

Law Reform Commission of Western Australia

Aboriginal Customary Laws

Project No 94

THEMATIC SUMMARY OF METROPOLITAN CONSULTATIONS

January 2004

The Law Reform Commission of Western Australia

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Preface

The Law Reform Commission's formal consultations on the Aboriginal Customary Laws project commenced with a series of consultations in the Perth metropolitan area. Formal consultations were held progressively across the State during 2003 and have been preceded by pre-consultation discussions and visits.

The timetable for the metropolitan consultations was drawn up after discussion with the project's Aboriginal Reference Council and community leaders:

4 November 2002	Manguri, Queens Park
18 November 2002	Herb Graham Recreation Centre Mirrabooka
2 December 2002	Shire Council Function Room Armadale
9 December 2002	Medina Aboriginal Cultural Centre Rockingham
16 December 2002	Midland Town Hall Midland

This report provides thematic summaries of the issues that were raised and discussed at each of the consultations. The consultations themselves and these thematic summaries have been conducted in accordance with the Memorandum of Commitment (refer Appendix I) and with protocols that were discussed and approved by the Reference Council.

All of the consultations commenced with introductions by the project manager (Ms Cheri Yavu-Kama-Harathunian) and Special Commissioner, Ms Beth Woods, a traditional welcome and a presentation about the project by Professor Ralph Simmonds, Chair of the Law Reform Commission. At Manguri the traditional welcome was provided by Mr Dean Collard; at Mirrabooka by Mrs Doolann Eattes; at Armadale by Mr Milton Hansen; at Medina by Mr Fred Collard; and at Midland by Mr Richard Wilkes.

After the formal introductions and welcome, the consultations were opened up for contributions, comments and discussion by all who were present. These discussions sometimes occurred with the group as a whole, and sometimes within smaller discussion groups to reflect more specific concerns. The Directors of Research, in collaboration with the other members of the project team, produced a thematic summary which maintained the integrity of the consultations by utilising the colloquial language spoken during the discussions.

The reports were compiled by Dr Harry Blagg, Ms Hannah McGlade, Dr Neil Morgan and Ms Pat Torres (Ms Tatum Hands, Acting Executive Officer of the Law Reform Commission of Western Australia assisted in taking notes at the Armadale, Medina and Midland consultations).

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

Introduction

The Manguri consultations revealed a wide spectrum of concerns. The issues can be grouped together under five main headings.

1. Context and general perceptions of the project
2. Scope and Terms of Reference
3. What is Aboriginal Customary Law?
4. Recognition, status and role of Elders
5. Priority areas: Family and children; Law and Justice; and Governance

1. Context and general perceptions of the project

The consultation strongly reinforced the importance of the project reflecting Aboriginal diversity and taking account of different historical, social and regional contexts. In particular, the discussion frequently returned to issues relating to the effects of colonisation/conquest on indigenous people in the South-West. These included the following –

- The decimation of much indigenous culture, including traditional law and structures of family and governance;
- Questions of identity, relationships and family trees;
- The devastating impact of government policies of removing Aboriginal children from their families;
- Family violence and sexual abuse;
- A legacy of welfare dependency; and
- High rate of imprisonment of men women and children.

As a consequence of these and other factors, the consultations addressed some basic questions relating to the definition and identification of Aboriginal law and also the identification and role of Elders. These issues are discussed later.

These historical and social factors also caused some concern about the whole project. For example, there were comments to the effect that “there will only be laws for white people” and that, in some respects, it is “too late” in this part of the state.

There were also frequent references to the gaps between the expectations, the content and recommendations of earlier reports and their actual implementation. For example, many of the recommendations of the Royal Commission into Aboriginal Deaths in Custody have not been implemented. Indeed, the Western Australian government recently “de-implemented” one of the Royal Commission’s most basic recommendations – namely that there should be an independent Aboriginal agency to monitor the Royal

Commission's recommendations. The abolition of the Aboriginal Justice Council means that Western Australia is now the only State to have no such independent agency.

Nevertheless, despite these concerns, the consensus was that this is an important and worthwhile project provided it develops strategies capable of implementation.

2. Scope and Terms of Reference

In some respects, the terms of reference are very broad, embracing all aspects of Western Australian law other than native title and the Aboriginal Heritage Act. However, several difficulties were identified in attempting to address Aboriginal law within the framework of this reference. They included the following:

- The project is limited by the exclusion of national laws, including the Commonwealth Constitution. Although the State Constitution would fall within the terms of reference, Australia's national Constitution may also require amendment: "until we deal with the foundations, it is only whitewashing".
- Many Australian symbols are built on false assumptions that exclude Indigenous peoples. For example, the national anthem talks of Australians as "young and free" but this is clearly a reference to non-Indigenous peoples who first arrived in 1788. To Indigenous people, the country is neither young nor free. Until Indigenous peoples are included in national symbols, how can true credibility be given to "recognition" of Aboriginal law?
- There are significant regional variations even within the State; and state boundaries pose artificial limitations on discussions of Aboriginal law.
- The laws under discussion are State laws but the issues cross the whole of Australia – they are about the "total dreaming".
- Nationhood status is a key issue across the whole country; and the recognition of Aboriginal law is just one part of the mechanics of nationhood.
- A call for formal apologies (or a "proclamation of reconciliation") from the UK government as well as Australian governments.
- The implications of Australia becoming a republic.

Native title issues have proved very draining on some families, and sometimes divisive within the community.

3. What is Aboriginal customary law?

The history of colonisation in the South-West has raised difficulties surrounding the question "what is Aboriginal law?" There were lengthy discussions of this question. Key responses included the following: -

- Values, dreaming, ceremonies, recognised practices;
- Our definition of ourselves;
- Our place and sense of being (whereas white law tends to look at "law and order");

- Our total dreaming, our world view that materialises into practical outcomes and spirituality, which give meaning;
- Recognition of family and kinship; and of who can talk about what;
- A set of values and responsibilities that come with being indigenous;
- The key to survival and our connection with the past; and
- Embracing social order in both humanity and environment.

Land and access – including an inbuilt sense of being and of responsibilities in going into other people’s country.

There was also a strong focus on the importance of reclamation and revival of customary law for Noongar people, who have had more intensive history of dispossession and overturning of customary law by colonial authorities and legislatures: “By reclaiming customary law, we can take back much of what was lost when we were taken away”. The importance of Noongar language to the revival of customary law was also recognised.

Although there was no attempt to finalise a definition, the following statement summarises the gist of the debates:

“Connecting 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.”

4. Recognition, status and role of elders

Although Elders play a key role, the consultations revealed a range of issues within the Noongar community with respect to the identification of Elders and their roles. These dilemmas again reflect historical factors, including the stolen generation. For example, some people found themselves thrust into “leadership roles” when they had themselves been taken from their families and lost much of their cultural identity and support. It is clear that such uncertainties are unlikely to be encountered in some other parts of the State, where Elders are clearly recognised and their roles are well-defined.

The following points emerged during discussions:

- Some young people struggle to acknowledge as “Elders” people who may themselves have done “bad things”.
- It was suggested that Elders may be recognised through lineage (linkages through family trees); through earning community respect; and through knowledge of law. As one person put it, Elders have “knowledge, culture and respect and lead by example”.
- Some participants also suggested that there may be confusion between role models, leaders and Elders; and of the importance of distinguishing these categories. Clearly, the extent of such confusion, when it exists, varies widely across the State.
- **Female Elders:** Several people stressed the important role of matriarchs and female Elders and one suggestion was that there should be more co-ordination between Aboriginal women across the country.
- **Co-initiates:** The role of co-initiates was also stressed, in addition to that of Elders. Co-initiates can be a key peer group and a vital influence.

5. Priority areas: family and children; law and justice; and governance

Whilst recognising the overlap, and the holistic nature of the terms of reference, the consultation sought to identify priority areas. These can be grouped under three main headings: Family and Children; Law and Justice; and Governance.

(a) Family and children

Issues relating to family and children were at the forefront of discussions, with a particular focus on family violence, sexual abuse and the rights of children and women. The range of issues included the following:

- Custody issues in the Family Court and its mediation services - the court is “not listening” and does not seem to understand the dynamics of Aboriginal families.
- Aboriginal families sometimes adopt different parenting models (including the role of aunties, uncles and grandparents).
- A need for parenting programs for indigenous families (building on examples such as Manguri).
- Need for budgeting support/education.
- Long-term support services and an increase in Aboriginal Child Care agencies.
- Too many Aboriginal children are identified primarily as offenders and too little attention is given to Aboriginal children as victims.
- The circumstances of violence and abuse make it difficult for children to disclose abuse.
- The need for more “men’s programs”.

Overall, there was a clear consensus that it is necessary to develop Aboriginal-based family healing projects and initiatives, designed to give Aboriginal people responsibility and authority to work on issues on a systematic long-term basis. Such programs would include exploration and enhancement of cultural values of respect and non-violence, and a focus on mediation and conferencing. It was considered that the key to success will be incorporating a stronger community dimension and not in increasing funding to other government agencies.

(b) Law and justice

Discussions raised a large number of issues with respect to the criminal process and mental health procedures. They included the following:

- **Mental health:** practitioners tend to operate within a psychiatric framework and may not take full account of the cultural framework/context. For example, “hearing voices” may be interpreted differently. It was suggested that there should be greater cultural input, including the use of Aboriginal healers and co-ordination between psychiatric and Aboriginal cultural service providers.
- **Aboriginal/police relations:** it was recognised that there have been worthwhile initiatives in some parts of the State but that more needs to be done to improve police training/education and the development of relationship and protocols between police and Aboriginal communities.

- **Cultural dislocation** caused by people being imprisoned or held in detention a long distance from home (a problem with both remandees and sentenced persons).
- **Bail** conditions being too onerous; and people being remanded in custody and therefore unable to meet their cultural obligations (for example to the victim's family). Bail conditions disadvantage Aboriginal people who often do not own property and are discriminatory in that sense.
- **Court procedures and personnel:** too few Aboriginal lawyers and a need for Aboriginal judges and magistrates. Also a concern that juries may not understand cultural issues.
- **Sentencing circles and healing:** strong support was voiced for alternative approaches to be piloted. These included "sentencing circles" with judges/magistrates and community representatives sitting together. This was seen as one very practical mechanism for incorporating customary law approaches; and to provide a forum to focus on positive rather than negatives cultures.
- **Prisons:** although some prisons have established "meeting places" for Aboriginal prisoners, several other areas should be explored. In particular:
 - Dietary issues, including traditional foods
 - The development of truly Aboriginal programs (not "Aboriginalised") versions of non-aboriginal programs). These should include a strong focus on family and community responsibilities and family healing.

(c) Governance

One of the strongest themes to emerge from the consultations was the need to achieve social justice and to break down the current level of welfare dependency. Recognition of customary law was seen as a key aspect of greater empowerment.

As noted earlier, there was concern that there are few foundations in place upon which to build strong new models of governance. For example, there is no "treaty" in Australian (unlike New Zealand and Canada); the federal and state Constitutions do not acknowledge Aboriginal people; national symbols such as the national anthem exclude indigenous people; and the State government has abolished the Aboriginal Justice Council and nothing has yet replaced it.

However, a number of innovative options were canvassed as a means to "lifting" Aboriginal peoples' authority and enhancing governance structures. These included:

- A consideration of how the State Constitution could at least be amended (even if the national constitution is not). This could include an examination of mechanisms whereby Aboriginal people may have a more definite "voice" in Parliament (for example, Maori people in New Zealand have their own reserved parliamentary seats and significant political representation).
- The possible appointment of an Aboriginal Attorney General (with equivalent status to the current Attorney General) with oversight of Aboriginal law issues.

- The need for the Attorney General to also have Aboriginal advisors and to formulate protocols to insure the inclusion of Aboriginal people or advisors in studies or inquiries of relevance to Aboriginal people.
- Greater devolution to local communities in some areas. For example, the possible establishment of Community Justice Centres.

6. Conclusion

The Manguri consultation was conducted in a spirit of good will and collaboration and raised an enormous number of issues. It identified a range of problems, limitations and hurdles; but it also raised some important options for future detailed consideration. It also reaffirmed two important points. First, it is impossible – and dangerous – to generalise about Aboriginal law. The questions that are likely to be raised and the responses to those questions will vary across the State. Secondly, many of the proposals and initiatives would not require legislative change or change to the common law; they could be partially or fully achieved by changes in policy priorities and directions.

MIRRABOOKA

18 November 2002

"Aboriginal law was the first law in Australia".

Participant at the Mirrabooka consultation.

"Aboriginal Law means, guidelines set down since time immemorial to govern Aboriginal people in social groups".

Participant at the Mirrabooka consultation.

Introduction

The Mirrabooka consultation covered a diversity of issues, from criminal justice through to questions of political sovereignty and governance.

These themes, as addressed at the Mirrabooka consultations, are best summarised under the following headings:

1. Context and underpinning issues;
2. Large group discussion;
3. Small group discussions on priority areas;
4. Summary of main recommendations.

1. Context and underpinning issues

The Mirrabooka consultation discussions began by establishing some key questions:

- What is Aboriginal customary Law?
- How do we (Noongar people) recognise our law?
- What are the major issues facing our law?
- How can our law be enforced in Western Australia?

The impact of colonisation on Aboriginal law in the southwest was acknowledged. It was also said that "law" still exists in many forms, and continues to have an impact on the lives of Noongars – through family and kinship and through principles of mutual obligation and reciprocity. Despite attempts at "cultural genocide", Noongar people have survived.

2. Large group discussion

The large group discussion traversed a number of issues:

- The demise of the Aboriginal Justice Council was noted with some concern, as was the failure to deliver on the promise to come up with a better model (ATSIC, ALS, Government responsible for this).
- Lack of resources for the development of alternatives in the justice area, particularly to strengthen culture and help youth.

- The non-implementation of the RCIADIC recommendations was noted – some believed that fewer than 10 were completely implemented. But “we cannot admit defeat” on this.

Sovereignty

Need for constitutional change. An Aboriginal “Attorney General” sitting with the Attorney General.

- Self-determination and sovereignty were important foundational issues. Aboriginal people had to be acknowledged as a nation and given that status. The “Noongar Nation” movement was viewed by many participants as a worthy model to follow.
- Some positive non-legislative developments were noted, such as where magistrates and judges have recognised that Aboriginal defendants are often also subject to Aboriginal law.

Elders

- The initiatives at Yandeyarra, and other initiatives where Elders sit with magistrates, were supported.
- Elders “get left out” – eg. Plans to disband the Council of Elders. Also the system does not want to involve Elders in work with Aboriginal people. Aboriginal cultural practices are not thought suitable for inclusion in Community Service Orders.
- There needs to be more done for ex-prisoners. Elders should be given a role with young ex-prisoners.
- Not anyone can be an elder/law person – you are chosen.
- Respect for Elders is the core of Aboriginal culture.

Views of the project

- Some views were expressed regarding the “limited Aboriginal representation on the project”
- There should be two Elders from each region on the Aboriginal Customary Law Research Reference Council.

Culture, values and beliefs

- Aboriginal law once had an economic base, now we are dependent on welfare. We need an economic base.
- Intellectual copyright is an essential part of re-claiming culture.

Major issues affecting Aboriginal people and the criminal justice system and the law

- Policing, courts and prisons are still a major problem for Aboriginal people.
- Lack of equality – particularly in courts.
- “We still have the 1905 Act in reality – Mandatory Sentencing laws continue child removal policies”. They still “control our nation through our children”.
- DIA & ATSIC “control us, not us control them”.

- There need to be changes to State Constitution to enshrine equality between nations. The present one is racist.
- Good examples from Canada where Aboriginal people legislate for themselves.

3. Small group discussions on priority areas

(a) Law and justice issues

This group focussed on issues related to policing, courts & prisons. There was a view that the system was biased against Aboriginal people and discriminated against them at all levels. The greatest criticism was levelled against the police who were seen as “racist & discriminatory” and who “targeted Aboriginal people”, “especially young people in the Mirrabooka area”. Other views expressed were:

Cross cultural training

- Ongoing compulsory cross-cultural training of government employees by Aboriginal people, preferably from the area.
- Elders should be involved in training and in accrediting such training programs.

Juvenile justice

- Diversion favours non-Aboriginal children. Need more Aboriginal people on juvenile justice teams. There was general support for the new Department of Justice initiative of having an Aboriginal co-ordinator, but more needs to be done.

Policing

- Targeting of Aboriginal youth still occurs.
- Public stereotypes of Aboriginal youth – leads to over-policing.
- “Flogging” of Aboriginal youth still occurs in interview rooms – the police Royal Commission should be encouraged to look into this.
- More on the Police Royal Commission – “not interested in the policing of Aboriginal people – will be a whitewash of this issue”.

Corrections

- Need more Aboriginal prison officers and teachers in prisons.
- Pay Elders to work with prisoners.
- Need more Aboriginal supervisors on programs and more culturally appropriate ones – post release and community based programs.
- The “Banana Wells” program is a good model.
- Need to involve Aboriginal prisoners in design and delivery of programs – “they are the experts in their own lives”.
- Aboriginal people should be involved in the planning of Work Camps.

- The Department of Justice is not sufficiently accountable. There are no jobs for released prisoners, they are often unsupervised and left without adequate support.
- Aboriginal people in prison are given less respect than others – “treated as low-life”.
- The issue of transportation of prisoners for health related matters needs to be looked at: “security guards stop Aboriginal people receiving medical attention because they use security concerns to mask their indifference to Aboriginal health needs”.
- Imprisonment creates mental health problems – not addressed by “white treatment”.
- Loss of contact with family, they become homeless when they leave prison. Department of Justice to work with Homes West on this issue. Should be on housing waiting list when in prison.
- Design and layout of prisons not appropriate for Aboriginal people.

Courts

- Courts should acknowledge the relevance of Aboriginal law.
- Aboriginal law is useful in resolving family feuds.
- The Aboriginal Legal Service is under-staffed and under-resourced.
- Courts are part of “psychological abuse of Aboriginal people – from colonisation onwards Aboriginal people re-live a nightmare”.
- More funding for psychological support and assessments for Indigenous people.
- Child witness service not relevant for Indigenous children.
- Aboriginal women are the “back bone of the family” keep them out of prison as much as possible. Better diversionary programs, plus de-criminalisation of some offences.

General issues in law and justice

- Agencies need to “get out of their own boxes”.
- The recommendations of Royal Commission into Aboriginal Deaths in Custody need to be re-visited – why are there still deaths and over-representation of Aboriginal people in prisons?
- Young people need more community support and activity programs to combat boredom.
- Aboriginal children “access prison to survive because in custody they get three meals and a bed”.
- Need for an Aboriginal Ombudsman to hear complaints.
- Post-release suicides should be investigated as deaths in custody.

(b) Governance and sovereignty

- Look at other countries New Zealand, Canada and Palestine – to see what happened in those countries.
- Consider an indigenous treaty with all indigenous people. The government will deal with one body and cannot make the excuse that it does not know who to deal with.

- Indigenous people to look for outside help – United Nations etc.
- Mandatory sentencing must be abolished.
- The indigenous people never surrendered and therefore there should be indigenous passports and an indigenous electoral roll.
- The constitution should allow for 5 per cent of revenue and not the 1 per cent initially promised.

(c) Government practices and policies and state constitutional change

Even though DIA and ATSIC exist, they are not autonomous of government. How can we make them work better? They are not working at grass-roots level.

- There needs to be a “decolonisation of administration”.
- The Westminster legal model is no longer appropriate.
- Aboriginal people are not represented properly in government – policies are “white fella” concepts.
- The Indigenous Affairs Advisory Council is inappropriate and not an Aboriginal process.
- Aboriginal bureaucrats are captured by the system.
- Need to involve Aboriginal law in government processes to achieve Indigenous governance.
- Amend the Western Australian Constitution to recognise Indigenous sovereignty and the jurisdiction of Customary Law.
- Reinstate section 70 of the Western Australian constitution, which intended to reserve 1 per cent of state revenue for Aboriginal people.
- Authority of Elders to speak on behalf of Indigenous groups to be acknowledged.
- Establishment of local justice structures.
- Community councils resourced and empowered with authority to make these happen.
- Multi-disciplinary, integrated local teams to deliver justice strategies in partnership with Aboriginal communities.

(d) How do we deal with racism & prejudice at all levels of Australian society?

- Aboriginal and non-Aboriginal people need to be educated to understand the issues.
- Develop community education programs to dispel the myths and provide cross-cultural awareness training.
- “Best Practice” includes “hands on” training based on stories and experiences (“yarning”).
- Participation could be as in the reconciliation process, based around community action groups, to promote individual ownership of the process, working on family, friends, and workmates.

Schools

- Guest speakers in schools for teachers/workers as well as students.
- Teaching strategies to include storytelling/yarning/dance/art and music.
- Respect/language/community.
- In-services pre-school programs.

Government

- Develop strategic partnership with Aboriginal communities to protect local communities and empower individuals.
- Create judicial and political employment opportunities for Aboriginal candidates.
- Develop employment protocols and strategies that embrace the diversity of Aboriginal people and their skills.
- Be accountable and flexible.
- Acknowledge the principle of best practice in community and develop appropriate screening register of best operators.
- Participate in ongoing cross-cultural training.

Getting the message out

- Target organisations with a community base to disseminate message.
- Develop posters depicting positive images of difference and diversity.
- Development employment opportunities and traineeships in media for Aboriginal people.
- Use of cross cultural awareness training in universities, government departments and for media personnel and policy makers.
- Government support for Aboriginal films or films depicting a diversity of Aboriginal people with positive messages.

Cultural strength

- "Return to Country" – support for the "homeland" movement.
- Work on continuity and resilience of culture.
- Record family oral histories in written form to strengthen cultural awareness in our youth.
- Respect for self and others, particularly family and community.
- Respect Aboriginal customary laws and practices to empower cultural freedom.
- Unpack the shame factor and embrace a process of healing.
- Acknowledge successes of Aboriginal people and create mentor programs that encourage Aboriginal youth to learn from these role models.
- Target influential people to be supporters of the cause. Use appropriate range of people including youth, men, women and Elders.

(e) Cultural rites and rights

This group's focus was the acceptance/embracing of rites and rights of Aboriginal people:

- Burial rites: including taking the dead back to homelands without government and police interference.
- Conflict Resolution Groups to mediate between families in times of grief – Elders and law people involved.
- Access and exit from homelands, through Elders and law people – proper protocols to be adhered to by everyone.
- Elders to be consulted on all business in the area – not just selectively.

Rites / rights of parents, grandparents

- Acceptance of Aboriginal parenting, and childcare practices.
- Inclusion of Aboriginal Elders who have first and final say in childcare placements.
- Currently, agencies do not negotiate in a culturally appropriate way with Elders.

Marriage, inheritance

- Acceptance of Aboriginal marriage.
- Respect for skin groups, totems and moiety.
- Inheritance rights are given by both parents to designated child, or eldest child, depending on local custom.
- A need for the law to accept the veracity of oral as well as written testimony.
- A need for the law to accept Indigenous inheritance protocols, re: Aboriginal identity, birth, homelands, custodianship of sacred or significant sites and rights to practice culture.
- A need for the law to accept the practice of Aboriginal marriage by being "promised" or "given away".
- Right to be an Aboriginal person in Australia without needing written documentation, instead based on oral history of individual and family.
- Right to speak/write in own language in courts, with police and in other legal contexts.
- Right to freely associate in public parks and on street corners.
- Right to request Aboriginal elder/lawperson as "significant other"/advocate where language or culture presents as a barrier.
- Right to child custody access, where child safety and/or Aboriginality are in jeopardy.
- Family Law issues are immensely complex for participants; need more research on the impact on Aboriginal people and a process of dialogue on the issues.
- Right to Bail according to means on own recognizance.

4. Summary of main recommendations

- The Western Australian Government to recognise and respect Aboriginal Nationhood and Sovereignty.
- Two Elders from each region to be involved in the Aboriginal Customary Law project.
- Ensure Minister for Aboriginal Affairs is an Aboriginal person – consider having two Ministers, a man and a woman.
- Aboriginal affairs is a national responsibility, not just a state issue.
- There should be positions reserved for Aboriginal people in politics. Including Aboriginal parliamentarians sitting in a “House of Law”.
- More Aboriginal police officers and other similar positions.
- Need for dual laws working in partnership.
- Legal representation and support = white legal representation and support. Aboriginal people receive poor justice.
- More needs to be done to understand why Aboriginal recidivism is high.
- Government to recognise prior debt owed to Aboriginal people (Section 70 of the Western Australian Constitution – reserving 1 per cent of state revenue for Aboriginal people should not have been repealed – current calculation should be 5 per cent).
- In principle, agree to a Peace Accord: Aboriginal people agreement with each other recognised by UN (World).
- Recognise and accept usage of Aboriginal passport by Aboriginal people (self determination).
- Aboriginal delegation to investigate Aboriginal system of governance and autonomy with UN.
- The Western Australian Constitution should be amended to recognise Aboriginal sovereignty including representatives in Parliament, in political parties or a separate Aboriginal political party.
- Develop community programs that promote positive images of Aboriginal people to all Australians:
- Strategy of changing opinions and beliefs about Aboriginal people and culture.
- Owning prejudices and ignorance – accept as a shortcoming and accept change.
- Aboriginal communities need to “act” against racism, prejudice and discrimination – use Aboriginal Ombudsman and other agencies highlighting racism and discrimination.
- Recognition of Aboriginal protocols within government structure – local jobs for local Aboriginal people.
- Recognise and fund Aboriginal Disputes Agency that government and Western Australian’s can use.
- Recognition of Aboriginal laws of marriage, inheritance, land and skin groups.
- Good parenting skills and practices should be encouraged and supported.
- Aboriginal people should have the right to speak their own language in courts (need for language interpreters).
- Recognise that Aboriginal customary law is passed down orally (not written).
- Right to be Aboriginal in Australia (without documentation).
- Right to meet and gather on own land.
- Right to bail according to means.

ARMADALE

2 December 2002

*"Knowing where you are from, who you are and where you can go,
these are Aboriginal customary law rights."*

Participant at the Armadale consultation

Introduction

The Armadale consultations considered a wide range of issues. Many of themes were similar to those raised at the previous consultations (Manguri and Mirrabooka) but a number of new issues were also discussed. The themes included the meaning and importance of Aboriginal Customary Law; how Customary Law is recognised by Aboriginal people; the main issues facing the community; and the capacity and mechanisms to bring about change.

These themes, as addressed at the Armadale consultations, are best summarised under the following headings:

1. Context and underpinning issues;
2. The "big picture" issues;
3. Governance;
4. Recognising and implementing customary law;
5. Connections between Aboriginal customary law and "white" law;
6. How can we bring about change?
7. Priorities for reinforcing and recognising Aboriginal customary laws:
 - (a) General cultural recognition
 - (b) Legal processes
 - (c) Children, adults and family: the way forward
 - (d) Substance abuse

1. Context and underpinning issues

Participants stressed that it is crucial for the long term success of the project that the WA government is genuine in its commitment to the "rightful process of engagement": that is, for local family-based leaders and elders to be involved at all levels of planning, management and administration of the government response. This will need to occur at the local level in order to recognise regional and cultural diversities.

ACL issues will need to be appropriately defined with the rightful custodians of this knowledge. Participants stressed that there will need to be discussions on how this occurs at the local level. At some point detailed "case studies" and "focus groups" within families and communities in their cultural regions will be required.

There is a need for family-focused solutions to matters of law but the State must also recognise that political and economic issues (including sovereignty) connect to the acknowledgement of Aboriginal customary law. Aboriginal Laws came first but loss of land has meant loss of an economic base and created a welfare dependency. Immediate action is needed to examine changes to write Aboriginal people [First Australians] into the WA Constitution and to recognise their special status. This needs to be done in a climate of reconciliation, prior rights and social justice.

Aboriginal identity must be accepted in its contemporary forms: not by reference to outmoded stereotypical notions of the “primitive-fixed in time” or the “mystical-romantic noble savage” but by reference to the lived realities (urban, remote and rural). Our culture, spirituality and laws have not been “washed away by the tides of history” but have been preserved and evolved within families, communities, relationships and belief systems.

Knowledge of Aboriginal models/forms of governance and cross-cultural training is critical for all Australians including Judges, Magistrates, Lawyers, Police and Prison staff through the teaching of Indigenous Australian Studies. Intensive cross-cultural consciousness training should include “on-site” experiences in urban, rural and remote communities.

A range of new strategies is urgently required within public institutions, [including the media] to address the embedded and continuing racism which is still prevalent and continues to impact negatively on Aboriginal peoples. Long-term government strategies are also required in the form of strategic staffing and operational plans so that Aboriginal representatives have identified seats as Ministers, politicians, lawyers and advisors.

There is an urgent need for specific programs for Aboriginal youth, their families, leaders and elders within preventative and diversionary programs. Government must think in new ways: over-policing is not the answer and only exacerbates underlying cycles of disadvantage and lack of opportunities.

The consultations frequently stressed that it is difficult to address Aboriginal Customary Law given the continuing negative effects of dispossession and the exclusion of Noongar people from the economic, social and political life and development of the Australian Nation.

“Need for recognition of the initial theft of land, language, culture, stories, all the laws that governed us. Need for a treaty to deal with this past treatment.”

The denigration of Noongar law, culture and human rights at all levels was experienced during the British occupation and invasion. Land was stolen, never sold or given up through treaty or legal agreement with the custodial families. Despite this, the relationship between Aboriginal people, land and place survived.

“Noongar law must be upgraded and uplifted- the history must be told and exposed-both good and bad.”

Aboriginal customary law has survived within strong family structures until the present day despite the fact that governments and urbanised environments have superimposed forms of Western governance.

"Family decision-making structures to be recognised, without the influence of outside authorities."

Aboriginal forms of maintaining law and order and honouring family and individual rights continue to occur in a diversity of forms across rural, remote and urban locations with some areas experiencing change and adaptations as a result of contact with European government, missions and society.

"The Noongar language and culture centre must be re-established."

The "payback" form of punishment still exists within communities and is often administered by family leaders to individuals who have "broken the law". However, some individuals are then punished by both sets of laws and others face jail for administering payback.

The notion of "community", constructed by past government policies and which regularly informs government discussions on Aboriginal matters has often restricted, oppressed or destroyed the localised family-directed and informed, traditional forms or "tribal" structures, thereby excluding Aboriginal involvement, self-determination and management.

The need for Aboriginal families to reclaim, reteach and restore the prior Aboriginal forms of law and order is paramount, so that the discipline of children by families and adult actions within communities strengthens "culture", "law" and "respect", and restores local governance, control and cultural knowledge for the future survival of Aboriginal peoples.

"Resolution of conflicts is better when old ways of immediate response is used by families."

Respect needs to be acknowledged by both Aboriginal and non-Aboriginal towards each other, towards leaders and elders, youth, parents, grandparents, children, the land and what's on it, including people, plants, animals, land and sea environments.

"Who are the Noongar elders? Who are the traditional people from this area? ...The rightful and traditional families from the areas must be involved in any kind of government projects or programs for customary law."

2. The "big picture" issues

Aboriginal systems of localised customary laws as they exist today and in the past must be both recognised (acknowledged) and supported (validated) within the government within its public organisational structures, policies and practices (including the legal, political and education systems) in order to upgrade and elevate the status of Aboriginal Australians within Australia's Nationhood

"Aboriginal people [status] need to be upgraded, uplifted, need to have pride and recognition of how Aboriginal people lived before the white people came-Aboriginal people are still hurting-now degrading other people [due to this hurt]."

Constitutional changes should be made to recognise the importance and existence of Aboriginal peoples within the State, their Aboriginal Customary Laws [prior to British occupation of Australia and present day forms] and the

diverse and localised nature of its practice within Aboriginal forms of governance to maintain law and order.

Aboriginal Family clan structures and their localised and regional histories, heritage and laws should be acknowledged by the inclusion of "rightful" leaders that are defined/nominated/elected by their own families who represent them in a range of customary law matters negotiated between families and government.

Responsibility is throughout families, not just parents but grandparents, aunties, uncles – all can discipline now-[stolen generation times has meant that] no-one knows the correct way to parent ...because we don't live in the way that traditional people live....we must find new ways...people don't understand the role of the Noongar Patrol-they are trying to help the people...if you are not a responsible parent you can't blame society for what your kids are doing.

The reteaching, relearning and continuity of customary laws, practice and teachings must be done using "Aboriginal Ways", as described and negotiated by its rightful custodians within localised family clan structures whose members hold and practice the knowledge within current day Aboriginal family realities.

What is Bibbulmun Law? Do we know? People today are making up laws because of the ignorance of white people. This sets a precedent-they are the contemporary laws not traditional laws...white people are being told that the wrong people are elders because [government] needs leaders for certain things like ATSIC regional councils etc.

Aboriginal Customary Law must be returned to its own space with Aboriginal families having custodial ownership. Governments should create opportunities for this to happen through commitment to change, driven by a spirit of good will, social justice and reconciliation. Total involvement with Indigenous Australians will effect a better future for all Australians.

Aboriginal laws have to stay in their own regions-can't have Noongar law up north or Kimberley laws down south-it doesn't work.

This project may see Aboriginal customary law "get diluted so much to fit into white law that it is not able to be recognised...have seen kids in their cultural environments and they have no traditional education either...in remote areas they have their law and they don't need permission from white people. White people should listen to Aboriginal law first-not impose white law."

White people won't change law to suit Aboriginal people; there have been many attempts; promises before; need a treaty first; this is a good exercise for Aboriginal people but won't come to anything...white laws look after white people; need same treatment [as white people].

Education for all Australians about the true history and laws of Australia's past, [especially the historical period of British occupation and the affects of colonisation on the original Aboriginal peoples] and its resultant relationships between all who currently live in Australia in order to restore a balanced,

cross-cultural knowledge base that teaches respect for Indigenous Australians.

No recognition of some of the old people who got things done for everybody [like setting up ALS, AMS etc] under ACL had traditional spiritual healing people – white policy of voting people in (e.g. ATSIC) is wrong because only recognises one person for an area where there may be many elders.

Schools are not [always the best] place because their way confuses rational white thinking with Aboriginal spiritual thinking.

The role of Aboriginal families to manage their family affairs should be reclaimed and restored, with parents and grandparents and recognised by government as the appropriate and rightful carers and authority figures for their children. Strategies should be put into place to effect this in the wider community and within government structures, policies and practices.

Aboriginal ways of giving people a function in the community, that is ACL-What is the process for people to become an elder?-this has been diluted-what is the ACL way to elect elders?-how do we bring this back into our culture today?

We need the people [elders/leaders] who are the closest to those traditional people of yesterday [to be involved in this project and share knowledge about ACL].

Aboriginal Customary Law had responsibility for economics which was shared by community-family structures carried this out-ACL has ways of understanding family structures/responsibilities.

Aboriginal children's safety, care, health and well-being are paramount issues that need to be addressed for the continued viability and future of Aboriginal families and customary law practices. All governments must ensure long term commitment and action in the community happens, with Aboriginal family involvement at all levels of policy, planning, program management and service delivery.

"We need a safe place for kids."

"Kids today are in trouble because of [the effects of] the 'stolen generation' times-people who didn't learn traditional ways -and how to be good parents-they didn't have any parents to learn from-they were taken from them young."

"We need a system-a place where we can put them [kids] away and get them better-not be jailed...problems with young girls getting pregnant."

"In this area, plenty of substance abuse -need health workers, hospitals to look after them [the kids] not jail!"

"Where are Aboriginal kids playing sport? Should have more sports and activities to stop boredom!"

"[Some] kids not looked after at home, parents are on drugs etc so kids are going into town to get a feed from the white fellas...some kids have no hope-they sniff glue for that

reason...some kids in Perth, seven years old, sleeping rough because some parents are unable to look after them."

"Aboriginal people need to discipline our children-they are going astray; need Aboriginal law back to allow parents and families to discipline own kids and get respect back" ... "glue sniffers need law against the kids doing this on the street; need the right to take the bottle off kids; take the glue."

"Parents must be able to hit [discipline] kids and bring them home."

"But sometimes, no-one is responsible at home, when they bring them home!"

"Need type of initiation from 11-12 year olds, need a program to make/help kids to understand how white and black society meets, need to explain welfare, drugs, educate them."

"Initiation: young people taken from own people to learn of other laws-should understand their dreaming and stories and land forms; spiritual should infuse everything; this place is a burial place [where meeting is]."

"People need to look into own community; white people keep all the records and don't share with Aboriginal people."

The knowledge and histories of past experiences and information about customary law practices held by stolen generation people be acknowledged, remembered, recorded and shared.

"Stolen generation people do have knowledge [of customary law] from before missions."

Localised Aboriginal "models of reconciliation" be recognised, and established within community and government to resolve and address issues of anger, anguish and traumas experienced by families as a result of past government policies and practices that continue this dispossession and oppression into the present day lives of Indigenous Australian people.

"Community meetings can help kids-schools need funding to run programs to educate children and then parents can learn too-we need language programs for parents and kids too."

"Aboriginal people did not have prisons-they were dealt with according to customary law-family solutions is needed-they don't impose laws on anyone else[everyone knew what the law was!]"

"It's different for black and white [people] how they are treated."

"The ACL system well, it is changed by white people (law makers) white 'rational thinking' which is far removed from Aboriginal Customary Law-this will lead to oppression of Aboriginal people."

"What is needed is cultural awareness in schools!"

National and public holidays be established within the state and nation to heal the past and to celebrate the future for example a National and State-wide

“Sorry Day” to remember specific events in history that have affected Aboriginal Australians.

“For some people, it’s too late to reconcile-too much hurt and anger inside them.”

Need long-term commitment [financial and ideological] from state and federal government to ensure equity and access in terms of economic and other opportunities for Aboriginal people.

“Funding [for Aboriginal programs] short term, not good-need long term-best way is to train kids for jobs-CDEP should be abolished [in its present form] because there is no continuity after 6 months on the training program-kids go back to what they were doing before-they need jobs waiting for them [at end of training] ...programs for Aboriginal people are doomed to fail because of limited funding-need long term answers.

Aboriginal people must earn their money [in employment] not have hand outs – [organisations like] Noongar Patrol should get paid for looking out for white businesses and organisations [as they are playing a security role for people and their property].

We need to straighten out the system, but we still have to live within the system.”

3. Governance

Systems of governance in Australia today copy and impose the Westminster model. Governments need to change policies/ways of doing business within Aboriginal communities and Aboriginal people need ownership of change. ATSIC is the peak body that drives Indigenous affairs but, whilst it purports to serve Indigenous needs, often the system does not allow enough accountability and feedback to the communities it serves.

Past experiences of getting government to listen and act responsibly have been frustrating; there is therefore a danger that the ACL project will be corrupted by non-indigenous society as it is put within the operations of “white” law.

Government structures minimise the reality of Aboriginal family structures and given them inadequate representation in programs and the administration of policies.

As a foundation for effective governance, the WA Constitution should be changed to acknowledge WA Indigenous peoples. Compensation for Aboriginal peoples should be obtained through the securing of the 2% of revenue that was negotiated by British Commonwealth with WA government and later repealed by legislation. Consideration should also be given to the appointment of Aboriginal Ministers in state and federal Parliaments to holistically represent Indigenous peoples needs. It is no longer acceptable for non-Aboriginal people to hold positions that misrepresent our views and needs, or to set policy directions.

Organisations that support the continuation of Aboriginal cultural knowledge and practices must be given long-term support. It is wrong that Aboriginal

organizations are constantly required to “prove their worth” instead of being provided long term resources.

Family solutions and strategies should be recognised as the “right and appropriate” way to resolve Aboriginal issues at all levels of government and community programs; and individual family units should be involved in resolving their own issues and not in making decisions that fall within other families responsibilities, these responsibilities and rights are commonly known and recognised across the state within Aboriginal communities.

4. Recognising and implementing customary law

The consultations emphasised that the recognition and reinforcement of Aboriginal Customary Laws would have a beneficial impact on Aboriginal peoples’ self-esteem and knowledge. This, in turn, would reinforce boundaries of appropriate behaviour, especially amongst young people. The main points included the following:

- Need to look into the old forms of ACL and initiation stages for children and the teaching of the laws to children from the perspective of the two cultures – Western and Indigenous. We need historical journeys for children back to old places, to teach the old ways again with the rightful elders/leaders/family custodians of knowledge.
- People must be given the opportunity to re-learn and re-teach their own cultures about Dreaming, land and places. Because of the past, communities and families are disempowered. Therefore for Aboriginal customary law and order to function well there need to be programs that aim to restore and return cultural environments.
- Each region must keep its own laws. Elected representatives must acknowledge the ACL way, and not interfere in the cultural business, responsibilities or decisions that are not their responsibility. Practices must be Aboriginalised and reflect true custom not forced to change to fit government needs for efficiency/expediency. The most appropriate people to guide in issues of ACL are those who have been closest to old laws and traditions; they are the rightful ones to be involved, not just people who have western education/law.
- If Aboriginal controlled family/community based programs are supported with adequate levels of support-funding and people, then ACL ways of dealing with “out of control” children can be adopted (including more forceful discipline without the threat of intervention by the Child Protection Unit).
- For ACL to have meaning, Aboriginal people must be empowered to take on the responsibility of returning to old laws, and of educating the youth into respect for themselves, families and country, so that previous ways of travelling into sites/places can be revitalised and “cultural dreaming tracks” returned to the original custodians.
- All must acknowledge the past and continuing affects of Christianity on Aboriginal spiritual traditions. These must be exposed and critically examined in workshops/courses so that Christian traditions don’t override Indigenous ones.
- There has been a tradition within Australia of archiving and “bottling-up” our cultural knowledge told in confidence to early writers/researchers. Access to earlier research and academic works about ACL should be returned to the rightful families and communities.

5. Connections between Aboriginal customary laws and “white” law

The consultations addressed a number of difficult questions with respect to how Noongar law fits with “white peoples’ law”. Inevitably, discussions returned consistently to issues of dispossession and colonisation:

- There are issues relating to inter-generational responsibilities as a result of “stolen generation” times. Remember also that times are changing, people are adapting to new ways and all cultures are. We need to be given the opportunity to define our own terms of reference about...What Noongar Law is!
- Today there are few demonstrations of the proper Noongar decision-making model. Culture and language must be returned so that we regain our respect for self, children and family.
- Parental rights and responsibilities must be returned so that the family can be part of the solution for addressing children’s futures and opportunities; intra community conflicts may be reduced if things are done the right way according to ACL.
- Families/communities need programs so that individuals understand their rights and the role of different agencies.

6. How can we bring about change?

Throughout the consultations, there was a strong focus on the importance of education for both Aboriginal and non-Aboriginal people.

- Education programs teaching both sides of history should exist in schools.
- All teachers should receive cross-cultural awareness and anti-racism training.
- Library guides and warning notices to be placed within the front of books/films/education kits about any sensitive and sacred materials contained within. Often these materials have been collected by white researchers who do not realise the cultural significance of the material or the inappropriateness of Aboriginal children accessing them.
- Programs for all Australians to gain knowledge about how white ways have affected the way that Aboriginal people do things today.
- Stolen generations need increased programs for counselling; their children need support to understand the history; and parents who were stolen children need to return to the places/sites they belong to, so that their identities can be reclaimed, their healing can begin, and future generations will not have to deal with unfinished business of trauma, pain and grief.
- Stolen generation people have a wealth of knowledge and experience that needs to be shared so that the whole nation can heal with their stories.
- Intergenerational traumas play out with self-destructive behaviours that can lead to being targeted by law enforcement agencies: “We are not criminals—we are reacting to hurts and traumas that have never been resolved”.
- We must create again the intergeneration of knowledge, language and culture where children and adults learn in the community/family about our own people’s history - stories of Yagan and others.

- Councils can set up proper cultural advisory groups with all families represented across the board and create ASSPA committees in schools and homework centre programs so that Noongar people work better with each other and not in competition for the limited resources.

7. Priorities for reinforcing and recognising Aboriginal customary law

Smaller focus groups considered priority areas, including the question of how Aboriginal Customary Law can be recognised by “white law” and be enforced and respected in Western Australia.

(a) General cultural recognition

- Aboriginal culture and history existed in Australia before colonisation and indigenous people had a 40,000+ years of occupation and history prior to colonisation.
- When Aboriginal people meet each other they ask-who are you? Individuals often give their family and birth connections to people, place and events that go back thousands of generations within Australia-not just a few years of migrating here from overseas destinations
- It is important Aboriginal history be revitalised and respect. Families can learn more from older records [archives-Berndt Museum, SA Museum] and old people, and family files kept by government within old departments of AAD [Aboriginal Affairs Dept/Aboriginal Affairs Planning Authority].
- Aboriginal people must be thoroughly involved in the tourist and travel industry and royalties which are collected for national parks and tours to country should be paid into an Indigenous fund which can be distributed direct to Indigenous people to elevate their economic opportunities.
- Elders must be empowered to maintain local knowledge and culture, and where it has been taken due to past policies, this knowledge must be taught again to families.
- Indigenous people must have input into rewriting the Constitution so that it acknowledges our prior occupation, our current situation and future position.
- Monuments/plaques/statues should be erected in public places honouring the original groups of the land with local history information presented about the lifestyles of past and present family groups and organizations.
- Re-naming of important and historical sites that place Noongar history side by side with colonial history – for example renaming railway stations/public places with original Noongar.
- Long-term management plans to include Indigenous peoples in the preservation and maintenance of sites, “walking tracks” and natural parklands or animal and plant species protection within their environments. Environmental care programs utilising Indigenous people their systems of knowledge, land management practices and traditions, like “fire-burning or fire-stick farming” techniques so that bush fires don’t do widespread damage and so species are protected.
- Recognition, use and maintenance of Aboriginal spiritual cleansing and welcoming rituals like “smoking ceremonies” or language welcomes within government ceremonies and sittings of parliament.

- Fishing, hunting and gathering rights licences be given to Aboriginal people, their families, communities in recognition of our heritage and culture and continuous cultural practices.
- Land grants and funding programs be made directly to families so that cultural continuity is realised and educational, training and employment opportunities are created on the land to improve the well being of families.

(b) Legal processes

There was general concern that white law and lawyers do not provide adequate support or recognise cultural difference. A range of strategies was discussed to try to address these matters, including the following:

- Elders of the families should be empowered to resolve the problem of feuding. White law doesn't address the problem but just puts more people in prison.
- Elders should have more authority at a stage prior to formal contact with the white legal system.
- Elders should have special justice status along with judges, magistrates and be able to identify and address disputes.
- Prisons are bad places; they involve abuse and violence and do not rehabilitate. Imprisonment also exacerbates families' problems. There is a need for Aboriginal-owned diversionary programs
- Aboriginal people need to learn old ways of respect for law, learn about cultural ways and how to heal. To this end, Culture Centres should be established to have responsibility to address these issues in partnership with relevant agencies.
- Aboriginal law is the ancient law and needs to be brought back in to restore patterns of law and order and systems of respect for people, land, property and maintenance of order. This is needed for non-Aboriginal people too: they live in Australia but don't know what the first law was.
- Youth and stolen vehicles and driving without licences need to be addressed. The government should re-establish the driving programs at Clontarf and Cannington.
- Constant levels of inappropriate police conduct and responses towards Aboriginal people resulting in over-policing and targeting of our youth for what is perceived by them as anti-social behaviours are often misunderstandings not misconduct. A cross-cultural consciousness needs to be developed to address these issues.
- Aboriginal police and night patrols should not be law enforcers for "whites' interests" but should have a on-going and empowering relationship with the Aboriginal people, the community and elders they represent and serve.
- Aboriginal children often do not understand what is required of them within the court system and so inadvertently offend the magistrate due to misunderstandings in manner, dress and stance-need for education programs about this by the ALS and lawyers who represent Indigenous children.

(c) Children, adults and family: the way forward

- The main discipline is by parents, grandparents, also assisted by children's/adults aunts and uncles. Due to the stolen times, this form of discipline needs to be taught again. White laws about children's rights are often used by children as a threat against parents who attempt to discipline their child for wrong-doings.
- Welfare and Adoption legislation were a colonial tool for oppression against the Indigenous peoples. There is a need to repeal these laws.
- Safe sex education programs are needed in areas of high Aboriginal populations and especially in primary schools grades 5,6,7 together with the local Aboriginal medical services and with Community Health Services.
- Truancy of children must be examined for reasons why they leave school early or don't want to attend; and then culturally appropriate programs of support with Aboriginal staff be established to increase retention rates.
- There should be follow-up programs for youths' progress in school and later increased support in job seeking and career decisions. More responsibility should be given to AIEO's and ALO's with the "duty of care" clearly spelt out in their job descriptions.
- Those families who have been identified as requiring support in their parenting to be monitored and supported with culturally relevant "Aboriginal granny power" community structured programs.
- If Aboriginal families are to survive the next decade there needs to be the establishment of land and home grants to be extended for all families who can be established by the Aboriginal community as constantly "facing financial hardship".
- Establish economic and family enterprises for Aboriginal families to run own shops by "grants-in-aid", for example, "second-hand clothing and goods" and other family co-ops like bulk-foods etc., these "grants-in-aid" to include appropriate training and education for management of staff and enterprises.
- Eviction of families for "anti-social" behaviour only exacerbates the family housing problems-problems should be resolved through mediation and family conferencing-needs to address racism within Homeswest against Aboriginal families-evictions just lead to overcrowding into other families homes.
- Problems in housing and anti-social behaviours should be resolved in joint meetings with local shire councils, police and Noongar community towards a local solution that empowers the aboriginal community not further disadvantages them.

(d) Substance abuse

The participants all shared major concerns about the prevalence of substance abuse and the need for innovative strategies to address these issues. The main points that were raised included the following:

- Drug and substance abuse should not be a criminal matter but a health issue.
- There is no suitable drug rehabilitation or detox system in Perth for Aboriginal people.

- We need local laws to protect the youth and children against the rising incidents of glue and petrol sniffing – for example, allowing the police to remove these items.
- Agencies should co-ordinate “family circles” with families whose children are petrol or glue-sniffers or are involved in other community misdemeanours.
- Community education seminars are required on drugs, with Aboriginal people employed to get these messages across.
- Councils should become active in addressing these issues and establish active Aboriginal Advisory Committees who have a wide representation of families in their shire and clear job criteria.

ROCKINGHAM

9 December 2002

"I'm happy you've come here to sit down and talk, think and see."

Noongar Elder

Introduction

The Rockingham / Medina consultations showed that there are many concerns that are common across the metropolitan area; but also that there are some issues that have a particular resonance in each area. The main issues that were addressed are considered under the following headings:

1. The project structure and objectives
2. Context and underpinning issues
3. Broad areas of concern
4. Education
5. Police and the criminal process
6. Housing
7. Reclaiming Noongar customary law
8. Promoting change

1. Project structure and objectives

At the start of the consultation, questions were asked about how the Law Reform Commissioners, Special Commissioners and Research Reference Council were appointed. It was pointed out that there is no Noongar Special Commissioner. One participant also asked whether it is the opinion of the WA Law Reform Commission that Noongar Law is in fact "dead". It was also noted that Noongar elders had not signed off on the "terms of reference" for the project and that some had also not signed off on the "Memorandum of Commitment".

Professor Ralph Simmonds provided a detailed background to the project. He noted that the terms of reference were the responsibility of the Government and had simply been entrusted to the Commission. He pointed to the broad membership of the Reference Council (with representatives from all regions), emphasised that there is no view that Noongar law is "dead", and added:

"The Aboriginal Community Consultations are about embracing Aboriginal Customary Law and to take the advice of Aboriginal people to make changes...important to remain open and to share... We are independent of State government, therefore we can report freely your advice...so that a living document can be prepared that truly reflects the Aboriginal Customary Law matters that should be taken into account-this is the beginning of that process."

Concerns were also raised that the final outcome of this project might end up being further dominance of white law over first nations' land.

However, despite such concerns, the consultation generated passionate debate and unanimity on many matters, one of the elders remarking that:

"We will do our best to implement our Noongar Law to bring back respect today."

Participants also stressed the importance of holding a forum at the end of project to discuss its outcomes: "Don't just shelve and archive it."

2. Context and underpinning issues

Many members of the audience felt that aspects of Noongar Law had disappeared due to the effects of colonisation and the restrictive and racist policies which followed. However, although "ritualised initiations" had been disrupted, many aspects relating to family, law and order had survived and a range of best practice models could be extracted from "yarning about family history" and the experiences of Aboriginal Customary Law within those families who had actively preserved their languages and customs despite the genocidal practices of governments and missions.

Gender based issues were also acknowledged. There was agreement that these had to be unpacked in more detail as historical records show that the south-west peoples had both matrilineal and patrilineal models of kinship which in turn translates as men and women having customs linked to law.

It was said that Customary Law for the Medina/Rockingham community of people means the return of respect for Indigenous Australian people; and that it would be desirable if the consultation processes included having elders of each region working alongside the younger western educated facilitators of these consultations.

3. Broad areas of concern

The consultation revealed numerous issues relating to law, language, culture and family – and the effects of colonisation:

- Law has died out for [some] Noongar families and many have intermarried with other groups. How do we separate them so that they can be true to their own laws?
- "Noongar law is tracked back to the mother's line-we should all join into the one fight for the same cause."
- How many people know Noongar language? Some families stated that they wanted to learn from their own elders not others peoples who come from different areas.

"Younger and older people who are educated should help the elders to fight for their people's issues."

"Need things in the community for kids to do and without being thrashed and beaten for wrongdoings by the police- funding is needed for this but 'white man' has control of the money [and make their own decisions on how it is spent.]"

"Where are the ATSIC commissioners? They should be attending meetings like this instead of pussy-footing around."

- Some discussion ensued on the changing role of men and the loss of status and pride as contemporary warriors on their own land. Stolen generation people faced these issues due to government policies of separation from families, removal from family's land base and their access to their relatives who were custodians of law and cultural knowledge.

"In the past, my family has been put in jail for teaching language and culture, for teaching the corroborees to our children and family."

"The biggest issue is that there has been a breakdown in respect for Aboriginal people, our culture, our laws!...so kids today are getting into trouble with the [white man's] law."

It was suggested that, in order to return respect to Aboriginal Customary Law, the following issues need to be taken into account:

- Elders should sit with judges: "There should be two Wongi's, two Yamatji and two Noongars on the bench with the Magistrate to represent the families from the Perth region."
- Projects should be sustainable and culturally appropriate providing employment and training for Aboriginal workers who are family members of the children to continue the respect systems that are part of Aboriginal Customary Law. Such law was never enforced by strangers but by someone who had built up a relationship with you.
- Each area, according to the language has its own laws: Noongar, Wongi, Yamatji systems. Practical responses to including ACL within white law must hold this principle in high regard for outcomes to be culturally appropriate and just to the individuals concerned. However, "whether you are Noongar, Yamatji, or Wongi you are subject to the laws of the land that you are currently living on...there are similarities between Aboriginal Laws; we can understand each other's laws."

Here it is Whadjuk country-this must be respected-Aboriginal cultural protocols must apply at all times...Government should stop classifying us in "white man's terms":

"People who break law should be punished by their own law – Noongar kids must stay in Noongar country for their punishments."

"The Noongar language must come back to be taught to the families to return this respect through the law and through the rightful language that carries this law."

"Today, we as elders have to go back to our traditional ways...it can be done - we as people now from this day – at the present day - we don't go out to our areas and teach our children about the land...we must start to do this again...give the history and culture back to the children to build up this respect again for law."

"There should be 'culture camps' again for kids who get into trouble to teach the children respect for their laws, land and people...children should walk the old tracks again".

Participants also listed a range of other issues that impact on the project:

- Destruction of sites
- Identity – crisis
- Stereotypes – what is traditional
- Destruction of art
- Disrespect for cultural boundaries
- Breaking the law (for example, by claiming the wrong land or not respecting land/boundaries)
- Making decisions behind closed doors
- Family breakdowns/strengths
- Dreaming: Stories and False claims
- What is authentic? And who has the right to authenticate or define?
- Commodities, culture – tends to be devalued or made “kitsch”
- Ignorance and greed
- Marriage/family kinship/skin ties give permission for involvement with respect to share knowledge/skills
- Individual action for respect
- People from country introduce visitation to places/sites – protocols/practices and responsible behaviour to disclose or not
- Respect cultural boundaries when knowledge is shared
- Recognition of ancestral stories
- Connect across the land
- Meanings must be known – land rights be recognised/respected/validated
- Reclaim stories from archives
- Past history of union activity/role of missions impacted on Noongar people

4. Education

- In South Australia elders and custodians have a say in how Aboriginal studies are taught in the schools, that should happen here in WA with Noongar involvement with schools and EDWA.

“We need to teach Aboriginal language and culture again, in the past our old people were put into jail for teaching about our languages and laws!”

- Black man’s story has not been presented – we must present the truths of our people, history and culture.
- In the past the white law put Aboriginal people off the streets at 6.00pm due to the curfews to prevent Aboriginal peoples movement on the land, this history must be understood and reasons behind these laws and how it affects our contemporary knowledge about white law and the treatment of Aboriginal people in it.
- We see Aboriginal kids in Banksia Hill Detention Centre for minor things. They shouldn’t be jailed, but dealt with by their own elders, families and

communities to bring back respect for old ways and respect for law- if the law doesn't respect them how can they gain respect for the white man's law?

5. Police and the criminal process

- Police have to be held accountable for their actions towards children who are involved in the high-speed car chases. Kids have died, but there has not been proper investigation into the cases. "We must encourage all parents here and elsewhere who are affected by this to make sure investigators are doing the job properly...kids have been beaten by police!...Aboriginal investigators might help."
- Police Violence still a real and immediate issue with Aboriginal youth and adults who come into contact with them: "We know from our families' experiences that kids who get into trouble with the police are being flogged by police, that's not white law or black law."
- Adults/responsible people must be present when children interviewed by police and the Police Act should urgently be reviewed / changed
- Aboriginal people are feeling helpless, and the legal system doesn't appear to be representing their interests in defending their rights within white law, just processing them for courts and pleading guilty for expediency. The ALS are too busy dealing with what is classified as "criminal" cases and should be funded adequately to look at other civil and domestic law issues.

"The ALS always seem to be too busy-lack of services to the 'black-man' – they are all white [staff] and why aren't they [ALS] employing Aboriginal people to do these jobs?"

- Aboriginal investigators are needed (and agencies such as the Anti-Corruption Commission should get an Indigenous perspective
- Aboriginal community advocacy services and training to be provided to get law matters dealt with fairly and justly
- What about government statements on Reconciliation? They should work with people to address the issues of law and order-not victimise and demonise the Aboriginal community
- The Aboriginal Visitors Scheme [AVS] has broken down-Prisoners are not getting the proper critical care and treatment identified in the RCIADC. "We need someone there with voice-to ensure that kids aren't flogged in jail."

"Parents are not allowed to hit kids and because of white man's law, governments [in the past] have taken this [parental control] away and communities are still paying for it."

6. Housing

Housing emerged as a core issue. The "extended family" nature of Aboriginal families and the obligations imposed on families by Customary Law often means that people who are evicted go to families who still have housing and this results in overcrowding in unsuitably planned housing.

- Homeswest needs to adjust/change to suit the specific needs of Aboriginal people and reflect these realities. They may need house that have more than 5 bedrooms. Building plans/designs must cater for Aboriginal peoples' lifestyle: Houses that are appropriately built (for example (5 bedrooms) Granny Flats attached to 3-4 bedroom units or houses will satisfy the short term needs of families in established homes):

"Those Houses that have been built especially for Aboriginal people need to be kept for Aboriginal people and utilise local culture groups (eg Medina) to allocate houses as they respect Aboriginal people's needs)...Make it 'real' don't pay 'lip-service' – departments should be made accountable...Government are set in their ways-too rigid and inflexible- not right for Aboriginal people's changing needs as family numbers is ever-changing as relations come and go."

- Consideration should be given to directing money for housing to people instead of being administered by "housing authorities that don't want to house people".
- The Aboriginal staff in Homeswest Housing Authority need proper training so that they can be advocates for Aboriginal families as in the recent past, departmental officials have put some houses that were built especially for Aboriginal families on the market for sale to white people once the original families were evicted from the houses.

7. Reclaiming Noongar customary law

There was great discussion and debate about the continued existence and relevance of Noongar law given the genocidal practices of government and missions: "How can we recognise our law if our law is not respected?" Historical treatment of Aboriginal people meant that some ACL practices went underground and others disappeared (especially from families who had been part of the stolen generation). However, it was also acknowledged that stolen children were often old enough to remember the old ways and carried this information on through the generations by their storytelling and yarning about the past and old ways.

"It [bringing Noongar customary law back] can be done – must now embrace Noongar history and teach the youth. We are damaging our Noongar culture if we don't take this opportunity and use this centre to teach the kids. We have a responsibility to learn Noongar stories and pass them on...this lady has a room full of Noongar information...you can teach yourself the Noongar language – it should be compulsory for kids to attend cultural camps – learn language, stories, respect and hand them on to others...some people want money for stories before they do any work...this is wrong!...not what Noongar culture is about...it's an oral history...teaching about this will bring about respect, keep children out of jail."

Many people within the meeting felt that "We are all together now and should fight for one cause."

Discussions were held on the historical treatment by government and missions and the pressures placed on Elders today to represent their communities. There was a role for the younger people to assist in reclaiming back the previous law and power bases for elders and parents.

Structures should give Aboriginal law full respect. For example, when you travel to another country you are under that law. This means that Aboriginal people should have proper representation on bench (with judges); that elders should be supported in teaching language and culture (in the past, they were put in jail for teaching law): "We have a history on Noongar Boodjah to teach our law ...We need to share our stories teaching our kids about the past, the kura."

It was agreed that we need to consolidate oral histories of places/sites where people were.

In discussions, the following facets of Aboriginal customary law were identified:

- Elders, warrior spirit
- Sense of belonging
- Land, heritage, identity, humility, price
- Giving, sharing, unity, togetherness
- Spiritualness to land
- Communal not exclusive or dictatorial
- Trust
- Family and upbringing, shared meaning and values, family based
- Role models
- Knowledge, cultural boundaries, custodians
- Ancestral ownership, custodianship

8. Promoting change

Participants noted that Blackman's law has been in existence for thousands of years and white man's law for just 200 years. This is Aboriginal country but Aboriginal people have had to adapt to white ways. This has caused many problems. Eventually white law took over black-man's law. How do we get around this? We must use the white man's law properly to respect Aboriginal people's needs.

A range of issues and strategies were identified, including the following:

- ACL needs land – otherwise you've got no place. Noongar land was taken not given.
- Policing prohibiting cultural traditions – kangaroo hunting/rights
- Constitutional changes needed for "Betterment of Aboriginal people" Commonwealth law and State Law need to be renewed to see if Aboriginals represented.
- In rewriting the constitution, don't blame the people of the past: address the issues today with respect– sharing with balance is needed.
- Parents/grandparents control should be returned to Aboriginal communities.

- Establish well-managed groups who advocate/network/liase with Aboriginal families (e.g. the Medina Cultural Group in this area); but proper resources are required – including vehicle, staff, 24 hour service, safe house from police and government agencies.
- Strong Aboriginal – controlled community justice organisations are required.
- Funds should not be tied so directly to government control but in community hands. It is important to empower community projects.
- We must be “right and strong – not yes people” – and must be strong enough to represent indigenous voices.
- Cultural/law people should be involved in all areas – courts – police – education – Justice (ALS).
- We should avoid taking sides or being selective in responding.
- Must be aware of the diversity of aboriginal groups.
- Surviving “tribal” people are key people for change.
- Knowledge kept in archives be treated with caution – need to de-construct/re-construct.
- Develop mechanisms to reconnect and revitalise ancestral dreaming through family/country/knowledge.

*"The spirit of our law is still there – it may be dormant,
but it will be revived".*

Participant at the Midland consultation

Introduction

The Midland consultation took the form of a large group workshop where a number of issues that concerned local Aboriginal people were discussed. Participants at the Midland consultation identified a variety of issues of concern, including youth issues, prison health and policing issues as well as the identity and status of Elders in communities. There was a particularly strong focus on youth issues by comparison with the other metropolitan consultations and a number of young people were moved to speak about the issues that most concerned them and offered suggestions about how youth issues could be better addressed in the Midland area.

The suggestions, recommendations and comments made at the Midland consultation are summarised under four broad headings:

1. Law and justice
2. Youth issues
3. Economic and governance
4. Meaning and recognition of Aboriginal customary law

1. Law and Justice

As at other consultations, there was a strong focus on developing more effective law and criminal justice mechanisms in the interests of both the Aboriginal community and the whole of society.

*"We need a different system of punishment that deals with
Aboriginal people in a culturally appropriate way."*

Criminal Justice

Participants voiced a wide range of concerns about access to justice, court processes and court administration and decision-making. The main issues to be voiced were the following:

- Inconsistency of sentences given to Aboriginal offenders and other groups of offenders.
- Lawyers too often tell Aboriginal defendants to plead guilty – even when there is not enough evidence to support a verdict of guilty if tried.
- Legal Aid access is not equal – there is discrimination against Aboriginal people in terms of Legal Aid resources.
- Magistrates should sit with Elders.

- Aboriginal people should be encouraged to become Justices of the Peace (“JP”), especially in the rural areas where JP’s sit in judgement on many Aboriginal people. The Department of Justice should openly advertise for Aboriginal JP’s.
- Aboriginal advisors are needed in courts and at police stations to explain police and court processes, sentences, how to deal with fines and ask for time to pay, how the Aboriginal Legal Service works and how to get Legal Aid.

Police

As at the other metropolitan consultations, a major concern was Aboriginal – Police relations and police attitudes towards offences in which Aboriginal people are involved as victims or offenders.

- The police get involved in high-speed chases – too many Aboriginal children die.
- The police do not give the same resources to the investigation of all crimes. In particular, crimes involving an Aboriginal offender and an Aboriginal victim are not given the same priority as where the victim is non-Aboriginal.
- Police should pay greater attention to the assessment of health issues when a person is received into police custody.
- Police should do more to stop youth sniffing substances – their powers are too limited – they can’t take away the substances.

Fines

Several specific concerns were raised about the imposition and enforcement of fines.

- Fines are often set too high – they need to be appropriate to suit the means of Aboriginal people.
- Minor fines are imposed for small things – drinking in public, abusive language etc.
- When fines are set too high and people cannot pay them their motor vehicle licence is suspended – this impacts on work/family/social lives.
- Monetary fines are not always appropriate

Prisons – health and social issues

Major concerns were raised about the extent to which the recommendations of the Royal Commission into Aboriginal Deaths in Custody have been implemented and the need for independent monitoring of implementation issues:

- Need for Aboriginal prisoners to have family nearby, not be taken to prisons that are too far away for family to travel.
- Proper medical attention for Aboriginal people in prison.
- Imprisonment should be used as a last resort – this is still not the case.

- Attention should be given to the Aboriginal Visitors Scheme. It is not working well. They should employ gender appropriate people and Elders with language to talk to those in prison.
- Often they use women to counsel men in anger-management and sex offender programmes in prison – this is not appropriate and it doesn't offer role models for male youth in prison.
- Instead of custodial sentences consider diversionary options – break the cycle of imprisonment.

2. Youth issues

"Aboriginal agencies need to put Aboriginal youth back on the agenda."

General youth issues

The consultations raised many concerns about the position of young people – especially with respect to the role of elders and role models and the prevalence of substance abuse through "sniffing".

- Need for better conflict resolution/mediation – managing anger – involve family members to sort out issues/problems.
- Aboriginal youth are angry and misunderstood. Their anger is misinterpreted in courts and in prisons and they are punished twice.
- In the Aboriginal system, youth have a significant family member as a mentor. This needs to be brought back. Identify male and female community Elders as mentors for youth.
- Upholding responsibilities to culture, and especially to elders, is most important. It is important to have someone to speak to.
- Discipline must be taught to young kids – there are too many young kids on the streets playing truant from school.
- There are severe problems with respect to substance abuse, particularly the sniffing of paint and glue, in Midland area.
- Young girls are being sexually abused and exploited – older men are trading paint and other substances for sex.
- Substance abuse a consequence of trauma/abuse, lack of healing. This starts a cycle of stealing and prison.
- Support agencies need to do more: and those who do get funding for programmes to help kids must be more accountable for how they spend their money.
- Kids have got to be more actively encouraged to go into substance abuse programmes. Much more can be done.
- Need a separate Aboriginal agency devoted to Aboriginal youth to deal with issues like youth suicide, substance abuse, truancy, etc.
- Keep kids off the streets with things like: discos, fishing, holidays, meeting with other groups, abseiling, camps, night-time activities.
- Lack of respect for elders.
- Lack of confidence - need for confidence-building exercises aimed at kids.

Schools

"Parents need to take responsibility and talk to teachers. It starts from the bottom – if we don't have a say in the schools then how are we going to have a say in Parliament?"

- Teachers and Principals of schools need ongoing cross-cultural training to teach Aboriginal kids appropriately and handle their issues.
- We have to stop our kids from being bullied at school – this leads to rebellion and lack of education.
- Truancy is a real problem with Aboriginal kids. If kids have got a problem the parents should not just say "don't go to school" – they should be talking to the teachers.
- Importance of education – kids must grow-up and be in a position to make changes that will help their people. If this does not happen it puts the aspirations of Aboriginal people back another generation.

3. Economic and governance issues

Economic and land issues

- Need for strong independent economic base for Aboriginal people.
- Need economic base for land acquisition – fishing/hunting/water rights/gathering – a place where we can exercise our own law.
- Need for meaningful right to land, not a "Clayton's" title.
- Aboriginal culture and law is based in the economic exchange of trading between tribes.
- Aboriginal people knew how to maintain their economic base – they moved from place to place to allow their natural resources to regenerate.

Government and governance

- Aboriginal people's voices are watered down
- We haven't got anyone at the government level to change policies about Aboriginal people.
- Need for cross-cultural training of agency workers and government by Aboriginal people.
- Need constitutional change to properly recognise Aboriginal people and Aboriginal law.

4. Meaning and recognition of Aboriginal customary law

"People discriminate between urban, rural and remote people. They think that because we live in an urban or rural area that our culture is dead, but it's very much alive."

Two law systems

- There are two systems of law: white law and Aboriginal law. Aboriginal law is swift – white man's law is slow.

- White law treats Aboriginal people with contempt – we are still governed by a racist system.
- Aboriginal law demands satisfaction between families when something wrong is done. This appeases the spirits and is true to Aboriginal culture. White law does not have the same objectives or impact.
- Reconciliation between families (of victim and offender) can only be achieved after punishment is over. Without punishment, feuds between families begin.
- The “pay back” system is still strong in Aboriginal communities – even in the cities.
- Fair trial – family choose champions – spirits make the right time for punishment to be done.
- Customary law is based in territory – it does not change, only the people change.

Elders

“I blame the Elders for our problems because they do nothing unless they get paid.”

As at some of the other consultations (especially Manguri) profound questions were raised with respect to the identification and role of Elders:

- Who are the real Elders?
- Importance of Elders to deal with Aboriginal justice issues – need to face offenders.
- Because of the lack of true Elders around it is hard to administer Aboriginal customary law. It is not being used enough in the metro area.
- Inappropriate for government to appoint Elders: they must be appointed by the Aboriginal community itself.
- Consideration should be given to introducing a system of elections to designate who Elders are.
- Need for a cultural workshop for Elders to help identify and debate the following questions:
 - Who is an Elder?
 - What are the responsibilities of being an Elder?
 - Who can give guidance and support?
 - Who is standing up for us?
- Decision-making land, place and language.
- Desert people/Elders – the Yamatji and Wongi still live their cultural lives even as urbanised blackfellas.
- It is for us Aboriginal people to make Aboriginal customary law and culture strong.

APPENDICES

Appendix I: Memorandum of Commitment

Appendix II: Format for Submissions

Law Reform Commission of Western Australia

Aboriginal Customary Laws

Project No 94

THEMATIC SUMMARY OF CONSULTATIONS IN THE GOLDFIELDS REGION

May 2004

The Law Reform Commission of Western Australia

Commissioners:

Chair

Ms AG Braddock SC, BA in Law (Cambridge)

Members

Ms ID Petersen, LLB (Western Australia)

Dr CN Kendall, BA (Hons) LLB (Queen's) LLM SJD (Michigan)

Executive Officer

Ms H Kay, LLB, LLM (Western Australia)

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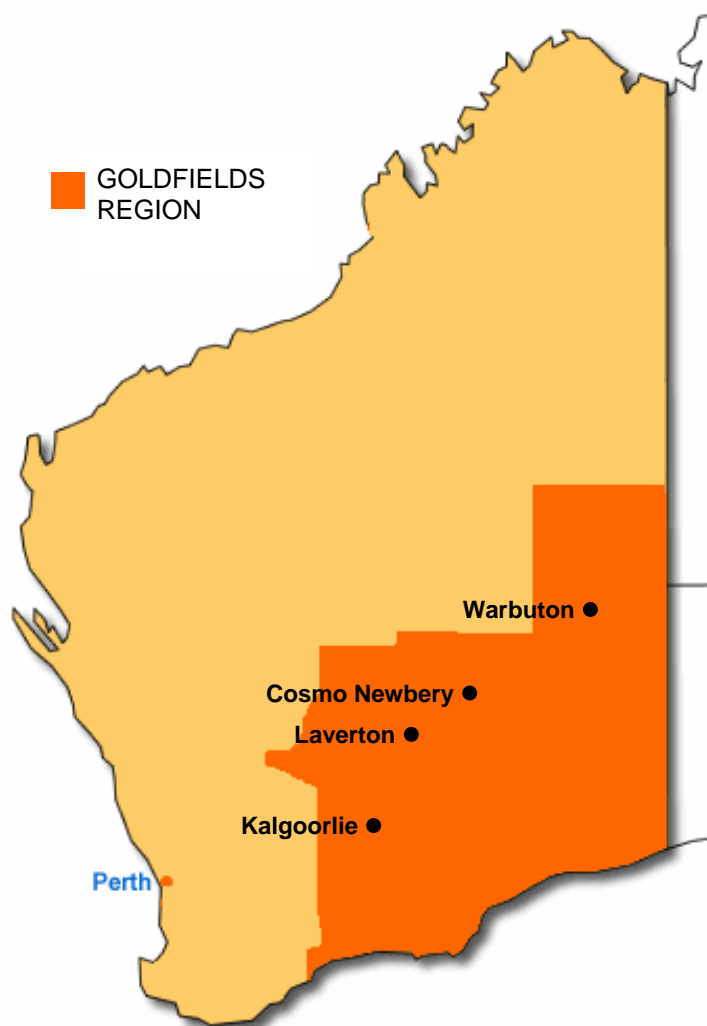
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Preface

The Law Reform Commission's community consultations on the Aboriginal Customary Laws project commenced in Warburton (in the Goldfields region of Western Australia) on 3 March 2003. Further community consultations were held progressively across the State throughout 2003 and were preceded by pre-consultation discussions and visits.

This report provides thematic summaries of the issues that were raised and discussed at each of the consultations in the Goldfields region. The consultations themselves and these thematic summaries have been conducted in accordance with the Memorandum of Commitment (refer Appendix I) and with protocols that were discussed and approved by the Reference Council.

All of the consultations commenced with a formal introduction, a traditional welcome and a presentation about the project by a Commissioner of the Law Reform Commission of Western Australia.

After the formal introduction and welcome, the consultations were opened up for contributions, comments and discussion by all who were present. These discussions sometimes occurred with the group as a whole, and sometimes within smaller discussion groups to reflect more specific concerns. The Directors of Research, in collaboration with the other members of the project team, produced a thematic summary which maintained the integrity of the consultations by utilising the colloquial language spoken during the discussions.

The reports were compiled by Dr Harry Blagg and Dr Neil Morgan with the assistance of Ms Heather Kay, Executive Officer of the Law Reform Commission of Western Australia.

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

WARBURTON

3 & 4 March 2003

As individuals and as representatives of the Law Reform Commission of Western Australia, we acknowledge the custodians of the Ngaanyatjarra lands and thank them for allowing us onto their lands and for sharing information with us. We also record our thanks to the Ngaanyatjarra Council and the Shire of Ngaanyatjarra.

In accordance with our Memorandum of Commitment, we promise to take the issues that were raised to the Government of Western Australia through our reports of the consultations and to take account of the stories and issues in formulating recommendations to Government.

Introduction

The following people attended as representatives of the Law Reform Commission or as advisers to the Commission: Professor Ralph Simmonds (Chair of the Law Reform Commission); Ms Gillian Braddock SC (Commissioner); Ms Ilse Petersen (Commissioner); Ms Beth Woods (Special, Commissioner); Ms Cheri Yavu-Kama-Harathunian (Project Manager); Dr Neil Morgan (Research Director); and Mr Charles Staples (Consultant).

A significant number of people (in excess of 40 over the two days) attended from Warburton and a number of other communities.

The consultations took place on two days and took a variety of formats. The main meetings were held outside in the meeting place near the community office on the mornings of Monday 3 March and Tuesday 4 March 2003. Some of the discussions involved both men and women and others involved men or women alone. In addition, there were occasions when further information was only given to selected members of the Law Reform Commission team. For example, on the afternoon of 3 March, senior male community representatives gave a confidential briefing to Dr Neil Morgan and Mr Charles Staples.

This paper is a thematic summary of the issues that were raised, not chronological minutes. It aims to cover all the major themes that were raised. The paper has been developed in a format that best allows the Law Reform Commission to use the ideas as a source for its future discussion papers and in considering future recommendations to government. The footnotes arise out of matters that were raised during the consultations and are provided by way of further explanation.

The discussions embraced a wide range of issues, covering the following broad areas:

1. General context and themes
2. Constitutional issues and limitations
3. Consequences when Aboriginal law is not carried

4. The impacts of imprisonment
5. Balancing aboriginal and white law punishments
6. Transport and travel arrangements
7. Policing issues
8. Are there issues that should be left to Aboriginal law and issues that should be left to White law?
9. Governance and by-laws
10. Culturally offensive behaviour and language
11. Substance abuse and family violence
12. Family relationships
13. Cultural training
14. Interpreters
15. Artwork

After outlining these issues, the notes conclude with a summary of the main proposals that emerged from the discussions. These proposals are divided into two categories: those that would require legislative change and those that would involve changes to practices and protocols.

This paper reflects only the issues that were considered during the brief consultation period. The Law Reform Commission would welcome any further submissions on these issues or on any other matters.

1. General context and themes

The Law Reform Commission has no doubt whatsoever that Aboriginal Law is a reality that is lived by people at Warburton; and that Aboriginal law rather than white law provides the primary framework for people's lives, relationships and obligations. The Commission also recognises that there are important differences between male and female laws, obligations and responsibilities.

The consultations illustrated very clearly that a holistic approach must be taken to considering what is seen as "white-fella's law" for the purposes of this project. When talking about law with non-Aboriginal organizations, the focus is generally on legislation and court practices. However, "on the ground" in communities, it is not confined to what is written in legislation or what happens in formal courtroom settings. It firmly embraces, too, the policies and practices of a range of government agencies (most notably, at Warburton, the police and the Department of Justice). There was a strong sentiment that many of these practices need to be addressed in order to respect and reinforce the authority of the community and law.

Many of the themes emerge from the following comments:

*"Aboriginal Law - older and stronger, from sky to earth and sea.
Whitefella law - new, small, come lately."*

"We need a balance - now Whitefella law taken over."

"We didn't put our law in paper, we put it in our brains."

"We are not happy. We want to see the law strong. We are upset that it is not recognised - no respect."

"The old people are sad: used to be proud."

"Our law is still there but white men don't respect our law"

"Our people do respect your law: look at them shivering in court"

"Respect for the law is like the Constitution: it is right at the bottom of law."

The Royal Commission into Aboriginal Deaths in Custody made us sad: our people must have been so brave to hang themselves: but where have we come since then?"

"The number one issue is the Constitution"

"Your Attorney General - the problem is, he's not just a law man but a vote man."

2. Constitutional issues and limitations

The Ngaanyatjarra Council asked that it be formally recorded that the "Number One issue is the Constitution" and stated that Aboriginal law **must** be recognised in the Constitution for the following reasons:

- there is a lack of respect for Aboriginal laws across Australia; and
- the lack of formal recognition weakens the authority of Aboriginal law

The Council also expressed its concern that State and Territory boundaries place artificial limitations on the Law Reform Commission's project: 'Here, Aboriginal law applies across State boundaries and is the same in South Australia and the Northern Territory.' It would be wrong to have different rules about recognition in the different jurisdictions.

Community representatives were concerned to understand the position of the Law Reform Commission in the structure of government as a whole. The Chair of the Law Reform Commission explained that it is an independent body that makes recommendations to the government. It is then for the government (not the Commission) to decide on what changes, if any, are to be made. He pointed out that the Commission has a successful track record in that many of its recommendations are acted upon but that the realities of the political process should be recognised.

One participant encapsulated the situation with the remark that: "Your Attorney General - the problem is, he's not just a law man but a vote man." Another said: "We are patient people. We have waited a long time and we can wait. But we want something done and you must push hard."

3. Consequences when Aboriginal law is not carried out

The discussions were wide-ranging and covered a range of issues that would broadly fall under the heading of "civil law", such as issues relating to family laws and copyright (see below). However, by far the greatest focus was on broad issues of community order (and disorder) and the role of criminal justice agencies.

The strongest concern was that the white system does not allow Aboriginal law to take its course in a timely manner. This undermines the authority of

Aboriginal law and creates consequences in terms of harmony and good order in the community. There was a strong view that there needs to be more of a balance between the two systems.

- “White law is slow, Aboriginal law is swift.” This creates problems when Aboriginal punishments are not carried out before the person is taken away by the white system: “The police should wait until a person has been through punishment”. The fact that the police take people away before Aboriginal law has taken its course shows that “the white system does not respect Aboriginal law: it is crucial to get punishment done first” and “we have no power, no rights to get the police to bring a person back.”
- Sometimes, Aboriginal law may require a person to face a number of separate families. For example, if 7 people are in a car and there is an accident in which some of those people are killed. All of the survivors must face all of the families of those who were killed; even if the families are in different places.
- “Lots of sadness” and anger is generated when people escape punishment. One example that was given was where a woman had “gone after” her husband in a car (deliberately driving the car at the victim) but ended up killing another man (whom she had mistaken for her husband). She pleaded guilty to manslaughter. The community considered that she should have been tried for murder, not manslaughter. When released from prison, she was taken from Kalgoorlie to another community by plane (though the road trip would have brought her through Warburton). This was done “all behind our back.” “She should have had her punishment at Warburton.”
- Cases such as this create ill will; not only because she should have been punished but also because those who are harbouring her should also be punished.
- Where a person has not been punished (for example, if the person is in prison), other family members may well end up being punished. One example that was given was where a woman from Warburton travelled to Kalgoorlie where her husband had gone. On the way, she picked up another woman at Laverton. They both went to Kalgoorlie and found the husband drinking. In the course of an argument and fight, the Laverton woman was killed by the Warburton woman’s husband. He was imprisoned but she has now been blamed for taking the victim to Kalgoorlie: “She’s got a hiding because he is in jail. She will carry on getting it. This creates family problems and feuds.”
- This example led to discussion of the question of when Aboriginal punishment is regarded as “finished” and what processes apply. It was said that there are not always set limits and that this is largely a matter for the victim’s family rather than a matter for the general community. Many senior people expressed concern that punishments sometimes “go too far”. In the previous example, “The family blame her and we can’t stop them.” More generally, it was said that: “blaming is bad; sometimes it goes on for years and years.”

4. The impacts of imprisonment

Community members outlined several ways in which they believed that the community itself could be involved in administering punishments imposed by the courts (see below). There was support for the use of imprisonment in

necessary cases but concern at impacts of various practices and policies on both individual prisoners and the community:

- There are “too many people in prison.”
- Prisoners are often serving time in prisons a long way from their homes and country. “The Department of Justice tells us it’s prisoners’ choice which jail they go to - but it isn’t.”
- Placement in prisons a long way from home leads to dislocation from family and to family problems.
- Such placements are destructive of Aboriginal law and culture: “All teaching gets left behind when people are going through law but then get sent to prison - they miss out on law and knowledge.”
- “You get no rights and no respect in prison.”
- The “worst thing is being strip-searched - having to stand and walk naked.” Prison staff “stare, mock and make fun of us.”
- Prisoners are not allowed to attend funerals.
- Prisoners are not given proper help in getting home. Families or community are expected to pick them up and transport them at their own expense.
- Infidelity can occur when men are separated, by imprisonment, from their partners. This can lead to disharmony and violence; this, in turn, can lead to further imprisonment, creating a complex cycle of abuse and incarceration.

5. Balancing Aboriginal and White law punishments

Community members made several suggestions as to how they would like greater legal authority to be given to Aboriginal law; and how they would like to be more involved in the administration of court-based punishments to give them cultural relevance and authority.

(a) Spearing

There was considerable discussion of spearing as a punishment under Aboriginal law. Speakers emphasised that this was not the only option and that they wanted to use a range of approaches to work with offenders (especially young people). However, spearing clearly has major symbolic and cultural significance.

Most of the senior men who were present acknowledged that they had been involved in spearing people in the leg or had themselves been speared in this way. They made it clear that, properly done, spearing was something to which offenders agreed and used the phrase “offering a leg.” They also emphasised that, properly done, it was a formal and regulated process (and that it is quite different from alcohol-related violence).

It was pointed out that the government had already intimated that it would not change the laws to legitimate such punishments. The men were therefore asked if there are any alternatives. They stated, unequivocally, that in some cases “there is no alternative.”

(b) Recognition of Aboriginal punishments when sentencing

Community members felt strongly that there should be stronger recognition of punishments under Aboriginal law when white courts impose sentences. It was suggested that this should be done in two ways. First, by more formal recognition of Aboriginal law and, secondly, by giving greater weight to the realities of Aboriginal punishment in deciding the actual sentence.

Some suggested that this could be done by stating a formal "split" (eg 50/50) between Aboriginal and white law components of a punishment.

(c) Managing prisoners in the community

There was strong support for an approach under which people would serve part of a prison sentence in a community - based facility rather than a normal prison. It was said that this would give the community greater authority and power with respect to the management of offenders, especially when the offences are essentially against the community.

Speakers suggested that such an approach could also serve as a bail facility.

It would be necessary to consider developing separate camps / facilities for men and women.

If such facilities are established, older community members should be given formal jobs and responsibility (and should be paid)

(d) Community based punishments

A large number of community based punishments exist under the Sentencing Act and related legislation. These include Community Based Orders, Intensive Supervisions Orders, Parole Orders and Work and Development Orders (to work off a fine).

During the consultations, several suggestions were made as to how such punishments could be better used to reinforce community responsibility and respect for culture and law: "Lots of money goes to prisons but not enough back into the community." "More resources to the community could help stop people going back to prison."

The proposals included the following:

- The Department of Justice should ensure that they employ both male and female officers - this is "very important". At present, they tend to be females.
- Currently work done under WDO's etc is demeaning and sometimes seems to replace what would otherwise be proper paid jobs. Work under court orders should not replace paid work; and the focus should be on work that "reinforces respect for culture, law and learning."
- Under court orders at present, "community work" is measured by "hours". Consideration should be given to revising this so that the offender must complete a task (not measured in hours) under the supervision of Elders. This would give support to the way in which things were done historically.
- Magistrates should pass sentences that give responsibility to Elders and allow them to take offenders to the bush. Magistrates should order the offenders to follow the law and what the Elders tell them.

- The Elders would then look after the offenders and, if they did not do the right thing, would take action to have them returned to court.
- “The government should understand” that the Elders will not “keep with” a person if the person runs off. They will take action in such cases.
- In fact, now, when people don’t do their community work, it may take a long time before Community Corrections Officers (based in Kalgoorlie) will take action.

6. Transport and travel arrangements

A number of concerns were raised with respect to the processes by which people are transported by the police and others, and the consequences of the current arrangements:

- The police often take people to Kalgoorlie or elsewhere but do not bring them back when court is over.
- This frequently means that groups of community members must go to pick the person up and sometimes they then get into trouble - for example, for driving without a valid licence or when they get to town.
- As noted earlier, there are poor arrangements for prisoners returning home. It is “no good” being taken such long distances in police vans.
- Prisoners also face long journeys in the back of vans / trucks.

7. Policing issues

The Ngaanyatjarra Council identified the “Police Act” as the second most important issue after the Constitution (see above). This was recognised to be a difficult area; as one person put it, “sometimes the police are too slow, sometimes they are too fast.” However, there was also a view that community/police relations need to be reconsidered and that lines of communication and responsibility need to be developed and improved:

- The Ngaanyatjarra Council argued that the Police Act should be amended so that the police operate under the Community Council - to “make clear who is the boss here.”
- “The police come - don’t ask permission from the community and don’t tell us the reasons. They say “just open the door and let us in”. “We are still waiting to work properly with the police.”
- The role of Aboriginal Police Liaison Officers (APLO’s) is unclear.

8. Are there issues that should be left to White law and issues that should be left to Aboriginal law?

In order to explore the roles of the two sets of laws, and to consider whether a different balance is appropriate, there was discussion of whether some areas are essentially matters that should be left to white law and others that should be left to Aboriginal law.

No firm consensus emerged on this issue. However, it was suggested that the main role of white law would be in areas such as stealing and driving offences

(such as dangerous driving) in the lands. Some suggested that the community should be seen as having the main role in areas involving death or serious violence.

9. Governance and by-laws

There was a clear view that it is necessary to build community justice mechanisms to make and keep Aboriginal law strong. There was detailed discussion of the role of the Aboriginal Communities Act and by-laws enacted under that Act.

At present, Warburton's community by-laws cover three main areas: "grog", petrol sniffing and permits for access to the Lands.

Many people said that community by-laws should be strengthened so that communities can more effectively police and govern their own affairs and address problems of social disorder. The following problems were identified:

- The by-laws are being "broken too much" and there are problems with some non Aboriginal people and community workers bringing alcohol into the community. "These people need to be punished - white or black."
- The by-laws were weakened in 1996 when short sentences of imprisonment were removed and people could only be fined. Fines are not a strong enough penalty.

Community members expressed some frustration that they have made many representations to government on these issues but there has been no action.

There was a discussion about what new by-laws might be appropriate. However, no specific recommendations were made, with the important exception of a proposal to deal with "culturally offensive behaviour and language".

10. Culturally offensive behaviour and language

There was much concern (especially amongst the men) about the problems caused when people behave or "swear" in a culturally offensive manner - in other words, in a way that shows disrespect for the law. It is important not to underestimate the importance of this issue (especially to the men). As one put it: "Respect for the law is like the Constitution: it is right at the bottom of law."

It was pointed out that there are many ways of swearing - some far worse than others. The particular concern is not with "Whitefella" type swearing; but with situations where people swear in a way that is deliberately disrespectful, insulting or offensive on matters of law, initiation or family.

When such behaviour / language occurs, the person to whom it is done will "choke" because it cuts to the core of their being. More than this, it offends everybody: "When you swear at one man, you are swearing at all men. They all feel hurt."

For this reason, problems arising from culturally offensive behaviour are generating problems of disorder and disharmony in the community.

It was said that “in the old days”, such incidents had sometimes resulted in death.

Nowadays, if an issue of this sort arises between two adult men, it will generally be resolved by the older men. However, when younger people or women swear in such a way, it is not easy to resolve. Unfortunately, it can sometimes result in violence but “the white law doesn’t understand this context and just treats it as domestic violence.”

11. Substance abuse and family violence

It was said that, although family violence is an issue, it is less prevalent than in many Aboriginal communities because Warburton is dry and remote. Also, it was said “Warburton women strong and men strong.”

Where there is fighting, other family members (especially grandparents) try to resolve the problem.

It is also possible for people to seek assistance through the Administrator’s office and there are women’s groups, including the Ngaanyatjarra Women’s Council.

12. Family relationships

There was some discussion (especially amongst the women) of marriage practices. It was said that some children are still “promised” and marry in that way. This is based on skin groups and is the parents’ decision. People must marry “the right skin way.”

However, a lot of young people now marry “for love”. Sometimes, this works out but it sometimes leads to fights.

13. Cultural training

There were strong calls for increased respect, training and awareness within the white legal system. Speakers gave many instances where this is a problem. Some told of police and prosecutors saying words to the effect of “your law is gone”. Strip searches in prison are a cause of distress (see above); and “their attitudes suggest they see us as stupid”.

14. Interpreters

There was concern that more provision needs to be made for interpreters throughout the justice system (not just courts but also pre-trial and after sentence). “Other races get them and they are paid for their work. We are not properly paid - like trackers in the old days.”

15. Artwork

Warburton has produced a wealth of magnificent artwork, some of which was on display at the Shire Offices at the time of the consultation. Other artwork is not on public display and some includes sensitive cultural detail.

Artwork is done by both men and women but is especially strong amongst the women.

There was some confusion over a number of matters relating to issues of ownership, decisions about what paintings would be displayed and possible sale of art works.

This was identified as an area in which further discussions may be needed between interested groups in order to clarify and explain the legal position in terms of copyright and other legal rights and relationships.

16. Summary of the Warburton proposals

The Consultation provided a valuable starting point for the Commission in understanding the main issues that face Warburton and a number of other communities. It was also possible, despite the relatively limited consultation period, to identify a number of proposals for change from the Community.

The proposals all reflect the Community's desire to see a "better balance" between the two systems of law that are operating; to increase the formal recognition and role of Aboriginal law; and to enhance respect, reduce cultural dislocation and improve community harmony.

The proposals are broadly divided into two categories: those areas that would require legislative attention if they were adopted, and those areas where the changes would be to the practices and protocols of government agencies.

Areas that would involve legislative change

- The Constitution must be amended to give recognition to the existence and reality of Aboriginal law. Ideally, this should involve changes to the Federal Constitution and not merely the State Constitution because Aboriginal law is not based on State and Territory boundaries.
- Consideration should be given to legislative amendments (which would be mainly to the Criminal Code and the Sentencing Act) to give formal recognition to spearing as a punishment.
- Consideration should be given to amendments to the Aboriginal Communities Act and to whether new by-laws and procedures are required (for example, with reference to the problem of "culturally offensive language or behaviour").
- The Sentencing Act and the Sentence Administration Act should be amended to allow courts to impose community based sentences that give authority and responsibility to community members; and this would include measuring "work" by reference to a task rather than a number of hours.
- The Police Act needs consideration.

Areas that involve changes to practices and protocols

- The development of police protocols to reinforce the authority of community elders when the police come into communities.
- More "work camps" style facilities (both male and female) to allow prisoners to be remanded on bail or to serve their sentences closer to home.

- The Department of Justice to reassess prisoner classifications and placement to reduce cultural dislocation and isolation.
- Transport of people by police and Department of Justice to pay more attention to getting people safely home.
- Department of Justice to consider all areas of the treatment of Aboriginal prisoners, including the culturally demeaning processes surrounding strip searches and travel to funerals.
- More assistance and explanations to community members of elements of the white legal system, including issues of governance, art work and criminal law and procedure.
- Increased cultural awareness training for all those involved in the justice system.

As noted earlier, these proposals are simply those that emerged from the consultations. The Law Reform Commission strongly encourages and welcomes other submissions and proposals.

Introduction

Ms Ilse Petersen (Law Reform Commissioner), Ms Beth Woods (Special Commissioner) and Dr Neil Morgan (Research Director) attended on behalf of the Law Reform Commission. Mr Richard Collard (Department of Indigenous Affairs, Kalgoorlie) also helped to assist in facilitating the discussion.

The meeting commenced at around 10.00 am and concluded at around 1.00 pm. It was attended by 30-35 people. Women were more strongly represented than men. Discussions took place both in a large group and with men and women separately.

These notes represent a thematic summary of the issues that were raised, not chronological minutes.

The discussions embraced a wide range of issues, covering the following broad themes:

1. General context
2. Stolen generation
3. Court procedures and evidence
4. Punishment under aboriginal law
5. Punishment under white law
6. Police and aboriginal patrols
7. Prisoners attending funerals
8. Language
9. Welfare agencies
10. Government agencies
11. Hotels and other businesses
12. Restricting alcohol
13. Dogs and the impact of baiting on culturally significant sites
14. Car licensing
15. Mining / pastoral leases

The main issues that were raised on these topics were as follows:

1. General context

- The Law Reform Commission was criticised for not allowing enough time for the consultation - need to look at how people lived, how culture was and how to sort it out. It was said that this is often the case - that people come and discuss matters but do not spend enough time or come back later.
- However, the participants did welcome the opportunity to talk about culture and law.
- Aboriginal law is strong and is being actively practised. But white law does not recognise this and does not respect Aboriginal customary law.

2. Stolen generation

- The stolen generation issue needs to be addressed: “Our children, grandchildren and great grandchildren are still in pain.”

“Mr Howard won’t apologise. This is not nice and discriminates against our people.”

3. Court procedures and evidence

“We had to tell our private lives for everyone to see and hear”

“Lawyers have three ways of saying something: We only have one”

“People want to give evidence but get very frightened.”

There was a forceful discussion of issues surrounding court procedures. It became clear that the Native Title hearings in Laverton had caused some anger and distress. Although native title issues are outside the terms of reference of the Law Reform Commission’s Customary Law project, the perceptions of the people at the consultation raised matters of direct relevance to the Commission’s work.

People voiced the following criticisms:

- Native title court proceedings had been very degrading and are still causing pain for Aboriginal people because of matters that were revealed and the hearing processes.
- Lawyers asking about family history had caused particular distress given the stolen generation: “It is degrading to be asked who you think your parents are when you were taken away”. “I know my biological father but my relationship with him is different from with the man who brought me up.”
- It was particularly difficult to answer these questions when many Aboriginal women had also been raped - this meant that “half caste people” had the worst of the Native Title hearings.
- It was difficult to understand questions and there was a need for interpreters.
- Aboriginal people were not allowed to tell their story in their way. Lawyers (often from pastoralists or mining companies) would interrupt too much and would sometimes force people to say things that were painful and which should not have been said.
- Aboriginal people could even be endangering others and themselves by saying some things
- Private matters and family were discussed publicly: they were not only recorded but also (in an example given) were also broadcast on a PA system to people outside the court: “We kept telling them this was wrong but they wouldn’t listen.”
- Women and children were therefore hearing evidence from men that was inappropriate for them to hear.
- Some people felt that lawyers “kept twisting” their answers and putting words into their mouths.
- Insensitivity to family members (one woman being told off for “giving information” to her mother when she was simply sitting next to her as she was sick).

- The court set-up was off-putting. The Judge sat “up top” and then there were “loads of lawyers with laptops”.

A number of suggestions were made for improvements to processes for giving evidence, including:

“They should talk to us first, not just come.”

- Consider the development of a court akin to the Koori Court
- More consideration to be given to the court room structure
- Consider more closed hearings where necessary
- More consideration to culturally sensitive and confidential information
- Allowing space for Aboriginal ways of telling stories
- Less intrusion by lawyers when stories are being told
- A call for Aboriginal Judges / Magistrates, Justices of the Peace, Court officers and so on.

4. Punishment under Aboriginal law

“The court system weakens our culture and protects offenders.”

“Culture is with a clear mind, not drunk.”

- Payback should not be confused with alcohol - related violence: “you can’t drink and do those things” but lawyers and Aboriginal Legal Service officers sometimes use customary law as an excuse / mitigation in the wrong cases and where the person was drunk.
- Payback has sometimes got carried away - for example when people are drunk or the person who is being punished has diabetes and cannot heal.
- Some important and useful comments were made as to how to differentiate customary law from alcohol-related “violence”. For example, courts should consider whether Elders were there; whether the person had gone back to the community or family; and whether there was a clear mind.
- However, there will be differences with different groups that will need to be worked through.
- When a person is in prison and has not been punished under customary law, their family receives punishment instead.
- The police should therefore bring offenders to the appropriate family for traditional punishment. A number of examples were given of people who have escaped punishment, including the following:

Woman and defacto drinking and arguing. She stepped into 4 wheel drive...the de facto tried to stop her driving...she ran him down.. she killed her de facto...she was jailed for 6 months...but now “she is free as a bird”...The Aunt feels hurt...because she wanted the police to bring the woman to Laverton...The woman did the damage...her family now harbour her and police arranged for a plane to take her back to Blackstone... The nephew’s wife got a hiding as he was there at the time, however, she has not been punished.

- It was also commented that sometimes, the punishments can be excessive. Reference was made to a case in which an offender's sister was hit for nearly two weeks and received open wounds - more punishment than the offender himself would have received.

5. Punishment under White law

"Too many people get picked up for minor stuff - causes cultural dislocation and disharmony: they never get jobs or back on track."

- Some suggested that minor offences should be dealt with by "white law" and major matters should be left to Aboriginal Law.
- Deficiencies in the current system were identified and suggestions were made about how to enhance community responsibility and cultural input where behaviour is to be dealt with by white law:
 - Fines and Work and Development Orders do not work;
 - Juvenile Justice Teams do not work - "offenders just phone Kalgoorlie";
 - Cautioning should be used for adults and juveniles;
 - Aboriginal people should be engaged in providing structured programs;
 - A work camp / hostel would be a good idea provided it was Aboriginal - run and concentrated on work skills and reinforcing the cultural context.

6. Police and Aboriginal patrols

- There are apparently 11 police officers at Laverton (one of whom is Aboriginal) and one Aboriginal Police Liaison Officer (APLO).
- There were many comments about alleged "heavy handed" tactics by the police - especially in cases involving disputes at the pub and arguments in public ("Aboriginal people have nowhere to hide when drinking and arguing").
- There was a strong view that the roles of the police and the Wongatha Wonganara Patrol needed discussion. There was a feeling that the police at times would be quick to respond to "less serious" incidents such as "drunk and disorderly", but would leave the Patrol to deal with some serious cases (examples were given of a female assault victim who was urinating blood and of a drunk driver "running amok").

7. Prisoners attending funerals

There was strong criticism of the Department of Justice (DOJ) for not allowing people go to funerals and the procedures that apply when they do attend:

- DOJ questions family connections and does not understand Aboriginal family relationships.
- Aboriginal people arrive at the funeral in handcuffs (including children). Sometimes they are even shackled. This is not acceptable and undignified.
- Even if allowed to the funeral, they are not allowed to the wake.

8. Language

- People need to learn Aboriginal language and Aboriginal culture.
- The language is different now as white man not writing the language correctly.
- When you read it, it is a different language to the spoken word.
- There is a recognised need for community language and cultural training.

9. Welfare agencies

- There is a great deal of fear (dating back to the stolen generation) of welfare agencies.
- Still lots of issues about non-Aboriginal welfare workers not understanding family networks.
- If the mother gets money for children and if the child is not with the mother, then Centrelink should see whom the children are with.
- Extended family: Aboriginal people automatically recognise the extended family (eg sister's children call the Auntie mother). This should be understood.
- White law has a need to write things down but Centrelink forms are no good.

10. Government agencies

- Government agencies tend to come with policies they've already decided on and not to consult first. This is not respectful.
- Should stay with no time limit and go around and meet all Aboriginal people in Laverton.
- ATSIC is "totally unattached" from the community and does not put enough money into community programmes.

11. Hotels and other businesses

- People complained of incidents where Aboriginal people had been charged higher prices than non Aboriginal people at the pub and where Aboriginal people had been refused service [Aggrieved persons on this and other issues can contact community groups, the Aboriginal Legal Service and/or the Equal Opportunity Commission: "They let dirty miners and drillers drink but Aboriginal people are barred."]
- It was said that the Hotel sells cigarettes for 50 cents each - can this be legal?
- It was also said that, at the hotel in Kookyine, people leave their bank keycard for alcohol then have no clothing and food for children. Despite publicity, this is still happening.

12. Restricting alcohol

"Social problems result from people coming to Laverton to drink. We respect them...they have to respect us".

A number of suggestions and questions were made about limiting the use of alcohol.

- Limit people from the communities and lands that come to Laverton to drink.
- The holiday period was described as the worst.
- Can the police be of more help when a family member is drunk and disrespectful? (At the moment police say it is a family matter).
- It was said that the community has proposed the following restrictions:
 - 10.00am - 2.00pm allow Aboriginal people to drink in Pub...2.00pm - 7.00pm...limited to sales only and cans only, no hard liquor.
 - At present the pub closes at funeral times, the day before and 10.00am - 2.30pm on the day.
- Can by laws be amended / implemented under the Local Government Act 1995?
- What authority does the Alcohol and Drug Authority have?

13. Dogs and the impact of baiting on culturally significant sites

- Dog licences are needed under white law but not under Aboriginal law. Our law says we let roam.
- This brings problems when people are fined for not having a licence or where dogs are taken away.
- Aerial baiting has seen 37 dogs die within 3 months. Stations may be involved.
- Baiting also has other bad consequences. Baits have been found around rock pools and creek beds. "We have been unable to drink water or follow cultural practices."

14. Car licensing

- "Daft rules: Lots of people end up in trouble". Car licensing, transfers and infringements cause fines and imprisonment. This just creates further problems in the community.

15. Mining lease/pastoral leases

- Even for cultural reasons, permission is needed to travel on leases -this is wrong.
- Mining companies do not take proper care in looking after land.
- Safety is also a concern: on one mining lease, there is a big pit, 4 levels, not fenced off.

COSMO NEWBERY

6 March 2003

Introduction

Professor Ralph Simmonds (Chair of the Law Reform Commission), Ms Gillian Braddock SC (Law Reform Commissioner), Mr Charles Staples (Consultant) and Project Manager Cheri Yavu-Kama-Harathunian attended on behalf of the Law Reform Commission.

The meeting, which was held outside the Community Office, commenced at around 11.00 am and concluded at around 12.30 pm. It was attended by 25-30 people. The meeting led to further meetings with a number of groups.

These notes represent a thematic summary of the issues that were raised at one or more of these several meetings, not chronological minutes.

The discussions embraced a wide range of issues, covering the following broad themes:

1. General context
2. Recognition of difference
3. Criminal justice issues
4. Understanding Aboriginal law and European law
5. Family violence
6. Substance abuse and community by laws
7. Marriage and inheritance

The main issues that were raised on these topics were as follows.

1. General context

- Speakers strongly emphasised that “the old ways are important and are followed”.
- A fair balance is needed between the two systems.
- “We in our community are still trying to understand the nature and purposes of your project.”
- With everyone related to everyone else, it can be hard to have a sensible community meeting without it breaking up into personal exchanges.

2. Recognition of difference

- One speaker commented that there should really be one law for everyone. But this is difficult when there are both Aboriginal and other laws operating.

- Aboriginal customary law would undoubtedly be different in different places. That would present a messy picture for recognition purposes.
- Aboriginal Customary Law varies considerably in strength from community to community, such as between Perth and Cosmo Newbery, and between Cosmo Newbery and Warburton.
- With the introduction of formal recognition of traditional law, wouldn't other ethnic groups want their own law? Wouldn't they resent recognition of our law? And how do people living in the city get their tribal punishment?

3. Criminal justice issues

- Much of the discussion focused on how to achieve a balance given that, in practice, two forms of law are often operating. A number of points and suggestions were made, including the following:

(a) Policing

- Aboriginal Police Aides (APLO's) think they are policemen, not a liaison with the community. They are sometimes not from the community, and so do not understand local ways.
- There is a need for special training for police aides in local ways.

(b) Aboriginal law punishments

- Tribal punishment is long lasting.
- Aboriginal customary law is about family satisfaction. Through retribution, it ends the anger, which offending causes. It enlists the family to prevent the offending in the first place, because of the prospect of retribution against the family if a member offends.
- Under Aboriginal customary law, family members can appropriately receive punishment for the offender who has been imprisoned. This suffering is accepted as a duty under Aboriginal customary law.
- By comparison with imprisonment, payback is often easier punishment: "three spears is pretty soft for murder".
- Consideration should be given to offenders doing some time in prison as well as spearing - balancing the two laws.
- As to payback, there will not be a spearing in every case. Sometimes the offender will threaten those who would otherwise spear (one man stating that he had guns in his car). Also, offenders often never know if they will be speared. Further, diabetes and treatments for heart conditions may make a spearing fatal.
- It was said that formerly, families could more readily discipline children physically without fear of legal repercussions. That prospect made for better children. That punishment in earlier days was out of love, not hate.

(c) Prisons

- The separation of prison is very hard and relations can't help the imprisoned as they are so far away.
- Local prisons should be built, alongside local police stations. This would help to improve the concurrent administration of European and traditional law. It would allow the community to be involved in education, children to see their fathers and so on.
- The community had taken note of the failed "boot camp" experiment. The concept, it was said, could have been a good idea. The facilities should have been retained, employing Aboriginal officers. Properly run, this would not have been a prison, but would have been recognised as a form of punishment where community members could have participated in programs of reparation and rehabilitation.
- Anger management courses are done in prison but when the person comes home, the same issues are there.
- After a person is dealt with at court, they are simply left to find their own way home. This is a serious problem, as they may have no money for food or travel.
- The same problems arise when people are released from prison and have long distances to travel.

4. Understanding Aboriginal law and European law

- It was suggested that there is a need to educate the community better about European law.
- However, it was also said that the community understands European law better than police and other officials as well as psychiatrists and psychologists understand Aboriginal law. This can create trouble when the community dismisses as "rubbish" uncomprehending officials or service professionals.
- Aboriginal people all know their responsibilities without books or writing or police or courts: "We don't think of our law in terms of hypotheticals."
- It is hard to explain our system to others. The payback system still works, and does keep us in line, for fear of the repercussions for our families.
- The example was given of a car accident. The smashing of the car, it was said, will go under European law. If anybody dies, that will be dealt with under both that law and Aboriginal customary law: "Nobody needs to debate the jurisdiction of Aboriginal customary law, because everyone knows it."
- Everyone involved in a fatal car accident is liable to Aboriginal law punishment - not only the driver.

(a) "Growling"

- If a person is upset, growling is a good way to show such feelings and to let off steam. However, if it is done in town, you are seen as "mental."
- In one case that was described, one member of the community responded to a cousin's complaint of unruly children by shutting up the shop and going to the school to "growl" at the children. This vented the anger felt

against them. The teacher didn't complain, as that teacher knew the culture.

- Cultural barriers may cause unnecessary fear (as when an uncle with a spear was growling at members of a family where his nephew was being treated by a nurse. The nurse was fearful she would be speared, but that was not being threatened.)

5. Family violence

- It was said there is a cycle of repeated punishment of men for mistreating their wives. The courts don't seem to understand the context of such violence.
- People may undertake anger management courses in prison but they face the same problems when released.
- Some women also use violence - not just the men
- It was said Aboriginal customary law and European law sometimes clash over domestic violence norms. The European law may cut across what Aboriginal customary law says a husband can do to a wife.
- Prison doubles the suffering for traditional peoples, in communities where control is hard to imagine apart from physical punishment.

6. Substance abuse and community by-laws

- Alcohol is a big problem because of the proximity of the community to Laverton. Community by-laws ban alcohol but they are not strong enough. They lead to a fine, not imprisonment, apart from overnight stays in a lockup.
- The law is weak now, ever since the removal of terms of imprisonment of 3 months or less. A week in a lockup would be a good punishment. Alcohol is being brought into the community now, even by Council members.

7. Marriage and inheritance

- It was said that people now get married for love and that this is not always "the best way."
- It was said that inheritance issues are handled here through Aboriginal customary law and skin groups. The relations arrange the funeral, and dispose of the property. When our young people get married, it is in the traditional way.

Introduction

This consultation had originally been scheduled for 6 March 2003 but had to be re-arranged when the project team was delayed in its return from Warburton by poor weather and closed roads. It was therefore rescheduled to 25 March. It was held at WMC Conference Centre, School of Mines, Curtin University.

Professor Ralph Simmonds (Chair of the Law Reform Commission), Special Commissioner Beth Woods and Project Manager Cheri Yavu-Kama-Harathunian attended on behalf of the Law Reform Commission.

The consultation commenced at 9:00 am and concluded at 3:40 pm. Around 33 different people attended at different times, all but a handful of whom were Non-Indigenous.

These notes represent a thematic summary of the issues that were raised, not chronological minutes.

The discussions embraced a wide range of issues, covering the following broad themes:

1. General context
2. Constitution
3. Family relations and the law
4. Children and youth
5. Elders
6. Substance abuse and aboriginal law
7. Education, training and employment of Aboriginal people
8. Criminal justice issues
9. Reconciliation and racism
10. Deaths, coronial inquests and inheritance

The main issues that were raised on these topics were as follows:

1. General context

- Aboriginal customary law is what makes people strong, inside, in who they are and what they believe. It is very powerful, through the skin group. If there is a breach, an important sanction is the way the offender suffers inside.
- It is most important to realise what tribal punishment is not: it is not wanton destruction of property, nor is it done drunk, and it does not produce feuds. It is ritualised, measured, final and relentless, without limitation periods.
- The diversity in Aboriginal circumstances provides the key to understanding the place of Aboriginal customary law, and means that

caution is required in addressing the issues. It was said that some Aboriginal people do not live in the traditional way, and should not be seen to be subject to Aboriginal customary law.

- However, this does not mean that people who do not live in a traditional way do not respect Aboriginal law. There is a difference between respect for such law and being bound by it.
- When those who are not normally subject to Aboriginal law visit the lands, they would consider themselves subject to it. This has significance for Kalgoorlie, given it's a place of diverse Aboriginal communities and European cultural origins.
- It was suggested that there may be a need for new forms of recognition of Aboriginality that get away from the concepts of 1/4 and 1/2 caste (which, it was said, are still used in parts of the law such as the Public Trustee). A new term to replace "Aboriginal" was a possibility, much as the Eskimos had taken on the word "Inuit".

2. Constitution

- It would be highly desirable for there to be an acknowledgment of Aboriginal people in the state constitution as a way forward in providing for Aboriginal identity.
- It was strongly suggested that there was a need to address the paternalism in the Aboriginal Affairs Planning Authority Act 1947 and previous legislation. It could be asked whether or not there was a need for the Act at all if the state constitution were to recognise Aboriginal peoples as the first peoples of the land.

3. Family relations and the law

- The discussions revealed some of the differences and tensions that exist between Australia's general family laws on the one hand and the reciprocal relationships, roles and responsibilities of Aboriginal people on the other. Participants raised the following points:

(a) General protocols

- Aboriginal law has a complex set of protocols governing family relationships.
- These include avoidance protocols to govern dealings between sons-in-law and mothers-in-law. For example, the son-in-law must have respect for the whole tribe / clan. This is just as much "the law" as a boy going through an initiation so that he might acquire respect for the whole culture.

(b) Skin groupings

- Nowadays those marrying into skin groups often don't respect these parts of the culture, particularly when the marriage occurs off the lands.
- Skin groupings within Aboriginal law determine relationships within the family. Marriage outside the permitted relationships would generally result in punishment.

- Skin groups keep bloodlines while determining relationships within the group and identity outside it.
- It is determined that infants are promised for marriage within skin groups when they come of age.
- Non-Indigenous people and Indigenous people from outside an area may be given a skin group by an Elder or law person. The person may be accepted as a relation into a family.

(c) Extended family relationships

- The extended family is the immediate family.
- There is a lack of recognition of the place of grandparents in Aboriginal society. They play the role of carers of children and have a key role in issues relating to skin groups.
- Extended family relationships have particular significance. For example, where a mother's brothers take on the care and rearing of her child, particularly in cases involving death of the parents. This gives the child a place of belonging.
- These extended family relationships lead to prisoners making applications to attend funerals in cases involving the death of relations. The authorities seem to find this difficult to understand and this casts a heavy burden of justification on the claimant. It was said that in one case where a number of prisoners needed to attend a funeral, the prison authorities held an election to determine who could be sent, given that resources dictated not all could.
- There are similar problems for government departments dealing with Aboriginal people through lack of understanding of the extended family.

(d) Carer arrangements

- It was said that the European law of carer arrangement involves too much paperwork and insufficient support for Aboriginal people. The case was given of a grandmother who took over the care of the grandchildren but was not supported by the current law and was, in fact, punished by it.
- Carer law dealing with the care of children needed to be more supportive and respectful, as well as less intrusive.
- Grandparents who bring up children should be paid foster care payments.

4. Children and youth

- Aboriginal youth need to be involved in Aboriginal Customary Law.
- This requires the support of Aboriginal family units, in their extended forms. Differences between urban and country settings should be noted.
- Aboriginal Customary Law is, in part, about values that should be passed onto children through the family.
- Discipline can include corporal punishment of a severe kind. Strong supportive families can nurture children so as to avoid the need for discipline.
- If all Australian families need to understand their responsibilities for their family members.

5. Elders

- In small group discussion, it was noted that it was hard to answer the question of who are Elders, without knowing why the question was being asked because Aboriginal people know whom the Elders are.
- Aboriginal Elders are those with reliable and respected understandings of traditional ways. This creates problems in places like Kalgoorlie, where community nominated Elders are not recognised. Kalgoorlie is a traditional meeting place for many communities on the move.
- Reinstatement of the Commission of Elders.
- The process of native title has clouded the issue.
- The process of native title is undermining the status and recognition of Elders.

6. Substance abuse and Aboriginal law

- There was considerable discussion of the problems caused by substance abuse in the context of both Aboriginal law and the general Australian legal system.
- There is insufficient recognition of the seriousness of the problem at the governmental level. The causes need to be recognised. Sniffing, which is endemic, is a costless way of escaping abuse, hunger, deprivation and problems caused by the family being unable to cope.
- Aboriginal law has no simple answer to problems of alcohol or drugs. The Aboriginal Communities Act provides one way of addressing problems, at least on the lands. But once they come in from the lands, children and adults can run amok. Also, on occasion, run amok in the communities.
- If sniffing were legislated against, children and adults would get more government help, supplemented by identifiable support.
- Sniffing becomes a problem for future generations: when mothers become pregnant, they often cease sniffing but return to it after giving birth.
- Aboriginal law does not cover conduct in the form of forcible disciplinary action, committed while the person was drunk or drugged, even if the person says that such conduct was appropriate in the name of Aboriginal customary law.
- Drugs are also an issue for Aboriginal people.

7. Education, training and the employment of Aboriginal people

- It was suggested that an educational task is for Aboriginal people to understand European law, as they already understand Aboriginal law.
- There is a need for more employment of Aboriginal people in government agencies given the extent of their Aboriginal clientele. The classic case was the justice system.
- It is important to give people encountering the judicial system an understanding of how the adversarial elements worked, and of the language used in court.

- More Aboriginal people helping out in courts, prisons and police.
- More interpreters and registry staff should be Aboriginal, with more of a gender balance.
- Policies affecting Aboriginal people's aspirations should not change with a change in Government.
- There is also a great need for Aboriginal people to be trained as interpreters in hospitals, schools and courts. They could advocate on behalf of children and teenagers and to assist them to understand and be able to respond to bureaucracy.

8. Criminal justice issues

(a) General

- It was asked, how would one determine the law under which an offender's punishment would come? If Aboriginal people have a choice, it is up to the individual to decide.
- It was said that understanding that Aboriginal people live in accordance with traditional ways can be most important to judges or others trying to understand an Aboriginal person's conduct. The example was given of an elderly Aboriginal man who had put licence plates on a car without appreciating that this was illegal.

(b) Policing

- Training in Aboriginal Customary Law should be provided as part of the curriculum at the Police Academy. This might help avoid disrespect of sacred sites and undue interference in punishment.
- It was said by Aboriginal Police Liaison Officers (APLO's) that there are cases of white man's rules getting in the way of community processes and showing disrespect for Aboriginal people.
- APLO's also stated that it was sometimes hard, when they confronted injustice to Aboriginal people, to know to whom to complain effectively. There might be a place for a Board or Committees (which, it was noted, had existed at one time).
- The role and function of APLO's needs to be reviewed. Currently it is to verify that Aboriginal suspects understand the charges against them and to explore the evidence. However, this role is being compromised by the use of APLO's as ordinary police. The original conception should be restored, by suitable provisions in the Police Act, excluding ordinary policing.
- It was suggested that Police Standing Orders might be revised to require other police officers to bear in mind the advice of APLO's.

(c) Courts

- Language cannot be separated from culture, and thus it is important to recognise language. This poses a problem because of the barriers to the use of local Aboriginal interpreters in court proceedings. Those barriers include cases where Aboriginal speakers are not accredited by NAATI (National Accreditation Authority for Translators).

- There must be culturally recognised representation of Aboriginal ways. This was most emphatically not the case when a lawyer recently told the judge that his client's violence towards women was the Aboriginal way. Violence to women is not the Aboriginal way.
- It was said there was a need for protocols to guide lawyers in their dealings with Aboriginal clients and reference was made to the "Anunga Rules", the film "Black and White" and the Report of the Royal Commission into Aboriginal Deaths in Custody.
- It was said that better arrangements need to be made to respect cultural sensitivities in the extraction of evidence in court proceedings, as in rape cases.
- Experience should be recognised for the purposes of qualifying someone as an expert witness, as an alternative to more formal qualifications. The legal system tends to recognise non-Aboriginal professors with titles after their names but not to recognise the experience and knowledge of Aboriginal people themselves.
- There needs to be recognition and acknowledgment of Aboriginal customary law in the form of more visits to communities by court officers, so as to build capacity and understanding in and of those communities. A model for such visits was that of the Coroner to a local community.
- It is most important for Aboriginal Customary Law to have Aboriginal judges who can deal with Aboriginal Customary Law on its own terms. (Note it is important to recognise who an Aboriginal Judge is - more Aboriginal Elders than white Judges).

(d) Prisons

- Prison rules cause difficulties in the context of funeral applications (see above).
- Another example is where prisoners want to speak to persons outside the prison in their own language, or give as a phone number that of a box in their community, where they would be relying on members of the community ensuring the message got through to the right people. The prison authorities might be concerned in both cases, in the first because of fear of escape planning, and in the second because of concern about not having a private phone number.
- More co-ordination needs to be made to assist released prisoners to return to their homes. This can be a costly matter and, at present, prisoners or their family or community often have to bear such costs.

9. Reconciliation and racism

- It was said that since the visit of Bill Jonas, the Social Justice Commissioner, and HREOC to Kalgoorlie there had been progress, albeit slow, on the matter of reconciliation. A mediator had been appointed to help with the development of a consultation protocol with Aboriginal communities. (Further material provided at the feedback stage 10/2/04).
- Changes are occurring, such as the disappearance of the former policy whereby adults were required to accompany Aboriginal teenagers into supermarkets. But racist attitudes also persist, as in the case of real estate agents telling clients with property to rent of how it is possible to ensure there would be no Aboriginal tenants.

- It is very important to counter racism effectively. Many Aboriginal people are caught between two worlds, in a very difficult position. The only solution is for Aboriginal people to have respect for themselves, as a means to effective action by Aboriginal people.
- In Aboriginal community there needs to be reconciliation amongst themselves before they can reconcile with the broader community.

10. Deaths, coronial inquests and inheritance

- Speakers identified a problem when Aboriginal people die suddenly and their bodies are sent to Perth for coronial inquiry purposes. The family then bears the considerable costs of retrieval of the body. It was asked why the government did not undertake responsibility for the retransportation of the body, to help the family concerned to make funeral arrangements and to cope with their grief.
- The traditional approach to the disposition of personal property on death is to destroy it. This creates problems under European inheritance law
- More work needs to be done in terms of education and awareness about making a will, with provisions on matters such as where the deceased should be buried. There is also a need for community help groups. The issues are so complex that they involve more than simply education, however.

APPENDICES

Appendix I: Memorandum of Commitment

Appendix II: Format for Submissions

Law Reform Commission of Western Australia

Aboriginal Customary Laws

Project No 94

THEMATIC SUMMARY OF CONSULTATIONS IN THE PILBARA AND KIMBERLEY REGIONS

May 2004

The Law Reform Commission of Western Australia

Commissioners:

Chair

Ms AG Braddock SC, BA in Law (Cambridge)

Members

Ms ID Petersen, LLB (Western Australia)

Dr CN Kendall, BA (Hons) LLB (Queen's) LLM SJD (Michigan)

Executive Officer

Ms H Kay, LLB, LLM (Western Australia)

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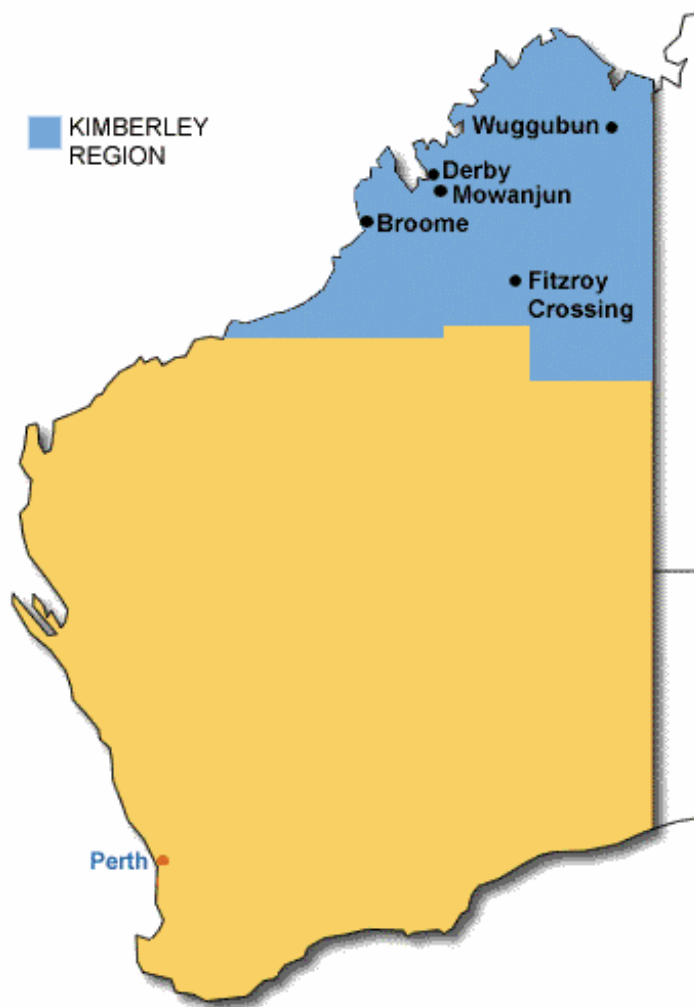
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Preface

The Law Reform Commission's community consultations on the Aboriginal Customary Laws project commenced in Warburton (in the Goldfields region of Western Australia) on 3 March 2003. Further community consultations were held progressively across the State throughout 2003 and were preceded by pre-consultation discussions and visits.

This report provides thematic summaries of the issues that were raised and discussed at each of the consultations in the Pilbara and Kimberley regions. The consultations themselves and these thematic summaries have been conducted in accordance with the Memorandum of Commitment (refer Appendix I) and with protocols that were discussed and approved by the Reference Council.

All of the consultations commenced with a formal introduction, a traditional welcome and a presentation about the project by a Commissioner of the Law Reform Commission of Western Australia.

After the formal introduction and welcome, the consultations were opened up for contributions, comments and discussion by all who were present. These discussions sometimes occurred with the group as a whole, and sometimes within smaller discussion groups to reflect more specific concerns. The Directors of Research, in collaboration with the other members of the project team, produced a thematic summary which maintained the integrity of the consultations by utilising the colloquial language spoken during the discussions.

The reports were compiled by Dr Harry Blagg and Dr Neil Morgan with the assistance of Ms Heather Kay, Executive Officer of the Law Reform Commission of Western Australia.

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

Introduction

The Consultations in the Pilbara Region took place between the 6th and the 11th of April 2003. The Commission split into 3 teams:

- **Team 1** (Harry Blagg, Special Commissioner Beth Woods, with the support of Sui Kamid, Regional Land Officer, Department of Indigenous Affairs Hedland) covered Kunawarritji, Marble Bar and Nullagine;
- **Team 2** (Professor Ralph Simmonds and Gillian Braddock, supported by Maureen Kelly Regional Heritage Officer, Department of Indigenous Affairs Hedland, covered Jigalong, Newman and Yandeyarra;
- **Team 3** (Cheri Yavu-Kama-Harathunian, Oldie Kelly and Ilse Peterson) Roebourne Regional Prison and Strelley Community.

Aside from these consultations meetings were also held with Indigenous people and government agencies in Port and South Hedland.

Arrangements for teams 2 and 3, in particular, were seriously disrupted by a cyclone off the Pilbara Coast.

The field trips are an essential means of ensuring that the Commission hears at first hand the views of Indigenous communities regarding Customary Law. The consultations have been guided by four key questions that together provide a focal point for discussion of law issues. Briefly, the questions ask:

- how is Aboriginal law still practised?
- in what ways is it practised?
- in what situations is it practised?
- what issues confront Aboriginal people when practising their law today?

The Commission has employed these questions as a general guide for discussion. However, these questions may not always be in direct alignment with the particular set of issues confronting Indigenous communities at this time. The community consultations have, therefore, not rigidly followed a pre-defined script, but have tended to adapt in accordance with the flow of local circumstances.

These notes represent a thematic summary of the issues that were raised, not chronological minutes.

The discussions embraced a wide range of issues, covering the following broad themes:

1. General context
2. Family relations and the law
3. Children and youth
4. Elders

5. Self-policing/governance
6. Traditional punishment
7. Substance abuse and aboriginal law
8. Community infrastructure issues
9. Health issues
10. Intellectual property/cultural property rights
11. Education, training and employment of Aboriginal people
12. Criminal justice issues
13. Reconciliation and racism
14. Welfare and family violence issues
15. Deaths, coronial inquests and inheritance

The main issues that were raised on these topics were as follows:

1. General context

- The question of harmonizing the two laws required the non-Aboriginal system acknowledging the existence of and respecting Aboriginal law. The issue of holding a big meeting was again raised by Elders, to “bring white fella and black fella law together”. “At the bush meeting all elders in area and judges talk, judges listen to Aboriginal law”.
- Aboriginal law is “slipping behind white law” and elders spend all their time at white men’s meetings (white forms of authority take priority of Aboriginal forms of business, Aboriginal business has lower status and accorded less respect, even by some Aboriginal people). Aboriginal law needs to be “raised up” to the same level as non-Aboriginal law, and Aboriginal business given the same importance.
- The laws are so different: have different values, “Black law is based on respect, white law is based on loop-holes”. But in many ways it (white law) is crueller than Black law, which is certain and clear, it sounds harsh but aspects of white law seem cruel - like slow spiritual death, slow torture, if you are from desert and locked up in Roebourne.
- A thriving community requires partnership between an ethical and motivated coordinator and a united council and elders. This establishes a basis for order, which then attracts committed teachers and health professionals. Good links with Commonwealth and State agencies are also needed.
- Law and ceremony were practiced as they had always been practiced. Law ceremony, the role of elders and (traditional) marriage, were all ways in which law was maintained. Hunting is part of Customary Law, showing respect for elders, families looking after each other.
- Some of the old men said: the problem (for Aboriginal law) is that it isn’t written down - white man has to see our law at work to understand. We know our law, it is in our memory, we see it in the land. But we need to write it down now, even if that is not our way. While we still have our old people. They said: it needs to be documented, transcribed and typed.
- The community has no problems recognising law, the problem is getting the balance between the two laws. For example, they believed that white people on communities should be bound by Aboriginal law.
- Aboriginal customary law was upheld with a passion in the community. People gather here up to 5,000 strong to celebrate the law and culture. This makes it hard to understand why European law appears to take little or no notice of punishment under traditional law.

- There is a need to continue to work to construct a better path between traditional law and European law. It was noted that contemporary European law struck many in the community as harsh. They had had relatively little education about it, and experienced its harsh application, as when poor postal communications meant loss of a driver's licence.
- Law ignored by the white government and the message is that there is no respect for the Elders. Government has to recognise Aboriginal customary law. White people have never known, or cared, about how Aboriginal people live their culture.
- People are learning law and culture but it is not upheld. Respect is gone - some people are accountable to no one – it is welfare all the way. White law is not respected.

2. Family relations and the law

(a) General Protocols

- Still being practiced today - women's and men's groups. These are kept separate-no mixed groups,
- Some people cannot be seated in the same room; example, mother-in-law and son-in-law are not allowed to be in the same place. The white system does not acknowledge and this causes a lot of stress. Examples given included hospital beds, schools and police vans.
- Classificatory systems for designating marriage were still practiced, people still were punished (usually a "hiding") for marrying "wrong way". These relationships were a major problem for the community.

(b) Skin groupings

- White people who live with Aboriginal people must respect Aboriginal law. In Pilbara communities - if white man wants to marry black woman, he must be initiated, white man has to recognise our law first. He must be subject to the law.
- Marriage is strong -separation is not allowed without parents' consent, if wife does separate she will be punished.
- The community has its skin groups and arranges marriages, to avoid "wrong way" marriages. This keeps blood pure. The communities also practice avoidance, such as mother-in-law/son-in-law avoidance, where they have no conversation with each other, communication is through another person.
- Four main skin groups, Kurrimuda, Bunaga Milunga and Boorunga. Young boy/girls if having any problems with family members must speak to their elders. Young girls are still being promised to husbands. Their relationships are chosen by their families.

(c) Extended family relationships

- Extended and family members still involved in bringing up children - rearing/caring. For example, two sisters can become mothers to each others families and two brothers can become fathers to each others families, Grandfather/grandmother, their sisters/brothers can become grandparents as well.

- Extended families play an important role too, even though they may not be blood relations. Non-Indigenous culture recognises blood relations and immediate family. Non-Aboriginals need to be aware of extended families and their kinship networks (sometimes no blood ties), especially for prisoners who request permission to attend funerals while they are in custody. Prison administration often ignores or does not understand the Aboriginal relationship protocols.
- Often children are brought up by grandmother, uncle or auntie who may live in a different region, town or different community and may not be blood related but are skin related. They are away from mother or father and are being cared for by the relation on either the father's or mother's side by blood or skin related ways.
- The non-Indigenous legal system did not recognise the significance of grandparents, particularly grandmothers, when families break-up and the importance of the grandparent/grandchild bond generally. Grandparents are often primary carers of children, when parents get on grog and drugs, or go to jail. They need more support from the government.
- Conflict between white man's law and Aboriginal law when placing children in custody. In Aboriginal law children are placed with mother's sisters after death of the child's mother; the grandmother can also become main parent.
- Issues were raised about people being evicted for anti-social behaviour, when they need to house their extended family. Homeswest is evicting them because of over-crowding; this shows a lack of understanding of cultural obligations to take in kin.
- Some women relinquish day-to-day responsibility for their children, to relatives, aunties, grandmothers, but keep hold of child benefit payments.

(d) Adoption laws

- Courts to be aware of the way Aboriginal community, family and individuals do adoption or foster care

3. Children and youth

- The problems start when young people refuse to be bound by the law, which may lead to them putting pressure on the police to prosecute law men "if they don't want to go through the law. More youths are complaining about law, which may lead to the situation where a young person goes through law and then lays charges. In traditional society, people did not give consent to be put through law."
- Many members of the community had broken away to live in Nyaparu Town, where respect for traditional ways has fallen away. The community gets the blame when young people leave the community and mess up in Nyaparu Town. Many do not want to live in the community, but the community has no control over them when they are in Nyaparu Town or Hedland. Many went to live there because they were involved in "wrong" relationships and these relationships would not be tolerated in the community. This is sad, because the community cannot maintain the kinship links with those in town, and they may no longer feel they can return. Children there are not being educated in the traditional ways.

- Attempts to bring people back to the community for their benefit have been thwarted by the government and the town. This has been particularly felt in the case of attempts to bring children back to get them away from difficult social environments. This represents a case of the enforcement of traditional law incurring liability for contravention of European law.
- A camp (Puntawari) has been established outside the community to keep young people who are troublemakers away. There, away from town influences, elders could teach them the traditional ways. However, although the camp has been established, it needs support in the form of running costs before it can accept any young people.
- Need for Elders, shire, government, police and schools to work together on the problems existing within the communities, including but not limited to youth issues. Two of the problems identified were solvent abuse and lack of (or need for) a driver's licence.
- There is a need to tackle the social issues and increase opportunities for young people. There are activities for the young people in the communities but in some cases the guardians/parents are not much help in encouraging the kids to participate. Local agencies and Community Councils need to be adequately resourced. Support groups needed for the children.
- There is not enough training for young men in the law; the training starts each year from August to Christmas. The need for young men to attend high school impacts on their training in the law. Some teachers do not show respect to the Elders and do not listen to them. The community school recognises the customary law way, but other schools do not. The school should close down and the teacher should go with the community on law business. The school should fit into community, not the other way around.
- Young boys from the community stay in town and if they cause trouble; the Elders have no authority to bring them back home. Previously, police would ring the community and a truck from the community would go to Port Hedland and pick up the youth. This no longer happens. Community by-laws should give the authority back to the community Elders, so that the police and the community can go and bring people back to the community.
- Parents committing crimes and the community takes care of and responsibility for the children. Grandparents often look after the grandchildren. This is not recognised by the authorities and they give the children back to the parents. Family & Children's Services do not listen to Elders. Further, the mother signs documents but she does not understand what she is signing and the child is taken out of the community. Family is very important in Aboriginal law and child should not be taken out of the community.
- Indigenous youth are developing a black American identity, because Indigenous identities afford them no basis for "respect". There was a general pattern of lack of esteem for aboriginality, manifest in the unavailability of interpreting services, and a lack of concern for aboriginal languages in schools.
- There was a lack of concern for the culture in which Aboriginal Customary Law was embedded. Lack of self-esteem feeds alcohol and drug abuse. Contravention of European law becomes a way of gaining attention, a break and a feed.

- Linking kids into sport is good - however kids do not know what is available and there is a lack of coordination and public transport. Also need money for uniforms etc.
- Aboriginal kids need to be given life skills and there should be initiatives to build their self-esteem. There is a lot of labelling of Aboriginal kids and they are discriminated against. The shopping centre at South Hedland was given as an example - where you are excluded for being an Aboriginal youth.

4. Elders

- The Elders know their law and are able to control the behavior of young people, when they were in the community. Once, all Aboriginal people in the Pilbara and everywhere knew their law and were stronger because of it.
- The Elders in the community take their obligation seriously, still having a strong role to play today in looking after issues that affect their communities/families and still have authority to enforce Aboriginal law and order.
- There needed to be some clarity regarding the "two punishment" issue. Elders needed to have some protection from prosecution when they administer traditional punishment, provided that they operate within the rules. An incident was mentioned where a young man who was flogged for breaking the community law, went to the police and, according to the Elders, nearly resulted in a custodial sentence for the Elder involved.
- It was explained to the Commission that Elders are law people and they are like the judge, lawyers for prosecution and defence (all in one). Elders will talk to the families involved and the community and decide on the dispute. In different places, the law is practiced in a different way; the Commission needs to listen to the different ways. White man cannot elect Elders. Each person from each area knows who the Elders are. Within the Aboriginal communities there is respect for Elders and they "carry our law and culture very strongly".
- In the Community ACL should be strengthened by by-laws and by black and white, it should be recognized that Elders in the community have the right to use them. Outside agencies and the police etc. should not deal with things in the community, but support the Elders who have been given rights to use ACL. White Law should not interfere when this occurs.
- The Council of Elders undermines the true Elders; they are government elders. True Elders are recognised by the community and all the communities respect them. "People change it but law never changes". Aboriginal people need strong leaders and they respect their Elders. An Elder has to be strong and respect himself.

5. Self-policing / governance

- The Elders recalled the "Ten Strong Men" or "Ten Man" Committee which operated from the Strelley Community some years ago, (until the mid 1980s) to pick up people drinking in Hedland and Roebourne and take them back to the community for punishment/discipline. It was considered by some as kidnapping and stopped. The elders then said "if you stop us, we cannot/will not help when there is trouble in future." "The respect was

broken" and some say that is why there is a lot of suffering in town. It was unclear whether the elders would want to institute a similar scheme today, a number of them said it would not work, or be tolerated, anymore (due to the degree of coercion employed, for example). They recognised that they could not force people to come back to the community.

- Some wanted the by-laws to be amended to give this power back to the community. "We need some back up" from our law.
- The men wanted to hold a big meeting involving all the East Pilbara communities and representatives from the key agencies, police and judiciary, to discuss a range of issues; they were especially concerned with issues of alcohol, drugs (ganja, amphetamines) and anti-social behaviour.
- Some communities had by-laws banning alcohol on the community. Community meetings dealt with offenders, by "growling" them in front of the community. Some communities did not have a Warden Scheme and did not require one as they had good relations with the police. Warden Schemes are required in more remote areas. On the other hand the men wanted to pursue the possibility of establishing a Community Patrol to assist people who get into trouble in the town.
- Some voiced concerns about Aboriginal people "arresting" others, rather work through mediation, express community disapproval through community meetings.
- Some communities had seen the establishment of a Warden scheme. There had been previous attempts to set up a scheme but these had run out of steam. The police were supposed to train the Wardens, but this did not happen. Wardens are to see to law and order in the community through the enforcement of the by-laws. But this is not happening because of lack of support from the government. Wardens have no power at present to search vehicles entering the community carrying alcohol, despite the by-laws prohibiting this entry. Change has been promised, but the community is still waiting.
- There is a community patrol that has been in operation here for about the last 18 months. These involve picking up people who are seen to be misbehaving or in distress, such as drunks. The patrol is, however, run from Hedland, and has no local coordinator or similar, and no other local infrastructure. Patrols are picking up people when they are drunk, but as there is no drying out place, people are using them as a taxi service home.
- There are important issues of lack of respect for the local black communities, including in shops, and other such places. To deal with some of the violence in the community, it might be useful to have local by-laws specific to the communities to address this.
- There was general disappointment that, against the background of the Deaths in Custody and Gordon Commission reports, there has been no action on the establishment of forms of local empowerment. There is a need for a whole of government response here. Thus, it would be useful to have local representatives of the Department of Justice. There should also be local Aboriginal JPs.
- One community had developed an offender management program that could avoid the \$68,000 per prisoner expenditure under the current European law arrangements. The Program had three components. The first was juvenile detention. The second was to deal with such as fine defaulters, having them assigned to community projects, such as

horticultural projects (see the Quinn Report (March 2003)), rather than imprisoned. The third was a facility for females.

- There was a need for greater consultation between the European and Aboriginal communities, so that the latter can understand, own and implement solutions to local problems. Local people can resolve their own issues if given the resources.

6. Traditional punishment

- In the community itself, if you do something wrong, you face traditional justice, out on the flats, a camp meeting is called as needed. But traditional law is not just tribal punishment. It is also about respect, including whom to respect.
- Traditional punishment was consistent, "Tribal punishment, blackfella way, never change". However it was recognised that the context has changed. Aboriginal people are subject to a range of conditions (diabetes, kidney problems, high blood pressure) as a result of colonisation. As one person said: "Diabetics – can't give them a lot of punishment, "cos already sick".
- Payback is important to traditional Aboriginals. Previously there was police sanctioning of payback but now too much litigation was given as the reason for no further sanctions. Police nominated the Elders after consultation with the community and released "guidelines" i.e. no injury above the shoulders. Police thought this worked well.
- It was said that with many people from the lands in prison, traditional justice to deal with offenders was forgotten. On release traditional ways need to be attended to. It may be preferable to have traditional punishment before imprisonment. In cases where the condition of the offender would prevent imposing such punishment (such as where the offender had a diabetic condition), the offender's family might receive the punishment. Consideration should be given to releasing prisoners to undergo traditional punishment, so as to relieve the burden on the family that might otherwise have to undergo punishment.
- It was noted that sometimes actions were taken in the name of traditional punishment, which were not properly so described. The example was given of a flogging by some one who was drunk. Traditional punishment in fact must be done while sober, and administered properly, using the appropriate tools, and in the appropriate places. There is an issue that has emerged of claims of traditional punishment that are false. This raises the question of how to ensure that true claims can be sorted out from false ones. This is particularly a problem for the police, who must decide on the appropriate response to actions taken in the name of traditional law.
- A problem area is where traditional law is used as an excuse for working out differences between families, resulting in violent exchanges in town. Elders have been unable to intervene here, and it has not been possible to take those involved back to traditional lands to be dealt with there. It was said that this had happened at funerals, where families had used the occasion to settle scores.
- There is an issue of young people not learning the traditional law. They had been sent to Jigalong for the purpose, but they came back before they acquired the necessary education.
- Traditional punishment has worked well here, but it is being eroded by external influences. Thus, elders cannot, as in days gone by, pick up

youths who are acting up, and bring them back to the lands. Police no longer assist them for this purpose.

- European law does not permit the community to see to it that an offender is first subjected to traditional punishment, which would permit the slate to be wiped clean. It is also worth noting that the punisher may have to look after the offender. Without this possibility, the matter can fester, resulting in apparently random violence.
- The Council has no simple solution to this difficulty. The Council respects the general law of the land, but it wants to see that law respect traditional law also. A solution might be to have sentences mitigated where traditional punishment is undergone, and to have the law recognise that the offender must face that punishment.
- Elders have the law - there are women elders. Elders in consultation with family and community decide on the punishment. Sometimes families say no to "tribal punishment way".
- Closure - some people feel that they should have punishment. If punishment is faced "then you are free". If you do not face your punishment then worse things happen to you. You and/or your family can become very sick or die.

7. Substance abuse and Aboriginal law

- Alcohol was named as the greatest problem. It affects and undermines law. People use "law excuse" when they are drinking and fighting, but Aboriginal law does not recognise drunken behaviour as lawful.
- Some communities have been beset with problems related to alcohol and petrol. There was fighting and when young people came over to see family there was often trouble. The elders punished these young people. The lesson was that there needed to be strong law and a settled community. Kin living in other communities where there was sometimes problems sent the young people down to be looked after and taught Aboriginal ways.
- When the men (including elders/law men) went to town they were freed from the restraints of the law and culture and became involved in drinking, most had been arrested at some time for drink related issues.
- Consideration needs to be given to introducing local liquor licensing conditions to control the availability of alcohol to local communities. Some communities operate under By-Laws to keep them as dry communities. Residents know they cannot bring alcohol into the community. If anyone breaks the By-Laws the elders have a meeting the next day to deal with the problems.
- Education in relation to alcohol is an issue, particularly in towns where there is only 1 drug and alcohol worker.
- One Elder commented that Aboriginal people could not progress without the support of white people. He said that if Aboriginal people did not have the grog problem then we could be strong. The grog is killing us, all over Australia, it will kill us all off, he said. It will require real partnership with government. He was not confident about the future, or that Aboriginal people could survive. Aboriginal people have their responsibilities - to make a commitment to letting go of alcohol, and government had to play its part.

- Some discussed the need for protocols of behaviour to deal with the different mobs coming into Hedland primarily to drink and fight. "Our law might be flat down on the ground. Money and drink is all they care about, not culture". The mobs then go back to communities and "don't want to work, or anything, just want grog".
- Alcohol has killed off our law (in relation to punishment practices). We can't spear anymore, too many people are killed. Because of alcohol, the wrong people are punished and people are killed. So we have stopped using spearing and flogging, does not work for us in this area. If something is not done there will be no ACL in 10 years. The main problem is Aboriginal self-esteem and "ownership".

8. Community infrastructure issues

- Some people commented that if all agencies did their jobs, a lot of problems would be manageable. Limited resources remained the common theme.
- The necessity of the provision of half way houses to help people coming in from the desert to learn town ways and to get people "job ready" was also suggested. The control of Elders is declining as people move into town. People feel freer in town but no housing and no jobs and access to alcohol and drugs creates problems.
- Telstra won't provide phones and there are no post boxes either. These agencies get away with removing services, yet there is McDonald's in the town.
- Another big issue is fly in fly out policies of BHP, which results in them not putting anything back into the community.
- Placement of women's refuge in Port Hedland wrong as there is no access to telephones, money or public transport. The bus service is inadequate.
- Services are lacking and this leads to a lawless town - this has been happening for many years.

9. Health issues

- There was a need to return to some earlier ideas put to government in a report it had commissioned, ideas that had called for service equalisation in remote communities. This needed to occur in health and in education.
- Transport is often a problem for community members and several times this has resulted in members being left stranded. On one occasion an elderly woman had a 12-year-old grandson who was running a fever. The Elder had to walk all the way to Community Health Centre, only to be told to bring the grandson to the clinic. After being flustered she called at the police station to ask for help with transport. The end result was the child had to stay overnight in hospital
- There was not even a health services officer in the community, which had recently created severe difficulties with the onset of labour for a pregnant woman, and with dealing with a severe head injury. There had been Aboriginal health workers, but they were relatively untrained. There was a considerable incidence of diabetes in the community that needed addressing.

- There were complaints about the attitude of the ambulance service to coming out to the community. The night of the meeting a man had fallen and badly cut his head. The ambulance would not come, using some excuse about lacking a spare tyre. The doctor also drives by but won't stop if it is not funded.
- There was also a problem with health authorities putting inappropriate people in same rooms together - a failure to recognise the Aboriginal customs around inappropriate contact.

10. Intellectual property/cultural property rights

- It was noted that property lost to law enforcement or to welfare agents could often only be retrieved by payment for it.
- Cultural objects are important, and are passed down to members of the family. There is an issue of insufficient payment being made for the use of cultural property, including by some of those operating tourist outlets.
- One of the communities visited is working on an arts centre for artefacts.
- Artwork is being produced by young people, and sold everywhere. It had not as yet raised any real problems. This was not really a concern, save for the return of artefacts that have been taken - exhibits in criminal case - or plain theft by authorities over the years.

11. Education, training and the employment of Aboriginal people

- The communities need better education on the legal system and their rights and how to exercise them, for example in relation to warrants, taking on caring role of children, parole, etc. This education package should be brought to each community: workshops would explain legal jargon and court procedures. This information should be available in language. There needs to be more invested in language and interpreter services. There are many interpreters for migrants, but few for blacks.
- Education on women and men's rights and what is cultural and not cultural is also required.
- It was noted that a variety of institutions in the community had not worked or did not work as well as they should because they lacked local knowledge. Mention was made of hospitals and schools. Turnover of staff was a problem. The appropriateness of non-Aboriginal education was questioned:

"Only learn about white settlers"; "Don't fit with our ways"; "not working - school not part of community spirit".
- However in one community an Aboriginal principal has just been appointed and there was some optimism about this. Many felt this was a reason for hope that more local children would go further through the school system.
- In education, after 40 years there was still no case of a community young person who had progressed into a tertiary institution. There was a need for closer liaison between the local schools and the communities.
- The Children are not interested in school, it doesn't take their culture into account - for example, it's not fair that children are marked absent when attending to law business.

- There was complaint that the teachers were all white and did not attend community meetings. Also the teachers brought grog into the community [for their own use].
- Cultural respect packages about ACL, languages, and other cultural things should be in schools from very early age not later on, should start when children enter school.
- Aboriginal people must learn their language and culture and this should be taught to them. There are many languages in this region; it is a "big mob". The community wish to teach "our own in the community, passing on the law and language is very important."
- There will always be people that you cannot reach but there are too many Aboriginal children that are not being reached. Changes should be made by Education to its curriculum for Aboriginal children. "One size fits all" - does not work. The Education Department needs to look at what is working elsewhere in Australia.
- There is a need for real training options for Aboriginal people as well as Training opportunities in prison prior to release - community specific training- i.e. training in engineering, driving trucks or within the mining industry.

12. Criminal justice issues

(a) General

- Aboriginal men did have experiences of the criminal justice system, largely in relation to events occurring off the community. The overwhelming majority had been involved with the system in some way.
- In general terms, the men were of the view that the Aboriginal people get a worse deal from the justice system. They get "two" punishments.
- The issue should be over when a person has been punished "black-fella" way. Mention was made of a killing in Hedland, the offender was speared and shouldn't have had to face white justice as well. The problems do not stop when men go to jail, the family faces punishment.
- Communities and family groups want tribal punishment to be done first before the offender is taken into custody (prison) - this avoids pain and suffering on both parties (e.g. family/s and person committing the crime, victim's family/s). Sometimes families take a long time to complete the punishment and this places stress on all families involved and then affects the community.
- A death resulting from car accident - punishment for driver and their family/s. Aboriginal family and Elders do not recognise that another vehicle or some other circumstance may have caused the accident. They look at who was present, driving at the time, and the other people in the car at the time.
- There is no understanding of Aboriginal Customary Law protocols by white people. For example, pre-sentence and Court reports should include cultural matters, such as the significance of avoidance relationships. Lack of understanding of these avoidance principles sometimes causes Aboriginal people to break ACL and get punished when they return to the community and even while a trial is going on. The trial itself creates situations where law is broken. For example, where a mother-in-law

testifies about a son-in-law, people coming into Court who have avoidance relationships and are forced to sit or stand with each other.

(b) Policing

- Some communities had by-laws but did not need a Warden scheme to enforce them because the community worked well, “[we] never see police, never had to see them in four years”. Some visits by “bush police” would be good in order to establish and maintain good relationships. The practice of moving police on relatively quickly made it difficult to have a consistent relationship.
- Aboriginal Police Liaison Officers (APLO) do not provide support to the communities. APLOS should visit communities on a regular basis - not just white police.
- There have been cases where police roughly handle clients when taken into custody. Clients are often thrown with force into panel vans. There appears to be is no consideration given for age, gender, or custom and the APLOs don’t object or intervene to explain the problem. If clients are aggressive police use pepper spray.
- It was also stated that on occasion, drunk and disorderly people are taken to lock ups when the sobering shelters are full. They are usually released around 8.00pm or 9.00pm. Police release them onto the street and no consideration is given to contacting the family to inform them about the released person’s whereabouts. The time that a person is released gives the person no time to contact or the police to contact family or relatives. People have to find their own way back to their community, which is sometimes a long distance away. The community members are afraid for people’s safety - for example, being hit by a car/truck when not fully sober.
- Funeral business is very important business, people have to go and have no choice. The police know this and wait for you up the roads, check vehicle and licenses. Put the people in jail. “You will break Aboriginal law if you don’t go to a funeral.” “The police- ‘preying like hawks’ at funerals, no respect for Aboriginal law”.
- Some police do not show respect when they enter the community - they should first communicate with the Elders before entry. Police just barge in - they do not “understand our way.” Police have not seemed to be engaging in much cross-cultural training. Nor have they been training many local people to become Aboriginal Police Liaison Officers (APLOs). None of the APLOs in the community are trained locals and do not appear to understand the local law. “Our people” were not asked to apply. Police should widen the APLO’s duties and their job description needs to be changed for better community liaison.
- Police arrive from the city and do not learn the culture of the area, all government workers must undertake appropriate cultural training in the locality; sometimes police insensitive. There was a need for better cross-cultural training for newly appointed local officers of government agencies. It should be a regular part of the training of such people to spend 1 week in the lands, rather than simply training in Perth.
- Police were also involved in taking cultural property (such as carvings and baskets), such as sticks taken as exhibits in the aftermath of fights. But this property has never been returned.

- There was also some anger that the police treated driving conditions in the area as similar to urban areas, imposing standards of road worthiness inappropriate in places where there were no roads. The issue also extended to law business, the police waited to check vehicles on the way to law grounds - some miss law business, as in the case of funerals; missing law business is breaking law. There was concern about police conducting illegal searches of vehicles and confiscating firearms, preventing men from hunting - hunting was said to be a way of practicing law.
- Police interfere with the punishment handed out by the community. Community want police to stay away and let community do the punishment themselves. Need for agreements between family and police don't interfere.
- At police station they only lock up troublemakers for a short period rather than keep them locked up overnight for protection of themselves and community. Bundle them off elsewhere so community members are kept awake all night.
- The main problems related to unlicensed vehicles and unlicensed drivers. Can't use back roads to do shopping in cars that are not completely A1. Police stand on hill to watch them then get them. This can result in driver being charged with no driver's licence, yellow sticker, driving under suspension, outstanding warrants etc. People say police take advantage of this opportunity.
- It was said that the communities needed to know more about the authority of the police, and of how European law operated, particularly in relation to the pursuit of offenders.
- The police and law are aimed at the Aboriginal "problem". Whites literally get away with murder. Examples of this include a "drive by shooting", blacks shot by the roadside by whites in a car, nothing done about it.
- There had been an ongoing panic in Hedland around Aboriginal crime and disorder. Talks of more police and tougher action against anti-social behaviour by Aboriginal people and curfews for youth. The meeting said that in contrast Aboriginal problems were never given publicity.
- Police have a lack of cultural knowledge and are more violent toward Aboriginal people. They are racist toward Aboriginal people but especially when in custody. Most racism in the justice system comes from prison officers and police.
- A lot of Aboriginal people were jailed for driving without a licence or for travelling between communities but not on a gazetted road ("back roads"). Jailing for minor offences, such as these "doesn't make sense". Aboriginal people need to travel between communities and the back roads allow them to move freely between the communities. The police sometimes close back roads. The communities use the back roads to travel to and from Court and to transport the sick to enable them to receive medical treatment. Aboriginal people in the communities without a driver's licence may still have to travel to Court and there is usually no other option but to drive.
- Driver's licence - the test/form needs to be revised, as Aboriginal people may know the answer but cannot answer, as they do not understand the question. Consideration should be given to administering an oral test.
- Requirement for licensing leads to fines and then imprisonment. Fines catch up with you - they hold the fines until you are out of prison. You cannot pay the fines, as you need to feed your children.

(c) Courts

- The Yandeyarra scheme was mentioned as a positive innovation. Others suggested the development of an Aboriginal Court using ALC to administer the justice system. A Court where Senior Law people and Elders in the regions sit and preside for minor offences, for serious offences and crimes that would carry lesser sentences in white man's law. In this Aboriginal Court both White Law and ACL for some offences and sentence to be administered under ACL. This Court could refer back to law of the land (white man's law) and white man's courts for very serious offences.
- This should involve Elders and whites law sitting together, as equals. Aboriginal people don't understand the law, and they face double punishment. (However) if we just mix the two laws, this might just further erode our law, because white law is stronger, before we mix them we must first strengthen our law and clarify a bedrock of Aboriginal values.
- There was a Memorandum of Understanding with the Department of Justice, which had led to a Juvenile Bail Facility, to open shortly. In addition, Chief Magistrate Heath would soon hold the first Circle Court at the community. And recently there had been the first appointment of a member of the community as a JP.
- Need interpreter services in court and in police interrogations. There are interpreters but their use in the Court system is only now and again. There are only a few interpreters and sometimes languages do not match. There is no Aboriginal interpreter service available at the Broome Court, despite a need for such a service. One person stated, "I felt that I wasn't heard". Most people felt that there was a problem with language, in addition people did not understand the language used in the Court.
- The Court processes were not properly explained, ex. Election. Aboriginal people that face the Court system need to be told about the system; for example, they do not understand "remand". Aboriginal people also do not understand why they are not dealt with quickly by the white system.
- Cross-cultural training is required, for example, with regard to witnesses - there are some things that you are not allowed to talk about - therefore you can't be a witness to an event, in criminal trials, etc.
- Mandatory sentencing was a major issue, with a disproportionate impact on Aboriginal young people. There appeared to be no will to do anything about mandatory sentencing notwithstanding strong recommendations against it on human rights grounds. The issue appeared to be bound up in a moral panic about home invasions, and young people in shopping centres.
- Convicted offenders should spend community hours on or near their own community. Aboriginal people generally cannot pay the fines imposed so they receive a further term of imprisonment.
- Of particular interest was a community justice initiative in NSW that had brought together a number of government agencies under Aboriginal direction

(d) Prisons

- There are considerable problems with release from prison for the purposes of funerals. Prisons don't understand the cultural ties within the extended family. For example, uncles that takes on father role - they have not been allowed out of prison to attend funeral at time because they are not

recognised as being "immediate family". People in Perth determine who is allowed to visit. Those decisions are based on complex bureaucratic processes, not Aboriginal Customary Law and do not readily allow for prisoners to be released for this purpose who are not blood relation. The criteria are too restrictive. The inability of prisoners to attend who should be able to do so can bring on conflicts between families.

- Also, prisoners who are allowed to come are often restrained inappropriately so they cannot grieve in the right way, such as by physically embracing others -- therefore unable to hold people. This was disrespectful and prevented the prisoner fulfilling his/her obligations, and thereby breaking Customary Law. "Mardu people have respect - won't run away".
- Forms seeking permission to attend a funeral should be more culturally appropriate and should be re-drafted after due consultation with Aboriginal people. The prison had created a Funeral Information Package, and whilst it was used in the prison it was not used by Department Of Justice head office.
- The Prison officer advised that there is also a problem with obtaining the correct and relevant information from prisoners. Prison officers needed training to ask the correct questions. Also, interpreters were sometimes necessary. In addition, there appeared to be too many links in the decision-making process.
- Many expressed the hope that this ACL business will make a difference and that something will happen to get Aboriginal people out of prison and give them skills to stay out.
- Young men treat jail like a holiday camp, get well fed and television; they have no fear of white law; Aboriginal law is harder. Jail creates more violence, the young men come back worse. Jail makes them big fellas; they don't listen to Elders. Instead of sentencing someone to 6 months in prison why not send them out to live in the bush for 6 months to do the law.
- Some expressed concern about transport and other social issues after release from prison. Sometimes released prisoners arrive on the community with no money. Paperwork should be done by social worker at or near prison for prison release payment. They should not arrive at community with no money and then have to wait 1½ months for payment. This places strain on relatives in community financially.
- Aboriginal Visitors Scheme (AVS) is contracted by police when a person has been picked up. Although they do get a couple of phone calls to ring family, police do not allow family or friends to visit the lock-up because they think they are going to supply alcohol/drugs - therefore being judgmental. Emergency phone calls are only calls that can be received by prisoners, its difficult to stay in contact.
- The women had concerns that the lock-ups are still being used to detain drinkers, in breach of RCIADIC recommendations. For example, drunks are detained for 8 hours to sober up in the lockup because sobering up centre is full. Bigger centre needed.
- Prisons - should be built closer to family. Officers send detainees away from country area and they try to starve themselves because they are lost and afraid. A preferable option is to leave people in the community and keep the family together - offenders can work in the community, ex. Clean up. Look at suspended sentences for men and women within the

community and the Elders in consultation with the community decide what the people are required to do within the community.

- Instead of prisons, build a community facility that can be used regionally or by several communities. Its main purpose is rehabilitation and restoration through education/training, employment training, courses for employment opportunities, drug, alcohol, violent and sex offending. Staffed by trained Aboriginal people and non-Aboriginal people who are not prejudiced. A place that family can come to and stay especially when death occurs in or out of prison, or when children are born so people in facility can do the cultural business and family is not made to suffer because person is in prison.
- Traditional medicines should also be available in prison.

(e) Aboriginal Legal Service

- Aboriginal Legal Service (ALS) should recognize that there is a need for their officers to be working in the prison not just visit from outside. ALS and other lawyers should explain how they will represent Aboriginal clients. Currently, there are no explanations about what “representation” means, not enough information on how to behave (how to show you are sorry), what to do or say. There is not enough information of what to do in Court; sometimes lost by language and things that you have to do when you go to Court.
- The ALS needs to be adequately funded.

(f) Parole

- Family detainees should have the option to do parole in their local community or a community that has been identified by the detainees’ Elders. Detainees have to be given the opportunity to be eligible for parole not just through the mainstream system of getting parole. There should be a cultural process for Aboriginal detainees to get parole because many Aboriginal men do not want to do mainstream prison programmes. If they are paroled to a dry community their healing will be supported. They will be helped to become rehabilitated by interacting, and living with family and being responsible to their community networks and given the opportunity to give something back to their community.
- Cultural protocols should be included in how the Parole Board makes their decisions about Aboriginal detainees and also in an Aboriginal detainees parole plan, management plan, release plan etc.
- The parole process should incorporate dry community networks. Better chance of staying out of prison if ex-prisoner is sent to dry community who has been contacted by justice system and this contact is part of the parole process, because wet community or closer to town communities will have problems for released prisoners.
- Parole - If a person is sent back to the community and breaks the rules, then what is done is at the discretion of the community. The parole officer needs training and education “in our ways.”
- Homeswest does not allow for an extended period of absence from the tenancy. Once you have completed the jail sentence and are on parole there is no house at the end. Lack of housing may affect your parole, so it is a Catch 22 situation. Housing should be provided upon release.

13. Reconciliation and racism

- “Aboriginal people kicked out of shopping centre, for trivial things, strict dress code for Aboriginal people, not for whites, they can go in without shoes and shirt”.
- The approach of police to an Aboriginal death appears to be different to the death of a white person- feel that police are not investigating in the same manner as “Aboriginal deaths not important”. There are a lot of Aboriginal deaths that are not investigated, examples given of a drive by shooting and a number of hit and runs.
- “Black deaths not worth reporting in the news - would if they were white”.

14. Welfare and family violence issues

- Department of Community Development does not know whole family networks or how placement of children may put burden on one person. Children get “dumped”, or end up running around, drinking and then the police pick them up. DCD is not around and doesn’t see it so it did not happen. Police therefore play a direct role, taking children to “auntie”.
- Reference 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, and particular reference was made to the position of grandparents. White law doesn’t understand the obligations of grandparents to take and care for children.
- Grandmothers get no extra money for the grandchildren in her care: Mothers of children still collect mother’s allowance, but they use the money for drink. Elders want parents to take responsibility for children. In the past no money was involved, when living off the land everyone looked after each other, now all this has changed.
- There was a problem where children had left dysfunctional parents, of a lack of clarity as to who now had responsibility for them. Many children were left to wander the streets without any other adults clearly responsible for them. Something was needed that would not resort to interventionist custodial arrangements, on the one hand, or to a simple hands off position, on the other. Times have changed from days when the state always intervened & took kids away. Families now take on additional burdens of care. There needs to be clear protocols in place for the placement of Indigenous children, there are “too many orphans in this community” and white men “just take stabs in the dark” when it comes to placing children. Aboriginal people need to be consulted more about family issues.
- When welfare takes children away from parents, they are not always left with extended family. Children can be taken to another community and placed with carers outside of the family. Some raised concerns for a repeat of history of the stolen generation.
- Domestic violence is a complex issue, and often involves extended family. Initially men in the area reacted negatively when the Domestic Violence Action Group (DVAG) was set up in the 1990s, now men are stronger and there are men’s groups being formed in Roebourne, Hedland, Onslow. “Men have been severely damaged by dispossession. Women still have a role and a reason to exist, men don’t. Men have cultural identity issues”.

- With regards to domestic violence, when young couples fight or get injured parents and family have authority from elders to carry out punishment on the one who is doing the injury. Elders and family will look at the injuries, rather than who started the fight, or who was fighting whom.
- Problems of domestic violence start early, young males bash girlfriends, de factos, wives, etc. We have more heavy drinkers and the police, courts, corrections can't handle them. If these men faced Aboriginal justice they would stop. Jail is a soft option. We shame our men when they are sober, if they go to jail they avoid the shame.
- There was a need for refuge within the community. Some suggested that it be close to the community somewhere near the non-indigenous people. Others wanted a family healing centre, for all family, all ages. There was mention made of the women's refuge built right in the Town of Port Hedland. Some say it is too dangerous and it should be more isolated.
- FCS takes the children and limits the mother's contact with her children - greater emphasis on Aboriginal adoptions and foster care arrangements into the community rather than sending the children away. One woman identified a number of problems relating to children, in particular the separation of siblings.
- Restraining orders - do not work for Aboriginal women, they only wish to seek momentary protection and do not understand that the order has to be discharged. If in prison, no visits allowed if restraining order in place.
- Matters raised by the Gordon Inquiry would not happen in traditional society. Traditional culture did not sanction child abuse and family violence and would prevent it occurring. Some people say, "Aboriginal people accept violence". This is not right. "Violence is not part of our culture."

15. Deaths, coronial inquests and inheritance

- Inheritance is not about material things but about the law and passing knowledge on to the community. Children inherit traditional songs and dances. For material goods, then the blood families give them to some one.
- Elders know the right community to take people to for burial. If there is a dispute as to the burial it should be resolved by the families and Elders. White people do not listen to family or Elders because Elders are not recognised. Then there is conflict within the community because the burial was done the wrong way.
- The approach of police to an Aboriginal death appears to be different to the death of a white person- feel that police are not investigating in the same manner as "Aboriginal deaths not important". There are a lot of Aboriginal deaths that are not investigated, examples given of a drive by shooting and a number of hit and runs.

Introduction

The Consultations in Broome took place on the 17th to 19th of August 2003. Commissioners Ralph Simmonds and Ilse Petersen, Special Commissioners Mick Dodson and Beth Woods, and Project Manager Cheri Yavu-Kama-Harathunian attended the consultations on behalf of the Law Reform Commission.

The field trips are an essential means of ensuring that the Commission hears at first hand the views of Indigenous communities regarding Customary Law. The consultations have been guided by four key questions that together provide a focal point for discussion of law issues. Briefly, the questions ask:

- how is Aboriginal law still practised?
- in what ways is it practised?
- in what situations is it practised?
- what issues confront Aboriginal people when practising their law today?

The Commission has employed these questions as a general guide for discussion. However, these questions may not always be in direct alignment with the particular set of issues confronting Indigenous communities at this time. The community consultations have, therefore, not rigidly followed a pre-defined script, but have tended to adapt in accordance with the flow of local circumstances.

These notes represent a thematic summary of the issues that were raised, not chronological minutes.

The discussions embraced a wide range of issues, covering the following broad themes:

1. General context
2. Criminal justice issues
3. Traditional law and punishment
4. Community justice mechanisms
5. Burials
6. Governance
7. Quality of life issues
8. Inheritance issues
9. Alcohol related issues
10. Education and young people
11. Intellectual property/cultural property
12. Family violence issues
13. Aboriginal courts
14. Legal services
15. Mental health issues

The main issues that were raised on these topics were as follows:

1. General issues

- Senior representatives of the Aboriginal community said that they needed to reclaim community values existing before the white man came, so as to “get comfort for our people in mind and heart”. The European law prevents this from happening, the process of settlement has fragmented Aboriginal society.
- Community leaders also wanted to see the recommendations from the Customary Law process implemented by government.

2. Criminal justice issues

(a) Police

- Young people see themselves being treated with contempt by the police.
- We also see that the police will not intervene in feuds. We cannot get them to take violence within the community seriously.
- Police need to be reminded of the way the handling of our people can make their problems of self-esteem worse. This can be seen in the practice of bringing people to this Refuge in the cages on the back of police vans. It can also be seen in the use of those cages to take them away from here, causing much distress for children in particular.
- Our children end up in filthy cells when detained by the police.
- New “Multi-function centres” may offer a greater law enforcement presence on remote communities yet it is not an option all communities want.
- Children see two types of law. European law harasses them in discriminatory ways. Some police are racist. And there is a considerable turnover in the police here.
- Children notice how those who look white are treated differently from those who look black. Those who look white face, however, the denial of their Aboriginality in their own community.
- Broome is a town with a tradition of discrimination against black children, unlike the rest of the Kimberley.

(b) Aboriginal liaison officers

- Aboriginal Liaison Officers face the problem of dealing with violent scenes where payback against them could result.

(c) Educating the judiciary

- Judges need to be educated about how traditional punishment works in a particular place, given that it varies from area to area. For example, there was a case of a very senior law elder who had to punish his wife who had been criticising him before other elders. In that case the sentencing judge did not take into account the traditional ways that brought this punishment about. The judge should have taken into account the fact that Aboriginal law was at work here.

- There may also be a need for a young person, convicted of what might be both an offence under European law and a breach of traditional law, to undergo education in traditional law as part of his sentence. Again, this would require the judge to know enough about traditional law for him to order this.

(d) Elders and judges sitting together

- One approach might be to have elders from the area advise the judge before there is any question of them accepting claims based on traditional law. In Turkey Creek (Warmun) elders sit with Magistrate Bloemen on matters involving alcohol and drug abuse.
- Justices of the Peace also need training, especially those in the Kimberley and the Pilbara. This was one of the recommendations of the Royal Commission into Aboriginal Deaths in Custody.
- People have not thought through how the communities should relate to European law. We need to go back to the pre-European ways of living, by sitting down with the elders to learn how really to respect the ways of traditional law. Many are confused about those ways. This confusion opens up possibilities for manipulation in the name of traditional law.

(e) Sentencing

- Suspended sentences are not a good idea. They sometimes simply give the offender an opportunity to offend again.

(f) Prison and rehabilitation

- Prison is failing Aboriginal people. One Aboriginal person said, "I used to think prison rehabilitated. Now I think it makes matters worse. We need to get families together, parents and grandparents, to deal with the issue".
- It should be remembered that the average wage of Aboriginals in Broome is CDEP, effectively below the poverty line.
- White people do not understand our skin groups. There is also a need for more general cultural awareness training in the agencies here. The high turnover of the staff of those agencies makes matters worse. We have to tell our stories to them repeatedly.
- It is important to note that there are working models of traditional law elsewhere, as in the US, with the Navajo, and in NSW, with the circle of elders.

(g) Prison and burials

- A big issue in the prisons here is the matter of who goes to funerals. This will for us often go beyond blood relations. Examples would include those who put the deceased through the law, or accompanied him through it. If that person does not go to the funeral, this shames them.
- We have had to educate the police about smoking cells to remove spirits.

3. Traditional law and punishment

- There was guarded support for traditional punishment by some police officers. However, the system of punishment would be at risk if it miscarried, it was said. The biggest problem for police otherwise inclined to allow traditional punishment take its course would be to be seen to be overseeing violence with its potential for liability. Legislation would be needed to deal with this issue. People have been put in a wheel chair as punishment for a sibling's wrongdoing. In that case, it may have been the fact that the punishers were affected by alcohol.
- It needs to be understood that leaving traditional law is not in fact a choice. That is because such law is a part of who you are. It also needs to be understood that traditional law can bind whites. For example, the case of the nurse who was stopped from dressing a wound that had resulted from payback. She was bound by the law.
- Those who have positions in the European legal system, including judges and lawyers, need to know who is, and who is not, bound by traditional law. Lawyers need to know more so they can better tell when their client is misleading them about the application of traditional law. This is because some Aboriginal clients through their lawyers have misled courts about traditional law.

(a) Two laws, different aims

- Many would say that undergoing European justice is easier than undergoing traditional law's punishments. Those punishments are meant to make you remember what traditional law prohibited. Under traditional law it is not important why you did what you did. The punishments of traditional law leave a physical mark so that you will remember what you did and that it was wrong.
- Many come to Broome from dry communities or to escape a dysfunctional environment. Some are fleeing payback. They would rather face European law than traditional law.
- Traditional law works. Its severity and speed can deter. But it has been weakened in Broome.
- It is a weakness of traditional law that it focuses on the incident, not its causes. We have known cases of punishment of passengers in vehicles involved in accidents through the drunkenness of the driver.

(b) Administering punishment

- Traditional punishment must, however, be properly administered. There have been recent cases of it being done in a way that permitted the offender himself to take retaliatory action. When the community say that there has been enough punishment, it must stop. This does not always occur, however. The question needs to be asked, is it a matter of culture or just of revenge?

(c) The courts and punishment

- There is a problem for the courts in informing themselves about what traditional law requires. Wallwork J is an example of a judge who informed himself appropriately of what traditional law involved.

Considerable sensitivity is needed, especially as people feel traditional law strongly now. And there are different protocols in different areas.

- There are examples in the Kimberley of the problems that arise at the intersection of traditional and European law. Thus, in one case of an offender whose conduct was required by traditional law, the judge did not impose a punishment, but the victim made a criminal injuries compensation claim. The offender had in fact wanted vindication, of the sort a complete defence would allow, not the waiver of a sanction.
- There is a need for flexibility to ensure, like mitigating factors in sentencing, that there is account for the varieties in local traditions.
- We are aware of elders concerned about a wrong that was committed in the name of traditional law, where the claim was false, but where the matter was shrouded by a code of silence.

(d) Learning about law

- There is the problem of teaching the law in different country. Indigenous studies are part of the primary school curriculum here, but not sufficiently. Children are not grounded through the law about who they are.
- There is a real problem of disempowerment through the absence of traditional law. Law is not strong here. Grandparents tell the children stories, but the children still feel remote from the law.
- It is not enough just to go through initiation to be respected in the Aboriginal community. "Going through Law" does not simply equal ritual. Becoming a man in Indigenous society should entail more than just becoming initiated, it should also entail gaining wisdom and knowledge. Simply focussing on initiation may only reinforce a cowboy mentality. More time is needed to go through the law.
- We need to bring the law back through books and recordings and stories. Many are afraid to follow the traditional ways for fear of giving offence. There is often a need for people to prove their Aboriginality through family tree construction. Authority from the old people is often needed, and many of them are now dead. Much information is being lost. Most children don't want to say their original names, because of shame. That shame derives from the image of Aborigines on TV, and the way they are spoken of in the town. Their idols now are pop stars.
- Parents tell us who we are related to. But many children do not know their language or their kin or skin group origins.

(e) Take us seriously

- It is important for white people to take our people seriously. The impression is sometimes left that it does not matter when we advocate that something be done. A recent example is our repeated recommendation that a mural be placed in the lock-up. But it is a different matter when a white person makes the same recommendation, which is what happened in this case.
- Aboriginals feel excluded. We face two sets of laws. We know that it will always be European law that will apply, rather than the immediate response of our law.

4. Community justice mechanisms

- Too many of our people are in prison for minor offences relating to vehicles, particularly keeping up licences. There should be greater use of community orders.
- We have a work camp at Derby, it must be said. And the Department of Justice is concerned about the issue of imprisonment rates also. We also note that there is an institute for juvenile offenders at Banana Wells, but it is not the answer. That is because the kids there do not get their culture. We need to send them to the bush rather than to Perth.

5. Burials

- Although burial matters have not been prominent in Broome, it is easy to imagine difficult cases. One might be if a man dies where his wife's family were required by their tradition to go to sorry country. The man's family might decide by reference to the country of his birth. At least things have improved since the days when our people were buried rapidly, without regard to the country to which they might need to be returned.
- There is a strong concern for burial in one's own country. There is now a move to better accommodate this, away from cemeteries, as part of the recapture of traditional ways of dealing with death. Substitutes for burial in country have developed, such as the use of soil from that country.

6. Governance

- What happened to the Aboriginal Justice Council? It may be important to get it back as a means of verifying claims as to traditional law.
- Things have gone backwards in Broome since the Council was abolished. The police now simply walk away from a discussion about policing, rather than be accountable for their actions. The police are currently placing outrageous conditions on curfews as part of bail and are waking up families in the middle of the night to check on a young person. This would have been challenged by the AJC.
- It will be important for the Commission to revisit the recommendations of the Royal Commission into Black Deaths in Custody.
- Capacity building is impossible without strong leaders. Yet the corporate governance initiatives that government supports has tended to involve selecting leaders who squeeze out the elders, leaving them with ceremonial roles only.
- Governance is something of a political football. It is necessary to change state-based corporate law to better reflect traditional governance arrangements. It is not necessarily the case that the allocation of jobs based on family relationships is bad, and may in fact be needed to reinforce traditional law.
- Traditional law could be truly empowering, instead of the European structures imposed on us.
- There are a few examples of traditionally based governance structures, in Cape York and the Pitjinja lands. But generally this is not happening.
- The by-law system is important, but may simply be increasing the levels of unnecessary imprisonment. The fact that the contraveners face a

limited array of sanctions for contravening them does not mean that contraventions cannot lead ultimately to imprisonment.

- The traditional roles of elders are being eroded. They are the people who are the support for traditional law. This erosion could mean the end of traditional law, outside the remote communities at least.
- Many Aboriginal people are themselves confused about their position and their culture. Terms like “self-management” and “empowerment” are just words until the matter of giving them knowledge of their culture and their law is addressed.
- Thus, it might be necessary that young people go through the law prior to undertaking the responsibilities of adult life, like taking a spouse. This is because at present they lack the sense of obligation and responsibility traditional law would give them, while European ways give them nothing that is equivalent.

(a) Regaining our strength

- Communities can recover their strength through traditional law. Compare the weaknesses of the current by-law and wardens system. This involves the choice of enforcers outside the skin group system of traditional law, and is another example of imposing white ways on our communities in the name of “empowerment”.

(b) A piece-meal approach to programmes

- There are many examples of programs to address community needs which have been piecemeal, and which have lacked adequate follow-up. An example is the Ministry of Justice anger management program.

7. Quality of life issues

- A problem, as Broome has grown, has been the worsening of the conditions for Aboriginal people. Thus, dialysis treatment has had to be introduced here.
- When we give evidence at native title hearings, we are asked why we do not exclude people from our country, and why we do not tend to it. However, Aboriginal people are one people who tend to include rather than exclude.

8. Inheritance issues

- It is true that traditional law does not provide clear guidance on the distribution of property on death. Where there is a will, this is respected. But otherwise, there can be problems. However, it must also be said that our people do not understand why, when there is no will, and the deceased left no family, the property goes to the government rather than to the community.

9. Alcohol related issues

- A major problem identified by Milliya Rumurra was the lack of a half-way house after residents leave treatment. When they return to their communities, they usually lack support for the continuation of their ways of living without any or as much alcohol.
- Milliya Rumurra has worked on educating members of the residents' communities, including family members, so that they can provide support. But lack of community support and understanding remains a significant problem, typified by the sort of community celebration with alcohol that is put on to mark the return to them of someone who has been through detox.

(a) Dysfunctional communities

- The problem is to find communities strong enough to remove the pressures to drink heavily. Many of their so-called leaders are suppliers of alcohol, which may have helped get them elected in the first place.

(b) Addiction

- Alcohol or marijuana abuse is the problem for our residents. They are typically not addicted, but are on the borderline. Problems with other drugs don't present themselves, as they might in say Port Hedland, where there is more money in the Aboriginal community.

10. Education and young people

- The greatest need is to reach young people, particularly those 10 years old or younger. Role models are hard to find. The best role models are their own parents.
- Education Department programs on alcohol and drug abuse are not working, on the evidence of what goes on in the street. Older people are often ignorant of the physical and psychological harm that substance abuse is doing to them. Younger people who are aware of this still keep doing it. The availability of these substances can be seen in the 52 licensed premises where they can acquire alcohol in Broome.
- Milliya Rumurra now deals with the children of former residents. Children suffer from boredom, and see government handouts and the entrenchment of unemployment in their families. Work is simply unavailable to them. It is little wonder they are discouraged. All of this tends to show that Broome's "multiculturalism" is somewhat overstated.
- Children can be the origin of feuding. Alcohol fuels much of it. Sticking up for their children has replaced discipline for many parents. Perhaps this is in part the result of displacement and angst.
- Older people drink to deal with the lack of self-esteem they feel. Younger people drink to establish self-esteem, at least among their peers.
- TAFE here tried to coordinate traditional skills training programs, but these were not pushed enough.
- Broome needs a drop-in centre where Aboriginal people will feel comfortable. There is a need for young people to feel happy and valued. The existing centre run by DCD does not cater well for 14 to 17 year olds.

Many of them have grown up with no dreamtime dancing, and with no football playing.

- In Broome development has overridden everything. Investment in the community itself is missing. Everything has become expensive, there is widening inequality and there is something of an upsurge in racism as outsiders move into the town attracted by the money to be made here.
- There is much theft, made worse by commercialism and peer pressure. There is a need for training for parents so they can help to offset these.
- Things are made even worse by false accusations against our children.

11. Intellectual property / cultural property

- Art offers one way of enhancing self-respect and providing a form of self-help that can benefit the community also. However, a lot of Aboriginals produce simple artefacts for tourists and simply use what they earn to produce drinking money. They do not try more elaborate work, and do not direct what they make into community building. Thus, we have not seen local people use local timber to produce boomerangs.
- What art there is comes from the remoter communities. It is virtually impossible to produce art in Broome, given the distractions there. Also, the cost of equipment is an issue.
- Artists in the Kimberley have had concerns. There is a need for account to be taken of stories, music, and dance, as well as painting. There is a need to see how the land or the community may be a part of the ownership interests here. Royalty issues need to be addressed. There are some most impressive examples of communities knowing how to split royalties up. See the case of the old man who sold an entire corroboree, including the paraphernalia, the music and the performance.
- See how the removal of artefacts to the south, including to the basement of the Battye Library, has hurt people here. We are told that bringing this material back would be problematic because it is too fragile, and could be lost up here. However, some of this material is very important for the cleaning of the ground for ceremonies, and its absence means the ceremonies cannot take place.

12. Family violence

- There is a problem of adequacy with European punishment. Tribal punishment through the family would be better. Counselling is often not enough. Wives live in fear of the release of abusive husbands who are about to come out on parole after relatively short prison terms. In prisons little changes except for the worse.
- Family would be prepared to administer punishment that would satisfy the victim and that the offender would recognise. It would be highly desirable to have submission to traditional punishment included as a condition of parole, submission by community leaders to do this have thus far been rejected by government and courts.

(a) European law part of the problem

- European law has caused many problems. Domestic violence results in the wife coming under pressure to leave the home. She suffers emotionally and physically with little or no support from the police or any one else in authority. Her own community may also let her down.
- We also have only one lawyer to turn to, one who tells us to plead guilty. With this lawyer, it is first in, best served.

(b) Restraining orders

- In domestic violence settings we face lots of issues of under-enforcement of restraining orders. It would be useful to have such orders able to apply to couples still living together, not just for cases where they will live apart. Apparently, such orders are possible in Queensland and the Northern Territory.
- Particular relations will be responsible for the protection of particular children or other young people, and this needs to be better understood in the European community.
- At the same time, issues have arisen concerning people marrying into a family. These people might take the marriage to mean they acquire rights in respect of all of the females in the family. This is wrong.
- There has also been a lack of understanding of what traditional law says about the protection of people from action being taken against them. Thus, wives who flee to their mothers' places should be safe from further violence there. But their husbands do not always respect this.
- Women and others were subjected to controlled punishments by men. This was often seen as a way of showing the men's concern for their women. Now we see an increase in women in prison for bashing up their men.
- Aboriginal women have moved on, but the men have been left behind. The men often don't know how to do things traditionally, and they have lost much self-esteem.
- Family violence could be made worse if traditional law were poorly reintroduced.
- Where women are promised to men, they have to go with them. If they do not there is shame. Sometimes there are bashings that wash out the breach when these women marry others than those to whom they were promised.
- At the same time the marriage promise system is about uniting groups, and preventing inbreeding.
- However, it should be noted that the marriage promise system is weakening.

(c) Child sexual abuse

- There are problems with paedophilia in this town. It is not just a problem in the Aboriginal community - there have been both Aboriginal and non-Aboriginal offenders. There is a perception in the Aboriginal community, however, of differential treatment of Aboriginal and non-Aboriginal offenders, with the latter receiving more lenient treatment by the courts.

- The victims of this sort of crime are seriously hurt, and may well become highly publicised criminals themselves. Aboriginal organisations are aware of the recommendations of the Gordon Inquiry, but we also note the money recommended is not ear-marked for agencies that provide services to the victims and their carers.
- It is a hard thing for Aboriginal people to deal with sexual abuse, particularly of children. This is because of the way payback is understood, and of the complicity of some male leaders. There is a men's forum being promoted to have men confront the reality they face. This has to happen if real change is to occur.

13. Aboriginal courts

- What is needed is to involve the parents, and to have an informal family court, along the lines of the circle court at Yandeyarra. What we need is to find a way to restore respect for children, especially among males who don't take this form of abuse seriously.
- A family violence court was promised here, for 1 July, but is now overdue.
- It is difficult to get convictions in this area, with the need for witnesses. It is clear there is under-reporting of offences in the area of rape and molestation.

14. Legal services

- The ALS is not much help to us. Lawyers don't allow us to speak for ourselves in court. Our people in court need their own advocate from their own community. ALS has insufficient staff.

15. Mental health issues

- Graylands offers no facilities for communication with the families of children sent there. North West Mental Health is often in no position to offer anything.
- In the mental health sphere, the challenge is to work out the interface between traditional law and the western system so as to distinguish mental illness from cultural difference and draw on the healing powers of traditional ways. Where those ways conflict with western precepts, the tendency is to try to give effect to the former. Aboriginal mental health workers and traditional healers are being employed now, as well as family members.
- Graylands is the only authorised treatment centre for the Kimberley, and this creates problems. Community treatment orders could include such healers, but tend not to. Without such orders, there is a duty of care issue that can arise with involving them.
- The Commission's project is timely, as there is a review of the Mental Health Act currently.
- Mental health problems increase if traditional punishment is delayed. There have been cases of suicides where people had not undergone the required payback.

(a) Disrespect

- We have been treated with considerable disrespect in courts, as when one of us was told to come back to court to testify only after she had got a set of false teeth. A voice is needed for our people in this town.
- We need a woman lawyer, and women judges.

(b) Supporting Aboriginal carers

- We see white foster carers paid to look after children. But because of the responsibilities for care our people feel, we end up with the same responsibilities but with no such financial support.
- One woman told how she had been looking after a young girl from her mother's country who first appeared in my driveway suffering the after-effects of serious sexual abuse from her father and her uncle. "She now does not speak at all. There is provision for payment for physical harm, but not for serious psychiatric illness. This responsibility has been very hard, barely surviving on a pension. In any event more is needed here to offset the high cost of living in Broome".

WUGGUBUN

9-10 September 2003

Introduction

The Consultations Wuggubun in took place on the 9th and 10th of September 2003. The Commission was invited to Wuggubun by Kimberley Law and Culture (KALAC) and the Kimberley Land Council (KLC) to participate in the 25-year anniversary celebrations of the KLC.

Commissioners Ralph Simmonds and Ilse Petersen, Special Commissioner Mick Dodson and Research Director Dr Harry Blagg attended the consultations on behalf of the Law Reform Commission.

The field trips are an essential means of ensuring that the Commission hears at first hand the views of Indigenous communities regarding Customary Law. The consultations have been guided by four key questions that together provide a focal point for discussion of law issues. Briefly, the questions ask:

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These notes represent a thematic summary of the issues that were raised, not chronological minutes. The discussions embraced a wide range of issues, covering the following broad themes:

1. General Context
2. Children and Youth
3. Elders and Law
4. Self Policing and Governance
5. Language
6. Traditional Law and Punishment
7. Women's Issues
8. Education, Training and Employment of Aboriginal People
9. Substance Abuse and Aboriginal Law
10. Community Issues
11. Community Justice Mechanisms
12. Criminal Justice Issues
13. Racism
14. Welfare and Family Violence Issues
15. Deaths, Coronial Inquests and Inheritance

The main issues that were raised on these topics were as follows:

1. General Context

- "Black law does not change." White law should not interfere with black law. White law cannot change black law.
- Some say that the laws need to work together, while others say, no they cannot work together.
- A way must be found of negotiating a relationship between our law and European law.
- The Commission should be interested to learn what is good in Aboriginal law, not what are the problems in Aboriginal communities. There should be partnerships between traditional and European law. Systemic reforms based on partnerships with communities to produce practical outcomes, rather than nice words in a report, are needed.
- With regard to the Commission's Terms of Reference, the comment was made that you cannot leave heritage and land issues out of this discussion.
- Aboriginal people are born into the law, they maintain it as their choice. Authority comes from their elders and comes from the community.
- Regarding the LRC Reference: there was discussion on how many other reports there have been. What will this report do? "What are you (LRC) going to do about the issues of drugs, booze, assault, incest: essentially underlying problems caused by lack of respect?"
- Old people had law and culture; now Western influence leads to jail. There is not enough money for Aboriginal law, singing, dancing and culture. Paid support not given to elders. Turn kids around if they follow the ceremonies, to reinforce their own culture; kids need to learn to behave and respect themselves.

2. Children and Youth

- There needs to be strong support for young people. Young people need to be taught. They need to go back to their community and their family.
- Families want the power back. If power is given back to the families their children will feel safer. American rappers and language are important to kids. Hurtful words are used - there are other role models for kids now.
- In the proper way you respected other people's children and that does not happen now. Elders used to sit down with you and your parents.
- There is a need to allow Aboriginal people to control their own kids. Allow them to take them to the bush and teach them their way. However, this cannot happen due to lack of resources. This needs support - government needs to look to giving support for Aboriginal people.

3. Elders and Law

- We need to use elders better.
- There is a need to recognise the authority of the elders.
- Lawmen are not “elected” in the white-fella fashion. It is already decided in the dreamtime. No one can tell you how these decisions are made. Often, it is passed down through family, it can skip generations, but that’s not the only way.
- Kimberley law is complicated. Skin systems are still vital and govern all relationships. Different mobs have their own law. Sometimes Elders die out and no one can take over that mob’s law.
- Much law is secret. “I could be killed for telling you how law runs”.

4. Self-Policing and Governance

- Old people had law and culture; now Western influence leads to jail. There is not enough money for Aboriginal law, singing, dancing and culture. Paid support is not given to elders. It would turn kids around if they follow the ceremonies, to reinforce their own culture; kids need to learn to behave and respect themselves.
- White people took too much from the Aboriginal people. They have to give something back.
- In the early days, people were dealt with in the tribal way. All power has been taken away from the Aboriginal people.
- Aboriginal organisations need to be responsible. There is too much poverty. High profile black leaders are not addressing our problems, they are feathering their own nests and not going back to the grass roots. High profile black leaders to blame. We should not be living in poverty today. There is a need to have the right people in power.
- We need to come together to make things happen, as people go back to country. We need services and resources delivered there, under our leadership, but with support.
- We need to be able to better regulate access to land. People are going into sacred sites with ATVs and 4WDs, damaging the land. The DIA does not have the resources to deal with the matter. The law requiring permits to enter aboriginal lands is not being enforced.
- At the same time, European law prevents us mustering cattle on our land.
- Mutual respect and legal pluralism are needed.
- Our law should be enforced by us, not by the police; correspondingly, European law should be enforced by the police, not by us.
- A suggestion was made about establishing a “punishment place” and a place for court proceedings in the community. “We could have young people from outside the community brought here, away from relatives who might be too soft on them.”

- There are problems with young people running into trouble in town. We want to have them working through their punishment with us, showing them the culture, such as hunting.
- We need to know where we stand with our law. We would like to be able to punish cattle thieves in the traditional way, with a flogging. We don't want to be sued for practising our law.
- Police in our community have watched on as traditional punishment is administered. Sometimes, when we cannot spear, but must sing, this makes the problem worse.
- Every one wants self-government. European law belongs to them, our law belongs to us. Our elders should control our law, just as your elders control yours.
- If we walk into a white person's paddock, we commit trespass. But when they walk on our sacred sites, they contravene nothing. Ours is the law of the land for us. They must obey our law, as we obey theirs.
- Mining companies are ignoring Aboriginal control of their lands, as the companies pass and re-pass doing their exploration. They do not consult, or consult adequately. And the government does not help.

5. Language

- There was also discussion about the importance of language. There was a right way to talk in own language. This was not acknowledged by the justice system and was not being used in the justice system. There needs to be support for programs. "Nothing has been delivered to our community to support our programs". Services are all town based and not community based.
- Everyone has the right to communicate in their language of choice. Necessary steps need to be taken by Government agencies to respect this. Participate and communicate in language – KLC & KALAC can help with language ensuring proper communication and proper process - however resources are needed.

6. Traditional Law and Punishment

- Our law is very strong and forceful. Old people carry it. Simply speaking of it can bring punishment.
- Our law is not on paper, but in our country. It is sacred.
- Traditional law goes much further back than European law. It is simple and strong. It needs to be kept hold of, tightly. It can't be changed. Change would in fact be fatal to it. It is much easier to understand than European law.
- You need to ensure you speak to the law carriers. They get the law from the old people. Often they don't ask to receive it. They in turn pass the law on to younger people.

- European law tells different stories from those traditional law tells. Both laws need to be at the same level.
- It is often easier to talk about law to judges than it is to talk about it to policemen.
- It is essentially about respect, culture is based on respect. Aboriginal land and heritage is not respected. Respect comes from culture but once in the criminal system you lose respect.
- Some use Aboriginal laws to get away from white justice.
- A criminal record sticks, whereas, once you have traditional punishment everyone is equal afterwards.
- In some places our law is very strong, in others it is not. We have our law everywhere; but some do not use it.
- You cannot separate our people from their land.
- At Fitzroy, if any one is killed, the killer should be put through our law first. At present, however, European justice is on top. We want Our law and European law to be at the same level.
- There must be examples outside Australia of accommodating traditional and European law. In Australia too there are examples, in the exercise of judicial discretion, as in the Northern Territory. In the Territory there are cases of court-supervised traditional punishment, with medical back-up.
- Traditional law says that justice should be administered by the community.
- Traditional law is potentially stronger than European law, in terms of addressing the underlying concerns in offending. Our law has been practised for some time. But it needs reinforcement, and greater respect. It should bind whites also. If a white contravenes our law, they should be punished under it. Coming to a community with strong laws entails being subject to them. Our law is an important part of who we are.
- The matter of Australia's international obligations in relation to physical punishment needs to be understood from our point of view. Ours goes back much further. These international law norms strike many of us as disrespectful and ridiculous. For us, prison is cruel and inhumane.
- Traditional punishments do not have to involve payback, except in the most serious cases.
- When our people are convicted of an offence and go to jail, they get no education. But being dealt with under traditional law does teach a lesson. "You go to prison, get no knowledge". In Aboriginal law you learn all the time.
- If someone contravenes our law and white law, and is not punished first by Aboriginal law, then the matter festers, with members of the offender's family being held responsible. Having traditional law apply first is the best way, and creates no double jeopardy issues for us. The administration of such law could be part of the justice plan referred to, and could help to address the problem of our people going to jail repeatedly.

- Concern about double jeopardy is a European, not an Aboriginal concept. If there is a contravention of both laws; double punishment may be a good thing in deterrent terms.
- An offender being punished in the traditional way will not be killed. The matter could be properly supervised, with an ambulance on hand.
- White people who witness punishment have to be bound by Aboriginal Law. In one instance a nurse was in attendance to assist after a spearing: "she wanted to fix him up but the bosses said leave him, she was bound by that law".
- Police should send offenders back to the community, not allowing them to stay in town.
- We need to ensure that those who properly administer traditional punishments are not themselves punished by European law.
- The State must think outside the box, treating elders as living treasures. The administration of punishment should be under the control of elders and ALOs must be allowed to punish in the traditional way.
- Jail is not the answer as it gives a bad image to a person, a person is nothing in jail. The proper way is Aboriginal law.
- Law has to be given back to the people, back to the community. Communities need to be properly financed, particularly to deal with domestic violence.
- To us, it is cruel and degrading to incarcerate, cruel to stop Aboriginal people living their culture, spearing is more humane.

7. Women's Issues

- It was easier in the past as women were respected and acknowledged.

8. Education, Training and Employment of Aboriginal People

- Schooling at home was suggested. There is a need to provide facilities and support structure so that elders and women can be empowered. Money doesn't mean respect.

9. Substance Abuse and Aboriginal Law

- There are drugs in the community and we need to be role models for the children.
- We need early intervention programs to deal with drugs and alcohol.
- Night patrols are a good response to drunkenness, but they need to be empowered and resourced.

10. Community Issues

- If Aboriginal people have an issue that needs attention they deal with the issue within the community.

11. Community Justice Mechanisms

- There is considerable interest in model programs, for example, “circle sentencing” courts for young offenders, training camp in Cape York, with the elders provided for by the government and the Broome night patrol. The Law Reform Commission should recommend ones. There are many good ideas in the Kimberley, to deal with the problems of young people, but few resources.
- Preventative, not curative, strategies are needed most. Government agrees, but does not deliver. What is needed is power to communities, to be exercised jointly with government agencies; and offenders need to be placed in communities, to be dealt with there.

12. Criminal Justice Issues

Police

- Police chase cars when it is not necessary. Police need to be properly trained and understand Aboriginal heritage and culture.
- There is a concern that if an Aboriginal kills someone, accidentally, they can lose their job; but if a policeman kills someone there is no such consequence.
- In Fitzroy over the last 9 years Aboriginal people have been killed by white people but there has been no report back to the communities affected on what has been done about these matters. Contrast the speed with which Aboriginal drivers have been dealt with. There is a sense of skewed justice.
- In Broome a young white man got 24 months on a good behaviour bond for calculated pearl stealing to feed a drug habit; contrast black youths who stole pearls haphazardly as a lark, but got custodial punishment.
- There needs to be a review of “move on” powers, directed against sleeping on the beach.
- The royal commission on black deaths in custody does not seem to have produced any justice.
- Where there are criminal cases involving Aboriginal offenders, there should be equal numbers of black and white jurors.
- Police discretion can be misused to discriminate. The legislation should cut back on police discretion.
- Aboriginal Liaison Officers cannot become fully empowered police without further training, in reality this is beyond most ALOs. ALOs cannot arrest whites, and must act under the direction of even a junior white policeman.

Courts

- Interpreters should be used in courts and to assist the family to understand what is going on.
- Having an Aboriginal person sitting with a Magistrate is a good idea. It also ensures equal representation (Aboriginal and white) on the bench.
- It is a good idea to have circle courts to talk problems through.
- Prisons
- Jail is not the answer as it gives a bad image to a person, a person is nothing in jail. The proper way is Aboriginal law.
- Men should not go to prison - it's inhumane. Aboriginal law is more humane.

Funeral Attendance

- There is an issue with prisoners being shackled at funerals. This is considered shameful and should not be allowed.

13. Racism

- "We accept people, forgive people, do our people get the same treatment". "We follow their rules, white rules, we just want equality in Australia".

14. Welfare and Family Violence Issues

- It is necessary to go back to the families. They should be held accountable.
- Law has to be given back to the people, back to the community. Communities need to be properly financed, particularly to deal with domestic violence. Communities should be empowered.

15. Deaths, Coronial Inquests and Inheritance

- Burial issues are indeed significant ones. Up here, it is contrary to our law for some one not to be buried in some sense in his country. The family, however, might say that it is appropriate to have a ceremony in another country.
- When some one dies, elders decide what happens with all the belongings.

FITZROY CROSSING

3 March 2004

Introduction

The Consultations in the Fitzroy Crossing Community took place on the 3rd March 2004. Two meetings were held, both hosted by Kimberley Aboriginal Law and Culture (KALAC) at the Karrayili Adult Education Centre in Fitzroy Crossing. Commissioners Gillian Braddock and Ilse Petersen, Special Commissioner Mick Dodson and Research Director Dr Harry Blagg attended the consultations on behalf of the Law Reform Commission.

The field trips are an essential means of ensuring that the Commission hears at first hand the views of Indigenous communities regarding Customary Law. The consultations have been guided by four key questions that together provide a focal point for discussion of law issues. Briefly, the questions ask:

- how is Aboriginal law still practiced?
- in what ways is it practiced?
- in what situations is it practiced?
- what issues confront Aboriginal people when practicing their law today?

The Commission has employed these questions as a general guide for discussion. However, these questions may not always be in direct alignment with the particular set of issues confronting Indigenous communities at this time. The community consultations have, therefore, not rigidly followed a pre-defined script, but have tended to adapt in accordance with the flow of local circumstances.

These notes represent a thematic summary of the issues that were raised, not chronological minutes.

The Commission attempted to meet with a cross section of the community and relevant agencies involved with Indigenous people.

The discussions embraced a wide range of issues, covering the following broad themes:

Morning Consultation Session

1. Traditional Law and Punishment
2. Elders
3. Welfare and Family Violence Issues
4. Burial Issues
5. Policing Issues
6. Departments of Justice and Community Development
7. Community Justice Issues
8. Substance Abuse and Aboriginal Law

Afternoon Consultation Session

9. Aboriginal Justice Plan
10. Policing Drug Issues
11. Department for Community Development
12. The Women's Resource Centre

Background

The morning meeting included members of the Fitzroy Valley community, including prominent Elders, and Aboriginal agencies in the town. The afternoon meeting involved the latter groups plus representatives from the Police, the Ministry of Justice, the Department of Community Development, the Women's Refuge and Women's Resource Centre.

The meetings in Fitzroy followed an invitation made to the Commission by senior members of the Fitzroy Community at a festival to celebrate twenty-five year anniversary of the Kimberley Land Council at the Wuggubun community in the East Kimberley in 2003. These senior men and women wanted to discuss matters related to the coexistence of "two laws" in the Kimberley, and also wanted the Commissioners to hear their concerns about relationships with the police and what they saw as lack of adequate consultation with Fitzroy Valley Elders and Aboriginal organizations on a range of justice related issues.

MORNING SESSION

1. Traditional Law and Punishment

The "two punishments" issue was the subject of considerable debate throughout the morning session. The Elders said that, presently, the Court tended only to listen to "one story" and was deaf to the other (Aboriginal) story. In one case, for example, a man was punished (according to Aboriginal law) following an incident where someone fell from the back of a truck he was driving. He was charged with driving related offences (including driving while above the legal alcohol limit), he had also broken Aboriginal law – the very fact that someone had died when he was in charge of the vehicle meant he had broken Aboriginal law, irrespective of whether he was "at fault" in the western legal sense.

So the man was both punished by the community and imprisoned by the white-fella law. The meeting believed that the court should have taken Aboriginal punishment into account and given him a non-custodial sentence. However, the magistrate, in this instance, declined to take this punishment into account.

This meeting raised a number of important related issues:

- There is no consistent mechanism for ensuring that knowledge about Aboriginal law and punishment is relayed to the court.
- Who should do this and in what form?
- Should there be "cultural reports" to courts, which include issues of alternative punishment and if so, whose responsibility should it be?

- Aboriginal Law should be taught in Universities to lawyers, to all training in law. There should be compulsory training courses – including cross-cultural awareness – in the bush.
- There also needs to be more Aboriginal people involved in the court, sitting with magistrates, as interpreters, and so on.
- Police do not understand that Aboriginal families face retribution if offenders do not face punishment – they are frequently denied bail for this to occur.
- Police fear that the person might die – and that they will be held responsible.
- Practices are very ad hoc. Sometimes Magistrates will not bail/remand offenders so that they can face punishment. In other instances they will do so. Occasionally magistrates do take into account the fact that punishment has occurred and make the necessary adjustment when sentencing.
- There was a case involving a Balgo man who stabbed a youth in the thigh. The Aboriginal Legal Service was successful in getting the Magistrate to understand that the act was not senseless and that the choice of the thigh was not arbitrary. The wounding had been carried out correctly in accordance with Aboriginal law because of an infraction of Aboriginal law. The Magistrate took this into account and the offender was given a three month Good Behaviour Bond.
- Magistrates should also be informed when punishment is carried out, and there should be a mechanism for verification. The punishment needs to be witnessed.

2. Elders

- There was a strong belief that Elders had been undermined – that “authority has been stripped from Elders”. The view was that old people should have the authority to jail young people who played up on communities. Currently, young people were “more afraid of the police than Elders”. This was wrong and authority should “run both ways” – police and Elders.
- Cases involving the potential for double punishment should be the subject of negotiation between appropriate law people and the judicial authorities. In relation to the man who was imprisoned and punished by the community (noted above), a participant said: “Someone should have been sitting with the judge at a ‘negotiating table’ discussing this. He shouldn’t have been punished twice. There should be an Elders Council or Commission sitting with Judges and Magistrates”.

3. Welfare and Family Violence Issues

- Elders should be involved in the resolution of family violence cases. If there was traditional punishment for family violence this would break the cycle. At the moment Aboriginal men claim Aboriginal law when they give

their wives a beating, the Elders can verify whether this is a genuine case of law-breaking or just “bullshit” law.

- The “kardiya” (white-fella) criminal justice system offers no safety for victims, neither does it change the behaviour of perpetrators.
- There also needs to be training on family violence issues in Fitzroy, for all the agencies involved.

4. Burial Issues

- It all depends on which group you belong to. Family has the right to decide where and when someone is buried - not the spouse: it is not often an issue here, people generally know the rules.
- KALAC has been successful in repatriating the remains of people from all over the world. It is important that people are buried in the right place and that blood relations are returned from other places. KALAC has been involved in sensitive work moving remains from the old cemetery (which has been subject to flooding) to a new site. They have been successful in exhuming bodies that have been buried in other country and returning them for burial in the Fitzroy Valley.

5. Policing Issues

- There was a strong perception that the police picked on Indigenous people, and that there were problems with the police culture. Racism is a problem with the police. Police, “lie in wait” for Indigenous drivers, they don’t stop white people when they come out of the pub.
- Different sergeants had different approaches, things change when a sergeant moves on and a new one is appointed. There is a need for some consistency, sergeants should not just come along and ignore arrangements and protocols that are in place and have been painstakingly negotiated between the community and the police.
- The Marrala Community Patrol has been taken over by the police. Some participants believed that there was a “deliberate strategy to undermine the Patrol”, led by key government and business agencies. The police have a patrol van to take drunks to the sobering-up-shelter, the van is like a police van, a caged ute. “It strips our people of dignity”.
- The defunding of the Marrala Patrol led the Aboriginal community to conclude that their aspirations were of lesser importance to the police and other agencies than the wishes of a non-Aboriginal service. Marrala Patrol placed the emphasis on safe drinking, drink reduction, and preventing alcohol related problems. Perhaps this was too challenging – there are interest groups with a stake in ensuring Aboriginal people spend money on alcohol.
- As things stand many people are being left stranded at the Crossing Inn. They take a taxi to the Inn but have no money to take the return trip. This leads to more accidents outside of the Inn and on the streets. People have been run over on the dark streets, this was why Marrala was established in the first place. Marrala had two 18-seater buses. It was able to be proactive and take people home before there was any risk.

- The police had refused to have two way radio contact with the patrol bus. Essentially, the police see Marrala's role strictly in terms of transporting drunks to the sobering-up-shelter. However, Marrala works according to Aboriginal law - and has to be aware of the possible consequences of transporting heavily inebriated people to the shelter, they may die or be seriously injured. The Patrollers could be subject to punishment. Marrala works through the authority of the Elders, all five language groups were represented on the bus. The bus had to stop working when there was some "sorry business" –this was used as the pretext to axe the Patrol.
- "The police think they know best", they ignored the views of the Elders, an example given of when Elders advised police that they could track missing youth.
- Police response time is very poor. They take too long to respond to domestic violence incidents. The police are not a 24-hour service in Fitzroy Crossing, they shut up shop at midnight during the week and 2 am weekends.
- There was a death in custody in early 2003. It involved the death of a young person who fell from the back of a police vehicle. The family felt they had been ignored by the police hierarchy. They had never called them to explain anything or to express regret or remorse at the death, when there had been a clear breach of a duty of care. Senior police should have come to Fitzroy and face the family.
- The Coronial Inquiry found that the youth's death occurred by way of an accident but made findings in relation to police management and the design of cage on the vehicle.
- Police have no clue about cultural issues – even though they all profess to. One police officer said "my boys understand the lingo", meaning the five Aboriginal dialects spoken in the area. This is not true.
- Basic safeguards, such as Anunga Rules, are not adhered to.
- They refuse to accept the need for a proper interpreter service. The Kimberley Interpreter Service (KIS) is not used by police and courts, even though it provides an excellent service.
- Aboriginal people tend not to become Aboriginal Police Liaison Officers (APLOs) because "we don't want to lock up our people". Aboriginal police should be from the area, here they brought in APLOs from Wyndham and Mullewa, they are "police lackeys", not representative of the Aboriginal community.
- There was a belief that the Aboriginal community was not well served by the police.
- There was little confidence in complaints mechanisms: "police investigating police does not work". The Ombudsman's powers are too limited. People see no point in raising complaints.
- Elders want to see police becoming involved in proactive strategies, doing educational work around drink driving not just "enforcing". DCD has provided some funds for KALAC to take kids bush, Elders want police involved in these weekends to improve relations with the youth.

6. Departments of Justice and Community Development

- These agencies are not based in Fitzroy but in Broome. Department of Justice, Community Based Corrections should put a position in Marra Warra Warra Aboriginal Corporation, not in Broome.
- Corrections have an expectation that people in Fitzroy should supervise those on Community Service Orders for nothing, people in Fitzroy want to help family, and are obligated to do so, but there should be some remuneration.
- There should be some resources put in to KALAC and organizations such as Marra Warra Warra to provide these services locally as well as supervise young people on community based orders and Conditional Release Orders.
- The same arguments can be made about the Department of Community Development. They have no full time presence here.

7. Community Justice Issues

- There needs to be training in Aboriginal law issues available locally, run through KALAC. The agencies need this. There should also be training in the white-fella legal system available for the community.

8. Substance Abuse and Aboriginal Law

- Alcohol and ganja are killing the young people, particularly ganja. There needs to be severe punishment for those selling ganja. Elders want to see dealers incarcerated, even their countrymen. There are enormous amounts of money involved, some people are afraid to speak out because they fear being shot if they identify dealers.
- Kids are going to school stoned or just hanging around. The police are not doing enough about the issue.
- The community sees ganja, particularly mixed with alcohol, as a serious drug problem.
- There also needs to be a drug education strategy suited to the specific conditions of Fitzroy Crossing. WADASA should be developing this with local health and related agencies.

AFTERNOON SESSION

The session began with a brief presentation by the Department of Justice on the current status of the Draft Aboriginal Justice Plan and initiatives such as the Kimberley Justice Plan.

9. Aboriginal Justice Plan

- Representatives from the Ministry of Justice outlined the justice planning process, which included both state and regional structures being put in

place. The Justice Plan had been developed as a partnership between state government and ATSIC, reflected in the "Statement of Commitment" document. The Plan has been developed at state level: there will be a Regional Reference Group, then there will then be the development of local planning – a three tier approach.

- The Fitzroy community voiced considerable concern about both the Aboriginal Justice Plan and the justice departments Kimberley Plan. The Aboriginal Justice Plan appears to be a "top down" initiative. They wanted to know: Who was to be on the regional group? How were they to be chosen? Who decides? It would be preferable to begin with a local reference group of elders and build a justice strategy from the bottom up. The examples of Ali Curong and Lajamanu in the Northern Territory were offered as examples to be studied. Community Justice Mechanisms need to develop from within community structures.
- The meeting also said that the Aboriginal Justice Plan and the Kimberley planning process would fail if they attempted to impose structures on the Fitzroy Valley they did not want. The locality had its own structures for Law & Justice issues, such as KALAC. Initiatives should be based on these. An Elders Panel of some kind should be a fundamental local mechanism. This constitutes the most up to date thinking in relation to the delivery of services to areas such as Fitzroy – do not set up new structures, rather "add value" to structures already in place and piggy back on existing resources. Those developing the Aboriginal Justice Plan should not try to "reinvent the wheel" when it comes to community based justice structures, rather work with those who are already involved in law and justice.
- The partnership arrangements between Fitzroy Valley Health and Nindilingarri Cultural Health Service was mentioned as an excellent example of such a process. In this case there has been a locally negotiated agreement between Fitzroy Valley Health Services and Nindilingarri to deliver culturally appropriate health care for the Fitzroy Valley population. The agreement includes identifying the roles of each in relation to the delivery of clinical care, early intervention programs, health education, research and development, health promotion and community development.
- The meeting feared that any regional justice structures would just be "stacked with government agencies". Instead there should be community involvement in implementation.
- Department of Justice personnel said they appreciated the opportunity to discuss the issues and that they saw the meeting as the beginning of a consultation process, not the end. There would be further visits and dialogue.

10. Policing Drug Issues

- The meeting describes some of their concerns about the current criminal justice and related systems (as described in the morning session). The police replied that they were firm in their commitment to arresting drug dealers and told the meeting to give information regarding them to the police. The police also said that parents had to accept responsibility. The meeting responded that Aboriginal parents felt they had had their authority to control their kids taken from them and Elders were not

respected. Kardiya agencies tended to empower the children to challenge their parents rather than empowering the parents to control their children.

11. Department for Community Development

- The DCD representative was anxious to work with local structures. Although she was a Care and Protection Worker, her brief was a Community Development one. The meeting responded that to do so they would need to work through credible local structures and understand the cultural issues – maybe place a children’s protection worker in KALAC.

12. The Women’s Resource Centre

- The Women’s Resource Worker was also keen to work within the community and improve access to the legal system for women in family violence situations. Discussion turned briefly to the problems posed for Indigenous victims in the current criminal justice system, the “uselessness” and “inappropriateness” of restraining orders, the need to work through traditional structures to end family violence, while, at the same time, ensuring women and children’s safety at the point of crisis.

Introduction

The Consultations in the Mowanjun Community took place on the 4th March 2004. Commissioners Gillian Braddock and Ilse Petersen, Special Commissioner Mick Dodson and Research Director Dr Harry Blagg attended the consultations on behalf of the Law Reform Commission.

The field trips are an essential means of ensuring that the Commission hears at first hand the views of Indigenous prisoners regarding Customary Law. The consultations have been guided by four key questions that together provide a focal point for discussion of law issues. Briefly, the questions ask:

- how is Aboriginal law still practiced?
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These notes represent a thematic summary of the issues that were raised, not chronological minutes.

The discussions embraced a wide range of issues, covering the following broad themes:

1. Children and Youth
2. Traditional Law and Punishment
3. Education and Young People
4. Community Issues
5. Domestic Violence

The main issues that were raised on these topics were as follows:

1. Children and Youth

- If people do something when they are drunk they have a defence, this is not right. There is no respect for elders, particularly when the kids have grog in their system. "Drugs and alcohol are hurting our community."
- Girls today do "humbug" (generally, "humbug" or "humbugging" means behaving disrespectfully & ignoring traditional Aboriginal codes of behaviour). Cousins go together. We should go back to the old days. Young people are too interested in white fellow way. White fellow law -

drugs and violence. The youth are a problem. They should learn our language. If parents were respectful of culture then the children would be.

- Young fellows do not know the law. It all starts with alcohol, when they are drunk they feel ten feet tall and bullet proof. But the next day, when not drunk they hang their head in shame. Some of the youth say "If you take me (for punishment) then I'll get the policeman on to you".

2. Traditional Law and Punishment

- One woman indicated that in cases of "wrong way" marriage (marriage outside of skin group) then people should be able to punish and it should not be classified as physical abuse. "It is just punishment and the people punishing under Aboriginal law should not be punished by white law".
- Aboriginal law always stays the same. Families get involved in deciding the punishment. If cannot punish in the traditional way, then this leads to a lack of respect and culture breaks down. They need authority to flog their children. The welfare has taken over and informs them that they cannot flog the children.
- Tribal punishment is not always practised in every situation.
- If white men do something wrong to black men then the white men should face black law.
- Our culture is not respected by others.
- If do the wrong thing, and are punished then the matter is finished. If it is not finished then person aggrieved can go after the other's family. If you are wronged, you punish until satisfied.

3. Education and Young People

- There is a pre-school in the community, however, the children need to go to school outside the community. There is no elder involvement in the school as this is not encouraged by the administrator or principal at the school. The culture within the school is white. No black history is taught.
- In the education system, there is a chronic truancy problem. There is good home-schooling in the out station. The elders take the kids out of the community and teach them.
- There is racism at school, children are laughed at, therefore, children do not go to school. An example was given of a child who was laughed at because of their hair.

4. Community Issues

- The town is run by white men and money counts. There was no justice for black fellows and the attitude from the police is all wrong. There was a comment about the high level of racism in Derby.

- The community is trying to get their bylaws together, this has taken some three years. The process is just too long and hard. However, the bylaws were put forward as a way to address issues of:
 - alcohol,
 - fighting between partners,
 - abuse,
 - non-payment of rent.

It would allow the community to exclude people who muck up.

5. Domestic Violence

- Domestic violence is dealt with by the white system as the black system cannot deal with it. Black system cannot work on this issue, as it will cause conflict between families.

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1. Children and Youth
2. Elders
3. Governance and Community Issues
4. Justice System
5. Policing Issues
6. Family Violence

The main issues that were raised on these topics were as follows:

1. Children and Youth

- Kids lack respect for culture. We need re-empowerment of our people and our structures of authority.
- Lack of education, drugs and alcohol, these are real problems.
- White-fellas might think flogging kids is abuse, but it's cultural way.

- Skin systems are still crucial, but many young people reject them and get involved “wrong way”.
- Even church groups like the Uniting Church feel it is essential that Aboriginal law and culture are strong.
- Some people are wrong when they think that DCD stops Aboriginal people having power over their kids: the “image of the 14-16 year old, armed with legislation’ is a myth.

2. Elders

- “There are elders and elders”. Some are from law side and others are elders because they senior people with wisdom and experience.

3. Governance and Community Issues

- Local Government is a “European model”, not well suited here. It is not well set up for consultations with Indigenous people. Local Government has only little involvement from Aboriginal people – ATSIC does a lot of the relevant work. The Shire works hard at involving Aboriginal people. It has service agreements with communities such as Looma and Mowanjum to provide services. There are also Indigenous Land Use Agreements,
- There needs to be better education about the role and benefits of local government.
- People need to be aware that only a fraction of LG money is from rates – in Derby its \$2 million of \$16 million.
- Derby has a large Aboriginal population, but there is no “Aboriginal space” in the town. Police move Aboriginal people on. Need somewhere to congregate. Council has no resources to build an appropriate place.

4. Justice System

- Kids are remanded to Perth. They should be remanded here, Banana Wells only takes 6. We need a remand facility here, and more use of CROs on stations.
- Up here, people breach orders but warrants not served for 6 months.
- The elders support the Numbud Community Patrol. Patrol people need knowledge of the law, and they also need local knowledge of issues.

5. Policing Issues

- Relations with the police are always an issue in Derby. There have been some good cops but some very bad ones as well. Generally speaking the police do not respect Aboriginal people. They do not even respect those they know to be community leaders and elders, such as the time when they told the Council Chair of Mowanjum to move on, he was waiting for a lift, it was humiliating.

- They use pepper spray to excess when it is not needed. “Our kids are terrified of police, there have been deaths in custody in Derby lock-up”, one recently. Harassment is an issue.
- There is a culture in the police, too much racism & lack of professionalism. “People are just thrown in to paddy wagons”. “It goes back to colonial days”. People are still alive round here from the Sturt Creek Massacre.
- One woman told a story of being at a meeting with a new police officer (up from Perth): “I look sort of white: when I told him I was Aboriginal he said, ‘you must be one of the good ones then’. I thought about it and wondered, ‘is he being racist?’ He just said it so matter of fact, like it was just ok to talk to me like that, he couldn’t see anything wrong”.
- We need good cross cultural training for police, in this area by local elders.

6. Family Violence

- Women often want to drop charges, they want to cancel VROs. The police tell them they can’t. Women want the abuse to stop, not men jailed.
- VROs have become a full time job for JPs, they are sometimes taken out unnecessarily when just cooling off is needed.
- The Derby Family Violence Prevention Programme has credibility. The Shire has been supportive. It has had funding renewed by Commonwealth. It has young men and young women’s programmes.

APPENDICES

Appendix I: Memorandum of Commitment

Appendix II: Format for Submissions

Law Reform Commission of Western Australia

Aboriginal Customary Laws

Project No 94

THEMATIC SUMMARY OF CONSULTATIONS IN THE GASCOYNE AND MID-WEST REGIONS

May 2004

The Law Reform Commission of Western Australia

Commissioners:

Chair

Ms AG Braddock SC, BA in Law (Cambridge)

Members

Ms ID Petersen, LLB (Western Australia)

Dr CN Kendall, BA (Hons) LLB (Queen's) LLM SJD (Michigan)

Executive Officer

Ms H Kay, LLB, LLM (Western Australia)

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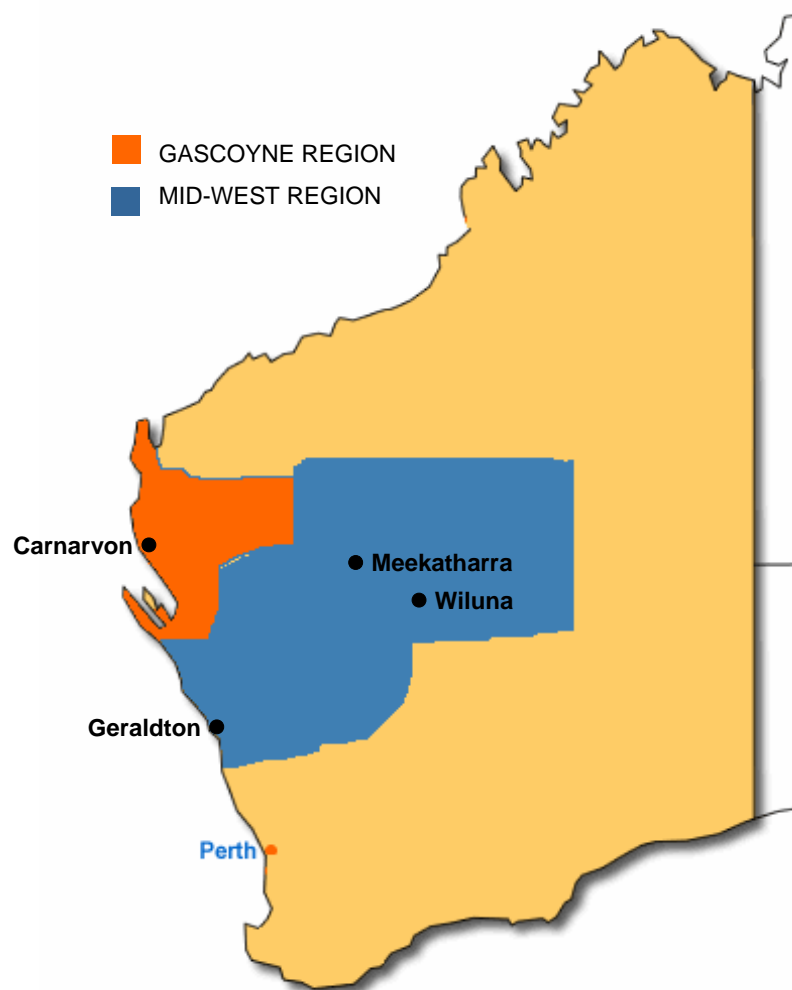
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Preface

The Law Reform Commission's community consultations on the Aboriginal Customary Laws project commenced in Warburton (in the Goldfields region of Western Australia) on 3 March 2003. Further community consultations were held progressively across the State throughout 2003 and were preceded by pre-consultation discussions and visits.

This report provides thematic summaries of the issues that were raised and discussed at each of the consultations in the Gascoyne and Mid-West regions. The consultations themselves and these thematic summaries have been conducted in accordance with the Memorandum of Commitment (refer Appendix I) and with protocols that were discussed and approved by the Reference Council.

All of the consultations commenced with a formal introduction, a traditional welcome and a presentation about the project by a Commissioner of the Law Reform Commission of Western Australia.

After the formal introduction and welcome, the consultations were opened up for contributions, comments and discussion by all who were present. These discussions sometimes occurred with the group as a whole, and sometimes within smaller discussion groups to reflect more specific concerns. The Directors of Research, in collaboration with the other members of the project team, produced a thematic summary which maintained the integrity of the consultations by utilising the colloquial language spoken during the discussions.

The reports were compiled by Dr Harry Blagg and Dr Neil Morgan with the assistance of Ms Heather Kay, Executive Officer of the Law Reform Commission of Western Australia.

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

Introduction

The Consultations in took place on the 30th and 31st of July 2003.

Commissioner Ilse Petersen, Special Commissioners Mick Dodson and Beth Woods, Research Director Dr Harry Blagg and Project Manager Cheri Yavu-Kama-Harathunian attended the consultations on behalf of the Law Reform Commission.

The field trips are an essential means of ensuring that the Commission hears first hand the views of Indigenous communities regarding Customary Law. The consultations have been guided by four key questions that together provide a focal point for discussion of law issues. Briefly, the questions ask:

- how is Aboriginal law still practised?
- in what ways is it practised?
- in what situations is it practised?
- what issues confront Aboriginal people when practising their law today?

The Commission has employed these questions as a general guide for discussion. However, these questions may not always be in direct alignment with the particular set of issues confronting Indigenous communities at this time. The community consultations have, therefore, not rigidly followed a pre-defined script, but have tended to adapt in accordance with the flow of local circumstances.

These notes represent a thematic summary of the issues that were raised, not chronological minutes.

The Commission attempted to meet with a cross section of the community and relevant agencies involved with Indigenous people.

The discussions embraced a wide range of issues, covering the following broad themes:

1. General context
2. Family relations and the law
3. Children and youth
4. Education and young people
5. Elders
6. Self-policing and governance
7. Traditional law and punishment
8. Women's issues
9. Men's issues
10. Substance abuse and mental illness
11. Community justice mechanisms
12. Criminal justice issues

13. Racism
14. Welfare and family violence issues
15. Feuding
16. Deaths, coronial inquests and inheritance

The main issues that were raised on these topics were as follows:

1. General context

- “Law is your life: you just can’t change that law that existed such a long time”

2. Family relations and the law

- The breach of law related to avoidance of wrong skin underpins some conflict. Youths from town have had inappropriate relationships with girls from outside town who they should really avoid. This has caused fights and conflict. The “skin” system is not practiced in town. Generally, the young choose their own partners. Whereas communities from out of town do try to stop “wrong way” relationships.

3. Children and youth

- Girls fare badly when they become involved with boys - it lowers their expectations, there is some violence involved in many of these teen relationships.
- Kids from communities speak their language but are too “shamed” to speak it at school. Most speak Ingada, language in Carnarvon, they also speak Wadjari.
- Children sometime deny their Aboriginality so they can fit into white society, this kills our culture.
- These children do not respect adults, why would they when they have to follow drunken adults round town?
- We need to start listening to our kids, ask them what they want. There is always a reason why kids play up.
- Adults should be made to front up to court when their kids play up.
- There have been “suicide epidemics” in town. There are no services for young people, lack of education and information for youth. Racist policing, racism in town, family violence and feuding, have also played a role.
- Sadly, young people may be safer on the street or in an institution than home. They learn about alcohol, violence, they become bored, some homes are no good. Others said that parents can’t discipline children, due to the legal restrictions.
- Prison has become a rite of passage for boys, pregnancy for girls.
- Girls exploit parents/grandparents, to look after their kids for them, while they go out and drink and play around. Too many old girls are looking after kids. “We have too many kids with kids.”
- Often it is the grandparents who are the primary care givers and they are not receiving enough support. They are abused verbally and physically and

this is very damaging. There is a lot of drinking and drugs with the younger people and the community will not “dob” them in.

- Some young girls are exploited (prostitution) by parents who use financial resources, gained by the young girls to benefit themselves especially for maintaining their own alcohol and substance use.

4. Education and young people

- There needs to be respect for law and culture in education, instead of learning about Captain Cook.
- They need to start at pre-school with language and culture.
- There used to be a truancy patrol that took kids to school. It used to be a good initiative. Today, there is a policy of shops not serving kids who should be at school, it seems to work. The patrol was good because it ensured that kids got to school in the morning.

5. Elders

- It is difficult to identify who the elders are. We can't define them easily. There is no interest from community in identifying who they are.
- How do you define an Elder? It must come from the Elders themselves. They must define the criteria under what they know about their law for who can take on this role in a community. Elders must answer.
- There is no Indigenous leadership, how can there be when they are all fighting each other?
- Many elders have no right to call themselves elders: how do we define who they are any more? We have no ceremonies for this anymore.
- There has been a serious breakdown of links between old and younger generations. Elders aren't respected.

6. Self-policing and governance

- We need mediation. But other people must want to let go. \$80,000 was given to AMS to establish mediation, allow Aboriginal people to do it, but other people didn't want Aboriginal people to do it, they wanted to fight instead.
- We only see ATSIC representatives at election time. Many of them only decide to appear Aboriginal to get power. Even their own kids don't identify as Aboriginal.
- Government departments fly in and fly out - new staff change, everything then leave - no consistency of policy - no community involvement.
- The majority of the ATSIC councillors are from one group, they are not representative.
- Corporations are also a barrier to progress. They have “captured our people again”. They create divisions and impose restrictions.
- The problem is: we can't even reconcile with ourselves. How can we do this? Through education?

7. Traditional law and punishment

- Aboriginal law was here first. When a man faces two punishments, black should come first. Aboriginal people have no respect for white law. We see all white institutions the same way.
- The young have lost the traditional law. They don't know right from wrong in our culture. How can they respect white law when they don't respect Aboriginal law?
- Many of us practise law every day, by observing our customs, for example by respecting parents and elders, looking after family.
- Keep our law separate, there is too much written law already. Ours is lore not law. We are already over-governed. There is too much law on the black-fella. We don't need written Aboriginal law as well.
- People will need to choose which law they live under, can't force people. Some kind of law council of elders might be good, but many would just ignore it.
- International treaties may outlaw spearing and physical violence as torture. These rights are individually rather than collectively based.

8. Women's issues

- There was recognition that women had to work together collectively although there are still an awful amount of obstacles, including the attitudes of Aboriginal men to make change.

9. Men's issues

- The "loss of role" for Aboriginal men is at the heart of men's issues. "Women don't need him, kids don't need him". We need some new initiatives, like the Men's Groups they are setting up in the southwest.

10. Substance abuse and mental illness

- The need for mental health services here are unmet, particular for young people. Alcohol is major problem and now drugs as well, for whites as well as black. Funding needed for adolescent mental health counsellors.
- Drugs are a serious issue: Kids are shooting up speed now, as well as drink and ganja. They need money, so they break into anyone's home, "black-fellas are now stealing off black-fellas", because of drugs. Blacks are now dealers as well. This is new. We have another lost generation.
- Some concern was expressed about the new sober up shelter being managed by church group. The Kardajili Night Patrol takes people home, that is not always a safe place and there might be family violence as a result. There clearly is the need for a shelter, but run by an Aboriginal organization, some believed. Others pointed out that the town is divided and fractionalized, with families in conflict over resources.
- Gambling is a serious problem. Like alcohol, it causes violence.

11. Community justice mechanisms

- Burringurrah Community wants to use an out-station to rehabilitate young people. They are talking to CALM about establishing the out-station and providing infrastructure. They want to use the camp as a means of giving more force to by-laws.
- There was a suggestion that there should be a justice reference group in each region with a representative from each family and they could determine issues within the community.

12. Criminal justice issues

(a) Courts

- The practice of JPs sitting alone was criticised as outmoded. In Mt Magnet the Aboriginal JP sits with the magistrate. Others requested more Justices of the Peace be appointed.
- Some Justices of the Peace are sympathetic and allow Aboriginal business to take precedence, even where this can lead to trouble with white-fella law. For example, someone may be due in court. The court knows he is off doing Aboriginal business. However, this cannot be taken into account and a bench warrant must be issued. This is the case even when he is going through law business.
- The RCIADIC made recommendations regarding advocacy in court and the need for interpreters. The Anunga Guidelines in the Northern Territory were identified by the RCIADIC as good practice, reducing problems associated with "gratuitous concurrence" and lack of comprehension. People speaking "Aboriginal English" may also require an interpreter not just those speaking "language".
- It is a requirement that an accused has an advocate in court and understands the process. However there are few interpreters. Those speaking Aboriginal English are disadvantaged in court; they need interpreters.

(b) Prisons

- The degree of violence that is routine in our criminal justice system is overlooked when discussing the issue of violence. Being taken from your country is a violent act. Strip searching law-men is a violent act - very degrading.

(c) Funeral attendance

- You have no choice about these matters: "If your face is missing, it will be noticed. People's attitudes to you changes if you do not attend".
- The practice of chaining prisoners at funerals was strongly condemned. It was a "bloody stupid thing". People would not run away, "too much shame". A man who worked as a prison officer in Bunbury said he felt shame being shackled to a prisoner at a funeral. It was disrespectful.
- There is a highly bureaucratic process involved in getting permission to attend funerals. The "next of kin" issue created problems.

- There is always a lack of cultural knowledge in prisons. The peer support officers are great, but there is too quick a turn over. There is a lot of pressure on them. Superintendents should seek Aboriginal cultural advice before making decisions about matters such as funerals.

(d) Other

- Prison doesn't work for sexual offenders - there needs to be community involvement in sentencing.

13. Racism

- There is still some entrenched racism. Resistance to establishing a sober up shelter is based on racism. The "old guard" in town still call Aboriginal people "natives", "boongs" and "niggers". They can't come to terms with multi-culturalism, think Aboriginal people are the "criminals" and that the purpose of crime prevention is to have them arrested and moved out of town.

14. Welfare and family violence issues

- Problems related to girl conflicts, are often both the cause and effect of family feuds. There is "cattiness" and fights, lots of jealousy and "jealousing up".
- Suicide is often linked to family violence and child sexual abuse. Kids come to school with bruises. Last year there were 2 successful suicides: this year 4. There was a period some years ago when there were 8 dead in a 6-month period. This was the time when there were calls for curfews, police repression etc, was "killing our kids". Aboriginal people believe that at least one Aboriginal child was directly driven to suicide by the police.
- Nothing seems to stop the anger. It creates domestic violence. Men come home from the pub and "smack" their partners in the mouth if there is nothing on the table. But they may have drunk away the money.
- There needs to be options for men, such as anger management and counselling. Aboriginal women tend to support initiatives, which respond to the problem but keep men out of jail.
- Restraining Orders are effective, even with Indigenous people, but the emphasis needs to be on "family healing".
- One Indigenous woman said that men do justify violence through customary law. "Men believe they can be violent according to law". Men use law "selectively", to support their own interests.
- Others said that extreme violence is a result of breakdown of Aboriginal culture: one woman said her parents "fought every night" on the mission, but would always get back together.
- "Violence is used in Aboriginal family issues", such as flogging people who get involved in "wrong way" relationships.
- There were some punishments "we can't discuss here", one woman said, this "punishment is lawful - men do have that right".
- Alcohol fuelled violence, "take grog away and it stops".

- Men will warn a brother in law who bashes their sister. This is law at work, an unwritten rule. Increasingly, though, people will tend to sort things out through British law.
- As a side issue, where there is property damage in a Homeswest house, the property cannot be fixed until the tenant puts in a police report. The police have to lay charges and in most instances the tenant does not wish to “dob” in a family member. There was a suggestion that Homeswest needs to address this issue.

15. Feuding

- Feuds go on and on. In the old days they would have been sorted out for good. Today people behave like savages. We weren’t savages when the white man came, but some of us behave like savages now. They go through wrecking people’s homes. That is not Aboriginal law.
- Girls feud over boys; this keeps the feuds alive.
- There are anywhere between 20 and 30 feuds going on (or have the potential to flair up) at any one time. It is a major problem. People are divided in factions. There was envy when one group was resourced. One reason for the lack of progress in town was that all the groups competed for scarce resources. There were over 30 different Aboriginal organizations, representing different family factions. There is deep bitterness and mutual suspicion.
- All the groups should pool resources. There is too much competition between groups. Elders don’t provide leadership on this issue. “Throw a dollar on the table, get forty groups after their share”.
- Feuds mainly involve kids, “jealousing up” each other and dragging adults into the conflict.

16. Deaths, coronial inquests and inheritance

- Some raised concerns related to the issue of body parts being removed - and not returned after the post-mortem, even though RCIADIC recommendations dealt with this matter. Also, the appropriateness of some autopsies and autopsy practices, in terms of Aboriginal spirituality, needs to be discussed.
- The Public Trustee’s Office has tended not to take Aboriginal values into account when making decisions. Aboriginal people know who property should belong to.
- The broader question of how Aboriginality is determined was discussed: the Tasmanian practice - a mix of self and community identification was mentioned as a possibility.

Additional meeting

Added at feedback from the meeting in Carnarvon on 16 February 2004

Youth

- Kids are shooting elders with “gings” (shangies). There is no respect for elders and parents are supporting the children.
- Elders want to find solutions for the troubled children.
- Elders cannot “growl” at the children or parents as it often ends in a fight if they do.
- The government policy “can’t hit kids” is detrimental to the cultural values of Aboriginal families.
- Truancy rates have led to a breakfast program being developed with CDEP agency at schools to give children a start for the day.

Education

- There is a mobile “Parenting/Education” van available to work with parents but there are problems of finding ways to work culturally and with trust issues.
- Police aides should be used more.
- Parents need to have support to find a way of controlling their children.
- Parents need support to learn ways of becoming strong male and female leaders in their families through educational programs that assist in bringing awareness to families about alcohol, drugs. Education process has to be strong in cultural knowledge.

Men’s issues

- Men also need a refuge. It is wrong to take women and children out of their family home and send them to a refuge. Take the men out of the home and into a refuge (family violence). The Magistrate is supportive of keeping men in the community if they can be placed in a men’s refuge and they will be required to undergo counselling and other programs that will help them not re-offend and be sent to prison and out of the area. Counselling needs to go further than just anger management.
- Men’s issues need to be controlled and owned by the men in the area. Government agencies should not control a service just support it and assist in providing resources.
- There is a serious need for a residential facility to be built in the Gascoyne area.
- Men and women on Methadone Programs go to the general hospital for treatment. The treatment is inappropriate as it is in public view of everyone else waiting. Name-calling is common, derogatory language is used within the hearing of the people seeking assistance.
- This program should be operated in discrete premises and the people employed should be educated on how to provide the service in a sensitive manner to the people in need of it.

Other issues

- Government wants to own and control all the services. They should be community based. There was no consistency of government policy. Policy coming from the bottom up.
- Scattered paydays do not help Aboriginal families because there is money around all week. There is a strong need for common paydays of welfare payments.
- Old people need their own hostels/homes where they can build up their own respect for themselves away from family problems.
- Hostels in the community, groups of old people living together to give each other support.
- Pilyardi Yardi Cultural Centre is being built without any input from grass roots people, no input from the Mungulla mob.

GERALDTON

26 & 27 May 2003

Introduction

The Consultations in took place on the 26th and 27th of May 2003.

This visit was initially scheduled as part of a regional consultation with Indigenous communities in the Gascoyne Murchison area, including Wiluna and Meekathara. Unfortunately, a death in the area meant that the larger trip had to be temporarily postponed. A more limited visit to Geraldton was considered appropriate by local elders consulted by Mr Dennis Eggington (Aboriginal Legal Service) on the Commissions behalf.

Commissioners Gillian Braddock SC and Ilse Petersen, Special Commissioner Beth Woods, Research Director Dr Harry Blagg and Project Manager Cheri Yavu-Kama-Harathunian attended the consultations on behalf of the Law Reform Commission.

The field trips are an essential means of ensuring that the Commission hears first hand the views of Indigenous communities regarding Customary Law. The consultations have been guided by four key questions that together provide a focal point for discussion of law issues. Briefly, the questions ask:

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The discussions embraced a wide range of issues, covering the following broad themes:

1. General context
2. Family relations and the law
3. Children and youth
4. Elders
5. Self-policing and governance

6. Traditional law and punishment
7. Substance abuse and Aboriginal law
8. Health issues
9. Criminal justice issues
10. Racism
11. Royal commission into Aboriginal deaths in custody
12. Welfare and family violence issues
13. Deaths, coronial inquests and inheritance

The main issues that were raised on these topics were as follows:

1. General context

- While Yamatji were not practicing law in a strict sense, they still have part of it “ingrained in them”. We are a distinct people with our own ways.
- Customary Law was quick and things were sorted out straight away.
- Aboriginal law is harder, much harder, than white-law. Most of the law is extinct because it has not been passed on.
- The law used to be strong, but now some people don’t even know their own skin group, and go running to white law. That law is often too soft, as in accidents, or in cases where prison results for situations involving death. In cases of death, traditional law might provide for death in return. Many young people prefer prison to facing the elders.
- Today being involved in law is a choice. There is a huge diversity of culture and tradition across the state. It is impossible to have one set of rules, applying everywhere. People need to be consistent about being bound by law, should not be able to simply “opt in or out” when it is convenient.
- Law too violent, when there is payback they hurt all the family.
- It was said that the whole issue of being Aboriginal was no longer clear-cut. There needed to be awareness of the different Aboriginal “identities”.
- There is a concern that native title issues have been read out of the project.

2. Family relations and the law

(a) Skin groupings

- There are a lot of wrong way marriages today. Elders’ advice is ignored and people marry the wrong kind. Sometimes there is conflict between Christian and Aboriginal values on marriage issues.
- It’s a hard road for Aboriginal people who have lost their skin systems and their strong law.

(b) Extended family relationships

- All Aboriginal people are next of kin. A man might have 6 wives: all with children. The extended family, countrymen, all have kin relationships.
- There was strong support for the Aboriginal Child Placement Principle, “Aboriginal family should always be considered first”.

3. Children and youth

- Younger and younger kids are involved in crime, with under 10 year olds involved in break and enters. These are in company with older siblings and kin and are used because they can't be charged. This bears out the perception that the delinquent/criminal "recruitment" system is "kinship" rather than simply age/neighbourhood based (as in the classic "western" delinquency model).
- The police are involved with other agencies in early intervention strategies - these form part of the Geraldton Aboriginal Cyclical Offending Intervention Project begun in the mid 1990s. This project focuses on integrating agencies as diverse as education, housing, justice, health etc. They try to link at-risk youth into the local PCYC and work closely with the Geraldton Street Work Project. The process includes family conferences.
- A program called "One Step Ahead", a case-management based program, has also been developed and focuses on increasing participation in schools. The police report that they have been successful in stopping some offending through the early intervention strategy.
- Young people are caught between 2 laws. Our child rearing practices are different. We give a clip round the ear, or a belting. White law has undermined our family structure and forms of authority. Many of this generation were "empty, had nothing, no spirituality or culture", very sad.
- Old people want to return to old laws and old ways to repair the damage. Return young people to the country and teach them the old ways, and learn practical skills. The old people don't want to see them locked up, they want to use shaming instead, the white law only makes the young people worse, enhances their status.
- Younger people should have the choice whether to learn about law and which paths to choose.
- There should be young offender places run by Indigenous people.
- For young people crime is a rite of passage. But they feel society has nothing for them. Parents need to be involved more and the Aboriginal community should hold them to account. The white system does not shame them. However, many youth do not have a functioning family to look after them.
- There is a lack of specialised facilities for juveniles. In such facilities they could develop better self-esteem, communication skills and other job-related skills. There could also be training in the traditional ways, both in such facilities and in prisons like Greenough. There is also a need for alternative sanctions, such as community projects, to break the cycle of re-offending and re-entry into the prison system.
- In cases of juvenile offending, it would be a good thing to have the parents charged, as under traditional law, for the hurt their children do in the community. White man's law destroyed these arrangements. However, it must also be acknowledged that children often make choices now that parents cannot control or even monitor them.

4. Elders

- You still need to consult with the elders - even though a lot of law has gone. They still know which places to avoid because of spirits and how to behave in the bush. They will just get goose bumps and know it is a spiritual place.
- They know how people should behave and how to show respect. You can't make decisions without talking to elders, they mediate in disagreements.
- Elders are generally respected people. However, they sometimes do not respect young people. Some elders set a poor example.
- There has been a loss of respect for the elders, which has been compounded by racism and the white community's reactions to the way we deal with our children. Education of the wider community is necessary here.

5. Self-policing and governance

- The Commission of Elders regionally provided a link with tradition. Family feuding was a problem that had a cultural basis, people were simply obligated to be involved in them, had no choice. The Commission of Elders was important in this area, they still have "cultural authority" to intervene.
- Sovereignty was a key issue today and goes to the status of Aboriginal peoples. Aboriginal jurisdiction was key to establishing law again.
- In our society there is a sense that people have lost their law, to professionals. In traditional law, at least for traditional people, there does not seem to be that sense of loss. Part of that sense of connection with the law may come from its traditional processes for them.

6. Traditional law and punishment

- The Elder suggested that law does not affect everyone the same way. Just those choosing to live within tribal law would be punished, for example. Some people in Geraldton would be considered to be bound by law. There is a great deal of migration from elsewhere, from east of the state where law is still strong.
- People should not have to face two punishments. There should be just one.
- There needs to be controls on punishment, it should not be carried out by people with "hot blood" and it should be supervised. "I have seen men speared like a porcupine" - in one instance a blunt nosed spear was used and the man bled to death. There needs to be better communication within the court regarding punishment. Perhaps experienced ALS court officers could inform the court whether traditional punishment was likely to occur or if the defendant was "pulling the wool over our eyes". There is a need for courts to account of the knowledge of Aboriginal court staff (ALS, court liaison), to understand these issues.
- One problem for court involvement is that the court might need to know how the process was likely to take place and may require too many specific details, for example, how big would the spear be? Would it be barbed? (etc).

- Aboriginal knowledge is crucial in determining whether a case involving traditional punishment is genuine or not. ALS court officers with this knowledge are important. This relates both to situations where courts are adjourned for punishment or where offenders claim that they were carrying out a customary punishment. It can mean the difference between a custodial or non-custodial option.
- Traditional law might not only be used in relation to mitigation but might also be used in relation to matters of aggravation. It is certainly true that traditional law might make the difference between a custodial and a non-custodial sentence.
- Undergoing traditional punishment is not a matter of choice. If it is not undergone, the families affected by the offence will be after you, or after your family. Traditional punishment can be hard, but at least after it is undergone the slate is wiped clean, with no risk of banishment from the lands. This is also true in family feuding, where such feuding is the infliction of bodily harm in white law. However, people sometimes go across the invisible boundaries we all recognise, so as to avoid traditional punishment.
- There is a distinction between Aboriginals in urban areas, and ones in remote areas, with traditional law a reality only for the latter. Determining Aboriginality for this purpose is also difficult. It is a little like children playing parents off against one another.
- If a project like the Commission's is to be meaningful, then serious consideration needs to be given to recognising something that seems to be an important part of much traditional law, the infliction of grievous bodily harm as part of traditional punishment.
- A judge's understanding of traditional punishments should not be a matter of elders giving them advice, but rather of a codification of such punishments. And in any event, if the matter is to be left to the judge, he or she should be required to recognise traditional law, not simply given discretion to do so.
- There are difficult issues of who should be subject to the law. Quite possibly a European living on the lands and married to a traditional person should be subject to it, if they were prepared to undergo it, the family wanted it, and the elders allowed it. But there should not be multiple legal systems. And there should be no allowance for convenient opt-in, opt-out arrangements.

7. Substance abuse and Aboriginal law

- There is an increasing drug problem, including not just ganja but speed and other hard drugs. Families will not do in kin, even when they are preying on other family, and destroying families. Dealers get status and "respect"; they have money and cars.
- Gambling is a major problem, consumes family budget and leads to evictions.
- The courts in the region have used the Bail Act to send Aboriginal people on bush programs for alcohol related problems.

8. Health issues

- The health system is still ignorant of Aboriginal law and culture issues. There is a shortage of Aboriginal staff and lack of cultural training: for example “avoidance” laws not understood, inappropriate people sometimes placed near each other, an example given of a man who missed out on treatment and died because he would have been placed near his mother in law in hospital: this law came first.
- The health department still does not have Indigenous people on interview panels. They miss out on “cultural criteria” and skills when appointing people to work in the hospital.
- The hospital is changing (slowly). Recently they adapted one of the hospital lounges to accommodate a whole family who were obliged to be with a dying relative.
- Geraldton Aboriginal Medical Services had been established because of the lack of appropriate services for Indigenous people.

9. Criminal justice issues

(a) General

- The justice system has “failed” to resolve fundamental problems in the Indigenous community. The juvenile justice system, in particular, illustrates that “Aboriginal youth have no respect for the system”.

(b) Courts

- There is a need for more Aboriginal JPs, especially younger ones with energy and commitment
- An Aboriginal person might be acquitted under white law, but still be punished under Aboriginal law.
- There have been cases where magistrates have utilised Intensive Supervision Orders and s16 of the Sentencing Act to allow for adjournments to enable offenders to return for law business to be carried out. It might be helpful to have this sort of legislation amended so as to mention Aboriginal law business specifically as one of the bases on which these sorts of discretion could be exercised. All this raised issues of training for Magistrates to use their discretion positively.
- There are no special programs to educate Aboriginal people about court processes. However, there are monthly information sessions at the Geraldton Court for self-represented litigants generally, run by the ALS and the Geraldton Community Legal Centre.
- There needs to be changes to the review of provisions regarding JPs sentencing, currently has to be to the Supreme Court. JPs can still imprison, but has to be reviewed by magistrate in 48 hours. The RCIADIC recommended an abolition of sentencing powers.
- JPs should sit with magistrates. Some Indigenous people have called for more Aboriginal JPs sitting with non-Aboriginal magistrates. Currently, only 2 out of 70 JPs in the region were Aboriginal.

- It was noted that there were now a variety of initiatives attempting to make courts more relevant to Indigenous people, such as Yandeyarra, Wiluna, the Koori Court (Victoria)
- To date, problems of false claims as to traditional law have not arisen in the Geraldton court. However, they have surfaced elsewhere, in the Kimberleys. The possibility for such problems requires vigilance by the prosecution, as part of the development of their local knowledge. Were the problems to surface here, there would be difficulties arising out of the lack of consensus of the sort to be found in the Kimberleys as to who are the recognised elders.
- Concerns that some Aboriginal people “play the system” by claiming law business in court. There was one case where a man claimed he was facing punishment and it transpired he wasn’t. There are obvious difficulties in confirming these claims.
- Some argued that the justice system has failed Aboriginal people. Traditional people, in particular, have no idea what is going on. There needs to be a parallel jurisdiction for Aboriginal people, examples such as the Koori Courts were mentioned. There was general support for this kind of initiative.
- Why were Aboriginal people not called on juries? Aboriginal defendants have the right to be judged by their peers. This never happens. They should use ATSIC electoral role for this.
- We need Aboriginal judges (including not just magistrates but also judges at the District Court level) and jurors (as part of mixed white / black ones) to provide an inside view of the communities. At present, even the elders are inhibited and do not say anything about traditional law. There is a need to explain to white judges what an offender may face under traditional law. Double jeopardy should be avoided. Traditional punishment should be undergone first. Then the judge should take it into account in passing sentence.
- The white system has failed traditional peoples. Even well meaning judicial officers do not understand such peoples, as where they plead guilty too readily. The solution may lie in Aboriginal courts that parallel the existing ones, if not in the arrangements at Wiluna and Yandeyarra. The Koori Court in Victoria is of interest, particularly to the extent it is different from any of the WA arrangements.
- There should be regular cross-cultural training for judges.

(c) Prisons

- White jail is an easy option.
- There is a need for proper training of prison officers in local cultures, so they can appreciate the sorts of stress suffered by prisoners brought from far away to a prison. More Aboriginal prison officers are needed. At present there are relatively few, and they tend to be caught up in the white culture rather than Aboriginal culture.
- In prison you can’t wear traditional clothing, like headbands.
- There should be special prisons for aboriginals. It was noted that incarceration at some detention centres was a rite of passage for some Aboriginals. Traditional law could address this.

(d) Funeral attendance

- There are occasions when Aboriginal prisoners go to funerals chained up and as a result they cannot show grief appropriately. If they can't attend they feel shame. The shame that can flow from these constraints illustrates how traditional law goes well beyond punishment.

10. Racism

- Aboriginal people are often criminalized on the basis of their appearance and how they speak.

11. Royal Commission into Aboriginal Deaths in Custody

- Government and agencies need to be reminded of the fundamental recommendations of the RCIADIC. For example: "Watch house (lock-up) recommendations often ignored - especially health of prisoners". Police are now too quick to get them off their hands - onto remand and prison. There needs to be a reduction in the arrest rate in the first place. The deaths are just happening somewhere else.
- There was also concern expressed that the state government was trying to off-load the costs and responsibility for the RCIADIC on to Federal agencies - by supporting the ATSIC "statement of commitment". Elders said they were "outraged" by the abolition of the AJC, and did not support the "statement", "it is a false document" one said, the ALS had been "tricked into it".

12. Welfare and family violence issues

- A serious problem with "horrific consequences". The feuding is intergenerational. The police work with their APLOS to mediate between families where possible. Feuds are re-ignited by young people - often teenage girls fighting over boys - this stirs up the adults. Jealousy is a major reason for family based forms of violence. It is possible to have seven families fighting with each other over seven different things. Also, it is accepted in many Indigenous families for young children to be "initiated" into feuding.
- The APLOS (all Yamatji) compose a family tree of the combatants and "map" the conflict, where it started, who has been involved, and try to resolve the underlying issues.
- Family violence affects all parts of the family, from young children through to grandmothers. Police have taken out VROs to stop grandsons attacking grandmothers.
- There was also a sense that mainstream domestic violence services did not work of Indigenous women. The service provides a support/advocacy service for victims, assists them in taking out restraining orders. They have had problems recruiting a full time lawyer.
- Child abuse and domestic violence were not accepted in customary law. There were strict rules against it.
- There needed to be more emphasis on treatment for men. Men should leave the home, rather than the woman and children.

- There were problems of access to children. Orders to protect reasonable access needed to be strong, with access for the father accommodated within an appropriate community framework. Conditions might be imposed, such as no alcohol or submission to drug testing.
- Domestic Violence Orders need to be double barreled. That is, they should apply to both males and females, to allow for the fact that wives sometimes manipulate the system. Thus, where a man is not allowed within 50 metres of a woman, she should not be allowed within 50 metres of him.
- Restraining Orders need to be closely monitored, so that the cycle of violence can be brought to an end.

13. Deaths, coronial inquests and inheritance

- Generally, verbal agreements are made regarding inheritance, things are rarely written down. There are variations in practice depending on locality, from the coast eastwards. As always, coastal people differ from desert people. Some burn all possessions (a desert, Central Australia practice) coastal people don't do this. In other places Aboriginal people have their possession buried with them - an example was given of a case where a man had his car buried with him. In some places it is traditional practice to give it to outsiders and let them take it away. We (coastal mobs) keep photos of the deceased; others do not.
- The meeting also acknowledged, however, that things had changed from the old days when issues focused on spiritual rather than material things, "all a man could give was what was in his heart", "we have to catch up, make a will if you have a car and a house".
- Public Trustees need more cultural training. They don't understand Aboriginal traditions regarding inheritance. They need to be reminded of RCADIC recommendations regarding "cultural training". Aboriginal people were unnecessarily depriving their surviving family by not making wills and the state was taking their savings and property instead. The Public Trustee's Office was sitting on Aboriginal money. They need advice from Elders about family structures and how possessions and money should be dispensed.
- In Geraldton, there is an expectation that property will be passed on, and there is sometimes conflict over who inherits. A few hundred miles away, the family must give it all away. There was agreement that Public Officers need to check out local practices.
- Funerals create conflict. Especially when people are from one place and live in another with new family. What happens when you die? You might want to be buried where you came from but your family might want to bury you where you die. There is sometimes a tug-of-war between families over burial sites. This causes great anguish and feuds.
- Young people use white law to prevent cultural practices around burials. Sometimes they ignore the power of verbal agreements (verbal wills) by old people and say they are not bound by these requests.
- Even Geraldton people have a wish to be buried in a place other than a recognized or declared cemetery (in the Northern Territory this is possible

under the Cemeteries Act). This is a form of law, even if we are not what people would see as “traditional” people.

- There is much dispute over the belief that the deceased must be buried in their country, when the surviving spouse wants burial elsewhere. The deceased might have expressed a view in conformity with that of the spouse, orally, but not in a will. Sometimes it might be appropriate to override the wishes of the deceased in such cases.

Introduction

The Consultations in Wiluna took place on the 27th of August 2003. Commissioners Gillian Braddock SC and Ilse Petersen, Special Commissioner Beth Woods, Research Director Dr Harry Blagg and Project Manager Cheri Yavu-Kama-Harathunian attended the consultations on behalf of the Law Reform Commission.

The field trips are an essential means of ensuring that the Commission hears first hand the views of Indigenous communities regarding Customary Law. The consultations have been guided by four key questions that together provide a focal point for discussion of law issues. Briefly, the questions asked:

- how is Aboriginal law still practised?
- in what ways is it practised?
- in what situations is it practised?
- what issues confront Aboriginal people when practising their law today?

The Commission has employed these questions as a general guide for discussion. However, these questions may not always be in direct alignment with the particular set of issues confronting Indigenous communities at this time. The community consultations have, therefore, not rigidly followed a pre-defined script, but have tended to adapt in accordance with the flow of local circumstances.

These notes represent a thematic summary of the issues that were raised, not chronological minutes. The discussions embraced a wide range of issues, covering the following broad themes:

1. General context
2. Family relations and the law
3. Children and youth
4. Elders
5. Traditional law and punishment
6. Substance abuse and Aboriginal law
7. Women's issues
8. Health issues
9. Education, training and employment of Aboriginal people
10. Community justice mechanisms
11. Criminal justice issues
12. Reconciliation and racism
13. Religion
14. Welfare and family violence issues
15. Deaths, coronial inquests and inheritance

The issues raised varied considerably between Meekatharra and Wiluna. The latter community leads a far more “traditional” lifestyle and customary law directly governs social relationships.

The notes from the original consultation were formally returned to the Wiluna community on the 4th February 2004. A number of the points in the notes were disputed and some additional information was provided. We have noted these in a separate section called “Additional material”.

1. General context

- The strength of these traditional practices varies from community to community in the area.
- There are two laws, and two worlds. White fella, black fella worlds are different.
- Some say we have gone around the issue of progress the wrong way. It doesn't take enough account of tradition. Housing is a good example, ideal for whites, it makes Aboriginal family life dysfunctional.
- Having two laws may be divisive.
- There are fewer controls over Aboriginal kids. That's why they mess up.
- Some local people opt in to Aboriginal law or opt out. It's more based on choice or family beliefs.

2. Family relations and the law

(a) General Protocols

- Family is everything; it is all these people have. But they cannot do it alone.
- Most Aboriginal people in the area are bound by law. Only recent arrivals who may only be distantly related to people in the area are not bound. If you form relationships you are bound.

(b) Skin groupings

- There are four skin groups and people still tend to marry into them. The culture survives despite the destructive affects of alcohol. Women are 'promised'. Some marry out of skin or if promised do break the rules and marry anyway. Both male and female have to be punished for the issue to be resolved and for them to be accepted back into the community. This is not like the white system where records are dredged up. In Aboriginal law, when it's over, it's over.
- It is not as strict as it used to be. Even some of our old people have had “wrong way” marriages.
- Today, some young women want to marry the western way, for love. They can reject the “promised” marriage, usually without reprisal.

3. Children and youth

- The behaviour of a group of young males in Wiluna is causing great distress to elders and the community. They show no respect to elders, have not been through law. They are all in to “gangsta” culture, baggy jeans, and caps. They steal cars and drive to Laverton, Leonora, Meekatharra, then just drive back and even just stop outside the police station until they are arrested.
- The young people steal cars and try to escape at law time. But they still have to come back here eventually; it is their culture. They have nowhere else to go.
- The legal system lets the kids down. It’s just a slap on the wrist, it can’t resolve underlying problems. Re-offenders come back and destroy younger kids.
- Many young people just do not understand the white legal system, no matter how many times they are in it. Being remanded for reports means nothing. They do not understand the time-scales involved.
- When young people are punished it must be done by someone from the right skin group, otherwise it does not work.
- At the moment the young people have no respect for the white legal system - they think they are the ones in control. We need to empower families, as long as the punishment is not too harsh.

4. Elders

- All here are bound by law. Our elders show us law. They are usually heads of families. They get the law from their old people. They choose you to carry on the law. It is passed down through male line. It is all linked to “skin” group. Over time 1 group will provide the leaders, then another group.

5. Traditional law and punishment

- Law is very strong. Many Aboriginal groups won’t come here for law business; “law too strong”, “too harsh”, they police their law stringently. It is based on traditional “cultural obligation” principles.
- If you don’t come forward for punishment (even if you are not “responsible” in the western legal sense), your family will cop it.
- Pay-back is a fact of life, people have been speared after accidents or where they have been “morally” responsible - such as when family are punished after the death of a child (in one instance because of petrol sniffing). People carry a greater responsibility under black law and will be punished for failing to prevent an accident. This is not seen as negligent under white law
- Occasionally non-Indigenous people are bound by this, even if they do not consent. Such was the case where a community wanted to spear a white person who accidentally ran over someone on a community.
- Process of Aboriginal punishment is quicker, effective and less complicated, however, in the white system, some Aboriginal people don’t understand why they have to go through a long, drawn out process.

6. Substance abuse and Aboriginal law

- Reducing further the access to alcohol might only displace the problem. If we removed the pub it would remove 60 per cent of the current users of the pub (the chronic drinkers), they would move to Meekatharra, Laverton etc. Police don't come down too hard for this very reason. They keep a lot of the region's chronic alcoholics here. They feel it can be managed better this way.
- Drug use includes, ganja, "chroming", petrol, some speed and alcohol. Petrol is a recent problem. So is ganja. They are brought in from outside.
- Restrictions on the sale of alcohol should be increased. The accord is a good idea and along with the Ganah Ganah Patrol and the shelter has reduced family violence. People should spend money on their kids and not grog.
- Parents feel powerless, and alcohol undermines the vitality of the community. Alcohol really undermines family as they are too inebriated to be consistent with discipline. There is a sense of despair. The young inherit this. Why not muck up? There seems no purpose to life and there are no boundaries.

7. Women's issues

- Described as a man's world and women and children left behind.
- Elders not accorded some level of respect as in the past.
- Programs not appropriately represented.
- Elders - men and women should be paid when they sit in the Court.
- Some women have to move to other regions to escape domestic violence.
- Problem with young girls sniffing and drugs and alcohol.
- Kids need to be kept busy.

8. Health issues

- There are lots of health problems in the community like diabetes, obesity and heart problems.
- In Meekatharra there is also a reasonably high incidence of youth suicide and self-harm. Kids feel they have nothing to live for; bright kids get pulled down and there is much jealousy. In Wiluna there is no youth suicide.

9. Education, training and the employment of Aboriginal people

- Education is still a western model. Young people did not get enough for them to compete in western society, and not enough of their own language and culture (although the language is taught it is done so as a language, other topics not taught in their language), so they were in deficit with both. Dissatisfied with both.

10. Community justice mechanisms

- Children have benefited from the various community justice mechanisms in place, such as the Social Justice Committee, the Sobering Up Shelter and the Ganah Ganah Night Patrol. Now parents are better behaved, less noise and fighting, they don't come back into the home intoxicated. So the children don't miss school.
- In Wiluna these initiatives also employ the local adult population. This has meant that around one third of the people have been able to share in the work over a year. This has had a cultural impact on the town with people becoming involved and owning alcohol reduction practices.

11. Criminal justice issues

(a) Policing

- The local sergeant is crucial, the most important white player in town, they have to be carefully selected. The police are the law. They can run amok. "They need to act as they expect others to". The current Sergeant is very positive, is accepted onto law grounds and punishment grounds (different places), and can mediate between the two laws. He is trusted by Aboriginal elders.
- When Aboriginal people do contact police they don't write things down, rather they tell a story. The Aboriginal way is quicker, gets it over with, its better in many respects.

(b) Courts

- The Wiluna Court model is clearly more user friendly and defendants appear to respect the elders sitting with the magistrate. On the other hand the system, while an advance on the traditional process, is not an "Aboriginal Court". The process is dominated by the magistrate and the language etc is very formal.
- There should be more elders on the court, two men and two women. One reason for this is that one woman might be mother-in-law to a defendant or witness and can't talk in front of her, so the court needs more options. At the moment, the court sometimes breaks Aboriginal law.
- Recently, 2 Warburton elders were in the same court and they could not talk to each other directly, only by making particular noises "from their throats". The magistrate said, "stop making those noises". He should have respected these men, instead he shamed them.
- The courts need more court interpreters. They need to interpret the "cultural issues". Also interpreters themselves may be bound by the Aboriginal law, this can create difficulties.
- Many Aboriginal people appear before the bench and they don't have a clue why they are there.
- Fly in and out can be bad for justice. Curfews are seen as the punishment (rather than simply conditions for bail). Long bail periods can set people up to fail.

- Remands in custody are some times longer than the sentence, sometimes there is no sentence.
- A Wiluna style court may not be appropriate in Meekatharra. Families here won't allow an elder from another family to deal with their kids. Only elders who have been through law would have the necessary authority to deal with kids in the court.

(c) Prisons

- Prison makes people worse; they learn worse things. There needs to be programs where we can take young people out bush. There is a voluntary program like this already, but it needs to be compulsory via court. Maybe, there should be "bush camps" run by Aboriginal people as an alternative to prison.

12. Reconciliation and racism

- Aboriginal people used to have no one to advocate for them. It was the last town in Australia that allowed Aboriginal people in the pub. It used to be segregated, with a caged area, that's gone now.

13. Religion

- Many Aboriginal people see no conflict between Christianity and Aboriginal cultures.

14. Welfare and family violence issues

- Family structures are disintegrating, falling apart. Kids play "lock-up" as a game, jail experiences are normalized.
- The problems caused by alcohol cannot be under-estimated. "If we removed alcohol there would be no family violence". It is a serious problem but the Accord (a Certificate of Special Measure linked to the pub license), the patrol and shelter, and better cooperation and partnership in the town, particularly with police, has reduced the problem.
- Violence in families is not related to law, but rather alcohol. Alcohol is destructive. People see the drink and violence more with Aboriginal people because it is in the open, not hidden like white fellas.
- The only other violence is "tribal", typically about payback, wrong way marriages, etc.
- There have been estimates that the rates of domestic violence have been reduced by 70% since the accord. There have also been 75% reductions in other forms of violence, drunkenness and disorderly conduct.
- There is too much abuse of the legal system. People accused of sexual violence should not be released on bail. The ALS is too quick to defend abusers, should help the victims more. Some men think it's acceptable to bash and rape women.

- There is hope that the new child protection workers in Carnarvon, Geraldton and Meekatharra, part of the Gordon Inquiry implementation, might improve things. Also, making Doctors report STD cases involving children.
- Children are poor witnesses. Men get off on the poor quality of video evidence by children. More weight needs to be given by DNA evidence, even if uncorroborated.
- DCD has the powers, but doesn't use them effectively with Aboriginal kids. Now they are too scared to intervene. We need more safe places for kids. Adults need to take more of a firm stand.
- Elders aren't taking a firm stance on family violence. There is no Aboriginal punishment for abuse any more.
- Few traditional men use Aboriginal law to justify abuse and keep silent on the issue.
- Kids see inappropriate videos and this normalizes some abusive behaviour.

15. Deaths, coronial inquests and inheritance

- Traditional ways are still strong. In one community all the houses were burned out after a death and the people moved out. In another case, where an old woman died, they are just waiting for the second funeral then they will all move out. Sometime this is for "sorry" time, if it's an important person, they may never return.
- Most agreed that 99% of funerals involve pay-back, due to "blame" or some past event. A number of prominent elders want to change this, trying to change rules. One elder refused to have punishment at the funeral of a relative, organizing a big feed instead.
- Funerals and punishments take place on different grounds. "Sorry Camps" so that people can come to pay respect to all family. Sorry grounds and punishment grounds are always different places. Family choose the sorry ground, usually at the Reserve, an old meeting place, cultural business is conducted there.
- On the issue of burials, the community expects a body to be returned here, it is not the spouse's decision to make.
- With regard to inheritance, "we don't have much to leave". If you have a car we send it to a group in another country, Jigalong or Warburton, because it would "remind them" too much of the deceased. The law is strong on this issue.

Additional material

Substance abuse and Aboriginal law

- The Wiluna School is situated opposite the pub. This does not give a good example to the children.
- A lot of the programs for kids are actually working.
- No rehabilitation for alcohol dependency in Wiluna.
- Alcohol is a real problem. It is killing Aboriginal people. No dialysis treatment in Wiluna.
- Some voiced strong opposition to the view that offenders convicted of family violence should be released for funerals. Need a zero tolerance approach. Mediation is useless. This would not work in the area.
- Elders not paid or appreciated for the knowledge when they sit with the Magistrate- this is a matter of respect.

MEEKATHARRA

28 August 2003

Introduction

The Consultations in Meekatharra took place on the 28th of August 2003. Commissioners Gillian Braddock SC and Ilse Petersen, Special Commissioner Beth Woods, Research Director Dr Harry Blagg and Project Manager Cheri Yavu-Kama-Harathunian attended the consultations on behalf of the Law Reform Commission.

The field trips are an essential means of ensuring that the Commission hears first hand the views of Indigenous communities regarding Customary Law. The consultations have been guided by four key questions that together provide a focal point for discussion of law issues. Briefly, the questions asked:

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1. Traditional law and punishment
2. Elders
3. Health issues
4. Inheritance
5. Youth and education
6. Family violence
7. Intellectual property

The issues raised varied considerably between Meekatharra and Wiluna. The latter community leads a far more “traditional” lifestyle and customary law directly governs social relationships. The Meekatharra community is considerably more integrated into non-Aboriginal society and customary practices are less influential in governing social relationships.

1. Traditional law and punishment

- Law business has not been practiced in Meekatharra since about 1974, those who choose to go through law have to go 70 kilometres north, to Martu country, out of Meekatharra.
- Going through Law helps to keep children away from drugs and alcohol because other children and adults treat the kids who go through Law with respect.
- Older people who have gone through Law have to watch out for the younger people who are going through Law.
- “Pay back” is not used. Aboriginal people are more concerned with making the white-fella system more open to them.
- If you are going through Law you cannot tell other people about it only talk to other Law people.
- Grandmothers teach children about where men and women can and cannot go.
- Dreamtime stories tell others about our Law but you have to know what things are being represented to understand the Law parts.
- In Meekatharra the creation spirits are the snake, emu and kangaroo.
- Kids know where to go and get “bimbi” - (bush gum).
- Emu fat is very important. It is a bush medicine and is used with dirt and other things to paint for dancing.
- Boys get a “juna”, a stick to use when hunting, when they are taught to use a rifle.
- ‘Juna’ is used to put a kangaroo out of pain when they are shot.
- Most Aboriginal people in Meekatharra follow the White Laws but we should have our own Aboriginal Law to fall back on.
- Lawmen can drive around now and pick up the young men and take them to the law ground. This is different to what used to happen before.
- White people need to learn the stories about our Law then it might work. You have to have a good reason to put our Law into the white law otherwise it will just get lost.
- Our own Law should be respected and put into WA Law system. We want to see it written there not just for Aboriginal people but white people can see it too.
- Kids hear stories about men being frightened to go underground because the land is their Sacred land. You cannot go down into your sacred land without doing the right things. Mining companies do not talk to the Elders and get them to tell them what has to be done for Aboriginal men and women to work on the mines.
- Some families go bush on the weekends to teach culture-hunting looking for bush tucker and medicine, teach dancing and songs about the country.
- All Aboriginal people should learn about or go through the Law.
- Kids know about feather foots, magic men, and their business and you can be trained to do these things if you go through Law, the Elders will pick you out.

2. Elders

- Respect for elders has gone out the window. It is 2003 and we live in a modern age. We can't go back. On the other hand we need elders still involved, as with Wiluna court. Meekatharra is different; there are fewer traditional ties.

3. Health issues

- The health of Aboriginal people is a major problem. Both young and old are dying, mainly of cancer. There is increasing general awareness of health issues and sexual education is taken more seriously.
- There had been a meeting at the courthouse to cut down on the grog - cut down on hours - it was a police and community initiative.
- "The new liquor accord has created some concerns, mainly that, rather than eliminating violence, there has been a time-displacement, the time frame changes."
- "Drinkers still buy grog (black and white), they just stock up in advance for the times they can't buy it. They still take the family budget". (This claim was disputed as true of Wiluna).
- The mines are too close to the town where people have to live but if there was no mine there would be no Meekatharra.
- Mining companies do not employ Aboriginal men or women sometimes because they are scared to go down in the mines. Men and women sit around and get drunk.

4. Inheritance

- When a death occurs the protocol is that the families make the decisions - whether that person is buried in country or not. It is sad when a dispute occurs but the family should sort it out.

5. Youth and education

- Some expressed the view that the education system is failing Indigenous children.
- In Meekatharra truancy is also big issue. The kids move around, they are very mobile. There are 190 on rolls, 130 attend - which means 60 chronic truants.
- On the other hand, it was acknowledged that the High School works hard at developing programs to address issues such as truancy - and retention rates have improved. Innovations include "on-the job training" as part of the curriculum, making education more directly relevant.
- The school also promotes learning about Indigenous culture and language
- It was admitted that some young people were out of control and engaged in risk taking behaviour. Drugs and alcohol affecting young people - "cannot get any sense out of them, the drugs are doing the talking". There were 12-13 year olds on drugs, mainly ganja, a few of the youth are also

into petrol sniffing and aerosols - other kids have brought them into town from outside.

- Many believed that there was little for young people to do. And this was why some acted up - the Shire and agencies in the town needed to do more for youth. There were few structured recreational and leisure activities, the pool was closed half the year - even though the weather was warm, Aboriginal young people were denied access to sporting facilities.
- Others took the view that there needed to be more controls placed on young people - such as curfews - and that families needed to take a firmer grip on them.
- Some Aboriginal and non-Aboriginal leaders in the town said that many of the complaints about young people in Meekatharra were made by people who were covering up their own lack of commitment to engaging with the young people. Some teachers, for example, who came from outside don't like it in Meekatharra, and wanted an excuse to abandon the kids.
- There needs to be more focus on education. Aboriginal people need to be working in schools.
- One school has had a problem with aggressive children attacking teachers. This aggressive behaviour often results from broken, dysfunctional families, alcohol and gambling. The school is just seen as a day-care centre. Parents don't see value in school.
- Very little for youth in Meekatharra. Youth get bored and try to liven up their life by doing things. Sometimes they do things that cause problems with the police.
- Sometimes kids do silly things because they are seeking attention.
- Lots of kids buy matches and aerosol like deodorant to set fires.
- Kids cannot go much around Meekatharra because of the mineshafts and open pits and this makes it hard to walk around on their country and play in the land.
- Lots of stuff from mines on the tips that can make bombs.
- Aboriginal kids feel shame and proud to be Aboriginal and they do not like being shown up for something.
- Lots of young girls are getting pregnant at earlier ages and they do not know what to do, but they should not get an abortion because they are breaking the Law.

6. Family violence

- There were concerns expressed about youth suicide and attempted suicide, levels of child abuse and child sexual abuse in the town. The issues raised in the 2002/3 Gordon Inquiry into child abuse were said to apply equally in Meekatharra, there were problems around family violence, teenage pregnancy and community fragmentation that required urgent attention from government.
- DCD has had difficulty in establishing credible programs. The approach is ad hoc and fragmented. Initiatives occur in isolation.
- Grandmothers looking after children - big problem - as no financial assistance given.

7. Intellectual property

- The dot paintings on display in the town are from Cotton Creek, the Centre obtains permission for the stories, dot painting and colours. That is the appropriate way.
- Traditional arts, such as emu egg carving, are only for Aboriginal people, & only Aboriginal people can play the didgeridoo.
- Western legal protection is needed for Aboriginal culture to survive.

APPENDICES

Appendix I: Memorandum of Commitment

Appendix II: Format for Submissions

Law Reform Commission of Western Australia

Aboriginal Customary Laws

Project No 94

THEMATIC SUMMARY OF CONSULTATIONS IN THE SOUTH WEST AND GREAT SOUTHERN REGIONS

May 2004

The Law Reform Commission of Western Australia

Commissioners:

Chair

Ms AG Braddock SC, BA in Law (Cambridge)

Members

Ms ID Petersen, LLB (Western Australia)

Dr CN Kendall, BA (Hons) LLB (Queen's) LLM SJD (Michigan)

Executive Officer

Ms H Kay, LLB, LLM (Western Australia)

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Preface

The Law Reform Commission's community consultations on the Aboriginal Customary Laws project commenced in Warburton (in the Goldfields region of Western Australia) on 3 March 2003. Further community consultations were held progressively across the State throughout 2003 and were preceded by pre-consultation discussions and visits.

This report provides thematic summaries of the issues that were raised and discussed at each of the consultations in the South West and Great Southern regions. The consultations themselves and these thematic summaries have been conducted in accordance with the Memorandum of Commitment (refer Appendix I) and with protocols that were discussed and approved by the Reference Council.

All of the consultations commenced with a formal introduction, a traditional welcome and a presentation about the project by a Commissioner of the Law Reform Commission of Western Australia.

After the formal introduction and welcome, the consultations were opened up for contributions, comments and discussion by all who were present. These discussions sometimes occurred with the group as a whole, and sometimes within smaller discussion groups to reflect more specific concerns. The Directors of Research, in collaboration with the other members of the project team, produced a thematic summary which maintained the integrity of the consultations by utilising the colloquial language spoken during the discussions.

The reports were compiled by Dr Harry Blagg and Dr Neil Morgan with the assistance of Ms Heather Kay, Executive Officer of the Law Reform Commission of Western Australia.

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

BUNBURY

28 & 29 October 2003

Introduction

The consultations in Bunbury took place on the 28th and 29th of October 2003.

Commissioners Ilse Petersen, Special Commissioner Beth Woods, Research Director Dr Harry Blagg and Project Manager Cheri Yavu-Kama-Harathunian attended the consultations on behalf of the Law Reform Commission.

The field trips are an essential means of ensuring that the Commission hears at first hand the views of Indigenous communities regarding Customary Law. The consultations have been guided by four key questions that together provide a focal point for discussion of law issues. Briefly, the questions ask:

- how is Aboriginal law still practised?
- in what ways is it practised?
- in what situations is it practised?
- what issues confront Aboriginal people when practising their law today?

The Commission has employed these questions as a general guide for discussion. However, these questions may not always be in direct alignment with the particular set of issues confronting Indigenous communities at this time. The community consultations have, therefore, not rigidly followed a pre-defined script, but have tended to adapt in accordance with the flow of local circumstances.

These notes represent a thematic summary of the issues that were raised, not chronological minutes.

The Commission attempted to meet with a cross section of the community and relevant agencies involved with Indigenous people.

The discussions embraced a wide range of issues, covering the following broad themes:

1. General context
2. Family relations and the law
3. Cultural authority and elders
4. Children and youth
5. Aboriginal law today
6. Education, training and employment of Aboriginal people
7. Substance abuse and aboriginal law
8. Intellectual property/cultural property rights
9. Burial and inheritance practices
10. Criminal justice issues
11. Racism
12. Welfare and family violence issues
13. Deaths, coronial inquests and inheritance
14. Other issues

The main issues that were raised on these topics were as follows:

1. General context

- The comment was made that the Aboriginal Justice Council has already answered the questions outlined in the Commission's Terms of Reference. "How many times do I have to meet before we get justice for ourselves?"
- White people have a lot to answer for.

2. Family relations and the law

- Provide us with adequate housing and then we will be in a position to look after ourselves. Housing is an issue as there are obligations to family. Homeswest needs to respect what the families want.

3. Cultural authority and elders

- Homeswest and other agencies deny the cultural authority of those Noongar families with a longer connection to the area. Frequently, Aboriginal people from outside the area are given priority in housing. This breaks Aboriginal law.
- There needs to be a set of "cultural protocols", setting out the appropriate form of behaviour for those coming from elsewhere. They would define who has the right to call themselves Elders and, therefore, speak on behalf of local people. Too often Noongars who have moved here from other parts of the South West claim the Elder rights, this is unacceptable.
- Anti-social behaviour is a problem and Aboriginal people are not able to regulate the people that come into a region.
- The protocols would also guide the decisions of government agencies when dealing with the Aboriginal community.
- The issue of the identification of elders was frequently raised. "Previously we had our elders and they were known - who are they now?" A name is put forward and backed by family groups. If you identify the family groups, they will identify the elders in the family groups. It should not be just a question of who speaks up the loudest.
- Government choosing elders is a flawed process. Status of elders has evolved, however, some elders cannot deal with contemporary issues. Committees backfire all the time, vote the problem in.
- The Elders are getting tired. They need to educate the young ones, to help the young ones.
- Elders should be paid for the information they pass on. The information has to be protected.

4. Children and youth

- The question was asked, "Why are our children in prison?"
- There is no support for strong Aboriginal managed projects intended to work with our young people and their families. Lake Jasper is a good idea

-although it has never received the support it needed from government. Government agencies such as DOJ, education and DCD have never grasped its potential as a project dealing with the whole family, not just kids in isolation, that is not the Aboriginal way.

- Kids should have family and community support. Work has to be holistic.

5. Aboriginal law today

- Until Aboriginal people can apply their law, they cannot deal with the problems created by colonization.
- The question was asked, "How can our young people know the law? There is not much traditional law around here, its more about understanding and respect."
- Hunting and fishing rights should be recognised. There is an issue involving Rangers catching people and prosecuting them for taking kangaroo. Hunting is a part of keeping the law alive and Aboriginal people need to pass this knowledge to the younger generation. Hunting and fishing are also a means of keeping a family alive and teaches the children respect. If people are prosecuted, then there is no respect. Aboriginal people should have the right to hunt and fish. The methods that can be used can be modern which includes using a gun. Hunting and fishing includes a relationship with country and does not encroach on other people's territories. Kids learn the connection with the land. Hunting teaches respect for the land.
- Law held people together. When the law is dismantled then "we are in real trouble". This needs to be changed. There needs to be cultural awareness. Presently there are two peoples and two laws and aboriginal people cannot resolve things the Aboriginal way. Sometimes good men are in prison for pay-back.
- The issue was raised about the historical connection versus traditional connection to the land. Who are the traditional owners?
- How people address each other is also a part of the law. For example, a grandmother is addressed by not mentioning her first name.

6. Education, training and employment of Aboriginal people

- A comment was made that "they are taking our language and culture away from us."
- There are Aboriginal stereotypes and people do not wish to employ Aboriginal people. Government Departments are not taking on enough Aboriginal people. There is not enough nurturing and mentoring. In general programs are set up to fail.
- There is a need for Aboriginal studies that recognise the past. "We need to fix that first". This is to be taught in schools. We have to acknowledge the past.
- The schools are getting too big and Aboriginal kids are not catered for in the system. The whole education system needs to be looked at again. Aboriginal language and cultural learning environment has to be reviewed. History is important. The community has put a value on Aboriginal culture.

7. Substance abuse and Aboriginal law

- Misuse of drugs is a problem. There should be a drug and alcohol rehabilitation centre in Bunbury and there is no sobering up centre in Bunbury.

8. Intellectual property/cultural property rights

- Aboriginal knowledge belongs to the community and the community should have rights over this knowledge. Art and language belong to the people. Aboriginal knowledge and culture should be protected and controlled for their benefit.

9. Burial and inheritance practices

- There are occasional disagreements regarding burial. Families and spouses sometimes disagree on where someone is to be laid to rest, Aboriginal way is for family to decide, but this is not always followed.
- Tend to follow "white" practices around inheritance, but most old people still do not make wills. This creates some family conflict.

10. Criminal Justice Issues

(a) Courts

- The jargon used in court is not recognised by Aboriginal people. Aboriginality is not recognised.

(b) Funeral Attendance

- The whole family and connections need to attend. This should be respected within the prison system.

(c) Prisons

- Aboriginal people have life long contact with the system - they get "life imprisonment by installments". We need better education and employment options, Elders should be involved in prison programmes and appropriate post release schemes.

11. Racism

- One person gave an example of being refused entry to the Rose Hotel. Discrimination has to stop. White people have to respect the individual person. There are issues of shaded discrimination and Mr Gallop's comment about Aboriginal parents not looking after children was offensive. Aboriginality is about respect.
- "There is a lack of respect." "We are not considered as equal."

12. Welfare and family violence issues

- Currently there is “mess and chaos” in the Aboriginal family. Family violence is an immense problem, the Gordon Inquiry illustrated this. Family violence is exacerbated by poverty and hopelessness. Standards of behaviour in some families is appalling and there is no simple solution.
- There should be a halfway house for violent men. Government agencies do not use their money properly. There is a need for something in the prison system to help prisoners when they get out of prison. Counselling is needed for the boys. A holistic approach is what is needed. Treatment programs in prison should include the family.
- There was an assertion that the Bunbury area had the highest level of domestic violence in the region.
- Early intervention was needed. Sessions giving information teaching parenting skills and taking people out of the home rather than assigning them to a jail. The programs offered in prison for anger management have no impact as they are not designed for Aboriginal people and no-one will go to them. Programs have to be devised for Aboriginal people. As there is no consultation with Aboriginal people it is not surprising that they are not culturally appropriate.
- More work needs to be done to identify the family groups in the area and for each to identify its Elders.
- Family feuding is an issue and people need help.

13. Deaths, coronial inquests and inheritance

- In relation to inheritance, material things do not matter.

14. Other issues

- Aboriginal people urgently require an economic base to progress. Only land ensures this.
- Currently the region is being stripped of resources, the DIA office has closed and we have no Aboriginal Justice Council - what happened to this?
- Bunbury does not get any support. ATSIC and DIA are not here. The Blue Light disco closed down, as did the Police and Citizens group. There is also a need for a night patrol.
- All the funding goes to remote areas. The perception is that Aboriginal people in the region are more urbanised and that their voice is not loud enough.

Moving forward

- There was considerable interest in the development of some local Aboriginal justice structures, or mechanisms. These included the development of an Aboriginal (Noongar) Court in the vicinity and some formal liaison structures involving justice and welfare agencies and Aboriginal people (a community justice group).

Feedback received in Bunbury on 24 February 2004

- There is a need to quantify who is an elder and who isn't. This is difficult as Bunbury has a lot of transient people and there is no Council of Elders. Currently those who are high profile, most vocal or most convenient are the ones who are consulted. This is causing embarrassment to the community. There is a need to delve into the issue but a lot of government departments are reluctant to do so. It suits some people to create division.
- There have been incidents of young people talking for Elders, that shouldn't happen.
- The whole community should be consulted and the community should elect who the appropriate Elders are to consult further. No one talks to Elders.
- Aboriginal people in government departments need to be more accessible, not hidden from their people. The power to sort issues out quickly has been taken away, out of the communities.
- People need to be taught protocols and local cultural awareness. Once they understand the issues then they can better assist. But it has to be a local who delivers the cultural awareness.
- There was praise for the Lake Jasper programme, however, some said there is the need for a follow up system run after it, which takes in parents as well. A holistic system. Some were re-offending to get back on the programme. Others commented that Lake Jasper doesn't suit everyone. Some claimed they should be dealt with in Bunbury and not sent off to Lake Jasper. There is a need for local solutions for local problems. If you include the local community you'll get better results.
- In 2000 it became compulsory for schools to offer indigenous studies. Many schools are not including it in their curriculum, despite it being compulsory. There should be checks to make sure Indigenous studies are being offered.
- With regard to hunting and fishing rights, there is a local agreement with local CALM officers. However, young CALM officers often don't know the protocols. Some CALM officers don't have an understanding of black fellas. They have never sat down with them.
- The issue of one person giving their view of Aboriginal culture also causes issues in the area of hunting and fishing rights. For example, catching marron in a way that is not allowed by authorities. The person charged explained that the method used was traditional. The authorities spoke to someone who claimed to be an elder. The elder told them that the method was not traditional, but this elder was from a different tribe and his family had never caught marron using this method. The wrong person was spoken to.
- There was an issue raised about access to land. How do we access our land so that we can hunt kangaroo and emu? Some have no connection to the land cause we were in missions, but we still know our traditions.
- With regard to Intellectual Property and Cultural Property Rights, it should be up to the agencies, for example TAFE etc, to share copyright information with the students so that they are protected. Individuals need to obtain their own economic independence and intellectual property can provide that independence.

- There is a need to protect resources such as timber minerals etc, however, not for monetary reasons. Indigenous people have different values. Money is not a part of their value system.
- Courts are culturally inappropriate. It would be good if representatives of the community could have the opportunity to visit the Koori courts in the Eastern States to see if the innovation could be adapted and applied to the Bunbury region.
- The life expectancy of Aboriginal people is a lot lower than the rest of the population. Aboriginal people are missing out on a lot as a result. For example the government is still running the same rules and time lines for Aboriginal people with regard to superannuation and the retirement age. The average Aboriginal male only lives to the age of 45 and the average female to the age of 48. They don't reach the age of retirement and therefore do not get access to their super. There is definite inequity. These funds end up lost, sitting in an account somewhere, because the family doesn't know to apply for them. This needs to be advertised so that Indigenous people are aware of the processes involved to claim lost monies.

Introduction

The consultations in Albany took place on the 18th November 2003.

Commissioners Ralph Simmonds and Ilse Petersen, Special Commissioner Beth Woods and Project Manager Cheri Yavu-Kama-Harathunian attended the consultations on behalf of the Law Reform Commission.

The field trips are an essential means of ensuring that the Commission hears at first hand the views of Indigenous communities regarding Customary Law. The consultations have been guided by four key questions that together provide a focal point for discussion of law issues. Briefly, the questions ask:

- how is Aboriginal law still practised?
- in what ways is it practised?
- in what situations is it practised?
- what issues confront Aboriginal people when practising their law today?

The Commission has employed these questions as a general guide for discussion. However, these questions may not always be in direct alignment with the particular set of issues confronting Indigenous communities at this time. The community consultations have, therefore, not rigidly followed a pre-defined script, but have tended to adapt in accordance with the flow of local circumstances.

These notes represent a thematic summary of the issues that were raised, not chronological minutes.

The Commission attempted to meet with a cross section of the community and relevant agencies involved with Indigenous people.

The discussions embraced a wide range of issues, covering the following broad themes:

1. General context
2. Family relations and the law
3. Children and youth
4. Elders
5. Self-policing / governance
6. Traditional law and punishment
7. Community justice mechanisms
8. Mental health issues
9. Intellectual property / cultural property rights
10. Cross cultural awareness and training
11. Education, training and employment of Aboriginal people
12. Criminal justice issues
13. Racism
14. Welfare and family violence issues
15. Feuding
16. Deaths, coronial inquests and inheritance

The main issues that were raised on these topics were as follows:

1. General Context

- Perhaps European law should be in a form that is more intelligible to Aboriginal communities, as well as to others. Traditional law is in fact something of a model of real simplification for European law.
- Aboriginal people – were treated like second-class citizens – the white people have stolen their culture and this project is all too late.
- Aboriginal peoples do not understand the protracted European processes. Their own are quick and decisive, especially in relation to domestic violence. Traditional law responds to the wish of the families for closure.
- One person expressed the view that it (reform) will never happen and in the end it (law) will all fade away. “Nobody knows about our law down here”. Culture will die out if its not passed down to the young people. One person said, “cannot go back”.
- There was a sense of loss and sadness speaking about the massacres and the “policy to breed out” Aboriginals and a feeling that there was a loss of Noongar identity.
- One person stated that he had been institutionalised all his life. People have been half brought up in one system and half in the other.
- Reconciliation and saying sorry were very important.

2. Family Relations and the Law

- At present we have mixed communities, which are not complete and are unbalanced. Family feuding is a problem. We have families, not communities, in Noongar culture. One’s sole responsibility is to one’s family.

3. Children and Youth

- Children and young fellows are no longer disciplined. Children see that and grow up without discipline. Aboriginal children are now using the white man’s law to protect them.
- Children could in the past be quickly and physically disciplined, but not any more. This is because of the police’s powers to intervene.
- It should be noted that some families will not take responsibility for problem children, as where there is a relationship change, or simply fatigue. Grandparents and other carers will share the children so as to maximise the return from welfare payments.
- Parents, grannies, uncles and aunties are not permitted to chastise children, who thus run wild. Admittedly, there must be some limits. But there is no recognition of the authority of persons other than parents.
- We need to give young people values they can use, while offering them redress for bullying. There is the problem of self-help attracting punishment under white fella law.
- Children are not getting the stories and the proverbs. They cannot be punished by the elders. And they can’t be taken on the “heroic journeys”

that could help to give them the traditional ways, for the same reasons. These “heroic journeys” have apparently worked in South Australia, as an alternative to going through the law. These journeys need to be reintroduced into communities that have lost their traditional law.

4. Elders

- There was discussion about the elders. The elders are not elected by the community. An elder is someone you respect due to their wisdom “what they say makes sense”. “Young fellows listen to them”.
- There should be an Aboriginal Court of elders where there is a fight over issues.
- Elders should get more respect, with a greater role for them in relation to young people. Young people don’t respect elders as they did previously. We have young people extorting money from elders to help with such things as the acquisition of clothes. At present, young people don’t respect European or traditional law.
- Drugs, alcohol and unemployment are serious problems for us. White fella law is too soft on the young. The elders could help. If young people knew the stories, they would pay the elders their proper respect.
- Our elders are somewhat younger than has traditionally been the case. Most are below 40. Most will not live past 50.
- Elders should be recognised for the training they have received. However, such training is not now being provided. See the importance of having the elders advise those at summer schools on the sites that are important to the communities.
- The young are not inheriting much from the elders. Very few young people want information on traditional law from the elders. Nor are the elders anxious to share information with them. What’s important for the young currently is fitting in with their peers.
- The desire of the elders for payment to share knowledge is the outcome of a history of broken promises.

5. Self-Policing and governance

- See the development of local government accord with Aboriginal communities. There has also been the giving of parkland to communities. There is not so much an emphasis on local government law as on native title law.
- There is one Aboriginal person in the Department of Justice locally, a person who is invisible to us. This is frustrating for the local communities, who want to see such people performing their roles. And the roles that are recognised by the Department sometimes do not allow for work with the communities.
- Although the law started here, it has been a long time since some one from here went through the law.
- Places that are important to us, like the Stirling Ranges, are places where Aboriginal people now cannot go. It is an insult to be told that we cannot use the land in the traditional way. We cannot take the old people to the

Stirling Ranges without working with government officers, which is disrespectful to our traditions.

- We can't go out to get bush tucker, and thus cannot bring children along to learn this tradition.
- When trying to find family histories in local records, our people have encountered demands that seem to require us to grovel. This is inappropriate treatment for "first peoples".
- There is a problem with people who never married in the "white fella" way, and thus are recorded as "never married".
- Fragmentation comes from living in the European community. Fragmentation is not as much of a problem in remoter communities. Thus, in some cases we could not get volunteer visitors for the prisons to speak with certain prisoners, as they were from other families. The fragmentation causes problems for other service providers, such as in nursing and home service. If there are such difficulties with service provision in health, how much greater would the difficulties be for justice delivery? There has, however, been an agreement between Silver Chain and the local communities, an agreement which has worked.
- But elders disagree among themselves about what traditional law is. There is criticism of them by others for talking about others' country. In fact, one could say that traditional law is in the Albany area largely lost; the elders themselves might be prepared to concede this.
- There is in fact something of the Afro-Americanisation of Aboriginality. Thus, there is the matter of integration of families prior to taking on traditional law. The issue is one of fixing families, rather than fixing communities.

6. Traditional Law and Punishment

- Aboriginal law should be respected.
- There is a need for government to recognise land ownership. There is a real connection with land.
- Double punishment is an issue.
- One person indicated that if you commit an armed robbery then you are punished white way but if it's a family issue then it should be the Aboriginal way, ie feuding if nothing is done - get the elders involved.
- Western law needs to look at traditional law, not vice versa.
- Note the difference between communities, for example in the finality of payback in remoter areas, and payback's role as part of a vendetta in urban areas. In those areas it is no longer a matter of customary payback, but of outbreaks of feuding, without cessation. Thus, in urban centres payback must be approached differently from payback in remoter communities.
- What is at stake is the matter of acceptance of punishment in the traditional way. Failure of those punished to accept it will unsettle the community.
- Payback is a matter of knowing where to spear, and has advantages over incarceration.

7. Community justice mechanisms

- The closest to traditional law systems in a community like Albany, is the Juvenile Justice Teams. Perhaps an elder should be included in each Team. Perhaps a separate Aboriginal Justice Team could be set up – there is model for this in New Zealand. The problem here is the different family groups. Setting up such a Team here then raises issues of representation, as well as of payment of the members.
- Note that the Juvenile Justice System now allows for cultural issues to be addressed in reports to the judge.
- Perhaps there should scope for anger management training as part of the array of diversionary options.
- There may a role for removal of the young for training in outdoor matters, not restricted to Aboriginal offenders. The young person may simply be in need of mentoring. The Bremer Bay experiment appears to have worked well, as part of a range of camps, for boys and girls. As ever, it comes down to families.
- There does not appear to be a street kids issue in Albany ? although there is the matter of transient children, without a fixed home, moving from house to house.
- Housing issues need to be resolved as part of the resolution of justice issues. It's a matter of house size, and special features such as those for children with special needs.

8. Mental health issues

- Mental health issues for Aboriginals are very complex. These include appropriate visitors for them when they are in jail, alcohol, and drugs. Many slip into the cracks in the system.
- Mental health is a big issue. Given our people's sense of powerlessness, mental health problems are not easily remedied. Thus, it is important to reassure our people as to their value.
- Our people have nowhere to go to call for help. The police could be more supportive. Locally, the small psychology ward is always overcrowded, and there are no out of hours services.
- We do get opportunities to have counselling, but it is one-to-one. We need group and family counselling. We also need to be able to help ourselves; others really cannot.
- There are problems under our law with public shaming.

9. Intellectual property/cultural property rights

- See the arts programme involving fringe dwellers that was started in Kalgoorlie. There was a problem there of finding an ethical agent: they are important to enforcing rights such as when a painting was incorporated into a tea towel.
- See also the cases of the Warburton Women, who have started "Eco-spiritual" tours. Those going on the tours agree not to disclose what they learn.

- There is a need for greater protection of the writing of the communities. Anthropologists have signed protection agreements with Aboriginal communities committing themselves to look after the stories of the communities.
- Aboriginal communities need to secure agreements to preserve exclusive intellectual property rights in their members' works.
- There is the problem of preserving the languages. The solution of that problem is crucial to traditional law. The issues include recording, rendering the material in writing, translations, if so, by whom, and whether the translations should be into English only.
- Paintings that have been sold are lost to the painter and to the community.

10. Cross cultural awareness and training

- There is a lack of cultural awareness training among many in positions of authority here. Attitudes have not changed much over the last few years. It is quite frequently the case, for example, that government officers tell us to plead guilty to charges against us.
- It is important to make whites aware of how the Noongar treat land, as part of the process of improving cross-cultural awareness.
- See the importance of fireplaces in their homes for Noongars. Yet HomesWest does not provide or allow for these in the accommodation they make available to us.

11. Education, training and employment of Aboriginal people

- "We need to be taught the real history of Australia, it's a shame that white fellows are taking the history away". "We need to know the history of massacres and the Aboriginal heroes". Government has to take responsibility for what happened and it has to be recorded. There is a monument in Albany to a white fellow who killed a lot of Aboriginal people; that is offensive. Aboriginal people need to know where we fit in. "Nothing has been done around here for Aboriginal people and no-one is responsible for that". "We need to know what happened with the black fellows and put it in the history books." So much of the history has been sanitised. "We need to write down the history and look at cultural education". "The history is there it just has to be written down".
- Put money into schools so that young people can learn Aboriginal culture. "Somebody give us a chance, the scales are not balanced".
- What is at stake here are the matters of education and value systems. There needs to be a big emphasis on education of the children in their own language and culture, from primary school onwards. Compare Maori language training in New Zealand, which has been an important part of the education of white children there also.
- ATSIC should be investing in the future for Aboriginal people for sustainable development. It is hard to get a job and ATSIC should be in a position to provide for Aboriginal people. Members of ATSIC provide jobs and grants to their families. They should invest the money in profitable

organisations and it really should be a multi-million dollar organisation. ATSIC has to be accountable.

- Employment is an issue. There is nowhere for people to go, no men's resource centre and so men go back into crime. They want a fair go and not to have a criminal record. There should be funding for Aboriginal people in jail to assist them on their release from jail and on parole.
- In Katanning there is not one person employed by an independent authority.
- One person said that if he was able to have full time work he would not involve himself in criminal activities, but now he has a record and as an Aboriginal then it is very unlikely he will get a job. "If I cannot get a job then I will sell drugs".
- On CDP there is no encouragement to work - part of Centrelink, but all it does is distort the unemployment figures. It would be best if rather than just going on CDP, a private employer would give 20 hours work and CDP give 15. CDP is a bit higher than employment benefits. There are no incentives to work, only pre-requisite is to turn up - there is so much untapped potential. A lot of people see their future as the CDP. CDP \$20 more than the dole. Its not included in unemployment figures. Few individuals are privately employed. There is a bit of the tall poppy syndrome with the kids and they are not encouraged to succeed. There should be more positions in government also getting kids from school and into worthwhile training in relevant areas. Presently Aboriginal kids are never going to gain any worthwhile employment.

12. Criminal justice issues

(a) Police

- We need Noongar policemen. There is disrespectful behaviour from police towards our children. We have been told by the police that we can't do anything about police conduct. This is even in cases where in effect some of our young people have been kidnapped.
- Aboriginal Liaison Officers can assist, but they lack the powers of regular police. The regular police need to have a better understanding of the roles of ALOs. When matters go to the next level from the ALOs, those matters tend to break down.
- ALOs are seen by the police as part of them, not as liaison with the Aboriginal community. ALOs should not be in uniform. Our people don't like to deal with them in their uniforms. However, ALOs do meet with the community on a regular basis. But there are only two ALOs for Albany as a whole.

(b) Courts

- There is a lack of understanding in the Courts and in the police force of Aboriginal culture - there needs to be education in language and culture for both the white and black people.
- ALS encourages people to plead guilty.
- Language used in court, doesn't make any sense - Aboriginal language should be used. Also, there are different meanings given to language. What a white person may perceive as a threat, an Aboriginal person would

not. One of our countrymen translating is important. Aboriginal language should be brought into the Court.

- We need more intelligible language in courts, to help our people understand what is going on. And courts need to hear from the family of the accused and from the elders.

(c) Prisons

- Some boys see prison as a rite of passage, although they are still scared when they arrive.
- Our young people are abused in prison.
- There are problems in the local prison facility, with young men from far away and no visitors while they are here. Many in prison lose hope and also lose their culture.
- Notwithstanding the Royal Commission into Black Deaths in Custody, people still die.
- When Aboriginals leave jail, they are suffering a form of post-traumatic stress disorder, which needs treatment. There is at least post-release counselling for full-sentence prisoners. Also, juvenile justice elements are being adapted to the adult system. But there is, for example, the problem of a mentor, paid for by the Department of Justice, still being seen as part of the Department and not of the community.

(d) Funeral attendance

- Funerals are a problem because the extended family and obligations are not recognised. "I wanted to attend the funeral of my first cousin, I received a letter from my mother, but I was not able to attend the funeral and now that brings shame to me and I will have problems when I leave jail".

13. Racism

- There are negative stereotypes of Aboriginal people.

14. Welfare and family violence issues

- There needs to be a support structure. Violence needs to be spoken about more. There needs to be an Aboriginal Men's Group.
- Violence is the result of many factors; employment is one, Aboriginal people cannot get a job in this region.
- No support is given to grannies looking after children. Thus, this is a larger burden for them. The Department of Community Development pays good money to carers, but won't pay grannies. Their policies need to be changed, as to assessing who is eligible for support, and the forms of the support. There is no DCD consultation with grannies with whom mothers leave their children. Sports expenses are too high for parents, let alone for grannies.
- This is a result of substance abuse, usually but not always. Sometimes there may just be abusiveness. Consider the Gordon Inquiry's findings.

Here, traditional law appears neither to be part of the problem nor part of the solution.

- There is also much frustration in the communities, which seeks an outlet. Consider, for example, a grandparent who abused a child for not providing more money.
- Domestic violence solutions are made problematic because of disrespect for white authority. At the same time, traditional law has not resolved the domestic violence problems.
- Consider, however, the Geraldton approach, where Restraining Orders were designed with the appropriate consultation. But there have been problems there also, as where people are banned from shops for indefinite periods.
- There may not be enough consultation as to the underlying issues before the orders are secured. Thus, domestic strains may not be sufficiently addressed.
- Note that Noongar men who are prevented from seeing their children may often become violent.
- Counsellors need to understand the kinship system.
- Battered women may have had a victim mentality, based on being beaten as children for being naughty.
- In Aboriginal communities there appears to be an acceptance of certain levels of underlying violence.
- There is in family law some stereotyping of men as “always wrong”. Not enough time is spent on understanding the problem, and explaining the effects of the remedies to be used. There has been some use of Restraining Orders as weapons, in keeping fathers away from children.
- There is something of an artificial separation of welfare and justice, in WA at least. This is so even with the current impetus in government for departments to “break out of silos”. Consider for example the Disabilities Services Commission and its remission of drug or alcohol abuse to the Health Department, and dual diagnosis that puts people between agencies. All of this has led some families to play some agencies off against others.
- The Strong Families Program is proving successful. But there is the problem of the prohibition on the sharing of information between the Department of Justice and the police that flows from relevant legislation.

15. Feuding

- Feuding is affecting the young ones. The young are being conditioned to feud here.
- Some of the feuding is an attention-getting stratagem.

16. Deaths, coronial inquests and inheritance

- The family decides about inheritance.
- There is now much marriage outside skin groups, which creates difficulties for burial determinations. Negotiations can often solve these problems, however.

APPENDICES

Appendix I: Memorandum of Commitment

Appendix II: Format for Submissions

Law Reform Commission of Western Australia – Project 94

Aboriginal Customary Laws – Prison Consultations

METROPOLITAN THEMATIC SUMMARIES

The Law Reform Commission was greatly indebted to the Aboriginal Peer Support Officers, who translated the discussion into the various dialects required.

The consultations were an essential means of ensuring that the Commission heard at first hand the views of Indigenous prisoners regarding Customary Law. The consultation has been guided by four key questions that together provide a focal point for discussion of law issues. Briefly, the questions ask:

- how is Aboriginal law still practised?
- in what ways is it practised?
- in what situations is it practised?
- what issues confront Aboriginal people when practising their law today?

The Commission has employed these questions as a general guide for discussion. However, these questions may not always be in direct alignment with the particular set of issues confronting Indigenous people at this time. The consultation has, therefore, not rigidly followed a pre-defined script, but has tended to adapt in accordance with the flow of local circumstances.

These notes represent a thematic summary of the issues that were raised, not chronological minutes.

The discussions embraced a wide range of issues, covering the following broad themes:

Men's Issues:

- General Context
- Family Relations and the Law
- Men's Law Business
- Self Policing/Governance
- Traditional Punishment
- Substance Abuse and Aboriginal Law
- Issues of Identity
- Criminal Justice Issues
- Racism
- Welfare and Family Violence Issues

Women's Issues:

- General Context
- Traditional Law and Punishment
- Women, Law and Culture
- Criminal Justice Issues
- Welfare and Family Violence Issues
- Homelessness

Men's Issues

General Context

- Much law was secret and could not be discussed, but the basis of law was respect - for other people, ceremony and land.
- If you are born Aboriginal then law binds you, it belongs to you (and visa versa). You must abide by the law of the country you are in.
- The law was still strong, even in prison because old men were still talking to the young men about law. In their communities the law was strong, because old men were putting young men through the law (that is how it is practiced today).
- Even in prison a form of law was practiced - through talk with old men and through art. 'It needs the old fellas to keep law strong.'
- On the community, the special places are still respected. We know how to practice law, in the correct places, "we sing our law" in these places.
- The two laws can't go together, because "Aboriginal law is better, white man's is too weak". You can't mix them or Aboriginal law will suffer.
- You must punish people the Aboriginal way.
- "Aboriginal way does not change, white law always changes". "Creator gave us law, it can't change".
- "No politician can grab law and introduce it somewhere else". "Elders can't do it either". "No one has this power, to put law somewhere else".
- White law must acknowledge Aboriginal law. "Let punishment happen", without interference.

Family Relations and the Law

- If a white fella married a black woman, he is bound by black law. By black law first, white law second.
- Skin relationships are crucial still. They regulate relationships in prison as well.

Men's Law Business

- Men have strong bonds with those they have gone through the law with.
- Law time can be a dangerous time. Boys have been killed when they make a mistake, or mess up. Some boys from town go back for law but don't understand and are killed. Family are told they got sick. You need family with you to keep an eye on you at law time, otherwise you can get badly hurt.

Self-Policing / Governance

- There was some discussion about having a full time police presence. Some thought it might stop feuding. Others said that Aboriginal people should do the policing.
- Elders should be the wardens and give sniffers a 'belting' '- 'Elders are our police'.
- Sometime police charge people for carrying out law. Administering a 'flogging', for example. This bleeds communities of their law and order. Elders are locked up so the transmission of law between generations is lost - this is a 'slow desecration of our souls'.

- Need a separate 'space' for our law. Maybe more by-laws are needed where we can enforce our law. Also it should be written into the white man's laws, with exemptions for regional variations.

Traditional Punishment

- Most agreed that it was ok to get white law out of the way first, to focus on the real issue of Aboriginal law. If a man breaks our law, the police must bring him to punishment place for spearing. White man should 'leave it alone', 'stay out of it'.
- Aboriginal way was 'too strong, even if you are in prison a long time (life)', 'the old people might say he should be killed and he will die "magic way" in prison'. The law will happen, wherever you are, this is why it is too strong to stop. It is inevitable. The 'Kardatji' will come to put spirits on them in prison, when they have not finished things outside.
- An example was given of a drunken fight where a person was killed. The man was arrested and the law-men petitioned the court for him to be released and bailed to the community. He was speared seven times, and was later sentenced to 8 years imprisonment (instead of life) as a result. His family was spared the punishment they would have received had he not been allowed to return. The men in the discussion thought this was a good way of dealing with it.
- If someone dies in prison, the family still faces the punishment, but it would be just one event and then it would be over (the implication was that the punishment might be moderated in light of this).
- The idea of having some kind of tribunal of elders and judges to decide which law to use in specific instances was mooted as a useful option. Going through Aboriginal punishment should mean a reduced sentence.
- Men should be able to go back to communities for punishment - even though the offence may have occurred without them being present. For example, if a child dies, the mother must be punished, as there is no such thing as an accident. The husband or brother in prison must be hurt as well.
- Black and white laws have different time scales. Whites think they have been duped and blacks have escaped punishment when they don't see immediate evidence of punishment being carried out. An example was given of man who received a lighter sentence for killing his wife because he was to face Aboriginal law. The community did not spear him immediately and the lawyers complained about it and said he 'got off'. They didn't understand that this was part of the punishment, to walk around not knowing when it would occur. But when the appropriate people and the families were gathered, he was speared 5 times.
- There was concern that Judges might place some impossible restrictions on punishment, for example, that it 'must not break the skin'. This had happened in the NT and it meant that the offender had effectively 'got off with it'. There needed to be some guidelines for judges to follow
- Spearing must be carried out according to special protocols. The right people must do it, sober, and according to rules. A man might choose a family member to lean on when the spearing occurs. Depending on the circumstances and local custom, the spear might be barbed, and/or on a woomera. Or a flat spear might be used, held in 2 hands from very close range. Police must not stop it from occurring - they will make it worse for the offender and it might all have to happen again.

Substance Abuse and Aboriginal Law

- There was agreement that a functioning out-station was required to take sniffers, and their families sometimes.

- A young man who confessed to being a sniffer said that petrol sniffing was about two things: 1. it overcame male inhibitions and sense of 'shame' and made boys 'brave' (in what is a very conservative culture with many prohibitions and taboos about sexuality and gender); and 2. it makes girls 'do things they only see in blue movies'.
- If Aboriginal people want to physically punish young sniffers, this should be allowed. Police and welfare should not interfere. Sometimes the community wants to jail them as well.

Issues of Identity

- Some stated that there was a big divide between urban Aborigines and people on communities. There were some, however, who moved between the two, who kept their language, had been initiated, but had a foot in the white world. They kept their culture alive.
- Others felt that many urban blacks had no identity, it was lost to them. They stated that they felt 'sorry for this mob'.
- Urban Aborigines looked to American black culture - 'we are being niggerized' - They have a 'damper and kangaroo-tails idea of culture'.
- They need to have an affiliation with the land.

Criminal Justice Issues

General

- White man's law is 'Johnny come lately law' - we didn't need police before, they just interfere.
- We need a cultural understanding of why offences occur. Crimes are related to a place. On communities different issues are important, for example break and enter less important.

Funerals

- There is a lack of sensitivity on the issue of funerals. Whites have a strictly limited, 'blood' view, of kinship. Aboriginal people have complex relationships - e.g. aunty-mother/cousin-brother
- You lose respect if you don't attend a funeral. It creates enormous problems, "white rules make the mess".
- Regional Prisons handle the matter better, for example. Greenough Prison recently sent 7 to a funeral in Wiluna, not all of whom were strictly kin.
- Security people (AIMS) are responsible for shackling prisoners. This brings shame, you need your hands free for respect, 'when the family see a man in handcuffs, they feel sorry for him, and shame'. Escorts prevent prisoners from grieving with relatives.

Policing

- Police work better when they work with Police Aides. There is a need for more Aboriginal policemen.
- However, Aboriginal police women cannot arrest Aboriginal men. Aboriginal men will not have anything to do with an Aboriginal police woman - black or white.
- You can't force people to be together, for example, putting a son in law and a mother in law together. This has happened in police vehicles for example. The son in law (but not the mother in law) will be punished for it.

Courts

- Some find the language difficult to understand. They need someone to talk in their language and have elders sitting with the judges.
- Others commented that there is often no room for all family in court.
- Others felt that judges should go more often to the communities, as it is too hard and expensive for families to go to town.
- There should be an advisory body or council - of whites and blacks, to advise courts on specific cultural and community issues when sentencing.

Prisons

- WA Prisons have a particular problem with predatory sex by men in prison. Some Aboriginal men can't be gay outside, so prison provides opportunities. Young people in prison are easy prey.
- Self-harm occurs, because people feel isolated when they come from far away and family can't visit. RCIADIC looked at this and they do have video-link up now from Hakea.
- An Aboriginal person might have to commit a minor offence to get into jail to protect a young, vulnerable relative from other prisoners. You need family support inside. Blacks bring their support systems with them. This makes it comfortable. Whites do it harder in many respects.
- Some felt there should be access to traditional food whilst in prison.

Parole

- The most important thing is staying off grog and petrol. There is a need for strong family members to take them away from places of temptation. Parole officers can help with this.
- There is also the need for earlier contact with Case Managers, one year before release, so that they can plan for re-entry.
- We need something like a 'cultural report', not just psychologist's reports, which assess the capacity of communities to cope and the cultural state of mind of the prisoner. Often the wishes of communities are ignored.
- There were also criticisms of the new 'points system' on security ratings, this influences parole decisions, but it is culturally insensitive, for example an Aboriginal man might be penalized because he can't talk to or take orders from a woman, or refused to have dread-locks cut. This leads to negative incident reports.
- Prisoners are not always clear on how these procedures work. There should be orientation videos explaining them in different languages.
- The two priorities for most on release are 1) going back to country 2) family contact.

Racism

- The white system cannot recognize the problems blacks have, for example mental health or disability issues (intellectual disabilities particularly). They do not screen blacks properly. Blacks get a level of service that is poorer and would not be tolerated by whites.
- Whites just see Aboriginals as 'niggers in high speed chases, arrested by police and hand-cuffed'.

Welfare and Family Violence Issues

- Alcohol & money are the main reasons family violence occurs. People 'fight to get more money for that grog - or for food'. "Women want to keep money to buy food, men want it for grog".
- There is no excuse for family violence. Normal domestic violence law should apply. Urban Aborigines should go through white law. Communities might need different rules. They should adhere to the rules where they are living.

Women's Issues

General Context

- The laws need to be made equal for them to work together, instead of one being higher than another.

Traditional Law and Punishment

- There was agreement that 'double punishment' was unjust. Aboriginal law is harsher, and it is inevitable for those living in desert communities. In the towns you are 'always up against police and white-fella law'.
- Aboriginal law is strict. Many young women come down to Perth to escape the close control, promised men, etc. There has to be physical punishment. The police in Kalgoorlie knew not to interfere, they take men back for punishment, then to jail.
- Many felt you shouldn't be punished twice. The two laws need to talk together to decide which way a person should be dealt with, either the Aboriginal way or the 'government' way. The offender should have a say.
- In the north, people would rather go to gaol than go through punishment, but eventually they have to go back to the community.

Women, Law & Culture

- Women's law business goes on in prison. Aboriginal women carry out law, to help or punish, by only on other Aboriginal women, not prison staff.
- Some women come from outside the area and 'chuck spirits at them, snakes, spears and other things, bad things, that give you nightmares, tormenting'. Women fear them.
- Learning 'dance culture' is part of becoming an Aboriginal woman. The stolen generations were responsible for breaking up these traditions.
- Some women 'sang corroboree way', according to their law and customs. This made other women afraid when they saw them tell stories to each other in 'language' and draw in the sand. This was their traditional way of yarning and sharing their culture. Desert people always draw in the sand like this, it is part of communication. Other women get frightened and say 'why she banging that sand?' But they are just 'yarning about home and family' telling their stories.

Criminal Justice Issues

Policing Issues

- The attitude of the police is a problem. Aboriginal people are seen as low-lives. Aboriginal women are disrespected by police. They have been sworn at and bashed. Aboriginal youth have no respect for police.

- The police treat our old people badly. They are kicked by police when drinking in parks. This also includes Aboriginal people who become cops. APLOs 'turn funny', look down on you and think they are better.
- The Northbridge curfew is "all about Nyoongar kids, keeping them down." "Many can't go home, it isn't safe. Some girls aren't safe at home, safer on the street".
- Many Aboriginal women would never 'go to the police for help'. Domestic violence victims do not go to the police for help. "The police are not a service - the service is to lock you up".
- They also said that they would never complain to an internal police complaints body. One woman said she had complained to the Ombudsman and trusted this process more.
- The women had negative experiences of lock-ups. They were 'not a safe place, dirty places'. 'There was no toilet paper, men watched you in the cell, in toilets', it was 'degrading'.

Courts

- White judges, juries, victims might be biased against Aboriginal people.
- The Drug Court was mentioned. Some thought it was harsh, whilst others said it was a 'get out of jail card'. It was easy to manipulate the system.
- Women said that they tended to plead guilty, even through they were not guilty on all the charges, just to get it over with, "just rip it off, like a band aid". They agree to 'fast track' otherwise they would have lengthy periods on remand, so might as well cop a plea. Lawyers (including ALS) 'frighten you' so that you just plead guilty to everything. We get pushed through the system. Also, the police have a practice of laying further charges in prison - several women said they refuse to cooperate.

Prisons

- Not all women find the experience wholly negative. They develop strong friendships and are safe from what they perceive to be a racist society and from family violence. "Its 80% black here, so I like it - outside we are a minority, here we are the majority". Its 'sad but true, we are safer here'.
- The prison tries hard to accommodate their needs, during NAIDOC week the children were allowed in all the time.
- There needed to be more appropriate courses, including more on Aboriginal studies. Aboriginal women tended to be put out in the garden, rather than in more skilled areas, such as the canteen or library, or doing textiles, "white get a better deal". Male prisoners also earn more.
- The peer support team has programs to assist new prisoners, helping them to settle in and avoiding deaths in custody. Remand periods were often very stressful. The prison tries to help prisoners re-integrate with pre-release courses linked to a job and with the support of Outcare.
- People from the desert die in prison in Perth (spiritually), they should have jail in the bush, nearer family. They get no visitors in Perth.
- Some described how uncomfortable the transport was from the regional lock-ups to the Perth prison, with hard benches and nothing to hold on to. Some had injuries that were sustained when arrested.
- Many women end up in jail because they are homeless, some because of alcohol and drugs, a number get themselves imprisoned to escape male violence. "Jail is a kind of refuge for Aboriginal women".

Welfare and Family Violence Issues

- The whole community gets involved in family violence, families take sides, they all fight. They hit with sticks, then they throw spears, they see it is going to far and back down then. Elders, old people will intervene to stop fighting.
- Jealousy is a serious problem. Not allowed to look pretty, 'beautifying' is a new thing for Aboriginal people, painting faces etc. Aboriginal men are more jealous than white, its all about insecurity.
- Pornographic movies are a serious problem, Aboriginal youths act on them, they are very dangerous in Aboriginal situations, no controls, things seen are immediately acted out.
- The women were no strangers to violence. They had experienced violence in their communities and in white society.

Homelessness

- Homelessness was a real problem. In Perth only Bridge House is any good to Aboriginal women. Aboriginal agencies need to be closer to real people. The Nyoongar Alcohol and Substance Abuse Service needs to go out bush. It's no use where it is. It should go out and talk, take some kangaroo tails and go bush.

REGIONAL THEMATIC SUMMARIES

Regional Prison Consultations are an essential means of ensuring that the Commission heard at first hand the views of Indigenous prisoners outside the Metropolitan area regarding Customary Law.

The consultation has been guided by four key questions that together provide a focal point for discussion of law issues. Briefly, the questions ask:

- how is Aboriginal law still practiced?
- in what ways is it practiced?
- in what situations is it practiced?
- what issues confront Aboriginal people when practicing their law today?

The Commission has employed these questions as a general guide for discussion. However, these questions may not always be in direct alignment with the particular set of issues confronting Indigenous people at this time. The consultation has, therefore, not rigidly followed a pre-defined script, but has tended to adapt in accordance with the flow of local circumstances.

These notes represent a thematic summary of the issues that were raised, not chronological minutes. The summaries do not identify individual prisons, however, in deference to Aboriginal protocol, they remain separated in men and women's sections. Some of the comments that appear in the regional prisons thematic summaries are also included in the general regional summaries.

The discussions embraced a wide range of issues but can be loosely subsumed under the following broad headings:

Men's Issues

- General Context
- Customary Law and the Importance of Elders
- Traditional Punishment
- Criminal Justice Issues
- Post Release - Employment
- Youth Issues
- Men and Family Violence

Women's Issues

- General Context
- Customary Law and the Importance of Elders
- Traditional Punishment
- Criminal Justice Issues
- Drugs and Alcohol
- Youth Issues
- Welfare and Family Violence Issues

Men's Issues

General Context

Both male and female Aboriginal prisoners in regional prisons had strong views on Aboriginal Customary Law and many believed themselves to be bound by law, even while serving sentences under the white-fella legal system.

Customary Law and the Importance of Elders

- Many men identified what they perceived as a general lack of understanding of - and some well embedded indifference to - Aboriginal law and its underpinning values and beliefs, both in the prison system and in the community at large. Men and women expressed the opinion that lack of understanding of Aboriginal law and culture led to discriminatory treatment in the justice system and that the white system needed to acquire a better understanding of these matters.
- "White law does not respect Aboriginal customary law. White-man, needs education big time".
- "Aboriginal culture/law still exists and is being practised today. You need to recognise and acknowledge this and make changes to the constitution."
- Some Aboriginal men said that Aboriginal law still had authority over them when they were in prison and that this fact should be better acknowledged by the system.
- Some wanted to see "spaces" created in prisons which would be set aside for law and culture to be practiced. Elders (including both those who were serving sentences and from outside the prison) would talk to the young people and raise awareness of culture. The correct kinds of food could be prepared and some ceremony practiced. Currently, it was said, few concessions were made, for example, "you can't wear traditional clothing, like headbands"
- Elders were still viewed as the embodiment of law (not simply as people with knowledge of law). A number maintained strongly that only elders could talk about law, saying that law was, "not our business" and "we get into trouble" if they discuss with the Commission.

- It was explained to the Commission that Elders are law people and they are like the judge, lawyers for prosecution and defence (all in one). Elders will talk to the families involved in any dispute and the community and make a determination.
- Moreover, the law is practiced differently in different places; the Commission needs to listen to the different ways. White man cannot elect Elders. Each person from each area knows who the Elders are.
- Within the Aboriginal communities there is still respect for Elders, "They carry our law and culture very strongly".
- "The responsibilities of Elders has to be recognised and respected by the white system".
- In the south west of the state many issues were viewed differently. Here, prisoners were less optimistic about the future of Aboriginal law and culture and that too much damage had been done to the fabric of Aboriginal society.
- "Aboriginal people - were treated like second-class citizens - the white people have stolen their culture and this project is all too late."
- Another person expressed the view that the necessary reform will never happen and in the end it (law) will all fade away. "Nobody knows about our law down here. Culture will die out if its not passed down to the young people". While another said that it was already too late and that "we cannot go back".
- There was a sense of loss and sadness when speaking about the massacres and the "policy to breed out" Aboriginals and a feeling that there was a loss of Nyoongar identity. One person stated that he had been institutionalised all his life. "People have been half brought up in one system and half in the other".
- Elder were viewed differently: and elder was someone you respect due to their wisdom "what they say makes sense" and "young fellows listen to them".

Traditional Punishment

- Most men were supportive of the practice or traditional punishments and believed it was an effective means of resolving problems on communities. Many saw the loss of the "power punish" as a vivid symbol of the decline of Aboriginal society since colonisation.
- Double jeopardy should be avoided and "traditional punishment should be undergone first. Then the judge should take it into account in passing sentence". It was recognised that traditional punishment can be hard, but at least after it is undergone the slate is wiped clean, with no risk of banishment from the lands. This is also true in family feuding, where, however, such feuding is the infliction of bodily harm in white law.

Being Bound By Law

- A number of men stated that undergoing traditional punishment was not a matter of choice. If it is not undergone, the families affected by the offence will be after you, or after your family. However, some people do sometimes go across "the invisible boundaries", so as to avoid traditional punishment.
- One person indicated that if you commit an armed robbery then you should be punished "white way" but if it's a family issue then it should be the Aboriginal way.
- Elders are more effective in stopping feuding than white law.

Acknowledging Aboriginal Authority

- Many men saw a need for Aboriginal judges (including not just magistrates but also judges at the District Court level) and jurors (as part of mixed white / black ones) to provide an inside view of the communities. At present, even the elders are inhibited and do not say anything about traditional law. There is a need to explain to white judges what an offender may face under traditional law.

Cultural and Historical Teaching

- A number of prisoners talked of the need for increased teaching about Aboriginal history.
- "We need to be taught the real history of Australia, it's a shame that white fellows are taking the history away".
- "We need to know the history of massacres and the Aboriginal heroes".
- Government has to take responsibility for what happened and it has to be recorded. There is a monument in Albany to a white fellow who killed a lot of Aboriginal people, that is offensive. Aboriginal people need to know where we fit in.
- "Nothing has been done around here for Aboriginal people and no-one is responsible for that".
- "We need to know what happened with the black fellows and put it in the history books." So much of the history has been sanitised.
- "We need to write down the history and look at cultural education. The history is there it just has to be written down".

Criminal Justice Issues

Funerals

- Rules governing attendance of funerals were a source of concern to prisoners who believed they did not take into account the imperatives of Aboriginal law. The rules of the Department of Justice do not recognise "skin" relations, only blood relations. The criteria are therefore too restrictive.
- "If appropriate persons do not attend the funeral, then their family is upset as it shows disrespect".
- The process needs to be made more culturally appropriate, and recognise skin relationships as well as the bonds of "family", obligation and reciprocity created when men go through law together. Several suggested that DOJ should re-draft guidelines after due consultation with Aboriginal people.
- The way those attending funerals are restrained so as to prevent proper grieving, creates problems.
- There is a need for proper training for prison officers, in local cultures, so they can appreciate the sorts of stress suffered by prisoners brought from far away to a prison like this one.
- More Aboriginal prison officers are needed. At present there are relatively few, and they tend to be caught up in the white culture rather than Aboriginal culture.
- Funerals are a problem because the extended family and obligations are not recognised. "I wanted to attend the funeral of my first cousin, I received a letter from my mother, but I was not able to attend the funeral and now that brings shame to me and I will have problems when I leave jail".

Interpreters

- Here were suggestions made that communication between the prison authorities and prisoners from remote locations (for whom English may be a fourth language) was often poor, prison officers lacked the skills and cultural knowledge to "ask the right questions" when the issue of funeral attendance came up.
- Interpreters were clearly necessary and needed to be accessible for both prisoners and prison staff. In addition, there appeared to be too many links in the decision-making chain. It was said that Regional Prisons did understand many of the issues and were willing to be flexible in making arrangements but the "bureaucracy in Perth" often over-ruled them. Some Regional prisons had gone as far as to create their own information sheets for prison staff, to assist them in making arrangements.

The Courts

- Interpreter services were also a major issue for those attending court. The lack of an Aboriginal interpreter service at the Broome Court House was noted, despite a significant need for such a service. One person stated "I felt that I wasn't heard".
- Most people felt that there was a problem with language, in addition people did not understand the language used in the Court. Also the Court processes were not properly explained; for example, some do not understand what the term "remand" meant. Also, Aboriginal people do not always understand why they are not dealt with quickly by the white system. Why it takes so long for a case to be heard in court.
- "Language used in court, doesn't make any sense to us. Aboriginal language should be used. Also, there are different meanings given to language. What a white person may perceive as a threat an Aboriginal person would not. One of our countrymen translating is important. Aboriginal language should be brought into the Court".

Fines Enforcement System

- This system was responsible for the incarceration of many Indigenous people: because Aboriginal people generally cannot pay the fines imposed so they receive a further term of imprisonment.

"Bulk Billing"

- On some occasions a person is picked up for 1 offence, but when they get to Court there are 3 or 4 more charges, they don't always know where these charges have come from.

Relations with the Police

- Following family feuding, police will sometimes lay charges, which will re-ignite the feuding. Better ways of handling these matters needs to be negotiated.

Driving While Black on Back Roads

- Some Aboriginal prisoners were certain that simply being behind the wheel of a car was enough to attract police attention. It is the case that many Aboriginal people do not have driver's licenses, however they are not driving on main roads or in towns. A lot of Aboriginal people were jailed for driving without a licence or for travelling between communities but not on a gazetted road ("back roads").
- Jailing for minor offences, such as these "doesn't make sense". Aboriginal people need to travel between communities and the back roads allow them to move freely between the communities. The police sometimes close back roads. The communities

use the back roads to travel to and from Court and to transport the sick to enable them to receive medical treatment.

- Aboriginal people in the communities without a driver's licence may still have to travel to Court and there is usually no other option but to drive.
- There was a need to educate the police as to the needs of the communities, particularly the use of the back roads. There is a real and justifiable need for the community's use of the back roads.

Drivers Licenses

- The test/form needs to be revised. Aboriginal people may have a sound understanding of driving theory but may not be able to answer the questions because of the way language is used. There should be oral tests for Aboriginal communities.

Police Attitudes

- There is also a need for proper training of police officers in Aboriginal culture. Many have a poor attitude to Aboriginal people. "A person gets picked up for a minor offence and then gets 12 months for resisting arrest".

Post Release - Employment

- Employment is an issue. There is nowhere for them to go, no men's resource centre and so men go back into crime. They want a fair go and not to have a criminal record. There should be funding for Aboriginal people in jail to assist them on their release from jail and on parole. In Katanning not one person employed by an independent authority.
- One person said that if he was able to full time work he would not involve himself in criminal activities, but now he has a record and as an Aboriginal then it is very unlikely he will get a job. "If I cannot get a job then I will sell drugs".

Youth Issues

- Need for Elders, shire, government, police and schools to work together on the problems existing within the communities, including but not limited to youth issues. Two of the problems identified were solvent abuse and lack of (or need for) a driver's licence.
- There are activities for the young people in the communities but in some cases the guardians/parents are not much help in encouraging the kids to participate.
- Parents and guardians are not allowed to smack a kid any more, "smacks are all right", also "shaming beating" within a community meeting is sometimes considered appropriate.
- Local agencies and Community Councils need to be adequately resourced. Support groups needed for the children.
- It was suggested that children should be allowed to go to prison for a visit and then "they may fear prison".
- Some pointed to a lack of specialised facilities for juveniles. In such facilities they could develop better self-esteem, communication skills and other job-related skills. There could also be training in the traditional ways. There is also a need for alternative sanctions, such as community projects, to break the cycle of re-offending and re-entry into the prison system.

- It was said that children and young fellows are no longer disciplined, children see that and grow up without discipline. Aboriginal children are now using the white man's law to protect them.
- Put money into schools so that young people can learn Aboriginal culture. "Somebody give us a chance, the scales are not balanced".

Men and Family Violence

- There needs to be a support structure. Violence needs to be spoken about more. There needs to be an Aboriginal Men's Group. Violence is the result of many factors; employment is one, Aboriginal people cannot get a job in this (Albany) region.

Women's Issues

General Context

- Both male and female Aboriginal prisoners in regional prisons had strong views on Aboriginal Customary Law and many believed themselves to be bound by law, even while serving sentences under the white-fella legal system.

Customary Law and the Importance of Elders

- As in the case of men, Aboriginal women expressed some deeply held beliefs about the importance of law in their lives. They also made it clear that many Aboriginal women still practiced their own women's law and that women elders were of significance.
- "Elders have the law - there are women elders"
- "Elders in consultation with family and community decide on the punishment".

Being Bound by Law

- There were differing views as to whether Aboriginal people could make choices about whether they were bound by law or not.
- Some were certain that people should have freedom of choice.
- Some said that you could live by white man's law if living an urban lifestyle and not practising Aboriginal Customary Law in your daily life, but those who lived by Aboriginal Customary Law in their daily lived should abide by it all the time.
- Others suggested that Aboriginal Customary Law was not a neatly packaged, "take it or leave it", object any longer. People did negotiate how it was employed under specific situations.

Traditional Punishment

- Traditional punishment is still a fact of life in many communities, however we were also informed that families, sometimes "say no to tribal punishment way".
- One strength of punishment, and the reason why some people feel that they should suffer the punishment, is that it closes the chapter.
- "If punishment is faced then you are free. If you do not face your punishment then worse things happen to you. You and/or your family can become very sick or die".
- Traditional punishment has more impact: "Family watches your punishment - and you are shamed".

Criminal Justice Issues

Funerals

- Prisoners - asking for compassionate leave to attend family funerals while in prison. DOJ have difficulty understanding family structures within Aboriginal culture due to extended families/immediate families, eg blood line.

Courts

- Translation services are required for Court proceedings and interviews with the police.

Legal Representation

- "ALS tells us we must plead guilty".

Community Based Corrections

- There was agreement that prisons should be built closer to family. However a preferable option is to leave people in the community and keep the family together - offenders can work in the community, for example cleaning up.
- Look at suspended sentences for men and women within the community and the Elders in consultation with the community decide what the people are required to do within the community.

Prison

- Meals within the prison - kangaroo tails and damper should be provided. Traditional medicines should also be available.
- Language is a major barrier for prisoners from remote areas. Explain things in language about how prison works and what the rules are, this will create peace of mind for the offender and will determine how she behaves in the prison system.
- Often prisoners can only express themselves by talking in their local language. This presents problems because prison/police staff cannot understand them.

Housing & Release from Prison

- Homeswest does not allow for an extended period of absence from the tenancy. Once you have completed the jail sentence and are on parole there is no house at the end. Lack of housing may affect your parole, so it is a Catch 22 situation. Housing should be provided upon release.

Fines Enforcement

- Current licensing requirements lead inevitably to fines and then inevitably to imprisonment, women said.
- "Fines catch up with you – they hold the fines until you are out of prison. You can not pay the fines, as you need to feed your children"

Drugs and Alcohol

- Alcohol a real problem for Aboriginal people. "Its killing people all the time".

- Sober Up Shelters and Night Patrols were viewed as good developments in the fight against alcohol, but there were some concerns expressed about the working practices of some shelters, for example they were not open enough hours of the night.

Youth Issues

- "There was nothing for the children to do in the communities- just a big hall".

Welfare and Family Violence Issues

- Women said that Family and Children Services (now DCD) takes the children and limits the mother's contact with her children. Need a greater emphasis on Aboriginal adoptions and foster care arrangements into the community rather than sending the children away. One woman identified a number of problems relating to children, in particular the separation of siblings.
- Restraining orders - do not work for Aboriginal women, they only wish to seek momentary protection and do not understand that the order has to be discharged. If in prison, no visits allowed if a restraining order in place.

Safe Places for Women

- Women from the Pilbara said that they have to travel to Hedland to be dealt with in court. One Hostel – would not let a person stay there if they are on bail from Court and it is expensive. There is no place to stay if you are coming from the community.
- There is a general lack of culturally appropriate safe places for women. Existing refuges are not always appropriate. A refuge was built right in the Town of Port Hedland. It is too dangerous and it should be more isolated.

Legal Education

- Legal education should go both ways. We should be educating people both Aboriginal and Non Aboriginal on the Aboriginal law and cultural system. Lots of Aboriginals do not fully understand the Justice System and they do not understand the consequences of the crimes they commit.