife Conservation Act 1950* (WA), and its successor in any future wildlife and biological resource conservation legislation, also apply to land designated under the *Conservation and Land Management Act 1984* (WA), but that such exemption be subject to the provisions of conservation management plans over such land.

Feral animals

Despite its clear foundation in traditional harvesting rights, Aboriginal people are not restricted to the taking of native fauna under the s 23 exemption. Aboriginal people are known to harvest introduced feral animals such as rabbits, pigs, buffalo, donkeys and camels for subsistence purposes.⁵¹ In some cases these introduced

45. For a fuller discussion of these matters, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 372–73 & 376–77 and Proposal 74.

46. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 376–77.

47. See, for instance, Australian Property Institute, Submission No. 11 (21 April 2006) 2; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 12. In its submission the ALS stated that Aboriginal people consulted by them desired a customary law defence to taking fauna and flora for customary purposes. The Commission has considered a similar argument in relation to extraordinary drivers licences and has rejected the idea of a customary law defence. For the reasons stated in that section (see discussion under 'Traffic offences', Chapter Five, above pp 116–17) and because an exemption provides an explicit right to Aboriginal people to harvest fauna and flora, whereas a defence would necessitate proving customary law purpose in court, the Commission considers that the current exemption scheme, as expanded by the Commission's recommendations, provides better outcomes for Aboriginal people.

48. It is noted that a new exemption of fishing for customary purposes was issued by the Minister for Fisheries pursuant to s 7(2) of the *Fish Resources Management Act 1994* (WA) on 31 March 2006 in relation to the taking of bluenose salmon. This would indicate that this definition of customary fishing will be pursued in future amendments to the Act.

49. *Conservation and Land Management Regulations 2002* (WA) reg 8. The penalty applied to breach of this provision is a fine of \$2,000.

50. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 377, Proposal 74.

51. Davies *et al*, *Sustaining Eden: Indigenous community wildlife management in Australia* (International Institute for Environment and Development, 1999) 45.



species have almost completely replaced indigenous species in Aboriginal peoples' diets. This may be because the indigenous species traditionally hunted has now died out or because the introduced species are more numerous and perhaps easier to hunt.⁵² The Commission sees no reason why recognition of customary harvesting rights should be limited to native animals and acknowledges that Indigenous hunters may have an important role in reducing the number of feral animals in Western Australia. The Commission therefore proposed that the exemption (and any successor in future legislation) remain applicable to all flora and fauna, including introduced species.⁵³ This is clearly a non-controversial recommendation and received no comment from respondents to the Commission's Discussion Paper. The Commission therefore confirms this proposal as a recommendation.

Recommendation 101

Aboriginal customary harvesting exemptions and rights to remain applicable to introduced species of fauna and flora

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

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 it should be more broadly defined than a person's immediate 'nuclear' family. In its Discussion Paper the Commission expressed the 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. The Commission acknowledged, however, the potential for a broader view of 'non-commercial' trade permitting barter or exchange between Aboriginal communities.⁵⁴ The Commission 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.⁵⁵

All submissions that commented on this invitation were in favour of expanding the exemption to allow for non-commercial exchange or barter within and between Aboriginal communities so long as it is not for financial gain.⁵⁶ Indeed the Pilbara Development Commission stated that the non-commercial barter or exchange of fauna and flora is an integral component of community subsistence and, in some instances, of adherence to Aboriginal customary law. The Commission agrees. As shown in Part VI of the Commission's Discussion Paper,⁵⁷

52. Ibid 38.

53. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 377, Proposal 75.

54. Ibid 377–78.

55. Ibid 378, Invitation to Submit 16.

56. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 12; Pilbara Development Commission, Submission No. 39 (19 May 2006) 6; Department of Fisheries, Submission No. 42 (25 May 2006) 3.

57. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 274–76.

Aboriginal people should be encouraged to make use of their traditional knowledge of the land and its natural resources by undertaking commercial harvesting of flora on Crown land.

anthropological research indicates that barter and exchange between different tribal groups was commonplace in traditional Aboriginal societies. The discussion also described instances of reciprocity of gifts and services demanded under customary law.⁵⁸ The Commission noted in its Discussion Paper that the Aboriginal Fishing Strategy had recommended a broader exemption in line with that discussed above and that barter and exchange between communities was an existing activity for customary fishing.

Apart from conservation interests of fauna and flora that may renew less rapidly than fish stocks, the Commission can see no reason not to recognise the customary practice of barter and exchange between communities so long as such barter and exchange is not for financial gain and is done in accordance with the Aboriginal customary laws of the relevant communities. The Commission therefore makes the following recommendation.

Recommendation 102

Recognition of non-commercial barter and exchange of harvested fauna and flora pursuant to Aboriginal customary law

That the exemption currently provided by s 23 of the *Wildlife Conservation Act 1950* (WA) and its successor in any future wildlife and biological resource conservation legislation be amended to permit the non-commercial barter and exchange of fauna and flora harvested pursuant to the exemption within and between Aboriginal communities so long as such barter or exchange is not for financial gain and is in accordance with the customary laws of the relevant communities.

Commercial exploitation of customary harvesting knowledge

Currently, any person may apply for a licence under s 23C of the *Wildlife Conservation Act* to harvest flora⁵⁹ on Crown land for commercial purposes, including for such things as perfume production, bush food, floristry and therapeutic use. Typically conservation considerations will inform the grant of such licences and their conditions (including quota of flora, place of harvesting, etc). An article in the *Weekend Australian Magazine* highlighted the significant economic benefits that commercial harvesting of flora can provide for Aboriginal people in Western Australia, particularly for those living in remote areas that have little to no viable alternative industry.⁶⁰ However, the article also warned of the vulnerability of some communities to exploitation by commercial harvesters that use Aboriginal traditional knowledge, expertise and labour for minimal return to the community.⁶¹

The Commission believes that Aboriginal people should be encouraged to make use of their traditional knowledge of the land and its natural resources by undertaking commercial harvesting of flora on Crown land. Taking conservation as its priority, it is the Commission's view that commercial harvesting of natural resources should remain subject to government-controlled licensing. However, in relation to harvesting by Aboriginal people, strong arguments can be made for the relaxation of licensing conditions, for the waiver of fees (including royalty payments) and for a certain number of licences (particularly in competitive industries such as sandalwood harvesting) to be set aside exclusively for Aboriginal communities.

The Commission is of the opinion that the new biodiversity conservation legislation offers an excellent

58. Ibid 275–76.

59. Licences may also be obtained under s 17 of the *Wildlife Conservation Act 1950* (WA) for the taking of fauna. However, Aboriginal persons taking fauna under licence for commercial purposes must abide by the restrictions on the means of taking that apply to the rest of the community under the *Wildlife Conservation Regulations*.

60. Laurie V, 'Bush Bounty', *The Weekend Australian Magazine*, 20–21 August 2005, 30–31.

61. Ibid. The article mentions the case of a very small community at Ullula, southwest of Wiluna, where Aboriginal women had been hired by 'city-based' commercial harvesters to collect seed for a fraction of its commercial value. The Office of Aboriginal Economic Development apparently assisted the community to negotiate a direct contract with a local mine that required native seeds for rehabilitation of the land.

opportunity for the Department of Environment and Conservation to review the licensing regime for the commercial harvesting of flora to investigate ways that it can be improved to encourage and assist Aboriginal people to develop commercial harvesting opportunities in Western Australia. Such review should be undertaken in consultation with Aboriginal people and in conjunction with the Office of Aboriginal Economic Development (Department of Industry and Resources) as the office responsible for increasing the economic independence of Aboriginal people in Western Australia.

Recommendation 103

Review of commercial harvesting licensing regime under the *Wildlife Conservation Act 1950* (WA)

1. That, in conjunction with the Office of Aboriginal Economic Development, the Department of Environment and Conservation review the current commercial licensing regime under the *Wildlife Conservation Act 1950* (WA) (and in any other relevant wildlife and biological resource conservation legislation) to investigate ways that it can be improved to encourage and assist Aboriginal people to develop commercial harvesting opportunities in Western Australia.
2. That such review be undertaken in consultation with, and with the involvement of, Aboriginal people.

Methods of customary harvesting

In its Discussion Paper the Commission described the various methods of harvesting foods used by Aboriginal people in traditional societies. It noted that, although there are probably still some Aboriginal people that employ entirely traditional hunting and fishing methods, most have adopted more efficient contemporary tools such as firearms, nylon fishing lines, nets, boats and vehicles. In many cases—and as a direct result of colonialism—the knowledge of how to manufacture and use traditional hunting tools has been irrevocably lost. In these circumstances, the Commission noted that to

insist on the exercise of Aboriginal harvesting rights only by use of traditional methods would effectively deny Aboriginal people their customary rights to harvest natural food resources.⁶²

Perhaps for this reason, the Aboriginal customary harvesting exemption under s 23 of the *Wildlife Conservation Act 1950* (WA) does not restrict Aboriginal harvesters to the use of traditional hunting methods. However, as the Commission's Discussion Paper also made clear, Aboriginal people hunting under the s 23 exemption are also not subject to regulations which restrict the use of firearms, snares, nets, traps, poisons and explosives in the taking of fauna.⁶³ In its submission, the Pilbara Development Commission argued that this created an inequity in the application of wildlife conservation provisions to members of the hunting community.⁶⁴

Clearly, under current provisions Aboriginal hunters may use means that are not available to other hunters. However, there are good reasons for this. Leaving aside, for the moment, the use of firearms (which is dealt with below) most of the other means identified under the *Wildlife Conservation Regulations* as 'illegal means and devices' were in fact traditionally used by Aboriginal hunters. As the Commission's Discussion Paper explained:

Traditional Aboriginal people employed myriad tools and techniques for the harvesting of food. For example, spears or lines with bone or wooden hooks were used for river-fishing; poison (extracted from noxious plants) was sometimes used for billabong fishing; whilst harpoons and rafts or canoes would be used for open sea fishing. In some areas Aboriginal people would build stone barriers into the sea to trap fish with the receding tide. Large game was mostly hunted with spears and, less frequently, with boomerangs or the use of camouflaged pits. Reptiles and small marsupials were hunted with the use of clubs or sticks, whilst stone axes were used to chop wood and to extract honeycomb from hollow trees. Vegetable foods were collected in dilly bags woven from grasses or pandanus fibre, and digging sticks were used to unearth yams and edible roots.⁶⁵

The Commission notes that while there does appear to be some inequity in the operation of the 'illegal means and devices' provisions, any amendment to the *Wildlife Conservation Act* to restrict Aboriginal hunters

62. See discussion in ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [977].

63. *Wildlife Conservation Regulations 1970* (WA) reg 54 'Illegal means and devices'.

64. Pilbara Development Commission, Submission No. 39 (19 May 2006) 3.

65. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 370 (footnotes omitted).

from use of methods—such as spears, traps, snares, nets and poisons—may have the consequence of impairing native title rights. Given that there has been no restriction on the means used by Aboriginal hunters under wildlife conservation legislation to date, an amendment that may affect native title rights may be held invalid under the future act provisions of the *Native Title Act 1993* (WA).

Although the Commission does not consider it feasible to recommend amendment of the *Wildlife Conservation Act* to allow for equitable application of ‘illegal means and devices’ regulations, it is concerned about animal welfare and notes that the primary purpose of the regulations is to restrict the use of hunting methods that may cause an animal to suffer unnecessarily. It has been forcefully argued by certain commentators⁶⁶ that customary harvesting exemptions and traditional hunting rights should be subject to animal welfare and protection legislation. Most traditional hunting practices that would be considered cruel have probably now been replaced by the use of tools, such as firearms, that generally afford an animal a less painful death. However, certain cruel practices in the killing of marine fauna such as dugong and turtle are still apparently common.⁶⁷ There are also reported methods of food preservation employed by some Indigenous hunters—such as tethering goannas by the neck or breaking kangaroos’ legs to prevent escape until required for food—that would be considered cruel to animals.⁶⁸

In Western Australia, the prevention of cruelty to animals is governed by the *Animal Welfare Act 2002* (WA). While there is a defence in the Act to cover acts authorised by law—which would include killing of animals under the customary harvesting exemption—this defence only applies if the authorised act is performed in a humane manner.⁶⁹ There is therefore scope for an Aboriginal hunter to be charged under the *Animal Welfare Act* if he or she participated in inhumane hunting practices, although there is no precedent for this in Western Australian case law.⁷⁰ Currently the Department of Environment and

Conservation takes the position of encouraging Aboriginal people to modify their means of traditional hunting if it involves acts of cruelty.⁷¹ The Commission commends this approach and recommends that education of Aboriginal hunters to avoid cruel practices be formalised by the institution of programs or information services to raise awareness among Aboriginal hunters of humane practices for taking of fauna under the s 23 exemption.

Recommendation 104

Education to avoid cruelty to animals taken under Aboriginal customary harvesting exemptions

1. That the Department of Environment and Conservation institute programs or information services to raise awareness among Aboriginal hunters of means of avoiding cruelty to animals in the taking of fauna under the exemption provided by s 23 of the *Wildlife Conservation Act 1950* (WA) and its successor in any future wildlife and biological resource conservation legislation.
2. That the Department of Environment and Conservation consult with local Aboriginal people, groups and organisations to establish culturally and regionally appropriate methods and means of communicating this information to Aboriginal people.

Use of firearms for customary harvesting

In its Discussion Paper the Commission observed that the legality of the use of firearms by Aboriginal people for hunting on Crown land was unclear. 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

66. See in particular, Dominique Thiriet, ‘Tradition and Change – Avenues for Improving Animal Welfare in Indigenous Hunting’ (2004) 11 *James Cook University Law Review* 159; Dominique Thiriet, ‘Traditional hunting: Cultural rights v animal welfare’ (2006) 31(2) *Alternative Law Journal* 63.

67. In Western Australia the taking of these marine fauna is prohibited, even by Aboriginal hunters under the s 23 exemption. For numerous examples of cruel practices of killing marine fauna by Indigenous hunters, including in Western Australia: see Thiriet, ‘Tradition and Change’, *ibid* 164–66. See also ABC News Online, ‘Council Looks to Tackle Inefficient Traditional Hunting Methods’ (17 May 2005), <http://abc.net.au/message/news/stories/ms_news_1369943.htm>.

68. Thiriet, *ibid* 166.

69. *Animal Welfare Act 2002* (WA) s 22.

70. The Commission notes that in the Northern Territory s 79(2) of the *Animal Welfare Act 1999* (NT) specifically excludes the possibility of using cultural, religious or traditional practices as a defence to an act of cruelty against an animal. The Commission believes that such a provision could usefully be considered in Western Australia; however, since it impacts upon practices such as halal and kosher butchering, the Commission feels that it may require a greater review than is within the scope of the current reference.

71. Simon Hancocks, Senior Policy Officer, Department of Environment and Conservation, email (1 August 2006).

regulations regarding methods of taking fauna (which prohibit use of firearms), they may nevertheless theoretically be subject to prosecution under s 267 if they employ firearms in their customary hunting activities on Crown land. The Commission noted that s 104 of the *Land Administration Act 1997* (WA) which gives authority to Aboriginal people to hunt 'in their accustomed manner', coupled with the exemption under s 23 of the *Wildlife Conservation Act 1950* (WA), would provide a reasonable excuse and constitute a defence to a charge under s 267; however, this remains untested at law. In these circumstances the Commission considered that the issue would benefit from legislative clarification and made a proposal to that effect in its Discussion Paper.⁷²

The Commission received three submissions on this proposal, all of which supported the need for legislative clarification.⁷³ Two of these submissions merit special mention here. The Department of Fisheries noted that the definition of 'land' in the *Land Administration Act* includes coastal waters up to three nautical miles⁷⁴ and that this must be taken into account (and the Department of Fisheries consulted) in any amendment to the legislation.⁷⁵ The submission of the Western Australia Police noted that any legislative change must complement the *Firearms Act 1973* (WA)⁷⁶ and that any exemption for Aboriginal people should be made explicit in the *Firearms Act* so that police officers are aware of it in the event that they are called upon to resolve a complaint for actions contravening the Act.⁷⁷ The Commission agrees with the observations made by the Police and the Department of Fisheries and recommends that these matters be taken into account in the clarification of relevant legislation regarding use of firearms by Aboriginal people in the act of customary harvesting. The Commission also notes that, in view of its recommendation above that the Aboriginal customary harvesting exemption be extended to apply to land designated under the *Conservation and Land Management Act 1984* (WA),⁷⁸ the use of firearms for customary harvesting on such land will also need to be considered.

Recommendation 105

Clarification of permissible use of firearms by Aboriginal people in customary harvesting

1. 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 and pastoral leasehold 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).
2. That the definition of 'land' in the *Land Administration Act 1997* (WA), which includes land seaward to three nautical miles, and its impact on fisheries interests and protection of marine fauna be considered in determining the permissible use of firearms under the *Land Administration Act 1997* (WA).
3. That the responsible Ministers institute a collaborative review of relevant legislation, including the *Firearms Act 1973* (WA), the *Land Administration Act 1997* (WA), the *Wildlife Conservation Act 1950* (WA) and the *Conservation and Land Management Act 1984* (WA) to ensure that permissible use of firearms in customary harvesting activity is clearly noted.

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.⁷⁹

72. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 382, Proposal 76.

73. Australian Property Institute, Submission No. 11 (21 April 2006); Department of Fisheries, Submission No. 42 (25 May 2006); Office of Commissioner of Police, Submission No. 46 (7 June 2006).

74. As defined in the *Land Administration Act 1997* (WA) s 3 which states that 'land' includes 'all coastal waters of the State as defined by section 3(1) of the *Coastal Waters (State Powers) Act 1980* of the Commonwealth'.

75. Department of Fisheries, Submission No. 42 (25 May 2006) 2–3.

76. In particular ss 11A(1), 11A(2)(c), 23(10) & 23(10a).

77. Office of Commissioner of Police, Submission No. 46 (7 June 2006) 12–13.

78. See Recommendation 100, above p 307.

79. For more detailed exposition, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 373.



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.⁸⁰ These are examined in the Commission's Discussion Paper.⁸¹ The Aboriginal Fishing Strategy Working Group (ASFWG) report made a number of recommendations which reflect the Commission's hierarchy of priorities—that is, placing Aboriginal customary interests above recreational and commercial interests but below the interests of conservation—and answered the Commission's concerns about limitations placed upon the s 6 exemption that are intended for recreational, rather than customary subsistence, fishers. The AFSWG report defined customary fishing in the following way:

Customary fishing:

- (a) applies to persons of Aboriginal descent; and
- (b) who are fishing for the purposes of satisfying personal, domestic, ceremonial, educational, or non-commercial communal needs; and
- (c) who are accepted by the Aboriginal community in the area being fished as having a right to fish in accordance with Aboriginal tradition.⁸²

In respect of (c), the report recommended that the question of who is accepted under customary law as possessing a right to fish in a certain area be solely a

matter for the Aboriginal community concerned and that, for this reason, (c) would not be incorporated into the legal definition of customary fishing.⁸³ The Commission noted in its Discussion Paper that this accorded with its own view in regard to establishing the content of Aboriginal customary law and who is bound by it. The Commission encouraged the Western Australian government to implement the recognition strategies contained in the report of the AFSWG.⁸⁴

Since the release of the Commission's Discussion Paper a further paper (Paper No. 208) has been published by the Department of Fisheries.⁸⁵ Paper No. 208 indicates that the Department has accepted the broad thrust of the AFSWG's recommendations. It proposes amendments to the *Fish Resources Management Act 1994 (WA)* to introduce a new sector of customary fishing that reflects customary fishing activity as a discrete right rather than an exemption to recreational fishing activity. The paper recommends that customary fishing become a sector within the government's Integrated Fisheries Management policy (therefore making it subject to fisheries management plans based on sustainability) and that it 'be given priority over all other fishing access'.⁸⁶

However, the Commission notes that the definition of customary fishing currently being piloted in exemptions under s 7(2) of the *Fish Resources Management Act* is

80. Department of Fisheries, *Aboriginal Fishing Strategy: Report to the Minister for Agriculture, Forestry and Fisheries by the Hon EM Franklyn QC, Chairman of the Aboriginal Fishing Strategy Working Group*, Fisheries Management Paper No. 168 (May 2003).
 81. For more detailed exposition, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 378–81.
 82. Department of Fisheries, *Aboriginal Fishing Strategy: Report to the Minister for Agriculture, Forestry and Fisheries by the Hon EM Franklyn QC, Chairman of the Aboriginal Fishing Strategy Working Group*, Fisheries Management Paper No. 168 (May 2003) 30.
 83. *Ibid* 31.
 84. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 381.
 85. Department of Fisheries, *Proposed Amendments to the Fish Resources Management Act 1994: Discussion Paper*, Fisheries Management Paper No. 208 (April 2006).
 86. *Ibid* 27.

different to that proposed by the AFSWG in that it applies to persons of Aboriginal descent who are fishing for educational, ceremonial, personal, domestic and non-commercial communal purposes *and* who are 'fishing in accordance with traditional law and custom'.⁸⁷ The wording 'in accordance with traditional law and custom' is seemingly aligned to the decision of Kirby P in *Mason v Tritton*⁸⁸ which, as the Commission's Discussion Paper explains, describes the 'exacting nature of the evidential burden'⁸⁹ required to prove a native title right to fish at common law.⁹⁰

The Commission believes that the definition of 'customary fishing' currently being piloted by the Department of Fisheries may require a higher form of evidence or qualification than the definition recommended by the AFSWG, which did not reference traditional law and custom but which required, in practice, acceptance by the Aboriginal community in the area being fished as having a right to fish there in accordance with Aboriginal tradition.⁹¹ The Commission also notes that this new definition potentially removes the right of the Aboriginal community to determine who has permission to fish the area in accordance with Aboriginal tradition. As noted above, this was a major factor in the Commission's support for the Aboriginal Fishing Strategy and, in the absence of any explanation for the new definition, the Commission finds it very difficult to assess the potential impact of this change. The Commission does note that while 'customary fishing' is repeatedly referred to in Paper No. 208, it does not in any place offer a definition of that term. The Commission strongly recommends that in any amendments to the *Fish Resources Management Act 1994* (WA) the Department of Fisheries revert to the definition of the term 'customary fishing' as set out in recommendation 1 of the AFSWG report.⁹²

Recommendation 106

Adoption of the Aboriginal Fishing Strategy Working Group's definition of 'customary fishing'

That, in proposed amendments to the *Fish Resources Management Act 1994* (WA), the definition of the term 'customary fishing' be as defined by the Aboriginal Fishing Strategy Working Group in recommendation 1 of Fisheries Management Paper No. 168.

The Commission further notes that Paper No. 208 speaks of including a provision in the amendments to the *Fish Resources Management Act* that 'allows the Executive Director to issue authorisations for the purpose of managing customary fishing'.⁹³ The nature of these 'authorisations' in relation to customary fishing is uncertain; however, it would appear that customary fishing activity may be subject to authorisation (and suspension of authorisation)⁹⁴ rather than simply conservation management by the authorities. This is contrary to recommendation 5 of the AFSWG report which states that 'customary fishing be recognised and managed as a positive, existing right and not a right to be conditionally granted'.⁹⁵

Although it is not openly stated in Paper No. 208, it would appear that, as a 'managed fishery', customary fishing may also be subject to the allocation of permits which are not 'granted as of right [and] would be valid only for limited and fixed periods with no right of renewal'.⁹⁶ The Commission finds that such a permit system is contrary to recommendation 1 of the AFSWG report which makes clear that:

87. See, for example, the new exemption of fishing for customary purposes issued by the Minister for Fisheries on 31 March 2006 pursuant to s 7(2) of the *Fish Resources Management Act 1994* (WA) in relation to the taking of bluenose salmon.

88. (1994) 34 NSWLR 572.

89. Ibid 584 (Kirby P).

90. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 371–72.

91. Department of Fisheries, *Aboriginal Fishing Strategy: Report to the Minister for Agriculture, Forestry and Fisheries by the Hon EM Franklyn QC, Chairman of the Aboriginal Fishing Strategy Working Group*, Fisheries Management Paper No. 168 (May 2003) 30–31.

92. Ibid, recommendation 1.

93. Department of Fisheries, *Proposed Amendments to the Fish Resources Management Act 1994: Discussion Paper*, Fisheries Management Paper No. 208 (April 2006) 29.

94. Paper No. 208 makes clear that authorisations will be subject to mandatory suspension for a period of up to five years if the authorisation 'accumulates three prescribed offences in a ten-year period': ibid 14. It should be noted that offences, including contravention of a management plan (which will apply to the new customary fishing sector), also attract penalties such as fines. It is not clear whether an authorisation would apply to an individual or to a community in relation to customary fishing.

95. Department of Fisheries, *Aboriginal Fishing Strategy: Report to the Minister for Agriculture, Forestry and Fisheries by the Hon EM Franklyn QC, Chairman of the Aboriginal Fishing Strategy Working Group*, Fisheries Management Paper No. 168 (May 2003) Recommendation 5.

96. Department of Fisheries, *Proposed Amendments to the Fish Resources Management Act 1994: Discussion Paper*, Fisheries Management Paper No. 208 (April 2006) 13.

Establishing who can fish in accordance with Aboriginal tradition in specific areas is the responsibility of the Aboriginal community and Government *should not play a role in legislating or enforcing this practice.*⁹⁷

If a permit system were applied to customary fishing under the proposed amendments detailed in Paper No. 208, then Aboriginal people will possibly be in a worse position than under the current exemption scheme. The exemption scheme applies to all Aboriginal people regardless of customary right and does not require any form of permit or licence. While the establishment of a customary fishing sector as described by the AFSWG report has important benefits, the potential of suspension of authorisations and a permit system applying to that sector under the current proposed amendments significantly detracts from the AFSWG's recommendations.

Without further information regarding the nature of authorisations, the definition of customary fishing and the potential application of a permit system, the Commission does not support the amendments proposed by the Department of Fisheries in Paper No. 208. Instead the Commission recommends the implementation of the Aboriginal Fishing Strategy proposed by the AFSWG in Paper No. 168. The Commission further reiterates the need for consultation with, and involvement of, Aboriginal people throughout the amendment process, particularly if proposed amendments stray from the recommendations of the AFSWG.



Recommendation 107

Implementation of the Aboriginal Fishing Strategy Working Group's recommendations

1. That the Western Australian government implement the recommendations of the Aboriginal Fishing Strategy Working Group as reported in Fisheries Management Paper No. 168.
2. That any amendments to the *Fish Resources Management Act 1994* (WA) that stray from the recommendations of the Aboriginal Fishing Strategy Working Group as reported in Fisheries Management Paper No. 168 be undertaken in consultation with, and with the involvement of, Aboriginal people.

Improving recognition – access to land for customary harvesting

In its 1986 report on the recognition of Aboriginal customary laws the Australian Law Reform Commission asserted that '[i]t is reasonable that Aborigines be accorded access to traditional lands for the purposes of hunting, fishing and gathering, whether these lands are unalienated Crown lands or subject to leasehold or other interests'.⁹⁸ As mentioned above, s 23 of the *Wildlife Conservation Act 1950* (WA) 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 *Conservation and Land Management Act 1984* (WA).⁹⁹

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:

Reservation in favour of Aboriginal persons

Aboriginal persons may at all times enter upon any unenclosed and unimproved parts of the land under a pastoral lease to seek their sustenance in their accustomed manner.

97. Department of Fisheries, *Aboriginal Fishing Strategy: Report to the Minister for Agriculture, Forestry and Fisheries by the Hon EM Franklyn QC, Chairman of the Aboriginal Fishing Strategy Working Group*, Fisheries Management Paper No. 168 (May 2003) Recommendation 1 (emphasis added).

98. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [989].

99. Recommendation 100, above p 307.

In Western Australia 36 per cent of the state's land area is covered by pastoral leases; the leaseholds of which expire in 2015.¹⁰⁰ The Aboriginal Access and Living Areas Working Group (AALAWG) was established to inform government of the interests and aspirations of Aboriginal people in relation to gaining access and tenure over pastoral lands prior to leasehold renewal.¹⁰¹ In particular, the AALAWG was asked to consider the terms of the reservation for Aboriginal people contained in s 104 of the *Land Administration Act*.

Section 104 access

The terms of the reservation for Aboriginal access to pastoral leases contained in s 104 have not changed since 1934.¹⁰² The AALAWG has observed that:

[Section 104] has never been effective in its apparent objective of guaranteeing Aboriginal access to pastoral lease land. This has been a source of concern to the main Aboriginal and pastoral stakeholders; to the former because reportedly significant numbers of Aboriginal people remain unable to access lands to which they have a traditional and/or historical connection, and to pastoralists because the general nature of the access reservation appears to suggest a right of untrammelled access to all pastoral leases by any of the State's Aboriginal groups.¹⁰³

In particular, the AALAWG found that the generic application of s 104 to all Aboriginal persons and all pastoral leases, and the undefined terms such as 'accustomed manner', 'sustenance' and 'unenclosed and unimproved', created problems for both pastoral and Aboriginal interests which sought clarification of the rights guaranteed under the section.¹⁰⁴ It was 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.¹⁰⁵ Access agreements would feature such things as codes of conduct for both parties, joint responsibilities in conservation and land management, and dispute resolution procedures.¹⁰⁶ In the event that an access agreement could not be reached, it was recommended that one be arbitrated between the parties to ensure that Aboriginal rights of access are protected.¹⁰⁷

In its Discussion Paper the Commission noted its support for amendment to s 104 to clarify the rights and responsibilities of traditional owners and leaseholders in relation to land the subject of a pastoral lease.¹⁰⁸ The Commission observes that amendments to s 104 of the *Land Administration Act* to reflect the recommendations of the AALAWG remain outstanding; it therefore makes the following recommendation.

Recommendation 108

Clarification of access by Aboriginal people to pastoral leasehold land for customary purposes

That the recommendation of the Aboriginal Access and Living Areas Working Group final report regarding clarification of pastoral lease land access and rights and responsibilities of traditional owners and leaseholders under s 104 of the *Land Administration Act 1997* (WA) be implemented.

100. Aboriginal Access and Living Areas Working Group (AALAWG), 'Aboriginal Access and Living Areas Pastoral Industry Working Group Final Report' (September 2003), <<http://www.dpi.wa.gov.au/pastoral/documents/aboriginalaccess.rtf>> 9. It is noted that there are presently six pastoral leases held by the Aboriginal Lands Trust and nine held by other entities (such as the Indigenous Land Corporation) for the benefit of Aboriginal interests: see Western Australia, *Parliamentary Debates*, Legislative Council, 4 December 2003, 14214 (Mr Ken Travers).

101. AALAWG, *ibid*.

102. *Ibid* 11.

103. *Ibid* 10.

104. *Ibid* 11.

105. *Ibid* 4. The working group also recommended that a facility for the registration of land access agreements be established but that working informal 'handshake' agreements between pastoral leaseholders and Aboriginal people be respected.

106. *Ibid* 5.

107. *Ibid* 13.

108. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 382.

Chapter Nine

Aboriginal Customary Law in the Courtroom: Evidence and Procedure

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Evidence

If Aboriginal customary law is to be recognised by courts in Western Australia Aboriginal people must be able to attend court as witnesses and explain their customary law in an effective way. In Part IX of its Discussion Paper the Commission recognised that Aboriginal people can have problems when giving evidence about their customary law in court.¹ It was also acknowledged that many Aboriginal people generally have difficulties dealing with the court process, whether as a witness or as a party to proceedings. The Commission identified some of the problems facing Aboriginal people in court and made proposals for changes to the rules governing evidence and court procedure to assist with those problems. The recommendations in this chapter are designed not only to assist Aboriginal people to give evidence about customary law, but also to help Aboriginal people to better understand and participate in the legal system.

In its Discussion Paper the Commission explained how the common law (or judge-made) rules of evidence and the *Evidence Act 1906* (WA) can make it difficult for Aboriginal people to give information to courts about matters of customary law.² The information that Aboriginal people have to tell the court is sometimes said to be inadmissible or such that the court cannot rely on it in making its decision. This is because information about customary law often does not comply with the rules the Australian legal system has developed to determine the types of information a court may rely on in coming to a decision. The reasons for this are complex, but flow from the fact that Australia's legal system is based on laws and rules posited in written form. By contrast, Aboriginal people have a tradition of oral history, with customary law handed down through the generations and recorded in stories, paintings and dance.

There are two main obstacles to the court receiving the information about customary law generally provided

by Aboriginal people: the rule against hearsay and the opinion rule.³ In short, when Aboriginal people are asked in court about the source of their knowledge of customary law, their reply is often that the law is what has been told to them. This offends the rule against hearsay because that rule states that the court cannot rely on second-hand information to determine the truth of a factual matter in dispute. When an Aboriginal person is asked to draw an inference or express an opinion about customary law the set of rules known collectively as the opinion rule determines whether that person is qualified to give evidence and on what their opinion or inference can be based. The opinion rule can be problematic for Aboriginal people for a number of reasons, which are discussed in detail in the Discussion Paper.⁴ The main problems are satisfying the legal test for who can give expert (or opinion) evidence and the fact that any opinion expressed must be based on admissible evidence. Thus the court will not allow an Aboriginal witness to state an opinion if the basis of the opinion is hearsay (or second-hand) evidence.

Some of the recommendations in this Report will lead to an increased need for courts to hear information about customary law; for example, to prove the existence of a traditional marriage⁵ or specific customary law obligations for the purposes of applying for an extraordinary drivers licence.⁶ There is therefore a need for the difficulties posed by the rules of evidence to be addressed.

The Commission's Proposals

In order to address these problems the Commission in its Discussion Paper proposed amendments to the *Evidence Act*. The proposals sought to exclude the hearsay and opinion rules in relation to information that proves the existence (or non-existence) or content of Aboriginal customary law. They also provided that a

1. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 385–95.

2. For fuller discussion, see *ibid* 385–87.

3. These expressions are shorthand expressions for a group of rules governing the reception of particular kinds of evidence. For a more detailed discussion of the application of these rules of evidence to information about Aboriginal customary law, see *ibid* 387–92.

4. *Ibid* 389–92.

5. See Recommendation 83, above p 274.

6. See Recommendation 13, above p 95.

person may be qualified to give expert evidence about Aboriginal customary law based on his or her experience of that law.⁷

Lawyers who had experienced difficulties in seeking to prove aspects of customary law welcomed the proposed changes.⁸ They noted that the common law rules of evidence are often broad enough to permit information about customary law to be admitted; however, much complex legal argument can be required before this position is established.⁹ For this reason, it was argued that it was desirable to make the position clear in the *Evidence Act*. The Office of the Director of Public Prosecutions (DPP) submitted that the proposed legislation would 'clarify the position and assist the courts to receive such evidence in a consistent manner'.¹⁰

Customary Law and the Uniform Evidence Acts

In making its proposals the Commission was informed by the recommendations of the Australian Law Reform Commission (ALRC) in both its 1986 report *The Recognition of Aboriginal Customary Laws*¹¹ (referred to in this chapter as the '1986 ALRC Report') and its 2005 *Review of the Uniform Evidence Acts*¹² (referred to in this chapter as the '2005 ALRC Discussion Paper'). Since the publication of this Commission's Discussion Paper, a final report on the uniform Evidence Acts has been released by the ALRC (referred to in this chapter as the '2005 ALRC Final Report').¹³ In respect of Aboriginal customary law¹⁴ the 2005 ALRC Final Report is directed to two issues. First, whether it is necessary

for the uniform Evidence Acts to be amended to include a provision dealing specifically with the admission of evidence of Aboriginal or Torres Strait Islander traditional laws and customs. And second, whether there should be a new form of privilege with respect to evidence that may render an Aboriginal witness liable to traditional punishment.¹⁵

Use of terminology

There is a slight divergence between the use of terms in the 2005 ALRC Final Report and this Report. In this Report the Commission uses the term 'Aboriginal customary law', whereas the 2005 ALRC Final Report uses the expression 'Aboriginal and Torres Strait Islander traditional laws and customs'.¹⁶ In the 1986 ALRC Report the expression 'Aboriginal customary law' was used and it was acknowledged that customary law could not be precisely defined.¹⁷ In contrast, in its 2005 ALRC Final Report the ALRC preferred the expression 'traditional laws and customs' and defined this expression as 'the customary laws, traditions, customs, observances, practices, knowledge and beliefs of a group (including a kinship group) of Aboriginal and Torres Strait Islander persons'.¹⁸ This expression is consistent with the language of the *Native Title Act 1993* (Cth), which refers to 'traditional laws acknowledged, and traditional customs observed'.¹⁹ The ALRC received a varied response to this definition in submissions and consultations.²⁰ Some issues were raised such as whether the narrow interpretation of the word 'traditional' in the *Yorta Yorta* decision²¹ would impact on the use of this expression. There was also concern

7. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 395, Proposal 77.

8. Support for this proposal was also expressed in a number of submissions received by the Commission: Australian Property Institute, Submission No. 11 (21 April 2006) 3; Law Society of Western Australia, Submission No. 36 (16 May 2006), 11; Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006), 6; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 5. The Law Society recognised that Aboriginal customary law 'is known, held and disseminated in ways which create evidentiary difficulties in legal proceedings.' It asserted that this 'mismatch' should not prohibit the formal recognition of Aboriginal customary law; particularly 'where the physical, economic, social and cultural well-being of Aboriginal people is affected.'

9. Greg McIntyre SC & George Irving, consultation (24 May 2006).

10. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 6.

11. Australian Law Reform Commission (ALRC), *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986).

12. ALRC, *Review of the Uniform Evidence Acts*, Discussion Paper No. 69 (2005). The uniform Evidence Acts means the *Evidence Act 1995* (Cth), *Evidence Act 1995* (NSW), *Evidence Act 2001* (Tas), and *Evidence Act 2004* (Norfolk Island).

13. ALRC, *Uniform Evidence Law*, Report No. 102 (2005). This report was prepared and published in conjunction with the New South Wales Law Reform Commission (as their Report No. 112) and the Victorian Law Reform Commission.

14. The expression used in the report is 'Aboriginal and Torres Strait Islander traditional laws and customs'. For comparison with the terms used in this Report, see discussion under 'Use of terminology' below.

15. The conclusions expressed in the 2005 ALRC Final Report about whether it is necessary to extend the categories of privilege to witnesses who do not wish to give evidence for reasons of customary law are discussed in more detail later in this chapter: see below p 323.

16. In the 2005 ALRC Final Report the expression 'Aboriginal and Torres Strait Islander' is used to describe Australian Indigenous persons. For the reasons expressed in the introduction to this Report the Commission has used 'Aboriginal' to refer to both Aboriginal and Torres Strait Islander people: see 'Introduction', above p 1.

17. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [99]. This issue is discussed in more detail in LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 49.

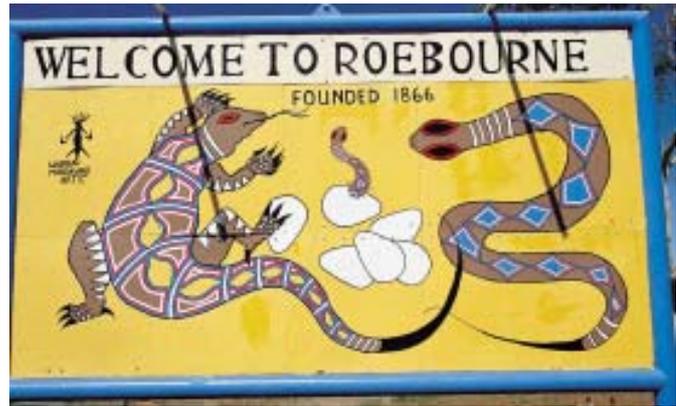
18. ALRC, *Uniform Evidence Law*, Report No. 102 (2005) Recommendation 19-3.

19. *Native Title Act 1993* (Cth) s 223.

20. ALRC, *Uniform Evidence Law*, Report No. 102 (2005) [19.91].

21. *Ibid* [19.89]. In *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 [46] 'traditional' was held to mean the normative rules of Aboriginal societies before the assertion of sovereignty by the British Crown.

about whether the similarity of the expression to the words used in the *Native Title Act* would mean that the judicial interpretation of those words would be adopted automatically into the uniform Evidence Acts.²² The ALRC stated that these issues do not present insurmountable problems and noted that most submissions preferred a 'broad-based definition';²³ that is, a definition broad enough to cover the types of material relevant for the purpose.²⁴ In any event, it was noted that no alternative solution was proposed.²⁵



Although the divergence of expressions may not have any practical impact, the Commission is concerned to ensure that no unintended consequences flow from the listing of specific items in the definition.²⁶ The Commission has therefore preferred the non-defined term 'Aboriginal customary law' for the purposes of this reference.²⁷ Nevertheless, it is clear from the discussions in both the 2005 ALRC Final Report and this Report that both are directed to the same notion and attempt to describe a broad concept that is not capable of precise definition.

Proposed amendments to the uniform Evidence Acts

In order to provide a background to the Commission's proposed changes to the *Evidence Act* it is useful to examine the recommendations that the ALRC has made in respect of this issue over the past 20 years. The 1986 ALRC Report contained proposed changes to the rules of evidence for Aboriginal witnesses seeking to give evidence about customary law. It made a recommendation (referred to in this chapter as the '1986 ALRC recommendation') that legislation be enacted to provide:

that evidence given by a person as to the existence or content of Aboriginal customary laws or traditions is

not inadmissible merely because it is hearsay or opinion evidence, if the person giving that evidence:

- has special knowledge or experience of the customary laws of that community in relation to that matter; or
- would be likely to have such knowledge or experience if such laws existed.²⁸

The 2005 ALRC Final Report noted²⁹ that this proposal aimed to make information about Aboriginal customary law admissible and also dealt with problems created by the rules of evidence discussed above.³⁰ This recommendation was never implemented.

The uniform Evidence Acts, enacted in 1995, relaxed the rules against hearsay and opinion evidence.³¹ In 2004 the ALRC commenced a review to evaluate the operation of the uniform Evidence Acts which, among other things, considered the impact of the Acts on evidence of Aboriginal customary law. In the 2005 ALRC Discussion Paper it was suggested that both the measures introduced in the uniform Evidence Acts and the 1986 ALRC recommendation did not go far enough to enable information about Aboriginal customary law to be properly heard by courts. The ALRC found that the admissibility of information of this kind was still contested, that divergent judicial approaches were

22. Ibid [19.4]. The ALRC states that it does not intend for the judicial interpretation developed in the *Native Title Act* context to be automatically incorporated into the uniform Evidence Acts.

23. Ibid [19.93]. It is stated at [19.100] that what was intended was wording that would ensure the full range of matter within the scope of the concept was included, and at [19.103] that 'by defining broadly the uniform Evidence Acts will be better able to receive more diverse evidence which can be used to prove the existence and content of particular traditional laws and customs'.

24. Ibid. See comments between [19.91]–[19.95].

25. Ibid [19.98].

26. It can be argued that listing items in a definition (in the manner of the 2005 ALRC Final Report) risks excluding relevant matters.

27. See discussion under 'Definitional Matters – Customary law', Chapter Four, above p 64.

28. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [642]. The ALRC also recommended the legislation provide that such evidence is admissible, notwithstanding the question of Aboriginal customary laws is a fact in issue in the case.

29. ALRC, *Uniform Evidence Law*, Report No. 102 (2005) [19.65].

30. These issues are discussed in more detail in LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 389–92.

31. The uniform Evidence Acts contain the rule against hearsay (s 59) but they also provide that hearsay can be admitted for a non-hearsay purpose (s 60); and that the hearsay rule does not apply to reputation evidence about relationships or age (s 73) and reputation evidence about public or general rights (s 74). The Acts also provide that a person can attain specialised knowledge (and therefore give opinion evidence) through study, training or experience (s 79) and abolish the ultimate issue and common knowledge rules (s 80).

taken, and that there was too much reliance on the attitudes of individual judges and lawyers.³² Therefore, the 2005 ALRC Final Report proposed that an exception be provided to the hearsay and opinion rules for evidence of Aboriginal customary law.

In the 2005 ALRC Final Report it was noted that a number of submissions recognised that a primary concern is ‘the discord between the rationale underpinning the hearsay and opinion rules in the common law system and the [Aboriginal and Torres Strait Islander] oral tradition of knowledge’.³³ The intention of the recommendations in the 2005 ALRC Final Report is to shift the court’s focus from technical breaches of the rules of evidence to a determination about whether the information presented is reliable.³⁴ Thus the recommendation in the 2005 ALRC Final Report is that the uniform Evidence Acts be amended to provide:

- an exception to the hearsay rule for evidence relevant to Aboriginal or Torres Strait Islander traditional laws and customs;³⁵
- an exception to the opinion evidence rule for evidence of an opinion expressed by a member of an Aboriginal or Torres Strait Islander group about the existence or non-existence, or the content, of the traditional laws and customs of the group;³⁶ and
- a definition of ‘traditional laws and customs’ to include ‘the customary laws, traditions, customs, observances, practices, knowledge and beliefs of a group (including a kinship group) of Aboriginal and Torres Strait Islander persons.’³⁷

These recommendations have not yet been enacted.

The Western Australian position

The Commission’s recommendation essentially mirrors the most recent ALRC recommendation, but does not use the term ‘traditional laws and customs’ for the reasons referred to above. The recommendation also specifically provides for a person whose knowledge is based on experience to be regarded as an expert and therefore able to give opinion evidence. This addition is necessary because, unlike the uniform Evidence Acts, the Western Australian *Evidence Act* does not specifically allow a person to be qualified as an expert on the basis of experience alone (although that is the position at common law).³⁸

Recommendation 109

Exclusion of the hearsay and opinion rules for evidence about Aboriginal customary law

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

1. An exception to the hearsay rule for evidence relevant to Aboriginal customary law.
2. An exception to the opinion rule for evidence relevant to Aboriginal customary law.
3. 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.

32. The ALRC also expressed concern that the court may take a liberal approach to the admission of material, and then afford it little weight. For a detailed history of the ALRC’s proposals about evidence of customary law, see ALRC, *Uniform Evidence Law*, Report No. 102 (2005) [19.2]–[19.105].

33. *Ibid* [19.13].

34. *Ibid* [19.74].

35. *Ibid* Recommendation 19-1.

36. *Ibid* Recommendation 19-2.

37. *Ibid* Recommendation 19-3.

38. See generally Byrne D & Heydon JD, *Cross on Evidence* (Sydney: Butterworths, 1996) [29060]. For example, an Aboriginal man who was trained from the age of seven by his grandparents in tracking human and animal footprints and had experience in footprint recognition over many years was considered to be an expert by the Northern Territory Supreme Court: *R v Harris* (1997) 7 NTLR 1.

Procedure

For many Aboriginal people, appearing in court as a witness and telling the court about their customary law is an extremely difficult thing to do. There can be a number of reasons for this including: the difficulties experienced by some Aboriginal people in understanding the court process;¹ problems associated with the language used in court;² problems caused by the techniques used by lawyers in court;³ and the fact that the demeanour of some Aboriginal witnesses might be misunderstood by the judge or jury.⁴ In addition, an Aboriginal witness may be restricted, for reasons of customary law, about what he or she can say in court.⁵ In its Discussion Paper the Commission gave careful consideration to the problems Aboriginal people face when appearing in court and made a number of proposals about practical ways of resolving these problems. The resulting recommendations fall into two broad groups: recommendations to assist with circumstances where the requirements of the court clash with an Aboriginal person's obligations under customary law; and recommendations to assist Aboriginal people to better understand and participate in the court process.

Conflict with Obligations under Customary Law

In its Discussion Paper the Commission examined ways in which the customary law obligations of an Aboriginal witness can conflict with the requirements of the court. These include where:

- witnesses cannot speak about a subject in front of certain people, such as where a man is not permitted to speak in front of his mother-in-law;

- there is a speech ban or taboo in place, such as where it is not permissible to use the name of a deceased person;
- information which may be relevant to the proceedings is secret, or cannot be publicly disseminated, such as information that can be known only by Elders; and
- knowledge of information that may be relevant to the proceedings is restricted to one gender only.⁶

It was recognised that Aboriginal witnesses can face a difficult decision in these circumstances. They can choose not to give evidence, in which case the court would fail to hear material that is relevant to the matter;⁷ or they may comply with Australian law, in which case they may breach customary law and possibly face punishment. Alternatively, they may censor their evidence, with the result that the court is unaware that all relevant evidence has not been provided.

Should a further category of privilege be created for customary law?

One way of dealing with the problem of a conflict between an Aboriginal witness's obligations under customary law and the requirements of the court is to extend the categories of privilege.⁸ This would enable a witness faced with such a situation to elect not to answer a question that might incriminate him or her under customary law. It was noted in the Commission's Discussion Paper that the ALRC was considering whether a further category of privilege should be created to encompass Aboriginal customary law;

1. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 396. See also discussion under 'Practice and Procedure', Chapter Five, above pp 188–91.

2. Ibid 396.

3. Ibid 398.

4. Ibid 400.

5. Ibid 407–408.

6. Ibid.

7. Ibid 408–409. In *Western Australia v Ward* (1997) 76 FCR 492, 499 Hill and Sundberg JJ noted that it was accepted by the parties to that case that it was 'notorious that there are circumstances where indigenous persons of one gender might rather refrain from giving evidence at all than reveal to a person of another gender matters secret to the gender to which the prospective witness belongs.'

8. A privilege is a right of a party to refuse to disclose certain confidential material to a court, not the right to refuse to attend before the court and give any evidence whatsoever: see ALRC, *Uniform Evidence Law*, Report No. 102 (2005) [19.107], quoting Byrne D & Heydon JD, *Cross on Evidence* (Sydney: Butterworths, 7th ed., 2004) [25005].

however, the 2005 ARLC Final Report concluded that this was not desirable. The Commission was not told in its consultations conducted prior to, or after, the release of its Discussion Paper that such a measure was necessary or desirable. Nor was it raised in submissions.

The Commission is of the opinion that the measures recommended in this Report will encourage Aboriginal witnesses to give evidence where they might previously have been reluctant to do so. In particular, by making changes to court procedure to alleviate some of the problems related to customary law and other cultural considerations. The Commission considers this to be a better option because the court will hear all the evidence a witness has to provide to the court. This is preferable to the situation where a witness exercising a privilege withholds information, thus denying the court an opportunity to hear evidence that may be relevant and reliable.⁹ The Commission therefore agrees with the conclusions expressed in the 2005 ARLC Final Report that a further category of privilege for Aboriginal customary law is not necessary.¹⁰

The Commission's approach

In order to overcome conflicts between customary law obligations of an Aboriginal witness and the requirements of the court, possible options include restricting evidence to persons of one gender or making evidence secret. While these potentially undermine the principles of openness and accessibility upon which the Australian legal system is founded, it is important to note that these principles are not absolute. For example, the names of offenders in the Children's Court are not made public.¹¹ Further, courts can be closed when hearing evidence from a person in the witness

protection program¹² or when hearing an application for a freezing order over a person's assets.¹³ Apart from these specific legislative powers, the court also has power at common law to close the court to the public. Further, a court can make orders restricting who may see certain evidence.¹⁴ It is clear that the court will, where the interests of justice demand it, restrict the persons who can be present in certain kinds of hearings or restrict access to sensitive information.¹⁵ The Commission considers that it is in the interests of justice that courts assist Aboriginal witnesses to avoid, where possible, conflicts with their customary law. The Commission took a pragmatic approach to this issue. Its recommendations are an attempt to provide a set of powers that would enable a judge in a case where customary law is relevant, or impacts on the ability of a witness to give evidence, to make orders to suit that case.

In submissions and consultations the Commission was told that, in addition to the measures proposed in the Discussion Paper, some of the court's existing powers should be used more often to deal with issues raised by customary law.¹⁶ Since the publication of the Discussion Paper the fact that Aboriginal witnesses can feel restricted by customary law in giving evidence in court has been discussed in the media.¹⁷ Notably, it has been suggested that the Australian Crime Commission could use its powers to compel witnesses to give evidence. If witnesses refused to answer questions they could be found in contempt of court, and perhaps jailed.¹⁸ The Commission does not consider that a punitive approach should be taken to these issues. The Commission's recommendations are directed to reducing the existing barriers to Aboriginal people giving evidence in court through changes to the existing court procedure.

9. The ARLC also noted that the establishment of a privilege against self-incrimination for reasons of customary law may place greater pressure on witnesses not to give evidence (ie, to rely on the privilege) in particular matters: *ibid* [19.127]. In addition, if Aboriginal people could refuse to give evidence because of Aboriginal customary law this may perpetuate the silence about issues of violence and sexual abuse: see Chapter One, above p 26 and Chapter Seven, above pp 284–88.

10. The issue is dealt with in detail in ALRC, *Uniform Evidence Law Report*, Report No. 102 (2005) [19.106]–[19.128].

11. *Children's Court Act 1988* (WA) s 36.

12. *Witness Protection Act 1996* (WA) s 32. Section 31 of the *Children's Court Act 1988* (WA) also allows the Children's Court to order that any persons be excluded from the courtroom or place of hearing where the interests of a child may be prejudicially affected.

13. Sections 42(a) and (b) of the *Criminal Property Confiscation Act 2000* (WA) provide that the court hearing the application can close the court or limit the persons present. Section 171(2) of the *Criminal Procedure Act 2004* (WA) gives a court hearing a criminal trial the power to order a person, or class of persons out of the court or restrict publication of the proceedings or any part of them, where it is required in the interests of justice.

14. *Scott v Scott* [1913] AC 417. For a fuller discussion of the circumstances in which the court does not hold hearings in open court or restricts publication of evidence, see Seaman P, *Civil Procedure Western Australia* (Sydney: Butterworths, 1990) [34.0.2]–[34.0.3].

15. In *Western Australia v Ward* (1997) 76 FCR 492, 498–99 a comparison was made between an order that restricted access to certain evidence in native title matters to persons of one gender, and proceedings involving sensitive commercial information where the court orders that information be made available to a party's legal advisers, but not the party. It must be noted that the decision in *Ward* was made in the context of the particular provisions of the *Native Title Act*.

16. Legal practitioner, confidential consultation (30 May 2006). The Commission was told that measures such as trial by judge alone and closing the court to the public might also be appropriate in some trials involving Aboriginal witnesses.

17. O'Brien N, 'Aborigines to be Compelled to Give Evidence', *The Australian*, 11 July 2006.

18. *Ibid*.

The measures recommended in this Report will encourage Aboriginal witnesses to give evidence where they might previously have been reluctant to do so.

The recommendations in this chapter can be broadly grouped into two categories. First, recommendations that enable the court to use its existing powers to respond to issues of customary law:

- restricting who can be in court to hear certain evidence;
- using facilities for vulnerable witnesses;
- allowing certain evidence not to be said in open court;
- restricting who can be shown certain evidence; and
- restricting the publication of certain evidence.

Second, recommendations that give the court new powers to enable it be more responsive to issues of customary law:

- making orders that allow for gender-restricted evidence to be heard in court;
- allowing the court to hear evidence from witnesses in groups;
- allowing the court to hear evidence on country.

Each of these recommendations is discussed below.

Using court's existing powers to respond to customary law issues

Closed courts

Although the general rule is that courts should be open to the public,¹⁹ courts may be closed in certain

circumstances. In criminal matters the *Criminal Procedure Act 2004* (WA) provides that all proceedings should be open to the public; however, s 171(4)(a) allows the court to make an order that a person or a class of persons may be excluded from the court where it is in the interests of justice to do so.²⁰ There are a number of other situations in which Western Australian legislation specifically provides for courts to be closed or persons to be excluded.²¹ In addition, the court has an inherent jurisdiction to close the court where the administration of justice would be hampered by the presence of the public.²² The Commission notes that there may be circumstances where, for reasons associated with customary law, it is desirable for the court to be closed, either while certain evidence is given or for the duration of a matter.²³ The Commission is of the view that Western Australian courts currently have sufficient power to close proceedings for reasons of customary law where appropriate.

Trial by judge alone

It was suggested to the Commission that in criminal trials, where sensitive issues of customary law are relevant, one way of assisting witnesses to feel able to give evidence is to have the trial before a judge, without a jury.²⁴ Section 118 of the *Criminal Procedure Act* provides that a person may elect to be tried by a judge sitting alone and a judge may make an order where it is in the interests of justice. This power could be of assistance where there are issues of customary law; for example, by reducing the number of persons who have to hear particular evidence, or by ensuring that

19. *Scott v Scott* (1913) AC 417, 437–46. At common law the rule is that courts should be public, except where the court is guarding a person under its parental jurisdiction (such as persons with a mental incapacity), or where the effect of publicity would destroy the subject matter of the litigation (such as matters involving trade secrets) or in other circumstances in which the administration of justice would be rendered impracticable by the presence of the public (such as matters involving national security): Seaman P, *Civil Procedure in Western Australia* (Sydney: Butterworths, 1990) [34.0.2].

20. Section 171(8) of the *Criminal Procedure Act 2004* (WA) provides that a person who is entitled under s 172(3) to act on behalf of a party to the proceedings must not be excluded from the courtroom under this section.

21. The *Criminal Property Confiscation Act 2000* (WA) states that in application for a freezing order the proceedings may be heard in a closed court (s 42(a)) or that the court may order that only persons or classes of persons specified by the court may be present during the whole or any part of the proceedings (s 42(b)). Section 107(1) of the *Corruption and Crime Commission Act 2003* (WA) provides that certain kinds of applications under the act can be made in closed court.

22. *Scott v Scott* [1916] AC 417, 437. See the discussion in Seaman P, *Civil Procedure in Western Australia* (Sydney: Butterworths, 1990) [34.0.2]. The Commission understands that criminal courts have closed the court to the public for security reasons: see, for example, *The State of Western Australia v Taylor, Barry, Yorkshire and Blurton* (Unreported, Supreme Court of Western Australia, No. 116/2005, 6 June 2006).

23. For example, where a witness is fearful of retribution under customary law if certain information is made public. It must be noted that while such considerations have gained some prominence in media reporting of this topic, the Commission was not told in its consultations with Aboriginal people about concerns of this nature.

24. Legal practitioner, confidential consultation (30 May 2006).

the persons in court are all of one gender.²⁵ The Commission encourages discussion of the potential use of this power in cultural awareness training for judges and lawyers working with Aboriginal people.²⁶

Vulnerable witness provisions

Section 106R(3)(b) of the *Evidence Act* provides that a witness can be declared a 'special witness' if he or she would, if required to give evidence in the normal way, either be likely:

- (i) to suffer severe emotional trauma; or
- (ii) to be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily, by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or any other factor that the court considers relevant.

Once declared as a special witness the person may have access to the following protective measures in giving evidence:

- they may have a support person with them in court;²⁷
- their evidence may be pre-recorded at a special hearing;²⁸
- they can give evidence from a remote room by closed circuit television;²⁹ or
- a screen can be placed between the witness and defendant in criminal proceedings.³⁰

In its Discussion Paper the Commission proposed that if a witness was not able to give evidence in the normal manner for reasons of customary law that witness should be able to be declared a special witness³¹ and have access to the protective measures set out above.

The Commission received some positive responses to this proposal.³² Lawyers consulted stated that the special witness provisions were working well for vulnerable witnesses.³³ They supported the idea of extending the concept to a witness who is restricted

in the way he or she can give evidence by reason of customary law. Two issues were raised in respect of this proposal. First, that arrangements in many regional courts did not permit the measures provided for special witnesses in the *Evidence Act* to be used; and second, that it is not necessary as the present provisions of the *Evidence Act* are wide enough to cover this situation.

Availability of special witness facilities

There is a lack of special witness facilities in regional Western Australia. In his submission the Chief Magistrate expressed concern that unless proposals such as this one are properly funded they will be 'paper promises'.³⁴ He explained that in the vast majority of courts outside the metropolitan area there are no closed circuit television facilities. Further, he commented that the government has not made available the funds necessary for such facilities and as 'a result inadequate measures such as screening are adopted'.³⁵

Recent proposed amendments to the *Family Court Act 1997 (WA)* make provision for evidence and submissions by video or audio link. The Explanatory Memorandum to the Family Legislation Amendment Bill 2006 (WA) states that the provisions of Division 2 of Part XI of the Act are designed to reduce the need for parties to travel long distances to attend directions hearings or final hearings of their cases.³⁶ It is clear that as courts move towards further acceptance of such technology it will be necessary for the facilities in regional areas to be improved.

The Commission considers that the same measure of protection currently provided to vulnerable witnesses in metropolitan courts should be given to vulnerable witnesses (both Aboriginal and non-Aboriginal) giving evidence in regional courts. If violent and sexual offences are to be properly prosecuted it is necessary to provide victims with appropriate protection. In order to ensure that witnesses are able to overcome the kinds of

25. It must be noted, however, that the Commission has recommended that a power be inserted into the *Criminal Procedure Act* to allow for the empanelling of juries comprised only of persons of one gender: see Recommendation 41, above p 63.

26. See discussion under 'Cultural awareness training for judicial officers', below pp 347–48. See also 'Cultural awareness training for lawyers', Chapter Five, above p 91.

27. *Evidence Act 1906 (WA)* s 106R(4)(a).

28. *Evidence Act 1906 (WA)* s 106R(4)(b).

29. *Evidence Act 1906 (WA)* s 106N(2).

30. *Evidence Act 1906 (WA)* s 106N(4).

31. LRCWA, *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) Proposal 83, 410.

32. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 14; Legal practitioner, confidential consultation (30 May 2006).

33. Wickham Chambers, consultation (25 May 2006); Legal practitioners, confidential consultations (30 May 2006; 12 June 2006).

34. Chief Magistrate Steven Heath, Magistrates Court, Submission No. 10 (21 March 2006) 1. The Magistrates Court sits in 103 locations outside the metropolitan area: Magistrates Court of Western Australia, email (1 August 2006). Closed circuit television facilities are available in 13 courts outside the metropolitan area: Courts Technology Group, Department of the Attorney General, email (24 July 2006).

35. *Ibid* 1. This view was also expressed in Department of the Attorney General, Submission No. 34 (11 May 2006) 15.

36. *Family Legislation Amendment Bill 2006 (WA)*, Explanatory Memorandum, 3.

problems that at present contribute to the under-reporting of violent and sexual offences, the government must provide adequate facilities in courts operating in remote locations.³⁷

Recommendation 110

Funding to upgrade special witness facilities in regional areas

That the Department of the Attorney General ensure that adequate facilities are available in every Western Australian court to enable witnesses to use the special witness measures provided for in the *Evidence Act 1906* (WA).

Are the present provisions of the Evidence Act sufficient?

The DPP agreed that protective measures should be made available for reasons of customary law, but was of the view that there is adequate provision for this under the present terms of s 106R(3)(b) of the *Evidence Act*.³⁸ In addition, some lawyers consulted³⁹ stated that any considerations of customary law should fit the existing legislative criteria before allowing a witness to be declared a special witness. That is, the witness must be said to be likely to suffer emotional trauma or be intimidated and distressed if they were to give evidence in the normal way. The Commission acknowledges that the reasons set out in the Act include 'any other factor that the court considers relevant'. Thus, if customary law is the source of emotional trauma, intimidation or distress, the present provisions are wide enough. However, the Commission is of the view that there may be situations (such as avoidance relationships or where a witness is not able to talk about a particular subject in front of person of the opposite gender) in which a witness may not exhibit distress, but simply refuse to speak, and therefore may not fit the criteria of the section. Further, the Commission recognises that while Aboriginal people are likely to be distressed by having to give evidence contrary to customary law, judges and lawyers may

not always appreciate this. For these reasons the Commission is of the view that it is appropriate to include a power in the *Evidence Act* that a witness may be declared a special witness for reasons of customary law. The Commission is of the view that the existence of likely emotional trauma should not be a requirement before a witness is afforded the protection provided by the special witness provisions where the witness's difficulty arises as a result of customary law.

Recommendation 111

Special witness for reasons of customary law

That s 106R of the *Evidence Act 1906* (WA) be amended to provide that a witness may be declared a special witness if for reasons of customary law he or she is not able to give evidence in the normal manner. This order can be made on the application of the witness, or on the initiative of the court.

Dealing with sensitive information

In its Discussion Paper the Commission noted that customary law may prevent a witness from saying certain words; for example, the name of a deceased person, or a person going through the law.⁴⁰ The Commission proposed that out of respect for Aboriginal customary law a court should have the power to prohibit any reference to offensive matters during the court proceedings, provided that to do so does not unduly interfere with the administration of justice.⁴¹

The DPP was supportive of this proposal, and noted that this has in fact occurred for many years.⁴² However, lawyers consulted believed that this is not done consistently and further direction is needed to ensure that information offensive to Aboriginal people is not mentioned in court without warning.⁴³ Further, it was suggested that such a power should not be limited to criminal trials and should be available to judges generally. The Commission accepts that this is a sensible approach. Thus, rather than being provided for in the *Criminal Procedure Act*, the Commission recommends

37. See discussion under 'Under-reporting of family violence and sexual abuse', Chapter 7, above pp 284–88.

38. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 7–8.

39. Legal practitioners, confidential consultations (30 May 2006 & 12 June 2006).

40. LRCWA, *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) 413.

41. *Ibid*, Proposal 87.

42. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 8. The DPP also expressed the opinion that this proposed provision should not be available only to Aboriginal people, but to all cultural groups in Western Australia. While the Commission has confined its proposal to Aboriginal people it may be necessary for further research to determine whether other cultural groups need similar provisions.

43. Wickham Chambers, consultation (25 May 2006). The proposal was supported by the Criminal Lawyers Association, Submission No. 58 (4 September 2006) 5.

that the *Evidence Act* provide that all courts may make an order that certain information (including words or phrases) should not be referred to for reasons of customary law.

Recommendation 112

Sensitive information not referred to in court

That the *Evidence Act 1906* (WA) be amended to provide that a court may order that certain information should 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.

Suppression of information

In its Discussion Paper the Commission discussed whether judges should be able to prevent the publication of sensitive information about customary law. It was noted that s 171(5) of the *Criminal Procedure Act* permits the court to prohibit the publication of anything that may identify a victim of crime. Section 57 of the *Evidence Act 1939* (NT) gives a court the power to prohibit the publication of a name of a party or witness if such publication would offend against public decency.⁴⁴ The Commission proposed that the *Criminal Procedure Act* be amended to include a provision that allowed a court to prohibit the publication of any evidence if the court is satisfied that the publication of that material would be offensive to an Aboriginal person or community by reason of matters concerned with Aboriginal customary law.⁴⁵ The proviso was added that 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.⁴⁶ The Commission received only one submission supporting this proposal⁴⁷ and in the absence of any opposition, the Commission makes the following recommendation.

Recommendation 113

Suppression of information

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

1. On the application of a party or on its own initiative a court may make an order that prohibits the publication of any information if the court is satisfied that publication of, or reference to, the information would be offensive to an Aboriginal person by reason of matters concerned with customary law.
2. A court must not make such an order if it is satisfied that publication of, or reference to, the information is required in the interests of justice.

Extending courts' powers to respond to customary law issues

Gender-restricted material

As noted by the Commission in its Discussion Paper, the problems presented by gender-restricted information are complex.⁴⁸ It is widely recognised that for some aspects of Aboriginal customary law knowledge is restricted to women or men only. The Commission proposed in its Discussion Paper that an application could be made to the relevant chief judicial officer in each jurisdiction 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.⁴⁹ The purpose of such a power is to enable the judicial officer to assess the relevance and importance of the gender-restricted information and make appropriate orders for the way in which the court should hear it. The Commission is not proposing that courts comprising persons of one gender be routinely convened. The Commission acknowledges that to do so would be logistically difficult, as well as contrary to the fundamental principle

44. In *R v B* (1992) 111 FLR 463 this section was relied upon to prohibit the publication of the name of a deceased Aboriginal male. Mildren J decided that, due to the high number of Aboriginal people living in the Northern Territory, publication of the victim's name in a murder trial would offend a large section of the public.

45. The court also has powers that can be exercised in other circumstances to prohibit the publication of proceedings or parts of proceedings: see, for example, *Criminal Property Confiscation Act 2000* (WA) s 42(c).

46. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) Proposal 88, 414.

47. Criminal Lawyers Association, Submission No. 58 (4 September 2006) 5.

48. For a fuller discussion of this issue, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 411–13.

49. Ibid 413, Proposal 86. This proposal was supported by lawyers consulted: Wolff Chambers, consultation (16 May 2006); Greg McIntyre SC & George Irving, consultation (24 May 2006); Wickham Chambers, consultation (25 May 2006).

It is appropriate for courts to be equipped with wide powers to make orders that may enable gender-restricted material to be heard.

that the court must administer justice in public.⁵⁰ Nevertheless, the Commission believes that it is appropriate for courts to be equipped with wide powers to make orders that may enable gender-restricted material to be heard.

The Commission considers that a combination of the courts' existing powers (for example, that the trial be heard by a judge sitting alone, without a jury)⁵¹ and the extended powers recommended in this Report (to suppress certain information, or to use the special witness provisions to keep a party from view)⁵² will generally be sufficient to enable the court to make orders to protect gender-restricted (or other secret) information about Aboriginal customary law. Nevertheless, the Commission concluded that provision for a single-gender jury may be necessary; therefore, the Commission recommended that in a criminal trial, where gender-restricted evidence might be heard by a jury, a judge can order that the jury be comprised of persons of one gender only.⁵³

Aboriginal people consulted expressed concerns about gender-restricted information and stressed that these issues are not just relevant to native title matters. It was also said that measures designed to protect this information are particularly important to ensure that the perspective of Aboriginal women is heard in court.⁵⁴ Lawyers practising in the area of native title gave encouraging accounts of the flexibility shown by the Federal Court⁵⁵ in land claims where it is necessary for

witnesses to give evidence about gender-restricted material.⁵⁶ A number of measures have been successfully adopted in the Federal Court to ensure that Aboriginal witnesses feel able to speak about matters that are gender-restricted for reasons of customary law. For example, where gender-restricted evidence is to be heard and counsel is of the opposite gender, a 'stand in' counsel has been used for particular sections of a hearing. Where a 'stand in' has been used, a summary of the evidence is prepared with the gender-restricted details removed. Importantly, it was said that the best way of dealing with such information was to properly prepare witnesses before a hearing. The witnesses can be assisted to describe the information in an abstract way, so that gender-restricted details do not have to be specifically referred to in evidence. There is then no need for restrictions to be put in place about the way the evidence is given.⁵⁷

In such matters a measure of flexibility will be required from both the courts and the Aboriginal witnesses involved. One of the concerns the Commission had about recommending a power allowing single-gender courts to be convened is that a court could not give an undertaking to a witness that persons of the opposite gender would never see the evidence. It was described to the Commission that in native title matters witnesses had to accept that the evidence might be seen by others if the matter was appealed.⁵⁸ The

50. *Scott v Scott* [1913] AC 417. For a discussion of the circumstances in which the court does not hold hearings in open court or restricts publication of evidence, see Seaman P, *Civil Procedure Western Australia* (Sydney: Butterworths 1990) [34.0.2]–[34.0.3]. The Commission acknowledges that the recognition of customary law must be subjugated to the dominant interests of the state: see above p 11.

51. Section 651A of the *Criminal Code 1913 (WA)* provides that a person may elect to be tried by a judge sitting alone (without a jury). Section 118 of the *Criminal Procedure Act 2004 (WA)* sets out the procedure for a trial of this nature. There is not a proscribed set of circumstances in which a judge may make an order for a trial by judge alone; the order can be made where it is in the interests of justice.

52. See Recommendations 111–113, above pp 327–28.

53. See Recommendation 41, below p 189.

54. Indigenous Women's Congress, consultation (28 March 2006).

55. It must be noted that the Federal Court has statutory power to sit in camera and to forbid or restrict publication of various matters, arguably wider powers than the Supreme Court: see *Western Australia v Ward* (1997) 76 FCR 492, 498–99. This case turned on the particular provisions of the *Native Title Act 1993* (Cth).

56. Greg McIntyre SC & George Irving, consultation (24 May 2006). See also discussion of this issue in McIntyre G, 'Aboriginal Customary Law: can it be recognised?' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 341, 377–79.

57. Greg McIntyre SC & George Irving, consultation (24 May 2006): it was said that restricted details are usually names, names of ceremonies and descriptions of what occurs at ceremonies, and that often knowledge of these details is not required by counsel. However, it must be pointed out that George Irving has been involved in at least one matter where the very piece of evidence that was sought to be restricted was crucial to the case; the gender-restricted evidence concerned descriptions of how law and language in the country under claim came to be and how it is passed on. The evidence thus went to the heart of the requirement, in native title cases, to establish a 'normative system'.

58. *Ibid.* It must be noted, however, that it is a remote possibility that it would be necessary to reveal what had been restricted in the course of an appeal given that an appeal only concerns questions of law or conclusions drawn from facts.

Commission is of the view that the best way of dealing with gender-restricted information is to allow the court to work out practical orders on a case-by-case basis. Where possible, efforts should be made to prepare witnesses to give evidence so that restricted material does not have to be disclosed, such as by the use of summaries or initials or descriptions in place of names. Where the disclosure of evidence cannot be avoided then powers to suppress information,⁵⁹ or for certain words not to be mentioned in court,⁶⁰ could be used. If necessary, the court may be closed⁶¹ or convened with court staff and a jury⁶² of only one gender. The Commission does not believe that it is appropriate to provide that the court may order the parties to be represented by counsel of a specific gender. Rather, the Commission is of the view that the kinds of practical measures at present adopted in the Federal Court for gender-restricted material should be employed where appropriate. Where such orders have been made the court would have to determine the best way of dealing with the transcript of evidence. Some witnesses may not be concerned about dissemination of information in transcript form; but, for those witnesses who are concerned, the extent to which the information can feasibly be protected should be determined before the witness gives evidence. This would enable the witness to make an informed decision about how to provide information to the court.⁶³

All lawyers consulted endorsed the proposal that a judge of a particular gender be assigned to a case that may involve gender-restricted information. It was said that this would be of assistance in making orders to enable information to be protected.⁶⁴ The Department of the Attorney General commented that the existing rules or processes provide mechanisms for parties seeking such an order.⁶⁵ The Commission considers that although it may be possible for courts to arrive at such an outcome by means of their present powers (because

it is in the public interest to allow such evidence to be heard),⁶⁶ it is nonetheless desirable to make it clear through a specific provision.

Recommendation 114

Application for a judge or magistrate of a particular gender to be assigned to a matter

1. That the *Criminal Procedure Act 2004 (WA)* provide that an application can be made to the Chief Judicial Officer of the relevant jurisdiction 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.
2. That the *Supreme Court (General) Rules 2005 (WA)*, the *State Administrative Tribunal Rules 2004 (WA)* and the *Magistrates Court (Civil Proceedings) Rules 2005 (WA)* should provide that an application can be made to the Chief Judicial Officer of the relevant jurisdiction 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.

Group evidence

In its Discussion Paper the Commission acknowledged that there may be situations where it is not appropriate, for reasons of customary law, for evidence to be given by one person alone. With this in mind, the Commission proposed that the *Evidence Act* be amended to allow for witnesses to give evidence about customary law in groups. Some lawyers consulted had experience with witnesses giving evidence in groups in native title matters. It was described as a beneficial method that helped to ensure all knowledge was being put before

59. See Recommendation 113, above p 328.

60. See Recommendation 112, above p 328.

61. See discussion under 'Closed courts', above p 325.

62. See discussion under 'Single-gender juries', Chapter Five, above p 189.

63. The importance of measures protecting gender-restricted information being adhered to was emphasised by the Indigenous Women's Congress. An example was given of a situation in which women had provided information to a hearing which was placed in a sealed envelope, but later shown to a non-Aboriginal man. The Commission is of the view that such instances can be avoided by explaining fully to the witnesses (before the evidence is given) what possible use will be made of information provided to the court. See Indigenous Women's Congress, consultation (28 March 2006).

64. There was also support for wording the recommendation so that it applies to evidence that is 'likely to be heard' to address the concern that if a witness is required to give all details of what gender-restricted material may be relevant in order to get an order for a judge of a particular gender to be assigned, then the witness may have revealed what he or she wanted to conceal in the first place: Wolff Chambers, consultation (16 May 2006); Greg McIntyre SC & George Irving, consultation (24 May 2006); Wickham Chambers, consultation (25 May 2006). See also LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 412.

65. Department of the Attorney General, Submission No. 34 (11 May 2006) 15–16.

66. It is noteworthy that in *State of Western Australia v Ward (on behalf of the Miriwung Gajerrong Peoples)* (1997) 145 ALR 512 the High Court did not overturn Lee J's decision to make orders that for certain pieces of evidence only persons of one gender could be present (including expert witnesses and lawyers).

Some Aboriginal people experience difficulty giving evidence and answering questions in the unfamiliar surroundings of the courtroom.

the court and by enabling some witnesses to speak where otherwise they may not.⁶⁷ In the absence of any submissions in opposition to this proposal⁶⁸ the Commission considers that it is desirable to allow that witnesses may give evidence in groups; however, it is acknowledged that this power may not be frequently required.

Recommendation 115

Witnesses can give evidence in groups

That the *Evidence Act 1906* (WA) provide that a court in the exercise of its discretion may allow witnesses to give evidence about Aboriginal customary law in groups, where it is required in the interests of justice.

Evidence taken on country

In its consultations for this reference the Commission was told of the difficulty some Aboriginal people experience giving evidence and answering questions in the unfamiliar surroundings of the courtroom. In addition, the Commission was told of the problems many Aboriginal people from remote areas face in travelling large distances to attend court hearings. Accordingly (and in recognition of the fact that it is done successfully in native title matters), the Commission proposed that the *Evidence Act* be amended to allow the court to convene 'on country' to hear evidence of customary law.⁶⁹ It was suggested that the court could decide to do so where a particular witness, or witnesses, may more likely be able to give evidence that would

assist the court if they remained on their country. It would also allow the court to travel to a remote location in circumstances where a number of witnesses (or a vulnerable witness) would have difficulty in travelling to a major centre to attend court.

Support was expressed for this proposal in the Commission's discussions with Aboriginal communities, in meetings with lawyers⁷⁰ and in submissions.⁷¹ The comment was made that pre-recording (where vulnerable witnesses in criminal trials have their evidence recorded without the presence of a jury) should be held where possible 'in own community and in language'.⁷² It was said that this would prevent the problem of witnesses 'clamming up' in court because of the unfamiliar surroundings, the presence of a (usually predominantly non-Aboriginal)⁷³ jury, and language problems. Lawyers consulted stated that when they had been involved in matters where evidence had been taken on country, Aboriginal witnesses were able to express themselves much more freely.⁷⁴ It was noted that the court was required to be flexible and



67. Wickham Chambers, consultation (25 May 2006); Greg McIntyre SC & George Irving, consultation (24 May 2006). It was noted by George Irving and Greg McIntyre that in native title matters the technique has only been used where the credibility of the witnesses is not in issue. An example was provided in a recent native title matter argued in the Federal Court: *Strickland & Nudding v Western Australia*, Lindgren J (judgment reserved).
68. The proposal was supported by Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 8; Anonymous, Submission No. 50 (30 June 2006).
69. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) Proposal 85, 411.
70. Wolff Chambers, consultation (16 May 2006); Greg McIntyre SC & George Irving, consultation (24 May 2006); Wickham Chambers, consultation (25 May 2006).
71. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 14; Anonymous, Submission No. 50 (30 June 2006); Criminal Lawyers Association, Submission No. 58 (4 September 2006) 5.
72. LRCWA, Discussion paper community consultation – Geraldton, 3 March 2006 (in confidence). The Western Australia Police were supportive of this concept. They stated that 'police prosecutors have in the past taken depositions remotely or by video from Aboriginal women who are declared special witnesses: Western Australia Police, Submission No. 46 (7 June 2006) 13.
73. See discussion under 'Juries', Chapter Five, above p 188.
74. Wickham Chambers, consultation (25 May 2006); legal practitioner, confidential consultation (22 August 2006).

improvise; however, the quality of the evidence justified the effort.⁷⁵

Despite the overwhelmingly positive response to the proposal that courts hear evidence on country, reservations were expressed about the practicalities of this proposal and the extra time and money it would require. In particular, the Chief Magistrate expressed concern about the cost of taking evidence 'on country'.⁷⁶ The Western Australia Police stated that increased amounts of time spent 'on country' would result in significant resource implications for the police, given that police prosecutors and witnesses would all be required to travel to remote communities. It was also mentioned that courts and those working with Aboriginal witnesses would have to be mindful that there are often not sufficient support facilities available for witnesses in remote areas and that special arrangements may have to be made.⁷⁷

The Commission recognises that, because of the logistical difficulties inherent in the concept of taking evidence on country, this is not a power that is likely to be frequently exercised. Nonetheless, it is an important way of acknowledging the status within the community of some witnesses who may be called upon to give evidence about customary law. The Commission considers that it is appropriate to equip the courts with this power, even if it is only used in exceptional situations.⁷⁸

Recommendation 116

Evidence taken on country

That the *Evidence Act 1906* (WA) provide that a court can allow evidence about Aboriginal customary law to be taken on country where it is required in the interests of justice.

Assisting Aboriginal People to Better Understand and Participate in the Court Process

The Commission recognised that there are significant barriers to Aboriginal people understanding and participating in the legal system. It proposed a number of changes to the rules governing court procedure to assist Aboriginal people. In summary they are:

- increasing the use of Aboriginal language interpreters;
- changing court procedure to take account of some of the problems Aboriginal people experience in giving evidence;
- providing further assistance to Aboriginal people in the court system; and
- continuing to educate all those working in the legal system about Aboriginal culture.

Increasing the use of Aboriginal language interpreters

Many Aboriginal people find it difficult to understand the language used in court – this was repeatedly stressed in the consultations and noted by legal practitioners consulted by the Commission. In Western Australia many Aboriginal people are bilingual or multilingual (with English as their second or third language)⁷⁹ and those Aboriginal people who speak English often speak a form of Aboriginal English that may differ significantly from Standard English.⁸⁰ Despite this, there are very few Aboriginal language interpreters working in Western Australian courts and there is only one Aboriginal language interpreter service in Western Australia: the Kimberley Interpreting Service.⁸¹

75. Greg McIntyre SC & George Irving, consultation (24 May 2006); legal practitioner, confidential consultation (22 August 2006).

76. Chief Magistrate Steven Heath, Magistrate's Court, Submission No. 10 (21 March 2006) 3. The Department of the Attorney General also stated that 'the remoteness of Western Australia would make this provision expensive and have the effect of delaying justice': Department of the Attorney General, Submission No. 34 (11 May 2006) 15.

77. Anonymous, Submission No. 50 (30 June 2006). It was pointed out that often whole communities may be distressed by the circumstances of particular hearings, and in that case it is not appropriate to expect the communities to be able to provide support for witnesses without assistance from witness/victim support services. This also obviously has resource implications.

78. Stewart O'Connell gave an account of the power such a measure might have: 'Chief Justice Martin afforded the community enormous respect. Not many Supreme Court Judges would leave the comfort of their courtrooms to sit under a tree in 30 degree heat and listen patiently to community elders. The community in turn listened, through a female Indigenous interpreter, patiently to him. It was reciprocal respect and education in action': Stewart O'Connell, Submission No. 54 (10 July 2006) 5.

79. The Australian Bureau of Statistics reports that 'in 2002, over one quarter (27%) of Indigenous people in WA spoke an Indigenous language. This was a higher proportion than at the national level (21%) due in part to a greater share of this state's Indigenous population living in remote areas (47% compared with 27% nationally) where an ability to speak an Indigenous language is more common. ... Around one in eight Indigenous people in WA (12%) reported that the main language spoken at home was an Indigenous language, with this figure rising to one in four (24%) in remote areas.' However, the Kimberley Interpreter Service says that it is difficult to accurately state the number of Indigenous language speakers in Australia and how many of those people speak some English because of the shortcomings in the language questions included in the Commonwealth Census and the lack of other accurate language surveys: Kimberley Interpreting Service, *Indigenous Language Interpreting Services*, Discussion Paper (June 2004) 4–5. See also McConnell P & Thieberger T, *State of Indigenous Languages in Australia* (Department of the Environment and Heritage, 2001).

80. The Kimberley Interpreter Service advised the Commission that in the Kimberley region most Aboriginal people will say that they speak English when they are speaking Aboriginal English or Kriol: Jane Lodge, Manager, Kimberley Interpreting Service, email (1 September 2006).

81. The Kimberley Interpreter Service began operating in 2000, and is an initiative of the Mirima Dawang Woortlab-gerring Language and Culture Centre

Until 2000 there were no interpreting services for Aboriginal languages in Australia.

Until 2000 there were no interpreting services for Aboriginal languages in Australia.⁸² In recent years, however, there has been a push to establish interpreting services for Aboriginal languages that has resulted in the creation of the Aboriginal Interpreting Service in the Northern Territory, the Kimberley Interpreting Service and other community-based services supported by local language centres.⁸³ There has therefore been some improvement in the availability of Aboriginal language interpreters,⁸⁴ but the present situation is far from adequate.⁸⁵ There is no coordinating body for these language centres and services, and no available list of qualified Aboriginal language interpreters (and their contact details).⁸⁶ Further, the current level of funding for these services is limited, and does not allow for professional development or expansion.⁸⁷

In its submission the Aboriginal Legal Service noted that 'arrangements are ad hoc and people communicate as best they can'.⁸⁸ The need for interpreters of Aboriginal languages has often gone 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'.⁸⁹ In addition, the need for interpreters is masked by the adoption of makeshift (but apparently very common)

practices, such as using a family member, friend, another prisoner or a member of court staff as an interpreter. There are strict rules under customary law about how and with whom Aboriginal people may communicate. Certain topics may be prohibited between men and women or people in a particular relationship. The Kimberley Interpreting Service notes that 'it is therefore very important that the correct interpreter is selected for each job'.⁹⁰

In seeking submissions about the use of interpreters the Commission was told about problems communicating some concepts from English into Aboriginal language



in Kununurra and the Kimberley Language Resource Centre based in Halls Creek. In the Kimberley region there are over 40 Aboriginal languages spoken. The funding for the Kimberley Interpreting Service is shared between eight government departments and their annual operating budget in 2004 was \$120,000: Kimberley Interpreting Service, *Indigenous Language Interpreting Services*, Discussion Paper (June 2004) 10; see also the Kimberley Interpreting Service website, <<http://www.kimberleyinterpreting.org.au>>. As at August 2006 the Kimberley Interpreting Service had 92 registered interpreters in 24 Aboriginal languages: Jane Lodge, Manager, Kimberley Interpreting Service, email (1 September 2006).

82. Kimberley Interpreting Service, *Indigenous Language Interpreting Services*, Discussion Paper (June 2004) 5.

83. Ibid. There are Aboriginal language centres throughout Western Australia including: Mirima Dawang Woolab-gerring Language and Culture Centre (Kununurra); Kimberley Language Resource Centre; Pundulmurra College (Port Hedland); Wangka Maya, The Pilbara Aboriginal Language Centre; Yamatji Language Centre (Gascoyne region). Aboriginal Legal Services of Western Australia, *Submission: Aboriginal and Torres Strait Islander Languages Interpreter Service in Western Australia* (April 2006).

84. The Kimberley Interpreting Service have advised the Commission, however, that their records indicate the use of interpreters by government is declining: Jane Lodge, Manager, Kimberley Interpreting Service, email (1 September 2006).

85. The Kimberley Interpreting Service has described the attempts of many government agencies to communicate with Aboriginal people in the Kimberley as 'totally incomprehensible'. They provide as a contrasting example the Kimberley Land Council and Karrayili Adult Education Centre (Fitzroy Crossing): 'both Indigenous owned and run organisations that understand that their members don't understand English. They use accredited interpreters as a matter of course for official business meetings and gatherings': Jane Lodge, Manager, Kimberley Interpreting Service, email (1 September 2006).

86. Trevor Tann, Department of Indigenous Affairs, telephone consultation (15 June 2006). The Western Australian Government's Languages Services Policy provides a free-call telephone number for advice about interpreting services for Indigenous languages. This telephone number connects callers to their local Department of Indigenous Affairs (DIA) office; however, the DIA does not hold a list of qualified interpreters. The Kimberley Interpreting Service has a database of accredited and non-accredited interpreters for the Kimberley region, along with small number in and around Perth.

87. Kimberley Interpreting Service, *Indigenous Language Interpreting Services*, Discussion Paper (June 2004) 3, 10.

88. Aboriginal Legal Service, Submission No. 35 (12 May 2006) 10. See also *ibid* 4.

89. The Kimberley Interpreting Service notes that 'many Aboriginal people from the communities in the Kimberley region only have 'survival skills' in English. They understand and communicate best in Aboriginal languages. 'Simple English' is not a good way to communicate essential information. Important information is often left out because it is too hard': see <<http://www.kimberleyinterpreting.org.au>>.

90. KIS: Frequently Asked Questions, <<http://www.kimberleyinterpreting.org.au>>.

and vice versa.⁹¹ An example described to the Commission occurred in the trial of a Goldfields Aboriginal man for wilful murder. He was asked, through an interpreter, whether he had intended to kill the deceased. He answered that he had. This answer took those in court somewhat by surprise, because the man had pleaded 'not guilty' to the charge. The judge asked the interpreter to tell the court what question he had asked the accused. The interpreter replied that he had asked the accused if he had killed the deceased – the concept of 'intention' not being one that it was possible to translate into language.⁹²

The Commission's proposals

In its Discussion Paper the Commission recognised the need for, and the difficulties associated with, the increased use of Aboriginal language interpreters. It made a series of proposals designed to increase the use of Aboriginal language interpreters and assist with the problems associated with their use. The Commission proposed:

- increasing the funding for the training of interpreters (including giving consideration to the accreditation system to enable more Aboriginal people to become interpreters);
- including the right to an interpreter in the *Evidence Act*;
- formulating a test to provide assistance to the court in determining when a witness requires the services of an interpreter;
- providing education about the use of interpreters to Aboriginal communities; and
- developing guidelines for the Department of the Attorney General to follow when using the services of interpreters.⁹³

At the return consultations conducted by the Commission, Aboriginal people expressed strong support for the proposals about interpreters. Aboriginal people in Broome advised that interpreters were needed at all stages of the criminal trial process. They further commented that lawyers representing Aboriginal people need to be aware of when their clients required interpreters.⁹⁴ Submissions showed strong support for the increased availability and use of interpreters for Aboriginal languages and for the right to an interpreter in court.⁹⁵

The significance of interpreters and the potential for their wide usage

Aboriginal people also pointed out that using Aboriginal language in court has a wider significance. In Fitzroy Crossing (where they have a pool of qualified interpreters) it was noted that there is an important link between language and preserving culture.⁹⁶ The Indigenous Women's Congress asserted that an Aboriginal person should not have to go to court and argue for an interpreter; instead an interpreter service should be in place at the court. They said that this is an important symbolic part of Aboriginal customary law and culture.⁹⁷ Women Elders attending a community meeting in Broome stressed that government 'must support language to support culture'.⁹⁸ It was noted that the more Aboriginal language is taught in schools, the bigger the pool of interpreters there will be in the future.⁹⁹

Submissions also acknowledged that training more Aboriginal language interpreters would have broader application than court proceedings. In Chapter Five above, the need for interpreters in police interviews is discussed.¹⁰⁰ In its submission the Aboriginal Legal Service (ALS) stated that some of the problems Aboriginal people experience with orders under the

91. It must be recognised that this is the case for other languages as well. For a discussion of the authorities looking at the manner in which interpreter services can be provided in legal proceedings, see *De la Esprilla Velasco v The Queen* [2006] WASCA 31 (Roberts-Smith J). For a discussion of the problems associated with interpreting 'word for word' and literal interpretation, see [17], [52] & [75].

92. Wolff Chambers, consultation (16 May 2006); Greg McIntyre SC & George Irving, consultation (24 May 2006). Greg McIntyre advised that a similar problem occurred in *R v Felton* (1977) where the issue for the court was whether the accused was able to properly understand proceedings. The interpreter advised the court that he could not adequately interpret into the applicable Aboriginal language either 'wilful' or 'murder'.

93. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) Proposals 78–82.

94. Submissions received at LRCWA, Discussion Paper community consultation – Broome, 7 March 2006.

95. Marian Lester, Submission No. 18 (27 April 2006) 2; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 10; Law Society of Western Australia, Submission No. 36 (16 May 2006) 12. The Department of Corrective Services stated that this proposal: 'is supported by the Kimberley Custodial Plan which states that translators should be made available in all court hearings where English is not the first language, and should be available to all Aboriginal people charged as a matter of course': Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 19.

96. Submissions received at a women's meeting: LRCWA, Discussion Paper community consultation – Fitzroy Crossing, 9 March 2006.

97. Indigenous Women's Congress, consultation (28 March 2006).

98. Submissions received at LRCWA, Discussion Paper community consultation – Broome, 7 March 2006.

99. Submissions received at LRCWA, Discussion Paper community consultation – Broome, 10 March 2006. It is notable that in the Office of Multicultural Interests, *Analysis of the Need for Interpreter and Translator Services within the Western Australia Government Sector* (May 2004) it is reported that there has recently been an increase in the use of Aboriginal language in Western Australia.

100. See discussion under 'Police Interrogations – Interpreters, Chapter Five, above p 207.

Submissions recognised that an increased availability of interpreters would be of great assistance in the areas of health, education and training.

Restraining Orders Act 1997 (WA) relate to language and communication problems.¹⁰¹ In addition, the ALS considered that interpreters will be of great assistance in involving Elders in legal proceedings:

ALSWA's executive committee is ... concerned about the high risk of miscommunication between the Elders and employees of the Western Australian legal system. Elders often speak English as a second or third language and may not be able to read or write. For this reason, information should be exchanged in both written and oral form and a qualified interpreter must be present when required.¹⁰²

Further, submissions recognised that an increased availability of interpreters would be of great assistance in the areas of health,¹⁰³ education and training.¹⁰⁴ The Department of Corrective Services commented that the use of interpreters should be an 'integral part of the way agencies work with Aboriginal people'.¹⁰⁵

The Commission acknowledges that there are significant barriers¹⁰⁶ to the increased use of interpreters for Aboriginal people in court. These barriers include: the fact that there are very few people qualified as interpreters of Aboriginal languages; the absence of an easily accessible interpreter service in all areas of Western Australia; the culture of 'getting by' that has become the norm with both Aboriginal people appearing in court and lawyers working with Aboriginal people; and the reluctance to incur further delay in the court process which might be the result of using an interpreter, or having to look for one.

A statewide interpreter service for Aboriginal languages

In order to overcome these problems it is necessary not only to provide more (properly trained) interpreters but to educate both the Aboriginal community, and people working with the Aboriginal community, about the use of interpreters. It is the Commission's view that these issues must be addressed in a coordinated approach to the provision of Aboriginal interpreter services. And of course, this approach must be properly funded. The Commission considers that for far too long the needs of Aboriginal people to properly understand what is happening in court have been inadequately addressed. Despite the best intentions of lawyers and the courts, it is not sufficient to rely on makeshift measures to ensure that Aboriginal people understand the court process. It is imperative that the Western Australian government give priority to the establishment of a statewide interpreter service for Aboriginal languages.

The Commission's proposals for interpreters are not new. The need for better interpreter services for Aboriginal people has been well-known and well-documented for some considerable time. The better provision of interpreter services for Aboriginal people has been recommended in numerous reports.¹⁰⁷ It is consistent with the government's stated aims, as set out in the Western Australian Government Language Services Policy¹⁰⁸ and the Western Australian Aboriginal Justice Agreement,¹⁰⁹ and with Australia's obligations under international law.¹¹⁰ The urgent need for a

101. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 8.

102. *Ibid.*

103. The Kimberley Interpreting Service has written strongly about the need for Aboriginal language interpreters in the health services area: 'low levels of communication between health professionals and their clients leads to inadequate diagnosis and poor treatment': Kimberley Interpreting Service, *Indigenous Language Interpreting Services*, Discussion Paper (June 2004) 5.

104. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 19; Department of the Attorney General, Submission No. 34 (11 May 2006) 14.

105. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 19.

106. These issues are discussed in more detail in LRCWA, *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) 403–405.

107. For a full list of previous reports and recommendations, see Aboriginal Legal Service of Western Australia, *Submission: Aboriginal and Torres Strait Islander Languages Interpreter Service in Western Australia* (April 2006).

108. *Western Australian Government Language Services Policy* (July 2000), <www.omi.wa.gov.au/OMI_language.asp>.

109. *Western Australian Aboriginal Justice Agreement* (March 2004).

110. Including Article 14(3) of the *International Covenant on Civil and Political Rights* (1966); Article 12 of the *Indigenous and Tribal Peoples Convention* (1989), the *Universal Declaration on Linguistic Rights* (1996) and the *Convention on the Protection of Human Rights and Fundamental Freedoms* (2001).

statewide Aboriginal languages interpreter service in Western Australia was recently recognised by the Commonwealth Department of Education Science and Training¹¹¹ and the Western Australian Office of Multicultural Interests.¹¹²

The Department of Indigenous Affairs (jointly with the Office of Multicultural Interests) has commissioned a discussion paper on Indigenous interpreting issues, but that report is not yet publicly available.¹¹³ Comments made in meetings held with lawyers included: 'there have been calls for the establishment of such a service for at least 30 years' and 'it is an issue of basic fairness – it is not good enough that there is an easily accessible interpreter service for other languages, but not for Aboriginal people.'¹¹⁴ It is clear that there is widespread support for the policy of establishing a statewide interpreter service. What is needed is for action to be taken to implement that policy and for it to be properly funded.

One of the main obstacles to the creation of a statewide interpreter service is lack of funding. The Office of Multicultural Interests commented in its report that:

There is general consensus among the service providers and community members consulted through this study that Indigenous interpreting services are often marginalised and do not enjoy the same level of funding allocation and allocation of resources, that is afforded to interpreting services for 'migrant' languages.¹¹⁵

The Department of Indigenous Affairs has stated that the set up costs are prohibitive: it took funding from eight Western Australian government departments to set up the Kimberley Interpreting Service.¹¹⁶ While the Kimberley Interpreting Service business plan shows that the service has the potential to be self-sustaining, at present extra funding is required to conduct professional development and provide training for new interpreters.¹¹⁷ The Commission notes that the Aboriginal Interpreting Service in the Northern Territory has been jointly funded by the Commonwealth and Northern Territory governments since 2000. In May 2006 the Commonwealth government announced that it would provide a further \$5.1 million to the service. The Attorney General, Philip Ruddock, stated that 'lack of access to interpreter services can adversely affect Indigenous Australians' access to a whole range of government and non-government services'.¹¹⁸ Despite the cost of setting up such a service, the Commission considers that the use of interpreters has the potential to result in reduced costs to government; for example, in the areas of justice and health by reducing the number of delayed court hearings and re-admission of patients to hospital.¹¹⁹

Aboriginal Legal Service proposal

In April 2006 the ALS sent a submission to both the Commonwealth and state governments seeking funding for the establishment of a statewide Aboriginal languages interpreter service (the ALS proposal).¹²⁰ In the ALS proposal the fact that there is no statewide

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111. Department of Education Science and Training, *Career Paths and Training for Interpreters and Translators* (December 2005).
 112. Office of Multicultural Interests, *Analysis of the Need for Interpreting and Translating Services within the Western Australian Government Sector* (May 2004). The Office of Multicultural Interests commissioned a review of the Languages Services Policy. The report on the review makes several recommendations for the development of a new Language Policy that would address issues raised in this report. This report is presently being considered by the Minister so was not available for the Commission to view prior to the publication of this report: Anne Aly, Office of Multicultural Interests, telephone consultation (9 June 2006).
 113. Trevor Tann, Department of Indigenous Affairs, telephone consultation (15 June 2006).
 114. Wickham Chambers, consultation (25 May 2006). A comparison can be made with the situation for interpreters of non-Aboriginal languages. The Translating and Interpreting Service (TIS) is operated by the Department of Immigration and Multicultural Affairs (for more information, see <www.immi.gov.au>). TIS provides interpreters for court proceedings, as well as a telephone service 24 hours a day, seven days a week. It services over 100 languages and has more than 1500 contractors. TIS does not provide interpreting for Aboriginal languages and they direct any enquiries to the Kimberley Interpreting Service.
 115. Office of Multicultural Interests, *Analysis of the Need for Interpreting and Translating Services within the Western Australian Government Sector* (May 2004) 66.
 116. The Kimberley Interpreting Service counters that funding its operations for three years for \$360,000 is cheap: 'what price does the government put on good communications?': Jane Lodge, Manager, Kimberley Interpreting Service, email (1 September 2006).
 117. Trevor Tann, Department of Indigenous Affairs, telephone consultation (15 June 2006); KIS, telephone consultation (1 August 2006). It must be noted that the Kimberley Interpreting Service stated that its business plan shows that it can be self-sustaining only if it develops some other income-generating business like cultural awareness training, not by providing interpreting services alone: Jane Lodge, Manager, Kimberley Interpreting Service, email (1 September 2006).
 118. Attorney General, The Honourable Philip Ruddock MP, media release (9 May 2006).
 119. This is confirmed by the Kimberley Interpreting Service who state 'the use of interpreters can have significant impact on public spending, with savings becoming immediately obvious. Court proceedings are delayed on a regular basis due to lack of communication with the defendant or the victim. Witness statements cannot be obtained and witnesses cannot be examined. This often results in court proceedings being re-listed, delayed or even abandoned. The use of Aboriginal interpreters also reduces dramatically the re-admission rate of patients. Aboriginal patients often do not take their medication or follow procedures because they did not understand the instructions and they have to be re-admitted ... By providing interpreters the government is enhancing service delivery to a significant group of clients whilst actually reducing costs': Kimberley Interpreting Service: Frequently Asked Questions, <www.kimberleyinterpreting.org.au>.
 120. Aboriginal Legal Services of Western Australia, *Submission: Aboriginal and Torres Strait Islander Languages Interpreter Service in Western Australia* (April 2006).

For far too long the needs of Aboriginal people to properly understand what is happening in court have been inadequately addressed.

interpreter service for Aboriginal languages is described as 'indefensible'. It is asserted that the situation 'should be urgently remedied by government, at least in the area of law/justice and health'.¹²¹ The ALS proposal is a significant step toward the establishment of an Aboriginal languages interpreter service. It contains a discussion of the issues to be addressed by a statewide interpreter service, sets out the current models for the provision of such a service, and makes a proposal for the establishment of a service in Western Australia. It concludes that:

1. A statewide interpreter service for Aboriginal and Torres Strait Islander languages urgently needs to be implemented in Western Australia, especially in relation to legal and health matters.
2. Government has provided a statewide interpreter service for speakers of other languages. Similarly it is government's responsibility to provide an interpreter service for speakers of Aboriginal and Torres Strait Islander languages.
3. Comprehensive information about the needs of both interpreters and those who need interpreters, best practice to address these, and interpreting service models, is available and accessible by government.
4. There is already in place in Western Australia an infrastructure that includes Aboriginal and Torres Strait Islander language centres, NAATI, TAFEs and TIS, all of which can be utilised in the provision of a statewide Aboriginal and Torres Strait Islander interpreter service. What is needed is a means to link them all together. ALSWA proposes that creating a short-lived organisation with the specific task of achieving this is a cost-effective way of developing and establishing an appropriate service.¹²²

In its submission the Law Society notes and supports the ALS proposal.¹²³ While the DPP does not refer to the ALS proposal, it suggests that a 'multi agency committee, with representation from the Law Society, ALS and Legal Aid should be established to develop proposals for the gamut of issues surrounding the development and use of interpreters. The DPP would wish to be involved with such a committee'.¹²⁴

The Commission recommends that the ALS proposal be supported. It is important that the service should be established in conjunction with the existing community language centres that are in place around Western Australia.¹²⁵ At the end of five years, assessment can be made of the best ways of expanding the service to ensure that it meets the needs of Aboriginal people in all areas of communication, including such areas as education, training and welfare.¹²⁶

Recommendation 117

Establishment of a statewide Aboriginal languages interpreter service

1. That a statewide interpreter service for Aboriginal languages be established in accordance with the Aboriginal Legal Service of Western Australia proposal.
2. That the service be reviewed and evaluated by the Commissioner for Indigenous Affairs after it has been in operation for five years, with a view to expanding it to include all areas of communication, including, but not limited to education, training and welfare.

121. *Ibid* 1.

122. *Ibid*.

123. Law Society of Western Australia, Submission No. 36 (16 May 2006) 12.

124. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 6.

125. See 'Principle Five: Community-based and community-owned initiatives', Chapter 2, above pp 36–37. The Kimberley Interpreting Service asserts: 'it is worth noting that Indigenous language interpreting services are supported and controlled by Indigenous people, developing their skills and building the capacity of Indigenous people to manage their own communities': Kimberley Interpreting Service, *Indigenous Language Interpreting Services*, Discussion Paper (June 2004) 8.

126. In respect of welfare, it is noted by the Kimberley Interpreting Service that in 2004 'the Department of Community development has booked an interpreter on one occasion over the past three years – a situation that raises many questions about the effectiveness of welfare in remote Indigenous communities': Kimberley Interpreting Service, *Indigenous Language Interpreting Services*, Discussion Paper (June 2004) 17.

In addition, the Commission considers that a committee of the kind suggested by the DPP should be set up by the Department of the Attorney General. This committee should monitor the issues relating to the use of interpreters in the courts. All of the more specific recommendations that follow are matters that could be carried out under the umbrella of a statewide interpreter service, or by the committee.

Recommendation 118

Establishment of a committee to oversee the use of interpreters in court

That the Department of the Attorney General establish a committee to review and evaluate the use of Aboriginal interpreters in court. The Committee should be comprised of representatives from (at least) the judiciary, interpreter bodies, the Office of the Director of Public Prosecutions, Legal Aid and the Aboriginal Legal Service.

Training of interpreters

In its Discussion Paper the Commission acknowledged that there is presently a shortage of trained Aboriginal language interpreters in Western Australia.¹²⁷ It also recognised that it can be difficult for Aboriginal people to train and become qualified as interpreters for a number of reasons, including the fact that many Aboriginal people live in remote areas and the lack of qualified trainers.¹²⁸ Careful consideration must be given to issues of accreditation in conjunction with the National Accreditation Authority for Translators and Interpreters (NAATI) to ensure that more Aboriginal

people are able to attain qualifications, without compromising the high standard needed for interpreting in courts. The Commission therefore proposed that there be increased funding for the training of Aboriginal language interpreters.¹²⁹

Those who provided submissions on this proposal expressed strong support for the training of Aboriginal interpreters, but some expressed concern about the suggestion that consideration be given to an accreditation system which enabled more Aboriginal people to attain accreditation as an interpreter.¹³⁰ It was noted that interpreters for court work need to be of a very high standard. The Chief Magistrate stated that 'there is a need to ensure that [this proposal] does not result in a second-class service for Aboriginal people. The standard of interpreter should be of a uniformly high standard. Aboriginal persons should not have to accept a lower standard than other non-English speakers'.¹³¹

The Commission has been advised by the Department of Indigenous Affairs,¹³² Central TAFE¹³³ and the Kimberley Interpreting Service that a number of attempts have been made to increase the numbers of people training as interpreters of Aboriginal languages. These efforts have included TAFE developing an Aboriginal-specific intake for the Diploma of Interpreting¹³⁴ and running a number of interpreting courses in regional Western Australia.¹³⁵ The extent to which those recently trained have found employment is not known.¹³⁶ A further issue is the requirement for ongoing training: to remain current, qualified interpreters should undertake at least two professional development sessions each year and continue to practise as an interpreter.¹³⁷

127. LRCWA, *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) 402.

128. Dagmar Dixon, Central TAFE, telephone consultation (4 August 2006). See also Kimberley Interpreting Service, *Indigenous Language Interpreting Services*, Discussion Paper (June 2004) 18.

129. LRCWA, *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) 402, Proposal 78.

130. Chief Magistrate Steven Heath, Submission No. 10 (21 March 2006) 3; Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 6.

131. Heath, *ibid.*

132. Trevor Tann, Department of Indigenous Affairs, telephone consultation (15 June 2006).

133. Dagmar Dixon, Central TAFE, telephone consultation (4 August 2006).

134. Department of Indigenous Affairs, *Annual Report 2004–2005*, 22.

135. Pundulmurra College (Pilbara TAFE) has committed to run the Diploma of Interpreting for 38 students from the Kimberley and 10 from the Pilbara for fourth term 2006. The course will be run at Pilbara TAFE initially with some later modules at the students' local TAFE or Adult Education Centre. Professional development will also be offered at Pilbara TAFE. Some accommodation has been arranged and all students will be funded by Abstudy: Jane Lodge, Manager, Kimberley Interpreting Service, email (1 September 2006).

136. The Kimberley Interpreting Service has advised that all graduates have had some assignments; however, in the last 12 months neither the local Magistrate nor the prison has booked an interpreter; ALS has booked three, and the five major hospitals in the area have also booked three: Jane Lodge, Manager, Kimberley Interpreting Service, email (1 September 2006).

137. Dagmar Dixon, Central TAFE, email (29 August 2006). Ms Dixon states that it is very important for interpreters to keep their qualifications current, although there is no formal requirement from NAATI to maintain accreditation. Ms Dixon notes that the Kimberley Interpreting Service is very good at maintaining the professional development of its interpreters, but much depends on the kind of on-going training offered and the ability of those providing the training: Dagmar Dixon, Central TAFE, telephone consultation (4 August 2006). The Kimberley Interpreting Service provides as an example that in August 2006 in Fitzroy Crossing the Royal College of Obstetricians and Gynaecologists provided female interpreters with a workshop on sexual assault and domestic violence terms and concepts. This professional development was paid for by the Kimberley Interpreting Service out of self-generated funds: Jane Lodge, Manager, Kimberley Interpreting Service, email (1 September 2006).

Recommendation 119

More training for Aboriginal language interpreters

That the Department of the Attorney General, in conjunction with Aboriginal communities, TAFE and the National Accreditation Authority for Translators and Interpreters:

1. Provide funding for the training of Aboriginal language interpreters.
2. Give consideration to a system that enables more Aboriginal people to attain accreditation as an interpreter.
3. Provide funding for the ongoing professional development of accredited Aboriginal language interpreters.
4. Give particular attention to training and professional development for Aboriginal language interpreters in regional Western Australia.

Right to an interpreter in court proceedings

There is no right to an interpreter in the Western Australian *Evidence Act*. The common law rule is that if a person on trial cannot speak English then that trial will be unfair if an interpreter is not provided.¹³⁸ The Commission proposed in its Discussion Paper that the *Evidence Act* be amended to provide a right to an interpreter in court proceedings.¹³⁹

Submissions received by the Commission supported this proposal.¹⁴⁰ Concern has been expressed that including this right in the *Evidence Act* could lead to the undesirable result of accused people being held in custody on remand for longer than necessary while an interpreter is located. In the consultations in Broome it was mentioned that there could also be a problem accommodating an accused while an interpreter is

located.¹⁴¹ Lawyers stated concerns that adjournments would be required if police, prosecutors or defence counsel did not realise that their witnesses needed interpreters, and interpreters were difficult to locate. Because the courts travel infrequently to remote areas this could lead to undesirable delays in the administration of justice.¹⁴²

Submissions and consultations also addressed the way the right to an interpreter would work in practice. The importance of an accused person not being required to pay for the services of the interpreter was stressed.¹⁴³ The DPP asserted that the leave of the court should be required, that procedures should be implemented for a linguist to reach a decision as to the need for an interpreter, and that the legislation should include that expert evidence can be provided to the court about the way Aboriginal people communicate and respond to questioning.¹⁴⁴ The DPP further cautioned that, while the principle in the recommendation is supported, 'it could not be implemented to its full extent until the situation regarding the lack of accredited interpreters has been rectified and sufficient interpreters become available'.¹⁴⁵

The Commission notes these concerns. Nonetheless, it considers that providing for a right to an interpreter in the *Evidence Act* would serve an important



138. See further the discussion by Roberts-Smith J in *De la Espriella Velasco v The Queen* [2006] WASCA 31, [18]–[50]. The fact that the right to be inserted in the *Evidence Act* reflects the position at common law was recognised by the DPP: Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 7.

139. LRCWA, *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) 402, Proposal 79.

140. The Law Council asserted that 'as an initial point of principle ... there should be a presumption in court proceedings and interviews with lawyers and police involving an Indigenous accused or witness that an interpreter will be needed': Law Council of Australia, Submission No. 41 (29 May 2006) 11. See also Criminal Lawyers Association, Submission No. 58 (4 September 2006) 5. The Kimberley Interpreting Service noted that Indigenous people do not know that they can ask for an interpreter and additionally there may be some 'shame' on their part (ie, embarrassment about not being able to speak sufficient English): Jane Lodge, Manager, Kimberley Interpreting Service, email (1 September 2006).

141. The further unwelcome alternative might be that if they are given bail and have come into Broome from the outlying communities, they will add to the number of homeless people from the communities in Broome, and there will be potential for more offences to be committed: submissions received at LRCWA Discussion Paper community consultation – Broome, 7 March 2006.

142. Wolff Chambers, consultation (16 May 2006); Wickham Chambers, consultation (25 May 2006).

143. Wickham Chambers, consultation (25 May 2006).

144. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 7.

145. *Ibid.*

declaratory function.¹⁴⁶ The establishment of a statewide interpreter service may alleviate some of the concerns about delay expressed in submissions and consultations. The service would locate interpreters and allow arrangements to be made prior to hearings so that adjournments could be minimised.¹⁴⁷ It is important to note that the proposed section would operate in conjunction with Recommendation 42 above which states that s 129 of the *Criminal Procedure Act 2004 (WA)* should be amended to provide that for all accused persons 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.¹⁴⁸ The Commission considers that there is a need for legislative recognition of the basic principle that any witness who is not properly able to understand the language of the court should have access to an interpreter. This recommendation is not confined to Aboriginal witnesses.

Recommendation 120

Right to an interpreter in court proceedings

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

1. A party or witness to proceedings has the right to assistance from an interpreter, unless it can be established that he or she is sufficiently able to understand and speak English.
2. An accused in criminal proceedings who cannot sufficiently understand English be entitled to the services of an interpreter throughout the proceedings, whether or not he or she elects to give evidence.
3. Where a court is not satisfied that a witness or party to proceedings is sufficiently able to speak or understand English then the proceedings should not continue until an interpreter is provided, or until the court is satisfied that it is appropriate to continue.

Recommendation 121

State to provide interpreters in certain circumstances

1. That the Western Australian government make funding available for:
 - (a) interpreters to be provided where required in criminal proceedings in all Western Australian courts for:
 - (i) all witnesses and accused persons; and
 - (ii) not-for-profit legal services to take instructions from their clients.
 - (b) interpreters to be provided in civil proceedings in all Western Australian courts and tribunals where:
 - (i) a judge or magistrate has decided that, in the interests of justice, a witness or party requires the services of an interpreter; and
 - (ii) the party is unable to pay the costs of the interpreter service.
2. That the Department of the Attorney General actively promote the amendment of the *Family Law Act 1975 (Cth)* to include similar provisions to (b) (i) and (ii) and that corresponding amendments be made to the *Family Court Act 1997 (WA)* (to ensure that the same provisions apply to proceedings involving children of a marriage and ex nuptial children).

When is an interpreter required?

The Commission considers that to accompany the above amendment to the *Evidence Act* it would be useful to provide assistance to judges, magistrates, lawyers and others dealing with Aboriginal people in the courts to help them to determine when the services of an interpreter are required.¹⁴⁹ It has been noted by linguistic experts that an Aboriginal person's ability to communicate in Standard English can be misunderstood

146. The Commission notes that the uniform Evidence Acts contain a right to an interpreter. Section 30 of the *Evidence Act 1995 (Cth)* provides: 'A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to be able to understand, and to make an adequate reply to, questions that may be put about that fact'.

147. The Kimberley Interpreting Service expressed concern about the ability of a statewide interpreter service to perform this function. They have commented that contacting interpreters in the Kimberley region is not straightforward as many do not have phones and are highly mobile. They have also noted the lack of local cultural awareness or even 'geographic awareness' that is often evident in bureaucracies located in southern Western Australia: Jane Lodge, Manager, Kimberley Interpreting Service, email (1 September 2006).

148. See Recommendation 42, Chapter Five, above p 191.

149. Dr Michael Cooke has noted the difficulties that lawyers and judges can have in determining whether an interpreter is required by a witness: Cooke M, 'Aboriginal Evidence in the Cross-Cultural Courtroom' in D Eades (ed.), *Language in Evidence: Issues confronting Aboriginal and multicultural Australia* (Sydney: UNSW Press, 1995) 93.

The key change needed is for both the courts and interpreters to be aware of, and be able to deal with, issues related to customary law.

because of the combination of the fact that Aboriginal people usually speak some English and the fact that Aboriginal English closely resembles Standard English because it uses some of the same words.¹⁵⁰ This can be compounded by an Aboriginal person's inclination to agree with authority figures (such as a judge, lawyer or police officer) asking them if they understand.¹⁵¹ This is apparent in the conflict between what Aboriginal people told the Commission they understood about court proceedings¹⁵² and the fact that interpreters are seldom used.

The Commission therefore proposed that a qualified linguist formulate a test to assist courts to determine when a witness or an accused requires the services of an interpreter.¹⁵³ In its submission the Department of the Attorney General expressed concern that the provision of a test may have the effect of preventing access to an interpreter by those in need and that more may need to be considered.¹⁵⁴ It was not the Commission's intention to create a test of a restrictive nature; rather, it was intended as an aid to persons working with Aboriginal witnesses to assist them with what is acknowledged to be a difficult task. In light of these concerns the Commission has elected to use the expression 'assessment guidelines' rather than 'test' in the recommendation below. Since the proposal has been supported by other submissions¹⁵⁵ and no opposing comments were received, the Commission confirms its recommendation.

Recommendation 122

The development of assessment guidelines to assist courts to determine if an interpreter is needed

That the Department of the Attorney General employ a suitably qualified linguist to develop assessment guidelines (both oral and video) to be used to assist the court, lawyers and others to determine when a person appearing in court either as a witness or as an accused may require the services of an interpreter.

Interpreters and customary law

In his background paper to this reference Michael Cooke described the way considerations of customary law can impact upon the role of the interpreter and made a number of suggestions to address this problem.¹⁵⁶ The key change needed is for both the courts and interpreters to be aware of, and be able to deal with, issues related to customary law. To this end, the Commission suggested that guidelines be developed for use by the Department of the Attorney General in dealing with Aboriginal language interpreters. It also proposed that Aboriginal communities be educated about the role of interpreters.¹⁵⁷ The purpose of this education is to raise awareness of the role that

150. Although, they can have significantly different meanings and sometimes a Standard English word may have one or more different meanings in Aboriginal languages and vice versa. It is noted that the word 'kill' may mean 'hit' and 'hurt' as well as 'kill': Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002).

151. The guidelines for using Aboriginal language interpreters in the Northern Territory include a series of questions to assist in the determination of whether an interpreter is required. The questions range from very simple ones such as 'do you know how to read and write English?' to more complex questions designed to see if the witness is simply agreeing with statements that may be put to them, such as 'Gough Whitlam comes from your community too! That's right isn't it?': see Northern Territory Department of Local Government, Housing and Sport website, <http://www.dcdsca.nt.gov.au/dcdsca/intranet.nsf/pages/AIS_Guidelines>.

152. See discussion under 'Fitness to plead because of cultural and language barriers', Chapter Five, above p 191.

153. LRCWA, *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) 403, Proposal 80.

154. Department of the Attorney General, Submission No. 34 (11 May 2006) 15.

155. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 10; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 5.

156. For a more in-depth discussion, see Cooke M, 'Caught in the Middle: Indigenous interpreters and customary law' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 77.

157. LRCWA, *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) Proposal 82, 405. It is noted in the Discussion Paper (Part IX, n 83) that the Kimberley Interpreting Service had applied for funding to make videos to impart information to Aboriginal communities about the role of interpreters. It has not received any funding for such a project and does not have plans to do so at this time: Kimberley Interpreting Service, telephone consultation (1 August 2006).

interpreters play in court and should include (in addition to the matters outlined in Cooke's Background Paper) overcoming any sense of shame attached to not understanding English and improving the status attached to Aboriginal languages.¹⁵⁸ The guidelines for the Department of the Attorney General 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.¹⁵⁹ It is also suggested that the protocols to be developed by the Law Society for lawyers working with Aboriginal clients should include guidelines for the use of Aboriginal language interpreters.¹⁶⁰

Recommendation 123

Department of the Attorney General provide education about the role of interpreters

That the Department of the Attorney General, in conjunction with Aboriginal communities, provide education about the role of interpreters through community education, including the development of information videos to be distributed in communities and accessible at police stations, courts and prisons.

Recommendation 124

Department of the Attorney General establish guidelines for using Aboriginal language interpreters in court

That the Department of the Attorney General establish guidelines for the use of Aboriginal language interpreters in court, including:

1. only using trained interpreters; and
2. providing information to prospective interpreters prior to engagement so that they can ensure there are no conflicting customary law considerations.

The Commission's recommendations for the increased use of Aboriginal language interpreters are a fundamental means of enabling the voice of Aboriginal people to be heard in all areas affecting their lives and communities. Interpreters can also make sure that the messages of the non-Aboriginal community are conveyed in a way that Aboriginal people can understand.¹⁶¹ The Kimberley Interpreting Service stated that: '[t]his is empowering Indigenous people and contributing to their full and equal participation in society.'¹⁶²

Changes to court procedure

In its Discussion Paper the Commission examined the difficulties experienced by many Aboriginal witnesses because of the techniques used by lawyers in questioning witnesses, particularly leading questions; questions demanding quantitative speculation; and repetitious questions.¹⁶³ 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. The Commission recommends three ways in which these problems may be addressed:

- by witnesses giving evidence in narrative form;
- by the court restricting the questioning of witnesses for cultural reasons; and
- by the further use of special witness facilities.

Evidence in narrative form

One way that has been suggested to deal with the problems experienced by many Aboriginal people when giving evidence is to depart from the question-and-answer format and for the witness to tell their story uninterrupted by questioning. This is known as evidence in 'narrative form'. In its Discussion Paper the Commission expressed the view that no reform to the law in Western Australia is needed to enable Aboriginal witnesses to give evidence in this way.¹⁶⁴ Nonetheless, the Commission sought submissions as to whether it was desirable for amendments to be made to the *Evidence Act* to set out guidelines for narrative evidence.

158. Kimberley Interpreting Service, *Indigenous Language Interpreting Services*, Discussion Paper (June 2004) 9.

159. LRCWA, *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) Proposal 78, 402.

160. See discussion under 'Protocols for lawyers working with Aboriginal people', Chapter Five, above p 96.

161. Kimberley Interpreting Service, *Indigenous Language Interpreting Services*, Discussion Paper (June 2004) 9.

162. *Ibid.*

163. LRCWA, *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) 398–400.

164. *Ibid.* 405–406.

Recommendations for the increased use of Aboriginal language interpreters are a fundamental means of enabling the voice of Aboriginal people to be heard.

In general, submissions received supported the use of narrative evidence.¹⁶⁵ The difficulties inherent in evidence being taken in this way were widely acknowledged.¹⁶⁶ That is, irrelevant or inadmissible material might be put before the court; witnesses may take longer than necessary to give their evidence; and there is a risk that a witness may take control of the proceedings.¹⁶⁷ Moreover, as was pointed out in consultations with lawyers, the use of narrative form evidence could never replace the question-and-answer format as even after a witness has provided the narrative there may be matters that the witness has not addressed, and specific questions may have to be put to ensure all relevant evidence is before the court. The Law Society noted that the ALRC had identified a considerable body of evidence supporting the view that the giving of evidence in narrative form is more culturally appropriate for some Aboriginal witnesses¹⁶⁸ and that such evidence is likely to be more accurate than evidence adduced by the standard question-and-answer format.¹⁶⁹

Section 29(2) of the uniform Evidence Acts allows a witness to give evidence in narrative form. The New South Wales Law Reform Commission has recommended that, wherever possible, courts should exercise their statutory power to permit Aboriginal witnesses to give evidence in chief wholly or partly in narrative form.¹⁷⁰ In 1996 the Queensland Criminal Justice Commission recommended that courts in

Queensland adopt the use of narrative form evidence, but this recommendation has not been enacted.¹⁷¹

It is clear from the submissions and consultations that courts in Western Australia have from time-to-time exercised their power to allow evidence to be given in narrative form. Some lawyers consulted said that in criminal trials they might object to its use (although none consulted actually had) because of the risk that inadmissible information might be heard by a jury. Those lawyers who had led witnesses through evidence in narrative form agreed that to successfully use evidence in this manner it was essential to be both confident about the personality of the witnesses (that is, that they would not be likely to stray into inadmissible material) and very well prepared.¹⁷² The same concerns were expressed in many of the consultations to the recent review of the uniform Evidence Acts.¹⁷³ The 2005 ALRC Final Report states that despite the reservations expressed by some advocates 'narrative evidence is an important tool in ensuring that the best evidence is before the court'.¹⁷⁴ The Commission agrees.

Although it is clear that the law in Western Australia does allow for evidence to be given in narrative form,¹⁷⁵ the consensus view of submissions received is that it is desirable to provide for narrative evidence in the *Evidence Act*. This will serve a number of useful purposes: to dismiss any issue about whether the technique is permissible; to provide an awareness-raising exercise so that lawyers and judges are aware of the

165. Stephanie Fryer-Smith (an academic working at Curtin University and the author of the *Aboriginal Benchbook for Western Australian Courts*) asserted that permitting Aboriginal witnesses to give evidence in this form is consistent with principles of substantive equality: Stephanie Fryer-Smith, Submission No. 23 (1 May 2006). The Australian Property Institute supported the use of narrative form evidence and commented that: 'it appears only reasonable that the form in which the oral evidence [of Aboriginal witnesses] is given should be in a culturally sensitive manner to permit the witness to provide the Court and other parties to the litigation the fullest understanding of the rights and interests asserted': Australian Property Institute, Submission No. 11 (21 April 2006) 3.

166. Stephanie Fryer-Smith, Submission No. 23 (1 May 2006); Law Society of Western Australia, Submission No. 36 (16 May 2006) 12; Wolff Chambers, consultation (16 May 2006); Greg McIntyre SC & George Irving, consultation (24 May 2006); Wickham Chambers, consultation (25 May 2006).

167. ALRC, *Evidence*, Report 26 (Interim) (Vol. 1, 1985) [608]. Further, it must be acknowledged that this form of evidence will not advantage all Aboriginal witnesses. Stephanie Fryer-Smith and the Law Society of Western Australia repeated the comments made by the ALRC that 'inarticulate, nervous or unprepossessing' witnesses might be disadvantaged by this mode of giving evidence.

168. ALRC, *Review of the Uniform Evidence Acts*, Discussion Paper 69 (2005) [5.34].

169. ALRC, *Evidence*, Report 26 (Interim) (Vol. 1, 1985) [280] [607]–[609].

170. NSWLRC, *Sentencing: Aboriginal Offenders*, Report 96 (2000) [7.41].

171. Queensland Criminal Justice Commission, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996), Ch 4, Recommendation 4.1.

172. Wolff Chambers, consultation (16 May 2006); Greg McIntyre SC & George Irving, consultation (24 May 2006); Wickham Chambers, consultation (25 May 2006).

173. See discussion of submissions and consultations in ALRC, *Uniform Evidence Law Report*, ALRC 102 (December 2005) [5.26]–[5.31].

174. *Ibid* 5.32.

175. Section 29(2) of the Uniform Evidence Acts is a statement of the common law position; namely, that upon an application by a party a judge may order that a witness give evidence in narrative form.

availability of the technique; and to allow formal recognition of the different mode of communication adopted by many Aboriginal people.

Narrative form evidence is not only for use by Aboriginal witnesses. It could also be used by other witnesses, including children¹⁷⁶ and experts.¹⁷⁷ Factors relevant to the exercise of the power to give evidence in narrative form may include a witness's age, cultural background and ability to observe warnings about what evidence is admissible. The Commission agrees with the assertion in the 2005 ALRC Final Report that narrative form may not be used often, but will be useful:

- where a witness is lapsing into narrative evidence and the judge believes this is appropriate;
- where the court anticipates that a witness will best be able to give evidence in this form; or
- where the party makes an application that the witness be allowed to give evidence in this way.¹⁷⁸

The 2005 ALRC Final Report recommends that s 29(2) of the uniform Evidence Acts be amended so that an order may be made for evidence to be given in narrative form either on the application of a party, or at a judge's request. The Commission essentially adopts the wording of Recommendation 5-1 from the 2005 ALRC Final Report.

Recommendation 125

Evidence in narrative form

That the *Evidence Act 1906* (WA) be amended to include a provision that a court may, on its own motion or an application, direct that a witness give evidence in narrative form and make orders for the way in which narrative evidence may be given.

Protecting Aboriginal witnesses from unfair questions

In its Discussion Paper the Commission noted that the courts in Western Australia already use their inherent powers to restrict questioning of Aboriginal witnesses

that is regarded as unfair, as they do for any witness. No proposal was made in relation to inserting a specific power in the *Evidence Act* to protect witnesses in this situation as it was considered that it was unnecessary. The Commission has revised its position after consultation with Aboriginal people and lawyers working with Aboriginal clients and witnesses. Although the specific vulnerabilities of Aboriginal people to particular kinds of questioning are well-known, there was a general consensus that counsel could do more to protect witnesses in this situation.¹⁷⁹

Section 26 of the *Evidence Act* provides that:

- (1) The court may disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question is—
 - (a) Misleading; or
 - (b) Unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.
- (2) Subsection (1) extends to a question that is otherwise proper if the putting of the question is unduly annoying, harassing, intimidating, offensive or oppressive.
- (3) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account—
 - (a) any relevant condition or characteristic of the witness, including age, language, personality and education; and
 - (b) any mental, intellectual or physical disability to which the witness is or appears to be subject.

It was suggested to the Commission in consultations with lawyers¹⁸⁰ that it would be desirable to include 'cultural background' as one of the factors listed in s 26(3)(a).

Vulnerable witnesses and the uniform Evidence Acts

Section 41 of the uniform Evidence Acts uses the same words as s 26 of the Western Australia's *Evidence Act*. The protection of vulnerable witnesses from improper questioning is considered in some detail in the 2005 ALRC Final Report.¹⁸¹ Opinion about the best way to

176. A discussion of the applicability of evidence in narrative form to the evidence of children can be found in ALRC, *Uniform Evidence Law Report*, ALRC 102 (December 2005) [5.18]–[5.21].

177. Evidence in narrative form could be used in conjunction with the present provisions of the *Evidence Act 1906* (WA) relating to expert witnesses: ss 27A and 27B make provision for a different manner of giving voluminous or complex evidence, including the use of explanatory charts.

178. ALRC, *Uniform Evidence Law Report*, ALRC 102 (December 2005) [5.32].

179. Wolff Chambers, consultation (16 May 2006); Wickham Chambers, consultation (25 May 2006); Legal practitioner, confidential consultation (30 May 2006; 12 June 2006).

180. Wolff Chambers, consultation (16 May 2006).

181. ALRC, *Uniform Evidence Law Report*, ALRC 102 (December 2005) [5.70]–[5.132].

legislate to protect vulnerable witnesses from improper questioning is divided among the Commissions that contributed to the report. The ALRC and New South Wales Law Reform Commission (NSWLRC) recommended that the uniform Evidence Acts be amended to adopt the new approach to vulnerable witnesses found in s 275A(7) of the *Criminal Procedure Act 1986* (NSW). This differs from s 41 in that it imposes a duty on the court to disallow an improper question, rather than a discretion.¹⁸² It states that the court *must* disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the questions meets the same criteria set out in ss 26(1)(a) and 26(1)(b) of the Western Australian *Evidence Act*. It includes the extra provision that it must do so if the court is of the opinion that the question 'is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate',¹⁸³ or has no basis other than as a sexist, racial, cultural or ethnic stereotype.¹⁸⁴ The factors that may be taken into account in determining whether a question should be disallowed are extended to include the ethnic and cultural background of the witness; the language background and skills of the witness; and the level of maturity and understanding of the witness.¹⁸⁵

The Victorian Law Reform Commission (VLRC) took a different view. It preferred to retain the discretion of the trial judge to disallow inappropriate questions. It also recommended the introduction of a mandatory requirement to protect witness that are particularly vulnerable, and defined vulnerable witness to make it clear to whom it applies.¹⁸⁶ It defined an improper question in the same way as the ALRC and NSWLRC and stated that a court must disallow any question put to a vulnerable witness of the type referred to above unless satisfied it is necessary in the circumstances.¹⁸⁷

Given that s 275A of the *Criminal Procedure Act 1986* (NSW) only commenced on 12 August 2005, and the proposal put forward by the VLRC has not yet been enacted, it is not possible to determine which of the above approaches works better in practice. Further assessment of this issue will be necessary as Western Australia considers the adoption of the uniform Evidence Acts.¹⁸⁸ In the meantime, the Commission recommends that the *Evidence Act* include a specific reference to cultural background to reflect the concerns expressed in the consultations and submissions to this reference.

Recommendation 126

Disallowing questions put to witnesses that are vulnerable by reason of their cultural background

That s 26(3)(a) of the *Evidence Act 1906* (WA) include 'cultural background' as one of the matters which may inform a court in exercising its discretion to disallow a question or require that it not be answered pursuant to s 26(1).

More assistance for Aboriginal people in the court system

The Commission was told during its consultations that Aboriginal people often do not understand the court process and want more help to do so. These comments often took the form of criticism of the ALS. The fact that ALS lawyers often do not have the time to explain things to their clients appears to be the source of much dissatisfaction, such as 'ALS keep telling our people to plead guilty'.¹⁸⁹ This does not suggest to the Commission that ALS lawyers are advising Aboriginal people to plead guilty when they are not; rather, it appears to demonstrate that often ALS lawyers do

182. Ibid [5.90].

183. *Criminal Procedure Act 1986* (NSW) s 275A(7)(c).

184. *Criminal Procedure Act 1986* (NSW) s 275A(7)(d).

185. Section 275A(3) provides that a question is not disallowable under the section merely because the question (a) challenges the truthfulness of the witness or the consistency or accuracy of any statements made by the witness, or (b) requires the witness to discuss a topic that could be considered to be distasteful or private.

186. A 'vulnerable witness' is to be defined as a person under the age of 18, or a person with a cognitive impairment/intellectual disability, and also includes any other person rendered vulnerable by reason of: (a) the age or cultural background of the witness; (b) the mental, physical or intellectual capacity of the witness; and (c) the relationship between the witness and any party to the proceedings, and the nature of the offence.

187. ALRC, *Uniform Evidence Law Report*, ALRC 102 (December 2005) [5.128].

188. Ibid [5.130]. The ALRC states that 'it is desirable for the uniform Evidence Acts to contain effective and uniform provisions to deal with this issue. But it is also important for the best solution to be developed and adopted in any uniform proposal.' It is therefore suggested that an assessment be made of the two approaches before a choice is made as to what should comprise the uniform approach.

189. Submissions received at LRCWA, Discussion Paper community consultations – Kalgoorlie (28 February 2006); Broome (7 March 2006); Broome Regional Prison (7 March 2006); Fitzroy Crossing (men's meeting) (9 March 2006).

not have the time to explain the intricacies of the criminal law to their clients. It is acknowledged¹⁹⁰ that the resources of the ALS do not permit the lawyers and field officers employed by them to devote much time to explaining the court procedure generally to defendants in court proceedings. This has the predictable result that many Aboriginal people are left confused by the process.

It must also be recognised that it is not just Aboriginal accused who are confused by the process – this is also a concern for victims appearing in court, and witnesses generally.¹⁹¹ Funding restrictions also impact on the ability of police prosecutors, the DPP and Victim Support Service to spend time explaining court procedure. It has also been noted that for a variety of reasons Aboriginal people are less likely to access assistance from such agencies where it is available.¹⁹² For this reason, the Commission proposed the employment of court facilitators to assist all Aboriginal people appearing in court, whether they are accused persons, complainants, parties or witnesses.¹⁹³ The position has been variously described as facilitator, liaison officer, or court worker. Although the Commission used the term ‘facilitator’ in its Discussion Paper, the expression ‘Aboriginal liaison officer’ is used in this Report to adopt the description of the existing position in the Supreme Court.

The proposal was widely supported.¹⁹⁴ The Department of the Attorney General suggested that the support of Aboriginal people should not be restricted to criminal courts and that such liaison officers ought to be available to all witnesses appearing in any jurisdiction. They provided the examples of family law matters, housing, adoptions and child protection.¹⁹⁵

Another submission stated that this kind of role is often carried out by Aboriginal volunteers, and stressed the

importance of employing Aboriginal people to fill these positions:

I support the proposal to employ ABORIGINAL court facilitators. However, the support needs to be provided a long time prior to the actual trial/hearing date/s. There is a dire need for more Aboriginal staff, including Aboriginal victim support and child witness preparation officers to be employed within the court system. I specifically mentioned these two occupations because these are the positions that provide the kind of court support that is referred to above. I don't believe we should become reliant on the recruitment of Aboriginal volunteers to provide this form of court support. Rather, we ought to be valuing and suitably rewarding the cultural knowledge and expertise that Aboriginal people bring to their roles. I would also note that there aren't too many Aboriginal people who are in a financial position to provide voluntary services.¹⁹⁶

The Commission further notes that liaison officers would be a very useful reference point for the court when seeking to make their hearings—on circuit, in particular—as culturally appropriate as possible. Liaison officers could assist with setting up local cultural awareness training or the ‘welcome to country’¹⁹⁷ at the beginning of a circuit. If it was proposed that evidence be taken on country, the services of Aboriginal liaison officers would likely prove invaluable.¹⁹⁸ The Commission considers that the role of the liaison officers could extend not just to explaining proceedings, but also to attempting to ensure that all customary law considerations are brought to the attention of the court so that special witness and other provisions can be used if necessary.

While the Commission acknowledges that courts in Western Australia are attempting to increase the numbers of Aboriginal liaison officers,¹⁹⁹ there are presently not enough positions to carry out the role

190. Submissions received at LRCWA, Discussion Paper community consultation – Kalgoorlie (28 February 2006). See also ‘Funding of the Aboriginal Legal Service, Chapter Five, above p 88.

191. Confidential, Submission No. 50 (30 June 2006).

192. *Western Australian Aboriginal Justice Agreement*, 11.

193. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 415, Proposal 89.

194. Marian Lester, Submission No. 18 (27 April 2006); Department of the Attorney General, Submission No. 34 (11 May 2006) 16–17; Aboriginal Legal Service (WA), Submission No. 5 (12 May 2006) 5; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 5; Family Court of Western Australia, Submission No. 57 (26 July 2006). During the return consultations in Broome it was stated that many people did not understand the court process; this included some prisoners at Broome Regional Prison who reported that they did not understand the offence of which they had been convicted.

195. The Department of the Attorney General, Submission No. 34 (11 May 2006) 16–17. It is noted that the Family Court of Western Australia has already proposed that such facilitator positions be established: Family Court of Western Australia, Submission No. 57 (26 July 2006).

196. Confidential, Submission No. 50 (30 June 2006) (original emphasis). In Chapter Two the Commission noted that the reliance on Aboriginal people to provide voluntary services is an attitude that is not demonstrated to the same degree with non-Aboriginal people. The Commission is of the view that Aboriginal people should be remunerated for the provision of essential services.

197. Dr Brian Steels, consultation (28 April 2006). It was noted that the court is opened by police, there is no traditional welcome or acknowledgment of country, and that there is a lack of Aboriginal culture in the courts.

198. See Recommendation 116, above p 332.

199. Chief Magistrate Steven Heath & Magistrate Libby Woods, consultation (17 May 2006).

that the Commission proposes.²⁰⁰ It is the Commission's view that an Aboriginal liaison officer should be employed wherever courts sit in Western Australia. It is acknowledged that this will require significant funding;²⁰¹ however, the Commission believes that the benefits of the recommendation would far outweigh the cost. As the Department of the Attorney General has asserted: 'overall the employment of [liaison officers] to provide assistance to Aboriginal people giving evidence in court would save valuable court time by helping to ensure a clear understanding of the court process'.²⁰²

Recommendation 127

Aboriginal liaison officers to be employed to work in courts

That the Department of the Attorney General employ Aboriginal liaison officers in all Western Australia 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.

Educating those who work in the legal system about Aboriginal culture

In its Discussion Paper the Commission made two proposals directed to educating lawyers and judges about Aboriginal culture.²⁰³ The Commission also acknowledged that the Law Society was considering the development of protocols for lawyers dealing with Aboriginal clients.²⁰⁴

Protocols for lawyers

In Chapter Five of this Report the Commission has recommended that protocols be developed to assist

lawyers working with Aboriginal people. The Commission suggests that the proposed protocols should address the problems that Aboriginal people can face in the court system²⁰⁵ and provide practical ways in which these problems can be ameliorated, including:

- suggesting culturally appropriate methods of leading evidence from witnesses (such as narrative form);²⁰⁶
- encouraging lawyers to object when questions are being asked of Aboriginal witnesses that are linguistically or culturally inappropriate; and
- involving experts to suggest techniques to ensure that evidence from Aboriginal witnesses is adduced in a manner that comes within the rules of evidence, is fair to the witness and does not prejudice the interests of the parties to the litigation.²⁰⁷

Cultural awareness training for judicial officers

The Commission proposed in its Discussion Paper that cultural awareness training be provided for all government employees working with Aboriginal people.²⁰⁸ Within the legal system it was proposed that such training be undertaken by lawyers;²⁰⁹ employees of the Departments of the Attorney General and Corrective Services;²¹⁰ and police officers.²¹¹ For judicial officers, it was proposed that Aboriginal cultural awareness training be continued. It was also proposed that sufficient funds be allocated by the government to the implementation of this proposal to enable:

- effective and appropriate programs to be developed;
- Aboriginal presenters to be engaged;
- the training to be local, particularly where a particular judicial officer is required to sit regularly at a particular location; and
- sufficient time to be allocated to such training so

200. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 415. The Department of the Attorney General stated in its submission that the existing Aboriginal liaison officer structure is effective if applied statewide and adequately resourced: Department of the Attorney General, Submission No. 34 (11 May 2006) 17.

201. Department of the Attorney General, *ibid* 16. However, it is acknowledged that in areas where courts sit infrequently, liaison officers need not be employed on a full-time basis. This was recognised by the Department of the Attorney General, who stated that consideration should be given to employing competent contractors.

202. Department of the Attorney General, Submission No. 34 (11 May 2006) 17. The Commission notes the Department of the Attorney General has expressed the intention to introduce Aboriginal Court Liaison Officers around Western Australia.

203. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) Proposals 7 & 90. Proposal 8 suggested cultural awareness training for the employees of the Department of Justice.

204. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 414. See discussion of the protocols and Recommendation 10, Chapter Five, above p 90.

205. Some of the difficulties are discussed by the Commission in its Discussion Paper: LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 396–401.

206. See Recommendation 125, above p 344.

207. This has been described as a 'reconciliatory approach' to litigation: see Flynn M & Stanton S, 'Trial by Ordeal: The stolen generation in court' (2000) 25 *Alternative Law Journal* 75, 77 quoted in LRCWA, *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) 414.

208. See Recommendation 2, above p 51.

209. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) Proposal 7; see also Recommendation 11, above p 92.

210. See Recommendation 12, above p 93.

211. See Recommendation 56, above p 212.

that it does not adversely affect the work of the courts.

Support for cultural awareness training for judicial officers was expressed in the submission from the Law Society and the Criminal Lawyers Association.²¹² Return consultations at Geraldton²¹³ and Fitzroy Crossing²¹⁴ noted that cultural awareness training should be local in character.²¹⁵ The return consultations in Bunbury were also supportive: cultural awareness training was described as a 'must'.²¹⁶ It was noted by the Indigenous Women's Congress that cultural awareness training must operate in addition to information about relevant customary law being provided on a case-by-case basis. It would thereby ensure that judges are educated generally about Aboriginal issues so they are informed about these matters before a specific case comes before them.²¹⁷ In the consultations with lawyers it was noted that judges (as well as lawyers) need education about the kinds of problems Aboriginal witnesses can face because of their customary law and practical ways of dealing with these problems.

The Chief Magistrate commented that, when cultural awareness training was implemented both by the Australian Institute of Judicial Administration and National Judicial College of Australia, 'the greatest difficulty has not been the preparedness of judicial officers to attend but the ability to find appropriate presenters'.²¹⁸ The Commission suggests that where community justice groups are set up they may be of assistance in locating suitable presenters and ensuring that training is local in character.

The need for training of this nature was discussed in the 2005 ALRC Final Report in the context of narrative form evidence. It was said that it is not the enacting of legislation to provide for such measures that will solve the problems facing many Aboriginal people in court:

Without an understanding of the reasons why giving evidence in narrative form may be more appropriate for some witnesses, it is likely that judges will fall back

on their own experience as advocates and view the practice with suspicion.²¹⁹

The report therefore recommends that judicial training include an examination of the ways that different kinds of witnesses may respond to traditional methods of examination-in-chief and cross-examination. The Commission endorses that approach. It also considers it vital that such training encompass the issues of disadvantage set out in the Discussion Paper and this Report, as well as the problems facing Aboriginal people in court²²⁰ so that the measures recommended in this chapter to overcome those problems can be properly implemented. The submission from the Catholic Social Justice Council recognised the general need for a 'broad cooperative educational and training approach involving the Aboriginal community, governmental, church and other non-governmental agencies'. They stated that this should 'precede, accompany and follow the suggested actions of the Commission's report'.²²¹ The Commission agrees with the Council that if the recommendations in this chapter are to succeed then it is crucial that all people working in the legal system attain a better understanding of the cultural differences that are at present a barrier to Aboriginal people properly understanding and participating in the legal system.

Recommendation 128

Cultural awareness training for judicial officers

1. That all Western Australian courts and the State Administrative Tribunal continue Aboriginal cultural awareness training.
2. That the Western Australian government provide adequate resources to ensure that:
 - (a) effective programs can be developed;
 - (b) Aboriginal presenters can be engaged;
 - (c) training is local in character; and
 - (d) time is allocated to the training so that the work of the courts is not affected.

212. Law Society of Western Australia, Submission No. 36 (16 May 2006) 1. Support was also expressed in Criminal Lawyers Association, Submission No. 58 (4 September 2006) 5.

213. Submissions received at LRCWA Discussion Paper community consultation – Geraldton, 3 March 2006.

214. Submissions received at LRCWA Discussion Paper community consultation – Fitzroy Crossing (women's meeting), 9 March 2006.

215. See discussion under 'Cultural Awareness', Chapter Three, above pp 49–51 and 'Principle Four: Local focus and recognition of diversity', Chapter Two, above p 36.

216. Submissions received at LRCWA Discussion Paper community consultation – Bunbury, 17 March 2006.

217. Indigenous Women's Congress, consultation (28 March 2006).

218. Chief Magistrate Steven Heath, Submission No. 10 (21 March 2006) 3–4.

219. ALRC, *Uniform Evidence Law Report*, ALRC 102 (December 2005) 5.36.

220. As described in detail in LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 396–401.

221. Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006).

Chapter Ten

Aboriginal Community Governance in Western Australia

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Aboriginal Community Governance

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 recommendations for the recognition of Aboriginal customary law and the accommodation of cultural beliefs 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 therefore examined the existing status of Aboriginal community governance in Western Australia and looked at what is being done (and what more could be done) to maximise opportunities for greater Aboriginal participation in decision-making, and to encourage more effective and appropriate community governance processes. The Commission's full examination of these issues is found in Part X of its Discussion Paper.¹



Indigenous Self-Determination in the Western Australian Context

Self-determination² is considered a fundamental human right at international law and is recognised in a number of international instruments.³ As shown in the Commission's Discussion Paper, 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.⁴ 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.⁵

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. In the Discussion Paper it was noted that the aspirations of Aboriginal people in Western Australia appeared to be focused on, but not confined to, the pursuit of self-determination in relation to economic, social and cultural development. It is the Commission's opinion that in order 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.⁶

1. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 417–38.
2. The concept of indigenous self-determination is discussed at length in the Commission's Discussion Paper and will not be repeated here: see *ibid* 419–22.
3. The *International Covenant on Civil and Political Rights* and the *International Covenant on Economic Social and Cultural Rights* share a common Article 1 which provides that 'all peoples have the right to self-determination'. The Discussion Paper outlines issues in relation to the definition of 'peoples' and application of this right to indigenous peoples at international law: *ibid*.
4. LRCWA, *ibid* 420.
5. See discussion, *ibid* 420–21.
6. *Ibid* 421.

Improving Government Service Provision to Aboriginal Communities

Much of the entrenched disadvantage experienced by Western Australian Aboriginal communities stems from a lack of infrastructure and essential government services.⁷ Part of the reason for problems of service provision to Aboriginal communities lies in the complicated nature of relationships between the three levels of government responsible for the delivery of services. In its Discussion Paper the Commission examined the responsibilities of local, state and federal governments to provide essential services to Aboriginal communities. It found that the rhetoric of self-determination has, in the past, allowed governments to abdicate their responsibilities to provide services that are an entitlement of citizenship and which non-Aboriginal Australians take for granted.⁸

Although there have been many recent developments aimed at improving the delivery of government services to Aboriginal people and communities,⁹ more must be done to improve outcomes on the ground. A number of the recommendations in this Report are directed at improving (or establishing) state-provided programs and services to Aboriginal people¹⁰ and the Commission's first guiding principle for reform in Chapter Two is concerned with the normalisation of major infrastructure and essential services provided by the Western Australian government.¹¹ In this chapter the Commission has concerned itself largely with the provision of local government services.

Accountability of local governments for 'Aboriginal' funding

The provision of local government services is an area where Aboriginal communities in Western Australia have been found to be disadvantaged relative to non-Aboriginal communities in comparable geographic regions.¹² A study undertaken by the Department of Indigenous Affairs in 1999 identified a number of factors contributing to the inequality of local government service provision to Aboriginal communities including the difficulty of providing and maintaining infrastructure in remote areas; issues with tenure of land and capacity to levy council rates;¹³ the 'private' nature of Aboriginal communities (resulting in the perception of inability to access land for the purposes of service provision or infrastructure maintenance);¹⁴ the fact that that because some Aboriginal communities are located on Aboriginal Lands Trust or Crown land, provisions of the *Health Act 1911 (WA)* and *Local Government Act 1995 (WA)* are not applicable and cannot be enforced by local government authorities; and the history of federal and state agencies circumventing local government approvals and involvement.¹⁵

These factors are typically raised by local government to explain the lack of local government service provision to Aboriginal communities. However, a more accurate explanation can perhaps be found in the fact that the lack of rate income generated by Aboriginal communities has fostered a view that Aboriginal people are not genuine constituents of local government and are therefore not seen to be a priority.¹⁶

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7. Local government essential services include the provision and maintenance of infrastructure such as local roads, footpaths, street lighting, stormwater drainage, parks and recreational facilities. It also has responsibilities such as town planning; building regulation and inspection, development approval; environmental health (such as food safety, waste disposal, effluent disposal and pest control), and the welfare and control of domestic animals, in particular dogs.
 8. For example, the lack of law enforcement in remote communities (examined in Part V of the Commission's Discussion Paper) is largely a consequence of the perception that the *Aboriginal Communities Act 1979 (WA)* 'empowers' communities to deal with their own law and order problems: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 119.
 9. For discussion of individual initiatives, see LRCWA, *ibid* 424–25. These initiatives are largely consequent upon the Council of Australian Governments' *National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders (1992)*, <<http://www.alga.asn.au/policy/indigenous/nationalCommitment.php>>.
 10. Such as programs addressing law and order issues, family issues, consumer education, cultural awareness training of providers and Aboriginal language interpreter services.
 11. See discussion under 'Principle One: Improve government service provision to Aboriginal people', Chapter Two, above pp 33–34.
 12. Department of Indigenous Affairs (DIA), 'The Provision of Local Government Services to Aboriginal Communities: A focus paper' (November 1999) 2–3.
 13. Communities located on Aboriginal Lands Trust land can claim charitable purpose exemptions under the *Local Government Act 1995 (WA)*.
 14. DIA, 'The Provision of Local Government Services to Aboriginal Communities: A focus paper' (November 1999) 9. In particular, in respect of communities declared under the *Aboriginal Affairs Planning Authority Act 1972 (WA)* where permits are required to enter community lands. Further, access roads to Indigenous communities are often private roads and, as such, councils have sometimes refused to take responsibility for their maintenance or provision. In recognition of this, in Western Australia, one-third of the Special Road Works funding is directed to local governments specifically for the improvement and provision of roads.
 15. *Ibid* 3.
 16. Gerritsen R, Crosby J & Fletcher C, *Revisiting the Old in Revitalising the New: Capacity building in Western Australia's Aboriginal communities* (Canberra: North Australia Research Unit, Australian National University, 2000) 24. See also Department of Indigenous Affairs, *Building Stronger Communities* (2002) 17; Commissioner Patrick Dodson, RC1ADIC, *Regional Report of Inquiry into Underlying Issues in Western Australia* (vol. 1, 1991) [9.1]. Apart from the Shire of Ngaanyatjarra (Warburton)—the only 'Aboriginal-owned' local government body in Western Australia—Aboriginal interests are not strongly represented on councils and are not therefore accorded priority.

The rhetoric of self-determination has allowed governments to abdicate their responsibilities to provide services that are an entitlement of citizenship and which non-Aboriginal Australians take for granted.

As explained in the Commission's Discussion Paper, 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.¹⁷ The Commission therefore proposed that the Western Australian government should investigate ways of improving the accountability of local governments for funding provided for the benefit of Aboriginal people in each local government area.¹⁸

Submissions received in respect of this proposal were generally supportive; in particular those received from regional development commissions.¹⁹ However, the submission of the Shire of Wyndham East Kimberley expressed concern about the Commission's proposal.²⁰ The Shire argued that the issue was 'not one at all of the lack of accountability for the current untied grants, but rather the inadequate level of funding for service provision to indigenous people outside of towns'.²¹ The Commission does not resile from the fact that service provision for remote communities is inadequately resourced; however, this is not the issue being addressed by its recommendation. Rather, the issue is that, as mentioned above, Aboriginal people are not seen as true constituents because many do not pay

local government rates, despite the fact that untied grants recognise and seek to account for this. The Shire of Wyndham East Kimberley's own submission attests to this attitude in saying: 'You cannot expect services to remote indigenous communities to be subsidised by ratepayers, when those communities do not pay rates'.²²

It has recently been reported that local councils have misused federal funding which was earmarked to provide essential services to remote Aboriginal communities in Western Australia.²³ This is not a new issue. It was recognised as far back as 1991 by the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) which made two recommendations aimed at improving local government accountability for funding designated for Aboriginal people.²⁴ At that time the Western Australian Grants Commission (now the Western Australian Local Government Grants Commission) admitted that much inequity was occurring in local government areas in the distribution of funds between Aboriginal and non-Aboriginal people. The Grants Commission reported to the RCIADIC that it had introduced a means of withholding funds²⁵ from the local government authority where the authority could not demonstrate that funds were being spent in an equitable manner.²⁶ The Commission is not aware whether the Local Government Grants Commission currently has a means of ensuring accountability of local governments for equitable distribution of funds to Aboriginal people;²⁷ however, it

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17. See Department of Transport and Regional Services (Cth), *2004–2005 Report on the Operation of the Local Governance (Financial Assistance) Act 1995* (2006) 105.
 18. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 423, Proposal 91.
 19. Gascoyne Development Commission, Submission No. 38 (11 May 2006) 4; Pilbara Development Commission, Submission No. 39 (19 May 2006) 4.
 20. Shire of Wyndham East Kimberley, Submission No. 47 (7 June 2006).
 21. *Ibid.*
 22. *Ibid.*
 23. Calverley A, 'Councils 'Misuse' Aboriginal Money', *The West Australian*, 13 July 2006, 36. The report references an address delivered to a conference at Murdoch University on 12 July 2006 by Professor Peter Newman, who is Chairman of the Western Australian Government's Sustainability Roundtable. See Newman P, 'Sustainable Indigenous Communities: Applying the 11 principles' (Speech delivered to the national conference on sustainability of Indigenous communities, Murdoch University, 12 July 2006).
 24. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) Recommendations 198 & 200. See also ATSIIC, *Towards Social Justice? An Issues Paper: Reform of Commonwealth-state financial relations* (1995), <<http://138.25.65.50/au/other/IndigLRes/1995/5/20.html>>.
 25. This was referred to in the RCIADIC report as the 'reduced service requirement'.
 26. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (vol. 4, 1991) [27.5] 'Delivering Local Government Services'.
 27. It appears that the 'reduced service requirement' by which the Western Australian Local Government Grants Commission (WALGGC) withheld funds from local governments is now redundant. There is an 'Aboriginal Environmental Health' disability factor that is applied by the WALGGC when determining grants. This gives more funding to recognise the extra costs incurred when providing environmental health services to remote Aboriginal communities in Western Australia. There is also an 'Indigenous' disability factor which allows those councils with large Indigenous populations to access more funding than they would otherwise receive. However, neither of these disability factors address inequality of service provision between

is clear that whatever processes may currently be in place, they are not working adequately to protect the interests of Aboriginal people in remote communities.²⁸

As recently as June 2006 the Minister for Local Government and Regional Development stated in Parliament that he receives constant 'complaints from remote communities that they are not receiving a fair deal out of local government'.²⁹ The Commission is concerned about this reality and therefore confirms its recommendation for improved accountability of local governments for funding received for the benefit of Aboriginal people. It should also be noted that the Commission has made the improvement of government service provision to Aboriginal communities its first guiding principle for reform in Chapter Two above.

Recommendation 129

Accountability of local governments for 'Aboriginal' funding and grants

1. That the Department of Local Government and Regional Development, in conjunction with the Western Australian Local Government Grants Commission, investigate ways of improving accountability of local governments for funding provided for the benefit of Aboriginal people in each local government area.
2. That mechanisms be put in place by the Department of Local Government and Regional Development to monitor and evaluate outcomes of local government service provision in Western Australian Aboriginal communities.

Funding for autonomy

In its Discussion Paper the Commission considered the funding options available to Aboriginal local governing bodies under the *Local Government Assistance Act 1995* (Cth). Broadly these include excision from the local government area and establishment as a separate

local governing body under state law (the Ngaanyatjaraku Shire Council in the Gibson Desert (Warburton) region is an example), and bodies 'declared' by the state to be local governing bodies.³⁰ The latter option has been used by other jurisdictions, notably the Northern Territory, to secure discrete federal funding for remote Aboriginal communities without the stringent reporting and service provision responsibilities required of local governments under state law.

To date there has been no attempt in Western Australia to take advantage of federal funding options for discrete Aboriginal communities as 'declared' local governing bodies. In its Discussion Paper the Commission suggested 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 might offer Aboriginal communities the prospect of enhancing their economic base by bringing employment to community members. However, it was acknowledged by the Commission that the direct funding option could only work in the most functional communities and would require significant initial support by government and preparatory programs to build local governing capacity. Nonetheless, the Commission considered that this option should be further explored in Western Australia and a proposal was made to that effect in the Discussion Paper.³¹

The Commission received only one submission in relation to this proposal. The Pilbara Development Commission (PDC) expressed concern that the

economic necessity of additional investment and support by government in the provision of preparatory programs to build the capacity of potential Aboriginal Local Governing Bodies prior to them undertaking their new role, is ... a substantial duplication of the role and responsibilities delegated to existing local government authorities for the provision of essential services.³²

The submission further suggested that when improvements were made to the accountability of local

Aboriginal and non-Aboriginal constituents of local government areas. See Western Australian Local Government Grants Commission, *Principles & Methods for the Distribution of Commonwealth Financial Assistance to Local Governments in Western Australia* (2004) 23–33.

28. This has been confirmed by the Department of Indigenous Affairs in its most recent survey of environmental health needs in Indigenous communities in Western Australia: DIA, *Environmental Health Needs of Indigenous Communities in Western Australia: The 2004 survey and its findings* (2005) 23.

29. Western Australia, *Parliamentary Debates*, Legislative Council, 27 June 2006, 4266b (Mr Jon Ford, Minister of Local Government and Regional Development).

30. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 431–32.

31. *Ibid* 436, Proposal 92.

32. Pilbara Development Commission, Submission No. 39 (19 May 2006) 4.

governments in the disbursement of funding pursuant to Recommendation 129, Aboriginal communities would benefit from increased service provision delivered by their current local governments.

The Commission acknowledges the points made by the PDC; however, it notes that this approach does nothing to address the reality that some Aboriginal communities are not well-served by their local governments and, given the attitudes discussed in the preceding section, may never be. It is the Commission's opinion that while the direct funding option may not be an immediate possibility for many communities (and should only be considered for functional communities with their prior, informed consent), it should not be dismissed without further investigation. The Commission has therefore confirmed its recommendation that direct funding possibilities be explored for the provision of basic local government services to functional discrete, remote Aboriginal communities that are currently not well-served by local government arrangements. It should be noted that major essential services (such as water, sewerage, power, public housing and health services) will continue to be supplied by various Commonwealth and state bodies under current bilateral agreements.³³

Recommendation 130

Allowing functional remote Aboriginal communities to access direct funding

1. That the Western Australian government explore the possibility of accessing federal funding for discrete, remote Aboriginal communities under s 4 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 and wish to build community capacity to provide and maintain basic essential services.
2. That such arrangements be preceded by programs aimed at building governing capacity within those communities and with appropriate initial government support.
3. That such arrangements only be pursued with the free, prior and informed consent of the relevant community.

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,³⁴ 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 were 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.³⁵

In its Discussion Paper the Commission proposed that the *Aboriginal Communities Act* be repealed and replaced with a new Act – the 'Aboriginal Communities and Community Justice Groups Act'³⁶ which could become a dedicated vehicle for establishment of community justice groups and reform of Aboriginal community governance. For reasons expressed in Chapter Five above and in the face of submissions from some Aboriginal communities that wish to retain their by-laws, the Commission has decided against the repeal

33. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 423–25.

34. The preamble of the Act reads: 'An Act to assist certain Aboriginal communities to manage and control their community lands and for related purposes'. See also McCallum A, *Review of the Aboriginal Communities Act 1979* (WA) (Vol. 1, July 1992) 97.

35. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 118–20; 430–31.

36. *Ibid* 120, Proposal 11.

of the *Aboriginal Communities Act*.³⁷ It has determined that the Act may be amended to allow for the retention of by-laws by those communities that wish to keep them and for the establishment of community justice groups for all Aboriginal communities.³⁸ The Commission also recognises that the *Aboriginal Communities Act* could be developed so as to support a framework for the establishment of effective community governance structures pursuant to Recommendation 131 of this Report.³⁹

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'.⁴⁰



In Western Australia the west Kimberley's Kullarri Regional Indigenous Body (KRIB) was one of the first regional representative structures established since ATSIC's demise. The Commission examined the KRIB model in its Discussion Paper and considered it an exemplar because it is a 'self-identifying' and 'self-organising' structure that has emerged from within the community itself.⁴¹ 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 WA

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 Aboriginal disadvantage described in Part II of the Commission's Discussion Paper and the law and order issues examined 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 Part X of its Discussion Paper. In particular:

- the inequality of government service provision to Aboriginal communities (as compared to non-Aboriginal communities in similar geographic regions);
- the lack of Aboriginal participation in community governance and the need to build the governing capacity of Aboriginal communities;
- the lack of an economic base to provide employment and create independent, self-supporting communities;
- an 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;
- the breakdown of cultural authority of Elders caused by, among other things, the emergence of alternative authority structures imposed by the

37. See discussion under 'Western Australian Aboriginal Community By-Law Scheme', above pp 113–15.

38. See Recommendation 17, above pp 112–13.

39. See discussion under 'A basic framework for reform of Aboriginal community governance', below pp 358–59.

40. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 433.

41. *Ibid* 433–35.

The abolition of the Aboriginal and Torres Strait Islander Commission has created a new imperative for Aboriginal governance at all levels.

current scheme of community governance in Western Australia;

- the failure to utilise existing expertise and aid capacity building of individuals and communities;
- the failure to appropriately involve Aboriginal people in decision-making in respect of issues that impact upon their quality of life; and
- the imposition of inappropriately designed or inflexible governing structures that fail to respond to the unique cultural dynamics of Aboriginal communities.⁴²

In its Discussion Paper the Commission acknowledged the potential of newly emerging regional Aboriginal governing structures to address some of these issues; however, it reflected that the need for effective governance at the community level remains. 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.⁴³

Some key principles for Aboriginal community governance reform

From its examination of relevant issues and matters affecting Aboriginal community governance in Part X of the Discussion Paper, the Commission identified six key principles that it considered should be applied by government in furthering the object of governance reform in Aboriginal communities.

1. **Voluntariness and consent:** 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 encouraging effective participation, building governing 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.

42. See *ibid* 422–35.

43. *Ibid* 435.

4. **Recognition of diversity and the need for flexibility in structure of governing institutions:** 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 family, social or skin 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. For this reason, the Western Australian government should take a long-term approach to reform of Aboriginal community governance.⁴⁴

A basic framework for reform of Aboriginal community governance

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 recommended the amendment of the *Aboriginal Communities Act* to enable the establishment of Aboriginal community justice groups.⁴⁵ 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. It is also of the opinion that the *Aboriginal Communities Act* may be a suitable vehicle for establishing a basic framework for reform and recognition of broader community governance in Western Australia. However, after considering the available research, governance studies⁴⁶ and the fact that relevant legislation⁴⁷ was under review at the time of writing the Discussion Paper, the Commission 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.⁴⁸

44. See *ibid* 436–37.

45. For a fuller discussion of relevant recommendations, see discussion under 'Community Justice Groups', Chapter Five, above pp 97–123.

46. Such as the COAG trials and the Indigenous Community Governance Project at the Australian National University's Centre for Aboriginal Economic Policy Research. For details of the ANU CAEPR Indigenous Governance Project and access to its publications, see <<http://www.anu.edu.au/caepr/governance2.php>>.

47. For example, *Aboriginal Councils and Associations Act 1976* (Cth); *Associations Incorporation Act 1987* (WA); *Aboriginal Communities Act 1979* (WA).

48. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 438, Proposal 93.

It is the Commission's opinion that representation of all family, social or skin groups and a balance of gender representation should be considered as the starting point for new governing structures.

The Commission received broad support for this proposal from submissions, in particular for its advocacy of a flexible approach.⁴⁹ The Commission notes that a recent in-depth study of Maori governance by the New Zealand Law Commission has also recommended a legislative framework approach which is guided by similar principles of flexibility, community participation, and recognition and enhancement of cultural authority.⁵⁰ Since there has not been much to advance any of the issues which restrained the Commission from making a more detailed proposal at the time of writing its Discussion Paper, the Commission confirms its original proposal. The Commission also endorses the submission of the Gascoyne Development Commission which emphasised the value of non-Indigenous expertise and partnerships between government agencies and communities to assist Aboriginal communities to achieve their governance objectives.⁵¹



Recommendation 131

Basic legislative framework for reform of Aboriginal community governance informed by key principles

1. That the starting point for reform of Aboriginal community governance in Western Australia be limited to a basic legislative framework that can facilitate self-identifying and self-organising governance structures to emerge at a community level.
2. That reform of Aboriginal community governance in Western Australia be informed by the key principles of voluntariness and consent; community empowerment through effective participation, capacity building and devolved decision-making power; 'downwards accountability' to the community and flexibility of government funding; recognition of diversity and need for flexibility in structure of governing institutions; balanced family, social or skin group, gender and traditional owner representation; and recognition of need for a long-term approach to community governance reform.
3. That Aboriginal communities be free to develop or choose a model of governance that is appropriate for their needs rather than have a model imposed on them by government without their consent.

49. Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006); Department of Indigenous Affairs, Submission No. 29 (2 May 2006); Department of Corrective Services (WA), Submission No. 31 (4 May 2006); Department of the Attorney General, Submission No. 34 (11 May 2006); Gascoyne Development Commission, Submission No. 38 (11 May 2006); Dr Brian Steels, Mawarnkarra Health Service Roebourne, consultation (28 April 2006). The Aboriginal and Torres Strait Islander Social Justice Commissioner emphasised the importance of full and effective participation of Aboriginal peoples in all decision-making processes. This is reflected in Principle Two of the key principles for Aboriginal community governance reform: see Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006).

50. New Zealand Law Commission, *Waka Umanga: A proposed law for Maori governance entities*, Report No. 92 (May 2006).

51. Gascoyne Development Commission, Submission No. 38 (11 May 2006) 4.

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Appendix A: List of Recommendations

Overcoming Aboriginal Disadvantage in Western Australia

Recommendation 1

[p 48] **Whole-of-government approach to Aboriginal service and program provision**

1. That the State of Western Australia adopt a genuine whole-of-government approach to the design, development and delivery of services and programs 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 Aboriginal disadvantage in Western Australia.
2. That, in recognition of the right of Aboriginal peoples to be involved in decision-making affecting their interests, the State of Western Australia put mechanisms in place to ensure the effective participation, consultation and consent of Aboriginal peoples in relation to the design and delivery of government services to Aboriginal communities in Western Australia.

Recommendation 2

[p 51] **Cultural awareness training for government employees and contractors**

1. 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:
 - (a) be designed and/or developed in consultation with local Aboriginal people, in particular traditional owners;
 - (b) draw upon existing local Aboriginal resources, networks and skills;
 - (c) be conducted or include presentations by Aboriginal people;
 - (d) be delivered at the regional or local level to allow programs to be appropriately adapted to take account of regional cultural differences and customs and concerns of local Aboriginal communities;
 - (e) include protocols and information specific to the role or position of the individual undertaking the training;
 - (f) be sufficiently long and detailed to meaningfully inform participants of matters necessary to the delivery of programs and services to Aboriginal clients; and
 - (g) be evaluated, updated and reinforced on a regular basis.
2. That *all* employees of Western Australian government agencies be offered, and encouraged to participate in, cultural awareness training programs regardless of their position or the frequency of their interactions with Aboriginal people.
3. That participation in agency-arranged cultural awareness training be a contractual condition where contractors or sub-contractors to any Western Australian government agency are required to work directly or have regular dealings with Aboriginal people.

Office of the Commissioner for Indigenous Affairs

Recommendation 3

[p 58] Establish an Office of the Commissioner for Indigenous Affairs

1. That the Western Australian government establish, by statute, an independent and properly resourced Office of the Commissioner for Indigenous Affairs to report directly to Parliament on:
 - (a) progress on implementation of the recommendations of the Law Reform Commission of Western Australia's Final Report into Aboriginal Customary Laws (2006) and the Report of the Royal Commission into Aboriginal Deaths in Custody (1991);
 - (b) departmental and agency participation in the whole-of-government approach;
 - (c) outcomes achieved in regard to reducing Aboriginal disadvantage and achieving reconciliation in Western Australia; and
 - (d) progress in the reduction of over-representation of Aboriginal people in the criminal justice system in Western Australia.
2. That the Office of the Commissioner for Indigenous Affairs be responsible for independent monitoring and evaluation of government initiatives directed toward Aboriginal people in Western Australia.
3. That the Office of the Commissioner for Indigenous Affairs be headed by an independent Aboriginal Commissioner, preferably from Western Australia.
4. That the Commissioner for Indigenous Affairs have the power to:
 - (a) require departments and agencies to provide information on request;
 - (b) require departments and agencies to report annually to the Commissioner on outcomes achieved in respect of Aboriginal issues and policies;
 - (c) establish joint working parties or collaborate with state or federal agencies and/or research bodies on issues affecting or relating to Aboriginal people in Western Australia;
 - (d) review laws and policies and provide advice to government;
 - (e) publish research, reports and information on issues relating to Aboriginal people in Western Australia;
 - (f) make findings and recommendations to Parliament or to any Western Australia government agencies in relation to any matter within the Commissioner's remit; and
 - (g) undertake investigations on matters as directed by the Premier of Western Australia from time-to-time.
5. That the Commissioner for Indigenous Affairs be appointed by the Governor on the recommendation of the Premier in consultation with Aboriginal people.
6. That the Commissioner for Indigenous Affairs' term of office be five years, renewable by both Houses of Parliament. The Commissioner should only be suspended or removed from office by the Governor on addresses from both Houses of Parliament.

Aboriginal Customary Law – Definitional Matters

Recommendation 4

[p 63] Definition of Aboriginal person and Torres Strait Islander person

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:

'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 may be considered:

- (a) genealogical evidence;
- (b) evidence of genetic descent from a person who is an Aboriginal person;
- (c) evidence that the person identifies as an Aboriginal person; and
- (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 may be considered:

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

Recognition of Aboriginal Customary Law

Recommendation 5

[p 69] Recognition of customary law consistent with international human rights standards

That 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. In all aspects of the recognition process particular attention should be paid to the rights of women and children and the right not to be subject to inhuman, cruel or unusual treatment or punishment under international law.

Recommendation 6

[p 74] Constitutional recognition of Aboriginal peoples

That, at the earliest opportunity, the Western Australian government introduce into Parliament a Bill to amend the *Constitution Act 1889 (WA)* to effect, in s 1, the recognition of the unique status of Aboriginal peoples as the descendants of the original inhabitants of this state. The Commission commends the following form, modelled on a similar provision in the *Constitution Act 1975 (Vic)*:

1. Recognition of Aboriginal peoples

- (1) The Parliament acknowledges that the Colony of Western Australia was founded without proper consultation, recognition or involvement of its Aboriginal peoples or due respect for their laws and customs.
- (2) The Parliament recognises that Western Australia's Aboriginal peoples, as the original custodians of the land on which the Colony of Western Australia was established —
 - (a) have a unique status as the descendants of Australia's first people;
 - (b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Western Australia; and
 - (c) have made a unique and irreplaceable contribution to the identity and wellbeing of Western Australia.
- (3) The Parliament does not intend by this section —
 - (a) to create in any person any legal right or give rise to any civil cause of action; or
 - (b) to affect in any way the interpretation of this Act or of any other law in force in Western Australia.

Aboriginal People and the Criminal Justice System

Recommendation 7

[p 86] **Programs and services for Aboriginal people within the criminal justice system**

1. That the Department of the Attorney General and the Department of Corrective Services immediately review the existing programs and services available for Aboriginal people in the criminal justice system.
2. That the Western Australian government provide resources to ensure that there are adequate and accessible culturally appropriate programs and services for Aboriginal people at all levels of the criminal justice system.
3. That when allocating resources for the provision of programs and services for Aboriginal people, priority should be given to establishing and supporting Aboriginal-owned programs and services.
4. Where it is not possible to establish an Aboriginal-owned program or service, the Western Australian government should ensure that Aboriginal people are involved in the design and delivery of government-owned programs and services.
5. That the Western Australian government pay particular attention to ensuring that there are adequate and accessible culturally appropriate services for Aboriginal victims of family violence and sexual abuse.

Recommendation 8

[p 87] **Repeal mandatory sentencing laws for home burglary**

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

Recommendation 9

[p 90] **Funding for the Aboriginal Legal Service of Western Australia**

That the Western Australian government consult with the Aboriginal Legal Service with a view to providing funding for specific projects or to assist Aboriginal people obtain adequate legal representation as a consequence of the recommendations in this Report.

Recommendation 10

[p 91] **Protocols for lawyers working with Aboriginal people**

1. That the Western Australian government provide funding to the Law Society of Western Australia for the purpose of developing protocols for lawyers who work with Aboriginal people.
2. That in developing these protocols the Law Society should consult with relevant Aboriginal people and organisations including the Aboriginal Legal Service and Aboriginal interpreting services.

Recommendation 11

[p 92] **Cultural awareness training for lawyers**

1. That the Western Australian government provide resources for the development of Aboriginal cultural awareness training programs for lawyers.
2. That the Law Society of Western Australia should coordinate the development of Aboriginal cultural awareness training programs for lawyers.
3. That the Law Society should ensure that Aboriginal cultural awareness training programs are developed in conjunction with Aboriginal people and, where possible, they should be presented by Aboriginal people.

4. That the Law Society should apply for Aboriginal cultural awareness training programs to be accredited as approved programs under the Legal Practice Board's mandatory continuing legal education program (if and when it commences).

Recommendation 12

[p 93] **Cultural awareness training for staff and volunteers in the Department of the Attorney General and the Department of Corrective Services**

1. That employees of the Department of the Attorney General and the Department of Corrective Services who work directly with Aboriginal people (such as community corrections officers, prison officers and court staff) be required to undertake cultural awareness training.
2. That cultural awareness training be made available at no cost for volunteers who deal with Aboriginal people on behalf of the Department of the Attorney General or the Department of Corrective Services.
3. That cultural awareness training be specific to local Aboriginal communities and include programs presented by Aboriginal people.

Recommendation 13

[p 95] **Extraordinary drivers licences**

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:

1. Where there are no other feasible transport options, Aboriginal customary law obligations should 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.
2. When 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.

Recommendation 14

[p 96] **Application to cancel a licence suspension order**

That the *Fines, Penalties and Infringement Notices Enforcement Act 1994 (WA)* be amended to provide that an Aboriginal person may apply to the registrar 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.

Recommendation 15

[p 96] **Education and legal representation for traffic matters**

1. That the Western Australian government provide resources to the Aboriginal Legal Service for the purpose of providing educative strategies for Aboriginal people across the state (in particular in remote locations) about the changes to the criteria for applying for an extraordinary drivers licence or the cancellation of a licence suspension order.
2. That the Western Australian government provide resources to the Aboriginal Legal Service for the purpose of providing legal representation for Aboriginal people who are applying for an extraordinary drivers licence or for the cancellation of a licence suspension order.

Aboriginal Community Justice Groups

Recommendation 16

[p 109] Trespass

1. That the *Aboriginal Communities Act 1979* (WA) 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 (who is not a member of the community) into their community and, if permission for entry is granted, to determine on what conditions the person may remain on the community. The provision should also state that it is an offence, without lawful excuse, to fail to comply with the conditions or enter without permission and that this offence has the same penalty as the offence of trespass under the *Criminal Code* (WA).
2. That the *Aboriginal Communities Act 1979* (WA) include a specific provision in relation to community members. This provision should state:
 - (a) That the community council of a discrete Aboriginal community which has been declared under Part II of the Act 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.
 - (b) That the community council can only ask a member of the community to leave if a majority of the community justice group in the community has recommended that the person be asked to leave.
 - (c) That the community council cannot ask a member of the community to leave if it would cause immediate danger to the health or safety of the person (or their dependents).
 - (d) That failure to leave the community within a reasonable time, or returning to the community during the specified period, without lawful excuse, constitutes an offence of trespass.
 - (e) That a lawful excuse includes that the person was required to stay in or enter the community for Aboriginal customary law purposes.
 - (f) That a member of the Western Australia Police can remove a person who has not complied, within a reasonable time, with the request of the community council to leave the community.

Recommendation 17

[pp 112–13] Community justice groups

1. That the *Aboriginal Communities Act 1979* (WA) provide for the establishment of community justice groups upon the application, approved by the Minister for Indigenous Affairs, of an Aboriginal community.
2. That the current provisions of the *Aboriginal Communities Act 1979* (WA) be incorporated into Part I and that there be a separate part (Part II) of the Act dealing with community justice groups.
3. That Part II of the *Aboriginal Communities Act 1979* (WA) distinguish between discrete Aboriginal communities and all other Aboriginal communities.
4. That for a discrete Aboriginal community to establish a community justice group the community must be declared as a discrete Aboriginal community under Part II of the *Aboriginal Communities Act 1979* (WA).
5. That the Minister for Indigenous Affairs is to declare that an Aboriginal community is a discrete Aboriginal community to which Part II of the Act applies, if satisfied, that
 - (a) A majority of the community supports the community justice group setting community rules and community sanctions; and
 - (b) 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.

6. That both discrete and non-discrete Aboriginal communities may apply to the Minister for Indigenous Affairs for approval of a community justice group.
7. That Part II of the *Aboriginal Communities Act 1979* (WA) provide that the Minister for Indigenous Affairs must approve a community justice group if satisfied:
 - (a) That the membership of the group provides for equal representation of all relevant family, social or skin groups in the community and equal representation of both men and women from each relevant family, social or skin group.
 - (b) That there has been adequate consultation with the members of the community and that a majority of community members support the establishment of a community justice group.
 - (c) That each proposed member of a community justice group must have a Working with Children Check and that at regular intervals the Minister for Indigenous Affairs review the membership to determine if all members are still eligible for a Working with Children Check.
8. That at regular intervals the Minister for Indigenous Affairs provide the community with an opportunity to approve the continuation of any existing members or alternatively, nominate new members for each relevant family, social or skin group.
9. That at regular intervals, the Minister for Indigenous Affairs provide the community with an opportunity to approve or otherwise the continuation of the community justice group
10. That Part II of the *Aboriginal Communities Act 1979* (WA) define what constitutes community lands.
 - (a) 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.
 - (b) For other communities the Minister is to declare the boundaries of the community lands in consultation with the community.
11. That Part II of the *Aboriginal Communities Act 1979* (WA) provide that the functions of a community justice group include but are not limited to 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.
12. That Part II of the *Aboriginal Communities Act 1979* (WA) provide that the functions of a community justice group in a discrete Aboriginal community include setting community rules and community sanctions and that these rules and sanctions are subject to the laws of Australia.
13. That Part II of the *Aboriginal Communities Act 1979* (WA) include an appropriate indemnity provision for members of a community justice group.
14. That the Western Australian government establish or appoint an Aboriginal Justice Advisory Council to oversee the implementation of this recommendation. 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 and agencies including the Department of Indigenous Affairs, the Department of the Attorney General, the Department of Corrective Services, and the Western Australia Police. 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. The Aboriginal Justice Advisory Council be responsible for :
 - (a) Consultation with Aboriginal communities about their options under this recommendation.
 - (b) Providing advice and support to communities who wish to establish a community justice group.
15. That community justice group members be paid when performing functions within the Western Australian criminal justice system.
16. That the Department of Indigenous Affairs in conjunction with the Department of the Attorney General provide appropriate training for community justice group members.
17. That the Commissioner for Indigenous Affairs review and evaluate community justice groups at a time to be determined by the Commissioner for Indigenous Affairs.

Recommendation 18

[p 115] **Review of the by-law scheme under the *Aboriginal Communities Act 1979* (WA)**

1. That the Commissioner for Indigenous Affairs review and evaluate the by-law scheme under the *Aboriginal Communities Act 1979* (WA).
2. That the review take place at a time to be determined by the Commissioner for Indigenous Affairs but the review should take place approximately three to five years after the establishment of at least five community justice groups in Western Australia.
3. That this review should consider whether by-laws are still considered necessary and supported by Aboriginal people.
4. That in undertaking this review, the Commissioner for Indigenous Affairs consult with Aboriginal community council members, community justice group members and community members.
5. That if it is concluded that the by-law scheme should be abolished then the Commissioner for Indigenous Affairs consider whether any other legislative changes are required.

Recommendation 19

[p 116] **Statistics and records in relation to by-laws**

That in order to facilitate the review of the by-law scheme, the Department of the Attorney General immediately establish procedures to keep accurate statistics about all charges arising from a breach of a by-law enacted under the *Aboriginal Communities Act 1979* (WA) and that these records include the outcome of the court proceeding.

Recommendation 20

[p 117] **Definition of driving under s 73 of the *Road Traffic Act 1974* (WA)**

That in order to remove any doubt and ensure that Aboriginal people living in discrete Aboriginal communities are protected by the provisions of the *Road Traffic Act 1974* (WA), s 73 of the *Road Traffic Act 1974* (WA) be amended to bring the community lands of an Aboriginal community declared under the *Aboriginal Communities Act 1979* (WA) within the definition of 'driving'.

Recommendation 21

[p 120] **Community officers under the *Protective Custody Act 2000* (WA)**

1. That the Western Australia Police and the Department of Indigenous Affairs jointly review the option of community officers under s 27 of the *Protective Custody Act 2000* (WA).
2. That as part of this review the Western Australia Police and the Department of Indigenous Affairs consult with Aboriginal communities as to whether there are any community members who are willing and able to act as community officers under the *Protective Custody Act 2000* (WA).
3. That as part of this review the Western Australia Police and the Department of Indigenous Affairs consider the training and support requirements of and payment for community officers.
4. That as part of this review the Western Australia Police and Department of Indigenous Affairs consider in consultation with Aboriginal communities if it is necessary for the definition of public place to expressly include discrete Aboriginal communities (or parts of those communities) which have been declared under the *Aboriginal Communities Act 1979* (WA).

Recommendation 22

[p 122] **The prohibition or restriction of alcohol in discrete Aboriginal communities**

1. That the Director General of the Department of Indigenous Affairs can apply to the liquor licensing authority, on behalf of an Aboriginal community declared under the *Aboriginal Communities Act 1979* (WA), for regulations in relation to the restriction or prohibition of alcohol.

2. That the Director General of the Department of Indigenous Affairs ensure that prior to making the application he or she is satisfied that the regulations would not contravene the *Racial Discrimination Act 1975* (Cth).
3. That an application can only be made by the Director General if the majority of the community members support the application.
4. That the regulations provide that breaching the restrictions or prohibition imposed is an offence.
5. That any regulations made under this recommendation can only be amended with the support of the majority of the community.
6. That the Commissioner for Indigenous Affairs review (at a time to be determined by the Commissioner for Indigenous Affairs) the effectiveness of any regulations made under this recommendation.

Recommendation 23

[p 123] Sale or supply of alcohol in discrete Aboriginal communities

1. 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 through by-laws enacted under the *Aboriginal Communities Act 1979* (WA) and/or under the *Liquor Licensing Regulations 1989* (WA).
2. That the *Liquor Licensing Act 1988* (WA) provide that this provision is only applicable to a licensed supplier of alcohol if that person actually knows that the alcohol will be taken into an Aboriginal community which has prohibited the consumption of liquor through by-laws enacted under the *Aboriginal Communities Act 1979* (WA) and/or under the *Liquor Licensing Regulations 1989* (WA).

Aboriginal Courts

Recommendation 24

[p 136] Aboriginal courts

1. That the Western Australian government establish as a matter of priority Aboriginal courts for both adults and children in regional locations and in the metropolitan area.
2. That the location, processes and procedures of any Aboriginal court be determined in direct consultation with the relevant Aboriginal communities.
3. That the Western Australian government provide adequate resources for the appointment of additional judicial officers and court staff. In particular, each Aboriginal court should be provided with funding for an Aboriginal justice officer to oversee and coordinate the court.
4. That the Western Australian government provide ongoing resources for Aboriginal-controlled programs and services as well as culturally appropriate government-controlled programs and services to support the operation of Aboriginal courts in each location.
5. That Aboriginal Elders and respected persons should be selected either by or in direct consultation with the local Aboriginal community. Aboriginal Elders and respected persons should be provided with adequate culturally appropriate training about their role and the criminal justice system generally.
6. That Aboriginal Elders should be appropriately reimbursed with a sitting fee.
7. That participation in an Aboriginal court by an accused, victim or any other participant be voluntary.
8. That the Commissioner for Indigenous Affairs evaluate and report on each Aboriginal court after two years of operation and consider whether any legislative or procedural changes are required to improve the operation of Aboriginal courts in Western Australia.

Criminal Responsibility

Recommendation 25

[p 148] **Repeal the offence of unlawful wounding**

That the *Criminal Code* (WA) be amended to remove the offence of unlawful wounding in s 301(1).

Recommendation 26

[p 150] **Education about the criminal law and the criminal justice system**

1. That the Western Australian government provide resources for the development of educative initiatives to inform Aboriginal people about Western Australian criminal laws, court procedures, and services available in the criminal justice system.
2. That in developing these initiatives, particular attention be given to providing information about any criminal laws and international human rights standards that may potentially conflict with Aboriginal customary laws.
3. That these initiatives be developed in conjunction with Aboriginal communities and organisations.
4. That these initiatives be locally based and, where possible, be presented by Aboriginal people and delivered in local Aboriginal languages.

Recommendation 27

[p 155] **Duress**

1. That s 31(4) of the *Criminal Code* (WA) be repealed and the *Criminal Code* (WA) be amended to provide that a person is not criminally responsible for an offence if he or she reasonably believes that:
 - (a) a threat has been made that will be carried out unless the offence is committed;
 - (b) there is no reasonable way to make the threat ineffective; and
 - (c) the conduct is a reasonable response to the threat.
2. That the *Criminal Code* (WA) provide that the defence of duress does not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.

Recommendation 28

[p 158] **Education about parenting and discipline of children under Australian law**

1. That the Western Australian government develop strategies to inform Aboriginal communities about their rights and responsibilities under Australian law in relation to the discipline of children, in particular to inform Aboriginal communities of their right to use physical correction that is reasonable in the circumstances.
2. That these educative strategies provide information to Aboriginal communities about effective alternative methods of discipline.
3. That these strategies be developed and presented by Aboriginal communities and organisations. In particular, Elders and other respected members, including members of a community justice group, should be involved in the design and delivery of any educational programs.
4. That the Western Australian government provide resources to the Department of Indigenous Affairs so that it can coordinate—in partnership with the Department of Community Development, Department of Health and the Department of Education and Training—the development of these programs.
5. That participation by Aboriginal people in these educational programs be voluntary.

Bail

Recommendation 29

[p 161] Responsible person bail for adults

1. That Clause 1(2) of Part D to the Schedule of the *Bail Act 1982* (WA) be amended to include, as a possible condition of bail, that a responsible person undertakes in writing in the prescribed form to ensure that the accused complies with any requirement of his or her bail undertaking.
2. That Clause 1(2) of Part D to the Schedule of the *Bail Act 1982* (WA) be amended to provide that the authorised officer or judicial officer must be satisfied that the proposed responsible person is suitable.
3. That Clause 1(2) of Part D to the Schedule of the *Bail Act 1982* (WA) be amended to provide that the condition of bail to a responsible person can only be used in circumstances that would, in the absence of the responsible person option, require a surety.

Recommendation 30

[p 162] Financial circumstances of the surety

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.

Recommendation 31

[p 164] Telephone applications for bail

That the *Bail Act 1982* (WA) be amended to provide that where an adult or child has been refused bail by an authorised police officer, justice of the peace or authorised community services officer or the accused 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 (either in person or by video or audio link) by 4.00 pm the following day.

Recommendation 32

[p 165] Non-custodial bail facilities for children in remote and regional locations

That the Department of Corrective Services 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 Corrective Services should work in conjunction with a local community justice group.

Recommendation 33

[p 167] Cultural background as a relevant factor for bail

That Clause 3(b) Part C of Schedule 1 to the *Bail Act 1982* (WA) be amended to provide that the judicial officer or authorised officer shall have regard to the following matters, as well as to any others which he considers relevant,

- (b) the character, previous convictions, antecedents, associations, home environment, family, social and cultural background, place of residence, and financial position of the accused.

Recommendation 34

[p 168] **The relevance of Aboriginal customary law and other cultural factors during bail proceedings**

1. 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, where the accused is an Aboriginal person, to any known Aboriginal customary law or other cultural issues that are relevant to bail.
2. That Clause 3 of Part C in Schedule 1 of the *Bail Act 1982* (WA) provide that, without limiting the manner by which information about Aboriginal customary law or other cultural 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 in the victim's community and/or the accused person's community.

Recommendation 35

[p 170] **Improved bail and surety forms and notices**

1. That bail and surety forms and notices (including the bail renewal notice handed to an accused after each court appearance) be provided in plain English and clearly set out the relevant obligations of the accused or the surety.
2. That the Department of the Attorney General provide resources to suitable Aboriginal organisations to prepare culturally appropriate educational material in relation to the obligations of an accused on bail and the obligations of a surety. This material should include what an accused person can do if he or she is unable to attend court.
3. That the culturally appropriate educational material include, where possible, information provided in Aboriginal languages.

Sentencing

Recommendation 36

[p 173] **Cultural background of the offender as a relevant sentencing factor**

1. That the *Sentencing Act 1995* (WA) include as a relevant sentencing factor the cultural background of the offender.
2. That the cultural background of the offender be included in a list of other relevant sentencing factors.

Recommendation 37

[p 177] **Taking into account the circumstances of Aboriginal people when considering the principle that imprisonment is a sentence of last resort**

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 (or a term of detention) is appropriate the court is to have regard to the particular circumstances of Aboriginal people.

Recommendation 38

[p 183] **Aboriginal customary law and sentencing**

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:

1. any known aspect of Aboriginal customary law that is relevant to the offence;

2. whether the offender has been or will be dealt with under Aboriginal customary law; and
3. the views of the Aboriginal community of the offender and/or the victim in relation to the offence or the appropriate sentence.

Recommendation 39

[p 184] Evidence of Aboriginal customary law during sentencing proceedings

That the *Sentencing Act 1995* (WA) and the *Young Offenders Act 1994* (WA) be amended to provide:

1. That when sentencing an Aboriginal person the court must have regard to any submissions made by a member of a community justice group, an Elder and/or respected member of any Aboriginal community to which the offender and/or the victim belong.
2. 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 (or parties) a reasonable opportunity to respond to the submissions if requested.
3. That if an Elder, respected person or member of a community justice group provides information to the court then that person must advise the court of any relationship to the offender and/or the victim.

Recommendation 40

[p 186] Adjournment of sentencing

That s 16(2) 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.

Practice and Procedure

Recommendation 41

[p 189] Single-gender juries

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

104A. Application for jury of one gender

- (1) A court may order, upon an application by the accused or the prosecution, that the jury be comprised of one gender.
- (2) A 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.

Recommendation 42

[p 191] Fitness to plead

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

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.

Police

Recommendation 43

[p 196] **Prosecutorial guidelines**

That the Western Australia Police Service, *COPs Manual*, and the Office of the Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines 2005*, should be amended:

1. To remove the reference to 'cultural views' in the list of factors which are stated to be irrelevant to a decision to charge or prosecute.
2. To provide that factors associated with an alleged offenders' membership of a particular race, sex or other group may be taken into account if those factors are relevant to the circumstances of the offence.
3. To include a specific guideline about Aboriginal customary law and that this guideline should contain information about the nature of Aboriginal customary law; the importance of obtaining reliable information or evidence about Aboriginal customary law: and the need to protect Aboriginal victims from family violence and sexual abuse.
4. To provide that any relevant aspect of Aboriginal customary law, including Aboriginal customary law processes for dealing with offenders, be considered when deciding whether to charge or prosecute an alleged offender.

Recommendation 44

[p 197] **Cautions**

That Part 5, Division 1 of the *Young Offenders Act 1994 (WA)* be amended to provide that a police officer 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.

Recommendation 45

[p 199] **Referring to previous cautions in subsequent court proceedings**

That the *Young Offenders Act 1994 (WA)* be amended to provide that any previous cautions issued under this Act can only be referred to in court for the purpose of determining whether the young person has previously been given an adequate opportunity for diversion and/or rehabilitation.

Recommendation 46

[p 200] **Referral by police to a juvenile justice team**

1. That s 29 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.
2. That this section only applies if the police officer has first determined that it is not appropriate to take no action or to administer a caution pursuant to s 22 B of the *Young Offenders Act 1994 (WA)*.

Recommendation 47

[p 200] **Review categories of offences in Schedule 1 and Schedule 2 of the *Young Offenders Act 1994 (WA)***

That the Western Australian government's review of the categories of offences listed in Schedule 1 and Schedule 2 of the *Young Offenders Act 1994 (WA)* be immediately completed to enhance the availability of diversion to juvenile justice teams.

Recommendation 48

[p 201] **Referring to previous referrals to a juvenile justice team in subsequent court proceedings**

That the *Young Offenders Act 1994 (WA)* be amended to provide that any previous referrals to a juvenile justice team under this Act can only be referred to in court for the purposes of determining:

1. whether the young person has previously been given an adequate opportunity for diversion and/or rehabilitation; and/or
2. whether the young person should again be referred to a juvenile justice team.

Recommendation 49

[p 202] **Legislative criteria for the decision to arrest a young person**

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

Recommendation 50

[p 204] **Diversion to a community justice group**

1. That the Western Australian government establish a diversionary scheme for young Aboriginal people to be referred by the police to a community justice group.
2. That the Western Australian government provide adequate resources to community justice groups in order that they may develop and operate diversionary programs.
3. That the diversionary scheme be flexible and allow different communities to develop their own processes and procedures.
4. That the police fully explain to the young person (and responsible adult) the nature of the alleged offence and, that the young person has the right to seek legal advice before agreeing to participate in the diversionary scheme.
5. That the police ensure that the young person fully understands his or her options, if necessary by providing the services of an interpreter.
6. That any admissions made by the young person during the diversionary process cannot be used as evidence against the young person.
7. That a young person and an appropriate responsible adult must consent to any referral by the police to a diversionary scheme operated by a community justice group.
8. That, if the young person does not consent to be referred to a community justice group, 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.
9. That the diversionary scheme provide that a referral to a community justice group does not count as a conviction against the young person and can only be referred to in a court for the purpose of considering whether the young person should again be referred to a community justice group or to determine if the young person has previously been given adequate opportunities for diversion and/or rehabilitation.

Recommendation 51

[p 205] Evaluation of diversionary options for Aboriginal people

That the Commissioner for Indigenous Affairs regularly review and evaluate all diversionary options available in Western Australia for Aboriginal people to determine whether:

1. There are effective diversionary options for Aboriginal people and, if not, the Commissioner for Indigenous Affairs should make recommendations to ensure that there are effective diversionary programs.
2. Aboriginal people are being diverted at the same rate as non-Aboriginal people.
3. Any legislative or procedural changes are required to ensure the effective diversion of Aboriginal people from the criminal justice system.

Recommendation 52

[p 206–207] Legislative requirements for interviewing suspects

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

1. 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 police officer must ask the suspect to explain the caution in his or her own words.
2. If the suspect does not speak English with reasonable fluency the interviewing police 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.
3. 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.
4. In the case of a suspect who is an Aboriginal person the interviewing police officer 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. The interviewing police officer must provide a reasonable opportunity for a representative of the Aboriginal Legal Service to communicate with the suspect. The interviewing police 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.
5. If the suspect does not wish for a representative of the Aboriginal Legal Service to attend or there is no representative available, the interviewing police officer must allow a reasonable opportunity for an interview friend to attend prior to commencing the interview. The interviewing police officer does not have to comply with this requirement if it has been expressly waived by the suspect.
6. That appropriate exceptions be included, such as an interviewing police 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.

Recommendation 53

[p 208] Police protocols for determining whether an Aboriginal person requires an interpreter

That the Western Australia Police, in conjunction with relevant Aboriginal interpreter services, develop a set of protocols (including linguistic guidelines) for the purpose of considering whether an Aboriginal person requires an interpreter during an interview.

Recommendation 54

[p 210] **Review of move-on laws**

1. That the Commissioner for Indigenous Affairs review and evaluate the move-on laws after two years of operation.
2. That the Commissioner for Indigenous Affairs consider and report to the Western Australian government about whether the laws should be amended or repealed.

Recommendation 55

[p 211] **Review of the Northbridge curfew policy**

That the Commissioner for Indigenous Affairs or the Commissioner for Children and Young People (whichever office is established sooner) review and evaluate the Western Australian government's Northbridge curfew policy as a matter of priority.

Recommendation 56

[p 212] **Cultural awareness training for police officers**

1. That the Western Australian government provide adequate resources to ensure that every police officer in Western Australia participates in Aboriginal cultural awareness training.
2. That every police officer who is stationed at a police station that services an Aboriginal community participates in relevant and locally based Aboriginal cultural awareness training.
3. That Aboriginal cultural awareness training should be presented by local Aboriginal people including, if appropriate, members of a community justice group.

Recommendation 57

[p 213] **Recording of ethnicity by police**

1. That the Western Australia Police ask all victims and alleged 'offenders' to state their ethnicity (including people who are issued with a move-on notice or otherwise dealt with without being formally charged) and if a response is provided, appropriately record that response.
2. That police officers inform the person of the reason they wish to record the person's ethnicity (that is, to enable accurate statistics to be kept) and advise that a response is voluntary.

Recommendation 58

[p 214] **Western Australia Police website**

That the Western Australia Police immediately update its website to include:

1. The current name and contact details of the Aboriginal Corporate Development Team.
2. The contact details for all staff who work for the Aboriginal Corporate Development Team.
3. The roles and responsibilities of the Aboriginal Corporate Development Team.
4. Relevant policies, guidelines and publications.

Prisons

Recommendation 59

[p 217] **Prison funeral attendance policies**

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

Recommendation 60

[p 218] **Application process for funeral attendance**

1. That the Department of Corrective Services, in conjunction with Aboriginal prisoners and Aboriginal communities, develop culturally appropriate policy and procedure manuals for all prisons to assist prisoners and prison officers with applications for attendance at funerals.
2. In drafting these manuals consideration be given to the potential role of community justice groups in assisting prisoners with the application process. In addition, 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.

Recommendation 61

[p 220] **Use of physical restraints on prisoners attending funerals**

1. That the Department of Corrective Services review and revise its current policy in relation to the use of physical restraints on prisoners during funeral attendances. The revised policy should recognise the importance of Aboriginal prisoners attending funerals in a dignified and respectful manner. The policy should also provide that any decision about the use of physical restraints should take into account any risk of the prisoner escaping or absconding during the funeral and any risk to the safety of the public. The policy should state that, if required, restraints should be as unobtrusive and as minimal as possible in all the circumstances.
2. That the Department of Corrective Services ensure that its policy in relation to the use of physical restraints on prisoners during funeral attendances provides that, unless there is a significant risk to the safety of the public, all minimum-security prisoners should not be physically restrained while attending a funeral. If necessary, the Department of Corrective Services should renegotiate its contract with AIMS Corporation to reflect this policy.

Recommendation 62

[p 221] **Escorting prisoners and detainees to funerals**

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

Recommendation 63

[p 222] **Parole Board and Supervised Release Review Board**

1. 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 Review Board can request information or reports from an Elder, respected person or member of a community justice group from the offender's community and/or the victim's community.
2. That the *Sentence Administration Act 2003* (WA) and the *Young Offenders Act 1994* (WA) be amended to provide that when an Elder, respected person or member of a community justice group provides information to the relevant board that he or she must advise the relevant board of any relationship to the offender and/or the victim.

Recommendation 64

[p 223] **Transport arrangements for prisoners when released from custody**

That the Department of Corrective Services continue to develop, and provide adequate resources for, strategies to assist prisoners to return to their home communities upon release from custody.

Succession – Distribution of Property Upon Death

Recommendation 65

[p 236] Administration of intestate Aboriginal estates

1. That the present definition of 'person of Aboriginal descent' contained in s 33 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) be deleted and that the standard definitions of 'Aboriginal person' and 'Torres Strait Islander person' contained in Recommendation 4 of this Report apply.
2. That the requirement in ss 34 and 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).
3. That s 35(2) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) be repealed so 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).
4. That sub-regs 9(1)–(4) of the *Aboriginal Affairs Planning Authority Act Regulations 1972* (WA) be deleted and that any other consequential amendments be made.
5. 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).
6. That, in consultation with the Supreme Court, provision be made that proceedings in relation to an intestate estate with a value of less than \$100,000, or an amount otherwise prescribed, be conducted speedily and with as little formality and technicality as is possible, and so as to minimise the costs to the parties.

Moral claims against intestate Aboriginal estates

7. That s 35(3) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) dealing with moral claims be amended to read:

Where there is no person entitled to succeed to the estate of the deceased under s 14 of the *Administration Act 1903* (WA), and no valid claim is made to the balance of the estate within two years after the date of death of the deceased, the Governor may, on application, order that such balance be distributed beneficially amongst any persons having a moral claim thereto.
8. There should be legislative provision that, without limiting the factors to be taken into account in determining whether a moral claim exists, the Minister for Indigenous Affairs may consider as relevant that the applicant was in a classificatory kin relationship with the deceased under the deceased's customary law.
9. That sub-reg 9(5) of the *Aboriginal Affairs Planning Authority Act Regulations 1972* (WA) be amended to provide that a person alleging a moral claim against an undistributed Aboriginal deceased estate pursuant to s 35(3) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) may apply to the administrator for an order for distribution of the whole estate or a portion of the estate.
10. That sub-reg 9(6) of the *Aboriginal Affairs Planning Authority Act Regulations 1972* (WA) be amended to provide that as soon as reasonably practicable after receiving an application referred to in sub-reg 9(5), the administrator shall provide a written report to the Minister for Indigenous Affairs in respect of the moral claim. In making a decision on the moral claim the Minister may request further information from the applicant or the administrator, compel any person, financial institution or government agency to produce relevant records or direct the Department of Indigenous Affairs to undertake any investigations it thinks fit. If satisfied that an order of distribution should be made in relation to the moral claim, the Minister shall make such recommendation to the Governor.

11. That a new s 35(4) be inserted into the *Aboriginal Affairs Planning Authority Act 1972* (WA) to read:

Where, after a period of four years of the date of grant of letters of administration for the deceased's estate, no order is made under s 35(3) or where such order is made in respect of a portion of the balance of the estate only, the administrator of the estate shall thereupon vest the estate in the Authority upon trust that it shall be used for the benefit of persons of Aboriginal descent.

Recommendation 66

[p 237] **Obligation to administer Aboriginal intestate estates**

That, as part of its community service role, the Public Trustee be obliged to administer intestate Aboriginal estates valued at less than \$100,000 when it is expedient to do so or when the family of the deceased requests it.

Recommendation 67

[p 238] **Proof of relationship to an Aboriginal deceased**

That a new s 35(6) be inserted into the *Aboriginal Affairs Planning Authority Act 1972* (WA) to provide:

1. That in circumstances where an Aboriginal person claims entitlement to distribution of an intestate Aboriginal estate under s 14 of the *Administration Act 1903* (WA) 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 notice in writing from the Minister for Indigenous Affairs should be taken as conclusive evidence of the claimant's identity and relationship to the deceased.
2. That an application for proof of relationship should be made to the administrator of the estate who shall provide a written report to the Minister for Indigenous Affairs in respect of the claim. In making a decision on the claim the Minister may request further information from the applicant or the administrator of the estate or, in case of partial intestacy, the executor or administrator with the will annexed, compel any person or organisation to produce relevant records, or direct the Department of Indigenous Affairs to undertake any investigations it thinks fit. If satisfied that the applicant is who he or she claims to be, the Minister shall produce a written notice to that effect.
3. That an application under (2) above may only be made in respect of an intestate Aboriginal estate of less than \$100,000 value at the date of the application.

Recommendation 68

[p 239] **Release of funds of intestate estates by financial institutions**

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.

Recommendation 69

[p 240] **Wills education**

1. That the Department of Indigenous Affairs be 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.
2. That in devising this program the Department of Indigenous Affairs seek advice from the Public Trustee, the Aboriginal Legal Service and other relevant organisations and individuals.

Recommendation 70

[p 241] Will-making initiative

1. That the Department of Indigenous Affairs—in consultation with the Aboriginal Legal Service, the Public Trustee and regional legal practitioners—establish a will-making initiative for Aboriginal people in Western Australia.
2. That consideration be given to committing to this initiative the funds held in the Aboriginal Affairs Planning Authority's Intestate Trust Account by virtue of the operation of the intestate provisions of the *Aboriginal Affairs Planning Authority Act 1972 (WA)*.

Recommendation 71

[p 242] Claims for family provision against an Aboriginal estate

1. 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.
2. 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 *Inheritance (Family and Dependants Provision) Act 1972 (WA)*.
3. That, in consultation with the Supreme Court, provision be made that proceedings in relation to an intestate estate with a value of less than \$100,000, or an amount otherwise prescribed, be conducted speedily and with as little formality and technicality as is possible, and so as to minimise the costs to the parties.

Guardianship and Administration

Recommendation 72

[p 244] Financial management protocols

1. That where an Aboriginal person who is beneficiary of a deceased estate administered by the Public Trustee seeks voluntarily to place the management of their financial and/or legal affairs or of their inheritance in the hands of the Public Trustee, the Public Trustee must, before accepting such management:
 - (a) ensure that the person is made aware of alternatives for the financial management of their inheritance by communicating this in a culturally appropriate way, with the assistance of an interpreter if required; and
 - (b) encourage the person to seek independent legal and/or financial advice and refer the person to appropriate agencies or organisations such as the Aboriginal Legal Service, Legal Aid, the Financial Counsellors Resource Project and the Department of Consumer and Employment Protection.
2. That the same protocol should apply to the Public Trustee in regard to accepting an enduring power of attorney on behalf of an Aboriginal person.

Recommendation 73

[p 246] Assessment of decision-making capacity of an Aboriginal person

That, as part of its assessment of its procedures and protocols for dealing with hearings involving Aboriginal people, the State Administrative Tribunal take steps to ensure that members are aware of Aboriginal perspectives in the process of assessing the decision-making capacity of an Aboriginal person who may be the subject of an order for guardianship or administration.

Recommendation 74

[p 247] **Regional partnerships**

That the Office of the Public Advocate and the Public Trustee establish links and develop partnerships with community justice groups and local Aboriginal-owned or run organisations to assist in acquiring necessary cultural information to better serve their clients.

Coronial Inquests

Recommendation 75

[p 252] **Time for objection to post-mortem examination**

1. That the *Guidelines for Coroners* (WA) be amended to state that in cases where a post-mortem examination does not have to be conducted immediately, a coroner should ensure that no post mortem examination is conducted until at least a period of 48 hours including one full working day has elapsed from the time when the coroner's brochure 'When a Person Dies Suddenly' has been provided to a next of kin to allow for any objections to be made pursuant to s 37 of the *Coroners Act 1996* (WA).
2. That the coroner's brochure 'When a Person Dies Suddenly' be amended to reflect the increase in time for objection to 48 hours.

Recommendation 76

[p 255] **Cultural, spiritual or customary beliefs to be taken into account in deciding whether to order post-mortem examination**

That the *Coroners Regulations 1997* (WA) be amended to provide that in making a decision whether or not to order a post-mortem examination of a deceased a coroner must take into account any known or communicated cultural, spiritual or customary beliefs of the deceased's family.

Recommendation 77

[p 256] **Expansion of Coronial Counselling Service to rural areas**

1. That resourcing for expansion of the Coronial Counselling Service in rural areas be investigated.

Employment of Aboriginal coronial counsellor/educator

2. That an Aboriginal counsellor/educator be employed on a full-time basis to assist the Coroner's Court in providing locally based and locally informed Aboriginal cultural awareness training to all coroners, including magistrates who act as coroners in country areas.
3. That the Aboriginal counsellor/educator be tasked to improve education about coronial processes in regional and remote areas and that this education include information about Aboriginal culture and customs relevant to the specific area.

Funerary Practices and Burial Rights

Recommendation 78

[p 262] **Burial instructions of deceased to be observed**

That the following section be inserted into Part IV of the *Cemeteries Act 1986* (WA):

13A Deceased's burial instructions to be observed

- (1) Provided they are not unlawful or against public policy, it shall be the duty of an executor or administrator of a deceased person's estate to use all reasonable endeavours to give effect to the

burial instructions contained or expressed in a will, including a codicil or any testamentary instrument or disposition.

- (2) If, having regard to the value and liabilities of the deceased's estate, the executor or administrator believes that carrying out the deceased's burial instructions would be unreasonable, the executor or administrator may apply to the Supreme Court for directions pursuant to s 45 of the *Administration Act 1903* (WA).
- (3) For the purposes of s 13(1) the term 'will' shall be taken to include any such instrument accepted by the Supreme Court as an informal will under the *Wills Act 1970* (WA).

Recommendation 79

[p 264] Forum for dealing with burial disputes

1. That provision be made for the Magistrates Court to deal with burial disputes where no burial instructions contained in a will (whether formal or informal) or other signed and attested written document have been left by the deceased.

Mediation between parties to burial disputes

2. That the hearing of burial disputes be preceded, wherever practicable, by mediation between the parties.
3. That the Department of the Attorney General undertake consultation with Aboriginal communities, the Aboriginal Legal Service and other relevant stakeholders to establish which organisation/s might be best equipped to offer culturally appropriate and immediate mediation to parties to a burial dispute in respect of an Aboriginal deceased.

Indigenous Cultural and Intellectual Property Rights

Recommendation 80

[p 266] Protocols for protection of Indigenous cultural and intellectual property

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 Indigenous artists and the observance of these protocols by all Western Australian industries, companies and individuals should be actively encouraged by government. The protocols should recognise and appropriately reflect the cultural diversity of Aboriginal peoples in Western Australia and should be developed in close consultation with Aboriginal artists and communities.

Recommendation 81

[p 267] Protocols to regulate 'bioprospecting' of Aboriginal knowledge

That, at the earliest opportunity, the Western Australian government develop protocols aimed at addressing issues that arise from the 'bioprospecting' of Aboriginal 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:

1. undertake direct consultation with Aboriginal people as to their customary law and other requirements;
2. ensure compliance with Aboriginal peoples' customary law and other requirements;
3. seek prior informed consent for the use of any Aboriginal knowledge from the custodians of that traditional knowledge;

4. seek free, prior and informed consent for access to Aboriginal land for any purposes, including collection;
5. ensure ethical conduct in any consultation, collection or other processes;
6. ensure the use of agreements on mutually agreed terms with Aboriginal people for all parts of the process;
7. devise equitable benefit-sharing arrangements; and
8. acknowledge the contribution of Aboriginal peoples.

Recommendation 82

[p 268] **State support for enhanced protection of Indigenous cultural and intellectual property**

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.

Family Law

Recommendation 83

[p 274] **Definition of 'traditional Aboriginal marriage'**

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.

Recommendation 84

[p 275] **Traditional Aboriginal marriage and other domestic relationships**

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).

Recommendation 85

[p 275] **Part 5A of the *Family Court Act 1997* (WA) applies to traditional Aboriginal marriages**

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.

Care and Custody of Aboriginal Children

Recommendation 86

[p 278] Consultation with child's extended family in consideration of adoption

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. Subject to the birth mother's signed direction to the contrary, this must include consultations 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.

Recommendation 87

[p 280] Culturally appropriate information about services and benefits for extended family carers

That, 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 (including classificatory kin) where necessary for the proper care and protection of the child, the Department for Community Development should make available to Aboriginal communities culturally appropriate information about support services and government benefits or subsidies (whether Commonwealth or state) to assist extended family carers.

Recommendation 88

[p 281] Enhance culturally appropriate service delivery in the Family Court of Western Australia

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.

Recommendation 89

[p 282] Functional recognition of non-biological primary carers

That the Western Australian government actively promote, at the national level, the cause of functional recognition of non-biological parents who have parental responsibility or primary care for a child, whether of Aboriginal or non-Aboriginal descent.

Family Violence and the Protection of Aboriginal Women and Children

Recommendation 90

[p 286] Education about legal rights of women and children and criminality of child sexual abuse

1. That the Western Australian government include in the educative initiatives planned in response to the Gordon Inquiry:
 - (a) information about the requirements under Australian law and international law of freedom of choice in marriage partners and the requirement of informed consent to marriage;
 - (b) information about the criminality of acts of sexual relations with children under the age of 16 regardless of marriage status under Aboriginal customary law; and
 - (c) information about the legal rights of women and children in the context of family violence and child sexual abuse or neglect and about the legal and related services available to assist women and children to exercise these rights.
2. That these initiatives be developed with the full and effective participation of Aboriginal people.

Recommendation 91

[p 290] **Community-based and community-owned Aboriginal family violence intervention and treatment programs**

1. That the Western Australian government actively encourage, support and resource the development of community-based and community-owned Aboriginal family violence intervention and treatment programs that are designed to respond to the particular conditions and cultural dynamics of the host community.
2. That, where community-based and community-owned Aboriginal family violence intervention and treatment programs can demonstrate appropriate outcomes within the host community in a reasonable timeframe, the Western Australian government commit to ongoing resourcing of such programs in preference to generic government-run programs.

Recommendation 92

[p 291] **Better provision and resourcing of men's counselling, education, treatment and accommodation services**

1. That the Western Australian government actively pursue the provision of new services, and better resourcing of existing services, for the counselling, education, treatment and short-term crisis accommodation of Aboriginal men in regional town centres and remote communities.
2. That, where possible, such services be provided in the same location to enable men to access counselling, activities, education, accommodation and treatment in a single visit without referral and be resourced to operate on a 24-hour basis.

Recommendation 93

[p 292] **Ongoing progress reporting and consultative evaluation of family violence initiatives**

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.

Recommendation 94

[p 294] **Working with children check**

That working with children checks be provided at no cost to staff and volunteers of not-for-profit Aboriginal community organisations and Aboriginal community initiatives such as community justice groups, school truancy patrols, drop-in centres and safe-houses.

Recommendation 95

[p 295] **Consultation with Aboriginal communities in review of the police order regime**

That, in undertaking the statutory review of Part 2, Division 3A of the *Restraining Orders Act 1997* (WA), the responsible Minister ensure that Aboriginal people are sufficiently consulted to gauge the effectiveness of the police order regime in addressing family violence in Aboriginal communities.

Customary Hunting, Fishing and Gathering Rights

Recommendation 96

[p 304] **Conservation to remain a priority in statutory recognition of customary harvesting**

That the statutory recognition of Aboriginal customary laws relating to hunting, fishing and gathering remain subject to the 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.

Recommendation 97

[p 305] **Government to consult, engage with and involve Aboriginal people in relation to conservation programs**

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

Recommendation 98

[p 306] **Enhancing communication of Aboriginal customary harvesting exemptions and restrictions**

1. That the Department of Fisheries and the Department of Environment and Conservation, in collaboration and consultation with the Department of Indigenous Affairs, take all reasonable steps to enhance communication of harvesting exemptions or rights of Aboriginal people and of any restrictions placed from time-to-time upon those exemptions or rights.
2. That these authorities consult with local Aboriginal people, groups and organisations to establish culturally and regionally appropriate methods and means of communicating this information to Aboriginal people.
3. That these authorities also consider means of raising awareness of Aboriginal harvesting exemptions and rights among non-Aboriginal people, particularly those engaging in similar harvesting activities under recreational or commercial licences.

Recommendation 99

[p 307] **Aboriginal customary harvesting exemption expanded to include taking of flora and fauna for other customary purposes**

That the Aboriginal customary harvesting 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.

Recommendation 100

[p 307] **Aboriginal customary harvesting exemption to apply to land designated under the *Conservation and Land Management Act 1984 (WA)***

That the Aboriginal customary harvesting exemption currently provided by s 23 of the *Wildlife Conservation Act 1950 (WA)*, and its successor in any future wildlife and biological resource conservation legislation, also apply to land designated under the *Conservation and Land Management Act 1984 (WA)*, but that such exemption be subject to the provisions of conservation management plans over such land.

Recommendation 101

[p 308] **Aboriginal customary harvesting exemptions and rights to remain applicable to introduced species of fauna and flora**

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

Recommendation 102

[p 309] **Recognition of non-commercial barter and exchange of harvested fauna and flora pursuant to Aboriginal customary law**

That the exemption currently provided by s 23 of the *Wildlife Conservation Act 1950* (WA) and its successor in any future wildlife and biological resource conservation legislation be amended to permit the non-commercial barter and exchange of fauna and flora harvested pursuant to the exemption within and between Aboriginal communities so long as such barter or exchange is not for financial gain and is in accordance with the customary laws of the relevant communities.

Recommendation 103

[p 310] **Review of commercial harvesting licensing regime under the *Wildlife Conservation Act 1950* (WA)**

1. That, in conjunction with the Office of Aboriginal Economic Development, the Department of Environment and Conservation review the current commercial licensing regime under the *Wildlife Conservation Act 1950* (WA) (and in any other relevant wildlife and biological resource conservation legislation) to investigate ways that it can be improved to encourage and assist Aboriginal people to develop commercial harvesting opportunities in Western Australia.
2. That such review be undertaken in consultation with, and with the involvement of, Aboriginal people.

Recommendation 104

[p 311] **Education to avoid cruelty to animals taken under Aboriginal customary harvesting exemptions**

1. That the Department of Environment and Conservation institute programs or information services to raise awareness among Aboriginal hunters of means of avoiding cruelty to animals in the taking of fauna under the exemption provided by s 23 of the *Wildlife Conservation Act 1950* (WA) and its successor in any future wildlife and biological resource conservation legislation.
2. That the Department of Environment and Conservation consult with local Aboriginal people, groups and organisations to establish culturally and regionally appropriate methods and means of communicating this information to Aboriginal people.

Recommendation 105

[p 312] **Clarification of permissible use of firearms by Aboriginal people in customary harvesting**

1. 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 and pastoral leasehold 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).
2. That the definition of 'land' in the *Land Administration Act 1997* (WA), which includes land seaward to three nautical miles, and its impact on fisheries interests and protection of marine fauna be considered in determining the permissible use of firearms under the *Land Administration Act 1997* (WA).
3. That the responsible Ministers institute a collaborative review of relevant legislation, including the *Firearms Act 1973* (WA), the *Land Administration Act 1997* (WA), the *Wildlife Conservation Act 1950* (WA) and the *Conservation and Land Management Act 1984* (WA) to ensure that permissible use of firearms in customary harvesting activity is clearly noted.

Recommendation 106

[p 314] **Adoption of the Aboriginal Fishing Strategy Working Group's definition of 'customary fishing'**

That, in proposed amendments to the *Fish Resources Management Act 1994* (WA), the definition of the term 'customary fishing' be as defined by the Aboriginal Fishing Strategy Working Group in recommendation 1 of Fisheries Management Paper No. 168.

Recommendation 107

[p 315] **Implementation of the Aboriginal Fishing Strategy Working Group's recommendations**

1. That the Western Australian government implement the recommendations of the Aboriginal Fishing Strategy Working Group as reported in Fisheries Management Paper No. 168.
2. That any amendments to the *Fish Resources Management Act 1994* (WA) that stray from the recommendations of the Aboriginal Fishing Strategy Working Group as reported in Fisheries Management Paper No. 168 be undertaken in consultation with, and with the involvement of, Aboriginal people.

Recommendation 108

[p 316] **Clarification of access by Aboriginal people to pastoral leasehold land for customary purposes**

That the recommendation of the Aboriginal Access and Living Areas Working Group final report regarding clarification of pastoral lease land access and rights and responsibilities of traditional owners and leaseholders under s 104 of the *Land Administration Act 1997* (WA) be implemented.

Evidence

Recommendation 109

[p 322] **Exclusion of the hearsay and opinion rules for evidence about Aboriginal customary law**

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

1. An exception to the hearsay rule for evidence relevant to Aboriginal customary law.
2. An exception to the opinion rule for evidence relevant to Aboriginal customary law.
3. 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.

Procedure

Recommendation 110

[p 327] **Funding to upgrade special witness facilities in regional areas**

That the Department of the Attorney General ensure that adequate facilities are available in every Western Australian court to enable witnesses to use the special witness measures provided for in the *Evidence Act 1906* (WA).

Recommendation 111

[p 327] **Special witness for reasons of customary law**

That s 106R of the *Evidence Act 1906* (WA) be amended to provide that a witness may be declared a special witness if for reasons of customary law they are not able to give evidence in the normal manner. This order can be made on the application of the witness, or on the initiative of the court.

Recommendation 112

[p 328] Sensitive information not referred to in court

That the *Evidence Act 1906 (WA)* be amended to provide that a court may order that certain information should 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.

Recommendation 113

[p 328] Suppression of information

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

1. On the application of a party or on its own initiative a court may make an order that prohibits the publication of any information if the court is satisfied that publication of, or reference to, the information would be offensive to an Aboriginal person by reason of matters concerned with customary law.
2. A court must not make such an order if it is satisfied that publication of, or reference to, the information is required in the interests of justice.

Recommendation 114

[p 330] Application for a judge or magistrate of a particular gender to be assigned to a matter

1. That the *Criminal Procedure Act 2004 (WA)* provide that an application can be made to the Chief Judicial Officer of the relevant jurisdiction 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.
2. That the *Supreme Court (General) Rules 2005 (WA)*, the *State Administrative Tribunal Rules 2004 (WA)* and the *Magistrates Court (Civil Proceedings) Rules 2005 (WA)* should provide that an application can be made to the Chief Judicial Officer of the relevant jurisdiction 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.

Recommendation 115

[p 331] Witnesses can give evidence in groups

That the *Evidence Act 1906 (WA)* provide that a court in the exercise of its discretion may allow witnesses to give evidence about Aboriginal customary law in groups, where it is required in the interests of justice.

Recommendation 116

[p 332] Evidence taken on country

That the *Evidence Act 1906 (WA)* provide that a court can allow evidence about Aboriginal customary law to be taken on country where it is required in the interests of justice.

Recommendation 117

[p 337] Establishment of a statewide Aboriginal languages interpreter service

1. That a statewide interpreter service for Aboriginal languages be established in accordance with the Aboriginal Legal Service of Western Australia proposal.
2. That the service be reviewed and evaluated by the Commissioner for Indigenous Affairs after it has been in operation for five years, with a view to expanding it to include all areas of communication, including, but not limited to education, training and welfare.

Recommendation 118

[p 338] **Establishment of a committee to oversee the use of interpreters in court**

That the Department of the Attorney General establish a committee to review and evaluate the use of Aboriginal interpreters in court. The Committee should be comprised of representatives from (at least) the judiciary, interpreter bodies, the Office of the Director of Public Prosecutions, Legal Aid and the Aboriginal Legal Service.

Recommendation 119

[p 339] **More training for Aboriginal language interpreters**

That the Department of the Attorney General, in conjunction with Aboriginal communities, TAFE and the National Accreditation Authority for Translators and Interpreters:

1. Provide funding for the training of Aboriginal language interpreters
2. Give consideration to a system that enables more Aboriginal people to attain accreditation as an interpreter.
3. Provide funding for the ongoing professional development of accredited Aboriginal language interpreters.
4. Give particular attention to training and professional development for Aboriginal language interpreters in regional Western Australia.

Recommendation 120

[p 340] **Right to an Interpreter in court proceedings**

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

1. A party or witness to proceedings has the right to assistance from an interpreter, unless it can be established that he or she is sufficiently able to understand and speak English.
2. An accused in criminal proceedings who cannot sufficiently understand English be entitled to the services of an interpreter throughout the proceedings, whether or not he or she elects to give evidence.
3. Where a court is not satisfied that a witness or party to proceedings is sufficiently able to speak or understand English then the proceedings should not continue until an interpreter is provided, or until the court is satisfied that it is appropriate to continue.

Recommendation 121

[p 340] **State to provide interpreters in certain circumstances**

1. That the Western Australian government make funding available for:
 - (a) interpreters to be provided where required in criminal proceedings in all Western Australian courts for:
 - (i) all witnesses and accused persons; and
 - (ii) not-for-profit legal services to take instructions from their clients.
 - (b) interpreters to be provided in civil proceedings in all Western Australian courts and tribunals where:
 - (i) a judge or magistrate has decided that, in the interests of justice, a witness or party requires the services of an interpreter; and
 - (ii) the party is unable to pay the costs of the interpreter service.
2. That the Department of the Attorney General actively promote the amendment of the *Family Law Act 1975 (Cth)* to include similar provisions to (b) (i) and (ii) and that corresponding amendments

be made to the *Family Court Act 1997* (WA) (to ensure that the same provisions apply to proceedings involving children of a marriage and ex nuptial children).

Recommendation 122

[p 341] The development of assessment guidelines to assist courts to determine if an interpreter is needed

That the Department of the Attorney General employ a suitably qualified linguist to develop assessment guidelines (both oral and video) to be used to assist the court, lawyers and others to determine when a person appearing in court either as a witness or as an accused may require the services of an interpreter.

Recommendation 123

[p 342] Department of the Attorney General provide education about the role of interpreters

That the Department of the Attorney General, in conjunction with Aboriginal communities, provide education about the role of interpreters through community education, including the development of information videos to be distributed in communities and accessible at police stations, courts and prisons.

Recommendation 124

[p 342] Department of the Attorney General establish guidelines for using Aboriginal language interpreters in court

That the Department of the Attorney General establish guidelines for the use of Aboriginal language interpreters in court, including:

1. only using trained interpreters; and
2. providing information to prospective interpreters prior to engagement so that they can ensure there are no conflicting customary law considerations.

Recommendation 125

[p 344] Evidence in narrative form

That the *Evidence Act 1906* (WA) be amended to include a provision that a court may, on its own motion or an application, direct that a witness give evidence in narrative form and make orders for the way in which narrative evidence may be given.

Recommendation 126

[p 345] Disallowing questions put to witnesses that are vulnerable by reason of their cultural background

That s 26(3)(a) of the *Evidence Act 1906* (WA) include 'cultural background' as one of the matters which may inform a court in exercising its discretion to disallow a question or require that it not be answered pursuant to s 26(1).

Recommendation 127

[p 347] Aboriginal liaison officers to be employed to work in courts

That the Department of the Attorney General employ Aboriginal liaison officers in all Western Australia 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.

Recommendation 128

[p 348] **Cultural awareness training for judicial officers**

1. That all Western Australian courts and the State Administrative Tribunal continue Aboriginal cultural awareness training.
2. That the Western Australian government provide adequate resources to ensure that:
 - (a) effective programs can be developed;
 - (b) Aboriginal presenters can be engaged;
 - (c) training is local in character; and
 - (d) time is allocated to the training so that the work of the courts is not affected.

Aboriginal Community Governance

Recommendation 129

[p 354] **Accountability of local governments for 'Aboriginal' funding and grants**

1. That the Department of Local Government and Regional Development, in conjunction with the Western Australian Local Government Grants Commission, investigate ways of improving accountability of local governments for funding provided for the benefit of Aboriginal people in each local government area.
2. That mechanisms be put in place by the Department of Local Government and Regional Development to monitor and evaluate outcomes of local government service provision in Western Australian Aboriginal communities.

Recommendation 130

[p 355] **Allowing functional remote Aboriginal communities to access direct funding**

1. That the Western Australian government explore the possibility of accessing federal funding for discrete, remote Aboriginal communities under s 4 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 and wish to build community capacity to provide and maintain basic essential services.
2. That such arrangements be preceded by programs aimed at building governing capacity within those communities and with appropriate initial government support.
3. That such arrangements only be pursued with the free, prior and informed consent of the relevant community.

Recommendation 131

[p 359] **Basic legislative framework for reform of Aboriginal community governance informed by key principles**

1. That the starting point for reform of Aboriginal community governance in Western Australia be limited to a basic legislative framework that can facilitate self-identifying and self-organising governance structures to emerge at a community level.
2. That reform of Aboriginal community governance in Western Australia be informed by the key principles of voluntariness and consent; community empowerment through effective participation, capacity building and devolved decision-making power; 'downwards accountability' to the community and flexibility of government funding; recognition of diversity and need for flexibility in structure of

governing institutions; balanced family, social or skin group, gender and traditional owner representation; and recognition of need for a long-term approach to community governance reform.

3. That Aboriginal communities be free to develop or choose a model of governance that is appropriate for their needs rather than have a model imposed on them by government without their consent.

Appendix B: Responsibility for Implementation of Recommendations

By Recommendation Number

Rec. No.	Short description	Body responsible for implementation
1	Whole-of-government approach	All departments and agencies
2	Cultural awareness training	All departments and agencies
3	Office of the Commissioner for Indigenous Affairs	Department of the Premier and Cabinet
4	Legislative definition of 'Aboriginal person' and 'Torres Strait Islander person'	Department of the Attorney General
5	Recognition of customary law consistent with international human rights standards	All departments and agencies
6	Constitutional recognition of Aboriginal people	Department of the Premier and Cabinet
7	Programs and services for Aboriginal people within the criminal justice system	Department of the Attorney General and Department of Corrective Services
8	Repeal home burglary mandatory sentencing laws	Department of the Attorney General
9	Funding for the Aboriginal Legal Service	Department of the Attorney General
10	Funding for the development of protocols for lawyers working with Aboriginal people	Department of the Attorney General
11	Funding to increase lawyers' awareness of Aboriginal culture	Department of the Attorney General
12	Cultural awareness training for staff of the Department of the Attorney General and Department of Corrective Services	Department of the Attorney General and Department of Corrective Services
13	Criteria for extraordinary drivers licences to include Aboriginal customary law	Department for Planning and Infrastructure
14	Application to cancel licence suspension order	Department of Corrective Services
15	Funding to Aboriginal Legal Service for education and legal representation in relation to traffic matters	Department of the Attorney General
16	Prohibition on people going onto Aboriginal community lands	Department of Indigenous Affairs
17	Establishment of community justice groups	Department of Indigenous Affairs
18	Review of by-law scheme	Department of the Premier and Cabinet
19	Statistics & records in relation to by-laws	Department of the Attorney General
20	Definition of 'driving' under s 73 of the <i>Road Traffic Act 1974</i> to apply to Aboriginal community lands	Department for Planning and Infrastructure

Rec. No.	Short description	Body responsible for implementation
21	Review of community officers under <i>Protective Custody Act 2000</i>	Western Australia Police and Department of Indigenous Affairs
22	Prohibition / restriction of alcohol in discrete Aboriginal communities	Department of Indigenous Affairs
23	Restrictions on sale or supply of alcohol to Aboriginal communities	Department of Racing, Gaming & Liquor
24	Aboriginal Courts	Department of the Attorney General
25	Repeal the offence of unlawful wounding	Department of the Attorney General
26	Development of educational initiatives to inform Aboriginal people about the criminal justice system	Department of the Attorney General
27	Reform of the defence of duress	Department of the Attorney General
28	Educational initiatives about parenting and the discipline of children under Australian law	Department of Indigenous Affairs, Department for Community Development, Department of Health, and Department of Education and Training
29	Responsible person bail for adults	Department of the Attorney General
30	Taking into account financial circumstances of surety for bail	Department of the Attorney General
31	Telephone applications for bail	Department of the Attorney General
32	Non-custodial bail facilities for children in remote communities	Department of Corrective Services
33	Cultural background as a relevant factor for bail	Department of the Attorney General
34	Relevance of Aboriginal customary law and culture during bail proceedings	Department of the Attorney General
35	Resources for improved bail and surety forms and notices	Department of the Attorney General
36	Cultural background of offender as a relevant sentencing factor	Department of the Attorney General
37	Taking into account the particular circumstances of Aboriginal people when considering imprisonment as a sentence of last resort	Department of the Attorney General
38	Consideration of Aboriginal customary law during sentencing	Department of the Attorney General
39	Evidence of Aboriginal customary law during sentencing	Department of the Attorney General
40	Time limit for adjournment of sentencing	Department of the Attorney General
41	Single-gender juries	Department of the Attorney General
42	Fitness to plead	Department of the Attorney General
43	Amendment of prosecutorial guidelines	Western Australia Police and the Office of the Director of Public Prosecutions for Western Australia

Rec. No.	Short description	Body responsible for implementation
44	Cautions for young Aboriginal people	Department of Corrective Services
45	Referring to cautions in subsequent court proceedings	Department of Corrective Services
46	Referral of young people to a juvenile justice team	Department of Corrective Services
47	Review of schedules of offences under the <i>Young Offenders Act 1994</i>	Department of Corrective Services
48	Referring to previous referrals to a juvenile justice team in subsequent court proceedings	Department of Corrective Services
49	Legislative criteria for the decision to arrest a young person	Department of the Attorney General and Western Australia Police
50	Establishment of a scheme for diversion to a community justice group	Department of Corrective Services and Western Australia Police
51	Evaluation of diversionary options for Aboriginal people	Department of the Premier and Cabinet
52	Legislative requirements for interviewing suspects	Department of the Attorney General
53	Police protocols for determining whether an Aboriginal person requires an interpreter	Western Australia Police
54	Review of move-on laws	Department of the Premier and Cabinet
55	Review of Northbridge curfew policy	Department of the Premier and Cabinet
56	Cultural awareness training for police officers	Western Australia Police
57	Recording of ethnicity by police	Western Australia Police
58	Update Western Australia Police website	Western Australia Police
59	Prison funeral attendance policies	Department of Corrective Services
60	Application process for funeral attendance	Department of Corrective Services
61	Use of physical restraints on prisoners attending funerals	Department of Corrective Services
62	Escorting prisoners and detainees to funerals	Department of Corrective Services
63	Parole Board and Supervised Release Review Board may request information from Elders or community representatives	Department of Corrective Services and Department of the Attorney General
64	Transport arrangements for prisoners when released from custody	Department of Corrective Services
65	Administration of intestate Aboriginal estates	Department of Indigenous Affairs
66	Obligation to administer Aboriginal intestate estates	Public Trustee of Western Australia
67	Proof of relationship to an Aboriginal deceased	Department of Indigenous Affairs
68	Release of funds of intestate estates by financial institutions	Department of the Attorney General
69	Education about wills for Aboriginal people	Department of Indigenous Affairs
70	Will-making initiative for Aboriginal people	Department of Indigenous Affairs
71	Claims for family provision against an Aboriginal estate	Department of the Attorney General
72	Public Trustee Aboriginal financial management protocols	Public Trustee of Western Australia

Rec. No.	Short description	Body responsible for implementation
73	Assessment of decision-making capacity of an Aboriginal person under the <i>Guardianship and Administration Act 1990</i>	State Administrative Tribunal
74	Regional partnerships with the Public Advocate and Public Trustee	Public Trustee of Western Australia and Office of the Public Advocate
75	Objection to post-mortem examination	State Coroner of Western Australia
76	Cultural, spiritual or customary beliefs to be taken into account when considering post-mortem examination	Department of the Attorney General
77	Expansion of coronial counselling service to rural areas and employment of Aboriginal coronial counsellor	Department of the Attorney General and Coroner's Court of Western Australia
78	Burial instructions of deceased to be observed – amendment to <i>Cemeteries Act 1986</i>	Department of Local Government and Regional Development
79	Forum for dealing with burial disputes and mediation between parties to burial disputes	Department of the Attorney General
80	Protocols for protection of Indigenous cultural and intellectual property	Department of Culture and the Arts
81	Protocols to regulate bioprospecting of Indigenous knowledge	Department of Environment and Conservation
82	State support for enhanced protection of Indigenous cultural and intellectual property	Department of Culture and the Arts
83	Definition of traditional Aboriginal marriage – amendment to the <i>Interpretation Act 1984</i>	Department of the Attorney General
84	Traditional Aboriginal marriage and other domestic relationships – amendment to the <i>Interpretation Act 1984</i>	Department of the Attorney General
85	Part 5A of the <i>Family Court Act 1997</i> to apply to traditional Aboriginal marriages	Department of the Attorney General
86	Consultation with child's extended family in consideration of adoption – amendment to the <i>Adoption Act 1994</i>	Department for Community Development
87	Culturally appropriate information about services and benefits for extended family carers	Department for Community Development
88	Enhance culturally appropriate service delivery in the Family Court of Western Australia	Department of the Attorney General and Family Court of Western Australia
89	Promotion of functional recognition of non-biological primary carers	Department of the Premier and Cabinet and Department for Community Development
90	Education about legal rights of women and children and criminality of child sexual abuse	Department of Indigenous Affairs
91	Community-based and community-owned Aboriginal family violence intervention and treatment programs	Department of Indigenous Affairs
92	Better provision of men's counselling, accommodation, treatment etc services in regional areas	Department for Community Development
93	Ongoing progress reporting of family violence initiatives	Department of Indigenous Affairs

Rec. No.	Short description	Body responsible for implementation
94	Free working with children checks for staff of Aboriginal not-for-profit organisations	Department for Community Development
95	Consultation with Aboriginal communities in review of the police order regime	Attorney General for Western Australia
96	Conservation to remain a priority in recognition of customary harvesting	Department of Environment and Conservation and Department of Fisheries
97	Government to consult with Aboriginal people about conservation programs	Department of Environment and Conservation
98	Enhancing communication of Aboriginal customary harvesting exemptions and restrictions	Department of Environment and Conservation and Department of Fisheries
99	Aboriginal customary harvesting exemption expanded to other customary purposes	Department of Environment and Conservation
100	Aboriginal customary harvesting exemption to apply to land under the <i>Conservation and Land Management Act 1984</i>	Department of Environment and Conservation
101	Aboriginal customary harvesting exemptions to remain applicable to introduced flora and fauna	Department of Environment and Conservation
102	Recognition of non-commercial barter and exchange of harvested flora and fauna	Department of Environment and Conservation
103	Review of commercial harvesting licensing regime under the <i>Wildlife Conservation Act 1950</i>	Department of Environment and Conservation
104	Education to avoid cruelty to animals harvested under Aboriginal customary harvesting exemptions	Department of Environment and Conservation
105	Clarification of permissible use of firearms by Aboriginal people in customary harvesting	Department of Environment and Conservation, Department for Planning and Infrastructure, and Western Australia Police
106	Adoption of the Aboriginal Fishing Strategy Working Group's definition of customary fishing	Department of Fisheries
107	Implementation of the Aboriginal Fishing Strategy Working Group's recommendations	Department of Fisheries
108	Clarification of Aboriginal peoples' right to access pastoral leasehold land for customary purposes	Department for Planning and Infrastructure
109	Exclusion of opinion and hearsay rules for evidence about Aboriginal customary law	Department of the Attorney General
110	Funding to upgrade special witness facilities in regional areas	Department of the Attorney General
111	Special witness for reasons of Aboriginal customary law	Department of the Attorney General
112	Sensitive information not to be referred to in court	Department of the Attorney General
113	Suppression of information for reasons of Aboriginal customary law	Department of the Attorney General
114	Judge of particular gender to be assigned to matter	Department of the Attorney General

Rec. No.	Short description	Body responsible for implementation
115	Witnesses can give evidence in groups	Department of the Attorney General
116	Evidence taken on country	Department of the Attorney General
117	Statewide Aboriginal languages interpreter service	Office of Multicultural Interests
118	Establishment of a committee to oversee the use of interpreters in courts	Department of the Attorney General
119	More training for Aboriginal language interpreters	Department of the Attorney General
120	Right to an interpreter in court proceedings	Department of the Attorney General
121	State to pay for interpreters in certain circumstances	Department of the Attorney General
122	The development of assessment guidelines to assist courts to determine if an interpreter is needed	Department of the Attorney General
123	Provision of information about interpreters	Department of the Attorney General
124	Establish guidelines for using Aboriginal language interpreters in court	Department of the Attorney General
125	Witness may give evidence in narrative form	Department of the Attorney General
126	Court may disallow questions put to witnesses who are vulnerable due to their cultural background	Department of the Attorney General
127	Aboriginal liaison officers to be employed in courts	Department of the Attorney General
128	Cultural awareness training for judicial officers	Department of the Attorney General
129	Accountability of local governments for 'Aboriginal' funding	Department of Local Government and Regional Development
130	Allowing functional remote Aboriginal communities to access federal funding	Department of the Premier and Cabinet
131	Legislative framework for reform of Aboriginal community governance to be informed by key principles	Department of Indigenous Affairs

By Department or Agency

All departments and agencies

- Recommendation 1 (whole-of-government approach)
- Recommendation 2 (cultural awareness training)
- Recommendation 5 (recognition of customary law consistent with international human rights standards)

Attorney General for Western Australia

- Recommendation 95 (consultation with Aboriginal communities in review of the police order regime)

Department of the Attorney General

- Recommendation 4 (legislative definition of 'Aboriginal person' and 'Torres Strait Islander person')
- Recommendation 7 (programs and services for Aboriginal people within the criminal justice system)
- Recommendation 8 (repeal home burglary mandatory sentencing laws)
- Recommendation 9 (funding for the Aboriginal Legal Service)
- Recommendation 10 (funding for the development of protocols for lawyers working with Aboriginal people)
- Recommendation 11 (funding to increase lawyers' awareness of Aboriginal culture)
- Recommendation 12 (cultural awareness training for staff of the Department of the Attorney General and Department of Corrective Services)
- Recommendation 15 (funding to Aboriginal Legal Service for education and legal representation in relation to traffic matters)
- Recommendation 19 (statistics and records in relation to by-laws)
- Recommendation 24 (Aboriginal courts)
- Recommendation 25 (repeal the offence of unlawful wounding)
- Recommendation 26 (development of educational initiatives to inform Aboriginal people about the criminal justice system)
- Recommendation 27 (reform of the defence of duress)
- Recommendation 29 (responsible person bail for adults)
- Recommendation 30 (taking into account financial circumstances of surety for bail)
- Recommendation 31 (telephone applications for bail)
- Recommendation 33 (cultural background as a relevant factor for bail)
- Recommendation 34 (relevance of Aboriginal customary law and culture during bail proceedings)
- Recommendation 35 (resources for improved bail and surety forms and notices)
- Recommendation 36 (cultural background of offender as a relevant sentencing factor)
- Recommendation 37 (taking into account the particular circumstances of Aboriginal people when considering imprisonment as a sentence of last resort)
- Recommendation 38 (considering Aboriginal customary law during sentencing)
- Recommendation 39 (evidence of Aboriginal customary law during sentencing)
- Recommendation 40 (time limit for adjournment of sentencing)

- Recommendation 41 (single-gender juries)
- Recommendation 42 (fitness to plead)
- Recommendation 49 (legislative criteria for the decision to arrest a young person)
- Recommendation 52 (legislative requirements for interviewing suspects)
- Recommendation 63 (Parole Board and Supervised Release Review Board may request information from Elders or community representatives)
- Recommendation 68 (release of funds of intestate estates by financial institutions)
- Recommendation 71 (Claims for family provision against an Aboriginal estate)
- Recommendation 76 (cultural, spiritual or customary beliefs to be taken into account when considering post-mortem examination)
- Recommendation 77 (expansion of coronial counselling service to rural areas and employment of Aboriginal coronial counsellor)
- Recommendation 79 (forum for dealing with burial disputes and mediation between parties to burial disputes)
- Recommendation 83 (definition of traditional Aboriginal marriage – amendment to the *Interpretation Act 1984*)
- Recommendation 84 (traditional Aboriginal marriage and other domestic relationships - amendment to the *Interpretation Act 1984*)
- Recommendation 85 (Part 5A of the *Family Court Act 1997* to apply to traditional Aboriginal marriages)
- Recommendation 88 (enhance culturally appropriate service delivery in the Family Court of Western Australia)
- Recommendation 109 (exclusion of opinion and hearsay rules for evidence about Aboriginal customary law)
- Recommendation 110 (funding to upgrade special witness facilities in regional areas)
- Recommendation 111 (special witness for reasons of Aboriginal customary law)
- Recommendation 112 (sensitive information not to be referred to in court)
- Recommendation 113 (suppression of information for reasons of Aboriginal customary law)
- Recommendation 114 (judge of particular gender to be assigned to matter)
- Recommendation 115 (witnesses can give evidence in groups)
- Recommendation 116 (evidence taken on country)
- Recommendation 118 (establishment of a committee to oversee the use of interpreters in courts)
- Recommendation 119 (more training for Aboriginal language interpreters)
- Recommendation 120 (right to an interpreter in court proceedings)
- Recommendation 121 (state to pay for interpreters in certain circumstances)
- Recommendation 122 (The development of assessment guidelines to assist courts to determine if an interpreter is needed)
- Recommendation 123 (provision of information about interpreters)
- Recommendation 124 (establish guidelines for using Aboriginal language interpreters in court)
- Recommendation 125 (witness may give evidence in narrative form)
- Recommendation 126 (court may disallow questions put to witnesses who are vulnerable due to their cultural background)
- Recommendation 127 (Aboriginal liaison officers to be employed in courts)
- Recommendation 128 (cultural awareness training for judicial officers)

Department for Community Development

- Recommendation 28 (educational initiatives about parenting and the discipline of children under Australian law)
- Recommendation 86 (consultation with child's extended family in consideration of adoption – amendment to the *Adoption Act 1994*)
- Recommendation 87 (culturally appropriate information about services and benefits for extended family carers)
- Recommendation 89 (promotion of functional recognition of non-biological primary carers)
- Recommendation 92 (better provision of men's counselling, accommodation, treatment etc services in regional areas)
- Recommendation 94 (free working with children checks for staff of Aboriginal not-for-profit organisations)

Coroner's Court of Western Australia

- Recommendation 77 (expansion of coronial counselling service to rural areas and employment of Aboriginal coronial counsellor)

Department of Corrective Services

- Recommendation 7 (programs and services for Aboriginal people within the criminal justice system)
- Recommendation 12 (cultural awareness training for staff of the Department of the Attorney General and Department of Corrective Services)
- Recommendation 14 (application to cancel licence suspension order)
- Recommendation 32 (non-custodial bail facilities for children in remote communities)
- Recommendation 44 (cautions for young Aboriginal people)
- Recommendation 45 (referring to cautions in subsequent court proceedings)
- Recommendation 46 (referral of young people to a juvenile justice team)
- Recommendation 47 (review of schedules of offences under the *Young Offenders Act 1994*)
- Recommendation 48 (referring to previous referrals to a juvenile justice team in subsequent court proceedings)
- Recommendation 50 (establishment of a scheme for diversion to a community justice group)
- Recommendation 59 (prison funeral attendance policies)
- Recommendation 60 (application process for funeral attendance)
- Recommendation 61 (use of physical restraints on prisoners attending funerals)
- Recommendation 62 (escorting prisoners and detainees to funerals)
- Recommendation 63 (Parole Board and Supervised Release Review Board may request information from Elders or community representatives)
- Recommendation 64 (transport arrangements for prisoners when released from custody)

Department of Culture and the Arts

- Recommendation 80 (protocols for protection of Indigenous cultural and intellectual property)
- Recommendation 82 (state support for enhanced protection of Indigenous cultural and intellectual property)

Department of Education and Training

- Recommendation 28 (educational initiatives about parenting and the discipline of children under Australian law)

Department of Environment and Conservation

- Recommendation 81 (protocols to regulate bioprospecting of Indigenous knowledge)
- Recommendation 96 (conservation to remain a priority in recognition of customary harvesting)
- Recommendation 97 (government to consult with Aboriginal people about conservation programs)
- Recommendation 98 (enhancing communication of Aboriginal customary harvesting exemptions and restrictions)
- Recommendation 99 (Aboriginal customary harvesting exemption expanded to other customary purposes)
- Recommendation 100 (Aboriginal customary harvesting exemption to apply to land under the *Conservation and Land Management Act 1984*)
- Recommendation 101 (Aboriginal customary harvesting exemptions to remain applicable to introduced flora and fauna)
- Recommendation 102 (recognition of non-commercial barter and exchange of harvested flora and fauna)
- Recommendation 103 (review of commercial harvesting licensing regime under the *Wildlife Conservation Act 1950*)
- Recommendation 104 (education to avoid cruelty to animals harvested under Aboriginal customary harvesting exemptions)
- Recommendation 105 (clarification of permissible use of firearms by Aboriginal people in customary harvesting)

Family Court of Western Australia

- Recommendation 88 (enhance culturally appropriate service delivery in the Family Court of Western Australia)

Department of Fisheries

- Recommendation 96 (conservation to remain a priority in recognition of customary harvesting)
- Recommendation 98 (enhancing communication of Aboriginal customary harvesting exemptions and restrictions)
- Recommendation 106 (adoption of the Aboriginal Fishing Strategy Working Group's definition of customary fishing)
- Recommendation 107 (implementation of the Aboriginal Fishing Strategy Working Group's recommendations)

Department of Health

- Recommendation 28 (educational initiatives about parenting and the discipline of children under Australian law)

Department of Indigenous Affairs

- Recommendation 16 (prohibition on people going onto Aboriginal community lands)
- Recommendation 17 (establishment of community justice groups)
- Recommendation 21 (review of community officers under *Protective Custody Act 2000*)
- Recommendation 22 (prohibition / restriction of alcohol in discrete Aboriginal communities)
- Recommendation 28 (educational initiatives about parenting and the discipline of children under Australian law)
- Recommendation 65 (administration of intestate Aboriginal estates)

- Recommendation 67 (proof of relationship to an Aboriginal deceased)
- Recommendation 69 (education about wills for Aboriginal people)
- Recommendation 70 (will-making initiative for Aboriginal people)
- Recommendation 90 (education about legal rights of women and children and criminality of child sexual abuse)
- Recommendation 91 (community-based and community-owned Aboriginal family violence intervention and treatment programs)
- Recommendation 93 (ongoing progress reporting of family violence initiatives)
- Recommendation 131 (legislative framework for reform of Aboriginal community governance to be informed by key principles)

Department of Local Government and Regional Development

- Recommendation 78 (burial instructions of deceased to be observed – amendment to *Cemeteries Act 1986*)
- Recommendation 129 (accountability of local governments for 'Aboriginal' funding)

Department for Planning and Infrastructure

- Recommendation 13 (criteria for extraordinary drivers licences to include Aboriginal customary law)
- Recommendation 20 (definition of 'driving' under s 73 of the *Road Traffic Act 1974* to apply to Aboriginal community lands)
- Recommendation 105 (clarification of permissible use of firearms by Aboriginal people in customary harvesting)
- Recommendation 108 (clarification of Aboriginal peoples' right to access pastoral leasehold land for customary purposes)

Department of the Premier and Cabinet

- Recommendation 3 (Office of the Commissioner for Indigenous Affairs)
- Recommendation 6 (constitutional recognition of Aboriginal people)
- Recommendation 18 (review of by-law scheme)
- Recommendation 51 (evaluation of diversionary options for Aboriginal people)
- Recommendation 54 (review of move-on laws)
- Recommendation 55 (review of Northbridge curfew policy)
- Recommendation 89 (promotion of functional recognition of non-biological primary carers)
- Recommendation 130 (allowing functional remote Aboriginal communities to access federal funding)

Office of the Director of Public Prosecutions for Western Australia

- Recommendation 43 (amendment of prosecutorial guidelines)

Office of Multicultural Interests

- Recommendation 117 (statewide Aboriginal languages interpreter service)

Office of the Public Advocate

- Recommendation 74 (regional partnerships with the Public Advocate and Public Trustee)

Public Trustee of Western Australia

- Recommendation 66 (obligation to administer Aboriginal intestate estates)
- Recommendation 72 (Public Trustee Aboriginal financial management protocols)
- Recommendation 74 (regional partnerships with the Public Advocate and Public Trustee)

Department of Racing, Gaming and Liquor

- Recommendation 23 (restrictions on sale or supply of alcohol to Aboriginal communities)

State Administrative Tribunal

- Recommendation 73 (assessment of decision-making capacity of an Aboriginal person under the *Guardianship and Administration Act 1990*)

State Coroner of Western Australia

- Recommendation 75 (objection to post-mortem examination)

Western Australia Police

- Recommendation 21 (review of community officers under *Protective Custody Act 2000*)
- Recommendation 43 (amendment of prosecutorial guidelines)
- Recommendation 49 (legislative criteria for the decision to arrest a young person)
- Recommendation 50 (establishment of a scheme for diversion to a community justice group)
- Recommendation 53 (police protocols for determining whether an Aboriginal person requires an interpreter)
- Recommendation 56 (cultural awareness training for police officers)
- Recommendation 57 (recording of ethnicity by police)
- Recommendation 58 (update Western Australia Police website)
- Recommendation 105 (clarification of permissible use of firearms by Aboriginal people in customary harvesting)

Appendix C: Cost Benefit Analysis – Aboriginal Courts

Introduction

In order to assist the Commission and readers of this Final Report to better understand the issues faced by Aboriginal people in the criminal justice system and to gauge the potential effectiveness of the Commission's recommendations, an evaluation was commissioned¹ on two indicators:

- the general cost of Aboriginal over-representation in the Western Australian justice system; and
- the cost benefit of the establishment of Aboriginal courts pursuant to Recommendation 24 of this Report.

Two distinct methodologies were employed to examine the costs of Aboriginal over-representation in the Western Australian criminal justice system and the net benefits of introducing specialised Aboriginal courts, respectively. The first section provides a broad picture of the overall cost of Aboriginal offending. The second section looks at a specific intervention that has considerable merit in reducing the costs associated with imprisonment and recidivism. Comparisons are made in both sections with earlier studies in Victoria.

Estimation of the Cost of Aboriginal Over-Representation in the Western Australian Justice System

Social commentary often arises when expectations differ from experience or reality. For example, we would generally expect the profile of a sample of the population to mirror the profile of that population. One such sample is prisoners. Here, contrary to our expectation, we find that the proportion of Aboriginal prisoners to be significantly higher than the proportion of the total population that are Aboriginal. This divergence is evident across all jurisdictions in Australia. In Western Australia in 2002, 34 of every 1,000 Western Australians was Aboriginal, yet 410 of 1,000 Western Australian prisoners were Aboriginal. This bias is often referred to as 'Aboriginal over-representation'.

The literature suggests that the causes of this bias are twofold. First, discrimination in the criminal justice system (systemic bias) may result in Aboriginal offenders being more likely to be charged, convicted and imprisoned than non-Aboriginal offenders of similar age and gender and for similar offences.² A second cause of Aboriginal over-representation is attributed to higher crime rates among Aboriginal people, particularly in those crimes that are driven by poverty or socio-economic factors.³ Whatever the cause or causes, there is an argument that, if the Aboriginal proportions of the general and prisoner populations were the same (34 in every 1,000 Western Australians), the costs of crime would be significantly reduced.

In order to evaluate the cost of programs that can reduce both systemic bias and higher crime rates, it is useful firstly to estimate the cost to government of Aboriginal over-representation in the criminal justice system. This can be done by comparing the cost of crime attributed to the current proportion of Aboriginal offenders with the cost of crime if the proportion of Aboriginal offenders was the same as the proportion of Aboriginal people in the population. For Western Australia, this would be 3.43 per cent instead of 41.08 per cent. Table 1 shows the steps in the process of estimating Aboriginal over-representation in the Western Australian criminal justice system. Explanation of these steps follows the table.

1. The evaluation was undertaken by Dr Margaret Giles of The University of Western Australia.
2. Office of Inspector of Custodial Services, *Directed Review of the Management of Offenders in Custody*, Report No 30 (November 2005) 5–6; Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [9.24]; Weatherburn D, Fitzgerald J & Hua J, 'Reducing Aboriginal Over-representation in Prison' (2003) 62(3) *Australian Journal of Public Administration* 65–73.
3. See Walker J & McDonald D, 'The Over-Representation of Indigenous People in Custody in Australia' (1995) 47 *Trends and Issues in Crime and Criminal Justice*, 6; Blagg H, Morgan N, Cunneen C & Ferrante A, 'Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System' (in press) 10.

Table 1: Derivation of the costs of Aboriginal over-representation

Process	Parameters	Estimates Western Australia ⁴	Estimates Victoria ⁵
Step 1	Total annual cost of crime in Australia 2001/2002 ⁶	\$31,780m	\$32,000m
	State population as a proportion of Australian population	9.79%	25.00%
	Total annual cost of crime in state in 2001/2002	\$3,111m	\$8,000m
Step 2	Indigenous population as a proportion of state population as at June 30 2002	3.43%	0.54%
	Cost of indigenous crime in state in 2001/2002 using indigenous population proportion	\$106.7m	\$43.2m
Step 3	Indigenous distinct persons in state prison population as a proportion of all distinct persons in state prisons in 2002	41.08%	4.40%
	Cost of indigenous crime in state in 2001/2002 using proportion of distinct persons in state prisons	\$1,278.0m	\$352.0m
Step 4	Discount factor	0.75	0.75
	Adjusted cost of indigenous crime in state in 2001/2002	\$958m	\$264m
Step 5	Cost of indigenous over-representation in criminal justice system in state in 2001/2002	\$851.3m	\$220.8m
Step 6	Inflation adjustment ⁷	1.1064	1.1064
	Cost of indigenous over-representation in criminal justice system in state in 2005/2006 ⁸	\$941.9m	\$244.3m

Methodology

The **first step** in this process is to determine the cost of crime in Western Australia. The most recent cost of crime estimation was undertaken by Pat Mayhew in 2002.⁹ No breakdown by state or territory was given. However, subsequent use of the Mayhew results (for example, by the Department of Justice in Victoria)¹⁰ have apportioned the Australian cost of crime estimates using the appropriate population proportion.¹¹ In 2002, the population of Western Australia was just under 10 per cent of the Australian population. Hence, the costs of crime in Western Australia in 2002 are estimated at \$3,111 million, which is 9.79 percent of Mayhew's estimate of the costs of crime for the whole of Australia (\$31,780 million).

4. Parameters for Western Australia are derived from the following sources: (a) Australian Bureau of Statistics, *Australian Demographic Statistics*, Cat No. 3101.0 (December 2002): Australian population at June quarter 2002 was 19,702,200; Western Australian population was 1,929,300; and low and high estimated projections of indigenous populations for 30 June 2002 are 62,577 and 69,669, respectively. These are 3.2435% and 3.6111% of the Western Australian population for the June quarter 2002, respectively. The arithmetic average of these two rates is 3.43%. (b) Crime Research Centre, *Crime and Justice Statistics for Western Australia: 2002* (2003), <http://www.crc.law.uwa.edu.au/_data/page/50334/ch5.pdf> 140, Table I. In 2002, the proportion of indigenous distinct persons is slightly lower (41.0770) than the proportion of all receivals (41.9862) but much higher than the proportion of prisoners on census night (34.4864). This reflects the higher through-put of indigenous prisoners who have relatively shorter sentences.
5. Department of Justice, Victoria, *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody. Volume 2 Statistical Information* (Prepared by the Implementation Review Team on behalf of the Victorian Aboriginal Justice Forum, October 2005) Chapter 4 – 'Methodology', 119–22, nn 4–7.
6. Mayhew P, 'Counting the Costs of Crime in Australia' (2003) 247 *Trends and Issues in Crime and Criminal Justice*.
7. CPI (Australia) adjustment: see Australian Bureau of Statistics, *Australian Economic Indicators*, Cat No. 1350.0 (August, 2006).
8. No adjustment is made for increasing crime rates or changes in the distribution of crime between 2002 and 2006.
9. Mayhew P, 'Counting the Costs of Crime in Australia' (2003) 247 *Trends and Issues in Crime and Criminal Justice*.
10. Department of Justice, Victoria, *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody. Volume 2 Statistical Information* (Prepared by the Implementation Review Team on behalf of the Victorian Aboriginal Justice Forum, October 2005).
11. This assumes that the distribution of crime across Australia is commensurate with the distribution of population. Hence it ignores how crime rates and costs might differ by geographical dispersion of the sub-population, urbanisation, per capita income, unemployment rates, property ownership, etc.

The **second step** in the process of estimating Aboriginal over-representation in the criminal justice system in Western Australia is to divide the costs of crime for Western Australia on the basis of the state population proportions of Aboriginal and non-Aboriginal people. In this way, if there was no Aboriginal over-representation, then crime by Aboriginal people in Western Australia should, hypothetically, cost the state \$106.7 million (3.43 percent of \$3,111 million) and crime by non-Aboriginal people should cost \$3,004.3 million (96.57% of \$3,111 million) in 2002.

In the **third step**, an estimate is made of the actual cost of crime by Aboriginal people on the basis of the imprisonment proportions of Aboriginal (41.08 percent) and non-Aboriginal people.¹² In Western Australia this estimate is \$1,278 million. This figure, however, includes both the cost of systemic bias as well as the cost of higher crime rates by Aboriginal people. In the Victorian study, a discount factor of 0.75 was applied to the estimate for Victoria to reflect that the Aboriginal population in that state had higher crime rates. Applying the same discount factor, **step four** shows that the adjusted cost of crime by Aboriginal people in Western Australia is estimated at \$958 million in 2002.

The **fifth step** in the process is to subtract the unbiased cost of Aboriginal crime (\$106.7 million from step two) from the adjusted actual cost of crime by Aboriginal people (\$958 million from step four). The result here is \$851.3 million in 2002. The general Consumer Price Index is applied to the 2002 estimate (shown in **step six**) to obtain the estimated cost of Aboriginal over-representation Western Australia in 2006.

Table 1 also shows the process of deriving the figures for Victoria according to the study undertaken by the Department of Justice of Victoria.¹³ In that study, projections of increased costs of over-representation were made based on rising percentages of people in contact with criminal justice system who are Aboriginal (4.4% in 2001–2002, 4.6% in 2005 and 4.9% in 2008). No such projections are available for Western Australia; therefore, the only cost increases included for both states in the table are based on inflation adjustments.

Findings

The cost of over-representation of Aboriginal people in the criminal justice system in Western Australia in 2006 is estimated at about \$940 million. This compares with an estimate for Victoria in 2006 of over \$240 million. There are two reasons for this difference. First, while Victoria has a population two and a half times that of Western Australia, the proportion of Victorians that are Aboriginal (0.5%) is much less than the proportion of Western Australians who are Aboriginal (3.5%). Second, Aboriginal offenders in Western Australia (for example, 41.08% of the distinct prison population in 2002 are Aboriginal) are about 12 times more prevalent compared with Aboriginal offenders in Victoria (eight times).

Aboriginal Courts Cost Benefit Analysis

A condensed evaluation of the financial impact of introducing Aboriginal courts in Western Australia was commissioned. Commonly labelled 'cost benefit analysis', it involves comparing the costs and benefits of a project or investment in dollar terms. Cost benefit analysis has a long history and a specific methodology, and is most often used by governments as a scientific means of evaluating change that may be funded by taxpayers and/or that can affect communities of voters.

The cost benefit analysis of Aboriginal courts in Western Australia was constrained in a number of ways. In particular, actual data for a number of parameters were not readily available. As a result, the cost benefit analysis has followed the approach and parameters used by Acumen Alliance (2006) in its appraisal of the pilot operation of Koori Courts in Victoria (hereafter referred to as the 'Victorian study').¹⁴

12. Following the methodology of Department of Justice, Victoria, it is assumed that these proportions are consistent across all components of the criminal justice system: see Department of Justice, Victoria, *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody. Volume 2 Statistical Information* (Prepared by the Implementation Review Team on behalf of the Victorian Aboriginal Justice Forum, October 2005).

13. Ibid.

14. Acumen Alliance, *Cost Benefit Analysis Koori Court Program*, Final Report to Department of Justice Victoria (January, 2006).

Methodology

Table 2 summarises the key costs and benefits of Aboriginal courts in Western Australia. As with the Victorian study, the costs are the difference between the costs of operating an Aboriginal court and the costs of operating a normal Magistrates Court (or lower court). These costs are given on a per person basis where a person is defined as a 'finalised defendant'. A finalised defendant is a defendant whose appearance before the court for a particular matter has been finalised by the passing of sentence or otherwise. Unit court costs are assumed to be the same for Victoria and Western Australia: \$3,444 per finalised defendant in an Aboriginal court and \$300 per finalised defendant in a 'normal' court. The number of finalised defendants per Aboriginal court per annum is assumed to be 88.¹⁵

The Victorian study derived benefits to the state Department of Justice (reduced costs related to fewer imprisonments and lower rates of recidivism) and other state agencies (reduced welfare and support costs for defendants and their victims), together with further benefits to the community (lower costs for private security and insurance industries and for households investing in precautions, and less need to provide for victims). For the Western Australian study, benefits are confined to reduced costs related to fewer imprisonments and lower rates of recidivism. There are two reasons for this. First, the Victorian study showed that these savings alone outweighed the costs of the Aboriginal courts by a ratio of 2.5 to 1. Additional benefits were shown to increase this ratio. Second, the additional benefits are more difficult to quantify in dollar terms. The Victorian study has relied heavily on apportioning the Mayhew costs of crime figures for Australia to figures for Victoria alone. As mentioned above, it is unclear whether this apportionment is a good approximation.

The reduced imprisonment figure for Western Australia is based on the Victorian study's assumption that prison days would reduce by 25 per cent if one quarter of Aboriginal defendants appearing before Aboriginal court magistrates received non-custodial sentences. That is, of the 88 finalised defendants, 22 will not be given a sentence of imprisonment. Average lengths of sentence for Aboriginal people in Western Australia and Victoria are 11.13 months¹⁶ and 16 months¹⁷ respectively. The day rates used for prisoners in Western Australia and Victoria are \$239¹⁹ and \$162¹⁹ respectively. The result is discounted by 90 per cent (that is, a factor of 0.10 is applied). Acumen Alliance provides no discussion or source for this discount factor in the Victorian study, although it most likely relates to the probability of receiving a prison term at sentencing.

The reduced recidivism figure is also based on an assumption from the Victorian study. Recidivism is reduced from 32.6 per cent (29 defendants) to 14 per cent (12 defendants) which amounts to 17 fewer persons re-entering the criminal justice system following processing through an Aboriginal court. A caution with regard to this assumption is that the Victorian experience is probably not long enough (only about two years) to accurately reflect changes in recidivism rates. However, more accurate recidivism rates for Western Australia were unavailable at the time of the study.

The per defendant cost to the criminal justice system is assumed to be \$30,312.²⁰ This is based on the Australian study of costs of crime by Mayhew.²¹

15. Ibid 35, four cases per sitting with 22 sitting days per year.

16. Crime Research Centre, *Crime and Justice Statistics for Western Australia: 2004* (2005), <http://www.crc.law.uwa.edu.au/facts_and_figures/statistical_report_2004?f=102381> 163, Table 5.4; frequencies were multiplied by the midpoint of each length of sentence group with the mid point for the last group assumed to be 105 months.

17. Acumen Alliance, *Cost Benefit Analysis Koori Court Program*, Final Report to Department of Justice Victoria (January, 2006) 35.

18. Department of Justice, Western Australia, *Annual Report 2004/2005* (August, 2005).

19. Acumen Alliance, *Cost Benefit Analysis Koori Court Program*, Final Report to Department of Justice Victoria (January, 2006) 35.

20. Ibid.

21. Mayhew P, 'Counting the Costs of Crime in Australia' (2003) 247 *Trends and Issues in Crime and Criminal Justice*.

Table 2: Cost benefit analysis of Aboriginal courts in Western Australia

Parameters	Estimates Western Australia \$	Estimates Victoria \$
Costs		
Aboriginal court costs	303,079	303,079
'Normal' court costs	26,400	26,400
Net costs	276,679	276,679
Benefits		
Reduced prison terms	175,565	178,200
Reduced recidivism	515,304	515,304
Net benefits	690,869	693,504
Benefit cost ratio	2.50 : 1	2.51 : 1

Findings

The benefit cost ratio for the introduction of an Aboriginal court in Western Australia servicing 88 finalised defendants per year is estimated at 2.5 : 1. **That is, for every dollar spent on the operation of an Aboriginal court, the State of Western Australia will save at least \$2.50.** The analysis excludes savings related to other reduced costs. These other savings include savings to households and victims, and to the insurance and security industries, and savings to other related government services such as employment networks, welfare and health services, and other community services. The estimated benefit cost ratio for Victoria is 2.51 : 1. The difference between the results for Western Australia and Victoria relate to the higher cost per prisoner year and shorter sentence length for Aboriginal prisoners in Western Australia.

If more than one Aboriginal court is established then the cost and benefit figures will both be amplified by the number of courts, leaving the benefit cost ratio the same. However, changes to other parameters (rate of recidivism, cost per defendant, etc) may increase or decrease the ratio.

Appendix D: List of Submissions and Contributions

Submissions

Aboriginal Education and Training Council, Department of Education	Kimberley Development Commission
Aboriginal Legal Service of Western Australia, Allen, David	King SM, Dr Michael S
Australian Property Institute	Law Council of Australia
Bendat, Paul	Law Society of Western Australia
Bishop, Helen	Lester, Marian
Brady, Dr Maggie (Australian National University)	Malcolm AC QC, Hon David K
Burdon, Peter (University of Adelaide)	Marchant, Bill
Calma, Tom (Aboriginal & Torres Strait Islander Social Justice Commissioner, HREOC)	Marlborough MLA, Hon Norm (Minister for Education & Training)
Casey, Dr Dawn (Western Australian Museum)	Marsh, Brian
Catholic Social Justice Council, Archdiocese of Perth	Martin MLA, Carol (Member for Kimberley)
Centre for Aboriginal Studies, Curtin University	Meadows QC, Robert (Solicitor General)
de Kerloy, Mony (Barristers & Solicitors)	Morno Yarnda Mnyirrinna, Sylvia
Deegan, Margaret	Munyard, CE
Department for Community Development	Ngaanyatjarra Council
Department of Consumer and Employment Protection	O'Connell, Stewart
Department of Corrective Services	Office of the Commissioner of Police
Department of Culture and the Arts	Office of the Director of Public Prosecutions
Department of Fisheries	Office of the Inspector of Custodial Services
Department of Indigenous Affairs	Office of the Public Advocate
Department of the Attorney General	Onley, Peter
Development Commission, Gascoyne	Pilbara Development Commission
Family Court of Western Australia	Public Trustee of Western Australia
Foss QC, Hon Peter	Queensland Law Reform Commission*
Fryer-Smith, Stephanie	Quirk MLA, Hon Margaret (Minister for Women's Interests)
Goode, Revd LP	Seabrook, Benjamin
Harris, Anthony	Shire of Wyndham East Kimberley
Heath, Chief Stipendiary Magistrate Steven	State Administrative Tribunal
Hope, Alastair (State Coroner)	Thompson, Clare (Legal Practice Board)
Indich, Reynold (Jumdingi)	Titelius, Richard
Indigenous Women's Congress	Vicker SM, Evelyn (Deputy State Coroner)
Kiddinck, Joost	Vile, June
Kimberley Aboriginal Law and Culture Centre	Walley, Tony
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Leonora
Medina
Mandurah
Manguri
Marble Bar
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Meekatharra
Midland
Mirrabooka
Mowanjum
Mt Magnet
Mungullah Community – Carnarvon
Northampton
Newman
Nullagine
Perth
Port Hedland
Rockingham
Roebourne
Strelley
Warburton
Wiluna
Wuggubun
Yalgoo
Yandeyarra
Yulella Aboriginal Community

KIMBERLEY REGION ABORIGINAL COMMUNITIES Map 2 of 2



LEGEND

- Beagle Bay Community Name
- Broome Town
- Roads



For communities in the remainder of the state,
please refer to Map1 in this set of 2,
Western Australia - Aboriginal Communities



Department of
Indigenous Affairs



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Appendix F: Memorandum of Commitment

The words written down in this document called '**The Memorandum of Commitment**' are words that the Law Reform Commission of Western Australia will act upon throughout Western Australia in the course of the consultations with Aboriginal people undertaken as a part of the reference on Aboriginal customary laws

The Law Reform Commission of Western Australia is committed to:

1. Working honestly and with integrity with Aboriginal people.
2. Entering Aboriginal country with permission and with respect for, and honour of the local cultural protocols and practices of the Aboriginal people of that country.
3. Leaving Aboriginal country with permission and with respect for, and honour of local cultural protocols and practices of the Aboriginal people of that country.
4. Ensuring that Aboriginal stories, information, cultural knowledge and cultural narratives are treated with the greatest respect and honour.
5. Abiding by the confidentiality to be accorded to all materials given to the Commission in confidence.
6. The Commission will treat cultural materials given to it, including stories, information, cultural knowledge, and cultural narratives as the property of relevant Aboriginal people, subject to the laws of the State and the Commonwealth.
7. The Commission does not wish to, nor claim to, own the stories and information given by Aboriginal people, subject to the laws of the State and the Commonwealth.
8. Ensuring that the principles contained in this Memorandum of Commitment continue past the life of the reference on Aboriginal customary laws.
9. Ensuring at all times that the aspirations and views of Aboriginal people are respected and acknowledged.

SIGNED by the Chairman of the Law Reform Commission, Professor Ralph Simmonds:

Ralph Simmonds

SIGNED by the Project Team and Reference Council members below as a commitment to maintain the Commission's confidences and as an indication of their loyalty to the reference on Aboriginal Customary Law:

<i>Amy Blain</i>	<i>R. Boyce</i>	<i>Shayle</i>
<i>Josie Boyle</i>		<i>Debra P. Row</i>
<i>Debra P. Row</i>	<i>Glendy Kickett</i>	<i>P. Jones</i>
<i>Dean Ballard</i>	<i>David Kelly</i>	<i>Beth Woods</i>
<i>Michael Doolan</i>	<i>Neil Morgan</i>	<i>Eric Wynne</i>
<i>YALURITJA</i>		

Appendix G: Aboriginal Reference Council and Initial Project Team

Members of the Aboriginal Research Reference Council

Special Commissioners: Professor Michael Dodson

Mrs Beth Woods

Chair: Ms Sarina Jan

Members: Ms Josie Boyle

Mr Dean Collard

Mr Dennis Eggington

Mr Neil Fong

Mr Lindsay Harris

The Late Mr C Isaacs

Mr Oldie Kelly

Ms Glenda Kickett

Dr Sally Morgan

Mr Hector O'Loughlin

Ms Donella Raye

Ms Pat Torres

Mr Eric Wynne

Initial Project Team: Crime Research Centre (UWA)

Research Directors: Dr Harry Blagg
(2001–2004) Professor Neil Morgan

Project Manager: Ms Cheri Yavu-Kama-Harathunian
(2001–2003)

Appendix H: List of Abbreviations

Following is a list of abbreviations used throughout this Final Report:

AADRS	Aboriginal Alternative Dispute Resolution Service
AALAWG	Aboriginal Access and Living Areas Working Group
AAPA	Aboriginal Affairs Planning Authority
AETC	Aboriginal Education and Training Council
AFSWG	Aboriginal Fishing Strategy Working Group
AHRU	Aboriginal History Research Unit (Department of Indigenous Affairs)
AJAC	Aboriginal Justice Advisory Council [proposed]
ALRC	Australian Law Reform Commission
ALS	Aboriginal Legal Service [of Western Australia]
APLOs	Aboriginal Police Liaison Officers
ATSIC	Aboriginal and Torres Strait Islander Commission
ATSILS	Aboriginal and Torres Strait Islander legal services
CALM	Conservation and Land Management
CCS	Children and Community Services
CDEP	Community Development Employment Project
COAG	Council of Australian Governments
DCD	Department for Community Development
DIA	Department of Indigenous Affairs (WA)
DOCEP	Department of Consumer and Employment Protection
DPP	Office of the Director of Public Prosecutions
EOC	Equal Opportunity Commission
HREOC	Human Rights and Equal Opportunity Commission
IAAC	Indigenous Affairs Advisory Council
ICCPR	<i>International Covenant on Civil and Political Rights</i>
KALACC	Kimberley Aboriginal Law and Culture Centre
LAC	Legal Aid Commission [of Western Australia]
LRCWA	Law Reform Commission of Western Australia
NAAII	National Accreditation Authority for Translators and Interpreters
NSWLRC	New South Wales Law Reform Commission
NTLRC	Northern Territory Law Reform Committee
OAG	Office of the Auditor General (WA)
PDC	Pilbara Development Commission
QCJC	Queensland Criminal Justice Commission
QLRC	Queensland Law Reform Commission

RCIADIC	Royal Commission into Aboriginal Deaths in Custody
SCAG	Standing Committee of Attorneys General
SCRGSP	Steering Committee for the Review of Government Service Provision
TAFE	Technical and Further Education
TIS	Translating and Interpreting Services
VLRC	Victorian Law Reform Commission
WWCC	Working with Children Check

Appendix I: Photograph Acknowledgements

The Law Reform Commission of Western Australia acknowledges the following individuals/organisations for kindly providing permission to reproduce the photographs throughout this Report:

- Law Reform Commission of Western Australia, *Mr Clarrie Cameron and Mr Ken Colbung at the launch of the Commission's Discussion Paper* (p vi)
- Ms Ilse Petersen, *En route to a consultation in North-West Western Australia* (p vii)
- Native Title Tribunal, *Wanjina Determination – August 2004* (p 3)
- Dr Tatum Hands, *Mr Russell Nelly, Warbuton Elder* (p 3)
- Tourism Western Australia, *Playing the didgeridoo at dawn in Kings Park* (p 4)
- The West Australian, *A traditional tribal dance is performed by a prisoner and his family members at the opening of the new Wyndham work camp* (p 7)
- The West Australian, *'Dinner Camp', Halls Creek, Kimberley* (p 9)
- Tourism Western Australia, *Cattle Muster* (p 11)
- The West Australian, *Hunting for trochus shell off the coast of One Arm Point, Kimberley* (p 12)
- Ms Gillian Braddock SC, *Prison boab tree south of Derby* (p 15)
- Ms Jessica Evans, *Dilapidated truck in Warburton* (p 17)
- Supreme Court of Western Australia, *Stained glass window of Lustitia, the Roman goddess of justice* (p 24)
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- Ms Jessica Harris, *Warburton International Airport* (p 34)
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- The West Australian, *Elders and child at Mulan Aboriginal community on the edge of the Great Sandy Desert* (p 38)
- Thomas H Tobias (Courtesy Battye Library) *Aboriginal prisoner, Coolgardie, 1895* (p 44)
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- The West Australian, *A Halls Creek man waits for a Homeswest apartment* (p 56)
- The West Australian, *Aboriginal Elder Ngari Ngari Morgan at the Martu Sports Festival in Cotton Creek – Ngari Ngari came out of the desert at the age of 30* (p 64)
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- Tourism Western Australia, *Campfire – Luridgii cultural experience* (p 80)
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The West Australian, *Halls Creek* (p 333)

LRCWA, *Broome Courthouse* (p 339)

Dr Tatum Hands, *Mangroves and pindan, Roebuck Bay, Broome* (p 351)

Ms Jessica Evans, *A gnarled tree in the Warburton landscape* (p 356)

Native Title Tribunal, *At the signing of the Derby Shire agreement, Jarlmadangah Barru* (p 359)