

Case Study 2

An Aboriginal woman (the offender) had lived at a remote community all of her life. She decided to move to Perth to be close to her daughter who had left the community to live in Perth with her husband. When she moved to Perth she found it very hard to be away from her country and community. She began to drink alcohol for the first time. While out one night she became angry with her daughter and they had an argument in the street. The police came and the woman was charged with disorderly conduct and assaulting a police officer because she pushed the police officer away. She has never been to court before.

The offender appeared in an Aboriginal court in Perth. After the woman pleaded guilty the offender's lawyer told the court about how difficult it has been for the offender since she moved to Perth. The offender does not want to go back to her community because her daughter is now pregnant. An Aboriginal court worker (who had spoken to the offender before court) told the magistrate that he knows of a few Aboriginal people from her country who now live in Perth and that he could introduce them to her. The Elder who was sitting next to the magistrate explained how difficult it can be for Aboriginal people to be separated from their country. The Elder also told the magistrate about an alcohol counselling program that is run by the community justice group in the offender's suburb.

The magistrate decided that the offender should be referred to the community justice group. The offender was told to come back to court three months later. During this time the offender completed a six week alcohol counselling course and met a number of Aboriginal people who are related to her family. One of these people works for an Aboriginal interpreter service and suggested to the offender that she might like to become an interpreter. The offender is very happy to do this.

After hearing all this from the Elder and Aboriginal court worker the magistrate decided to impose no penalty. The offender did not receive a criminal conviction.

ABORIGINAL CUSTOMARY LAWS PROJECT

Have your say ...

The Law Reform Commission of Western Australia wants to hear your opinion about the proposals contained in this document.

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Sentencing

Under Australian law, when a court finds a person is guilty of an offence it must decide how the person will be punished. When making that decision a court will take into account many factors including facts about the offender, their background and why they committed the offence. The Commission wants to make sure that all courts have to consider any relevant aspect of Aboriginal customary law or other cultural issues. To do this the Commission has proposed that:

- The *Sentencing Act 1995* be changed to make the cultural background of an offender relevant to the court's decision about what punishment (or penalty) to impose.
- The *Sentencing Act 1995* and the *Young Offenders Act 1994* be changed to make sure that when a court is sentencing an Aboriginal person it must consider:
 - (1) any aspect of Aboriginal customary law that is relevant to the offence;
 - (2) whether the offender has been or will be dealt with under Aboriginal customary law; and
 - (3) the views of the Aboriginal community of the offender and the victim about the offence and what should happen to the offender.

Many Aboriginal people told the Commission that they were worried about cases where false information was given to courts about customary law. In some cases the only information about customary law comes from the offender's lawyer. Sometimes courts have been incorrectly told that violence or sexual abuse against Aboriginal women or children is acceptable under Aboriginal customary law.

The Commission wants to make sure that courts are told about customary law issues in a reliable way. Therefore, it has proposed that a sentencing court must take into account information from an Elder or member of a community justice group. This information could be given to the court in writing or by the person talking to the magistrate or judge in court. Both parties (the accused and the prosecution) or the judicial officer could ask an Elder or a member of a community justice group to come to court and talk about the case.

The Commission has also proposed that the Western Australian government set up Aboriginal courts in Perth as well as in regional areas. The existing Aboriginal courts in Australia involve Elders sitting with and advising the magistrate about relevant cultural and customary law matters. The Commission thinks that Aboriginal courts are a way of making the criminal justice system work better for Aboriginal people.

The following case studies are examples of how these proposals might work in practice.

Case Study 1

An Aboriginal man (the offender) has pleaded guilty to a charge of assault against his partner. The offence happened on a remote Aboriginal community. While the offender was drunk he hit his partner on the face. Before the case went to court the offender had been spoken to by the community justice group in his community. The community justice group decided that the offender should be sent to an outstation for six months and was not allowed to come back to the community until after this time. The offender was also spoken to in front of the whole community about what he had done.

After the offender was arrested by the police he told his lawyer that he punched her because he thought that she was seeing another man. He said to his lawyer (and the lawyer told the magistrate) that the offender believes he is allowed to punish her this way under Aboriginal customary law. Two members of the community justice group explained to the magistrate what had been decided about the offence. The community justice group members (one male and one female) told the magistrate that his behaviour was not acceptable under Aboriginal customary law and that they were very concerned about what he had done. They also told the magistrate that the offender had been before a community meeting and the community wanted the offender to stay at an outstation for six months. At this outstation he would be guided by Elders and given support with his drinking problem.

After hearing from the community justice group members the magistrate found that there was no excuse for the offence under Aboriginal customary law. But the magistrate did take into account the fact that the offender had been shamed before his own community and that the community had decided it was best for him to be banished to the outstation.

The magistrate decided that the offender should be given an 'intensive supervision order' under the *Sentencing Act* and as part of this order the offender must live at the outstation for six months and also have alcohol and family violence counselling.