

background paper 6

Contemporary issues facing customary law and the general legal system: Roebourne – a case study

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Overview

The Law Reform Commission is currently enquiring into and reporting on Aboriginal customary laws in Western Australia. Because I have a strong relationship with many people in Roebourne I have been asked to discuss with them Aboriginal customary law and how it functions in their lives today, and report on their responses.

My report on the people's responses is included in Parts II and III of this paper. Respectively, these parts deal with customary law in Roebourne today and the role of customary law in dealing with current issues. So as to provide a background of understanding to these responses, in the first Part of this paper I have given a brief description of Roebourne and of customary law. I have also outlined four key factors relevant to a discussion of the role of customary law, as identified by the people I have spoken with. In preparing this report I have been conscious that it is not my role to critique the responses made to me. Therefore, in Parts II and III of this paper I have attempted to present the information as it was given to me. I have, however, included some of my own observations of these discussions in the conclusion.

People in Roebourne have had similar discussions with Commissioners and researchers who are also reporting to the Law Reform Commission on the role of customary law, so this paper forms only a part of their response. Further, for many reasons, including the demands on people's lives, the nature of the issues discussed, the nature of relationships between men and women and the time it takes for people to give their accounts, all the people who could speak on this issue have not had the opportunity to do so. The views expressed here therefore necessarily come from a selection of people.

Part I: Introduction

Roebourne

Roebourne, or Iremugadu, is a small town in the Pilbara region of Western Australia. It was established in 1864 and was the first colonial town in the Pilbara. It is built on the Harding River and is 12 kilometres from the coast. Now, there are the towns of Karratha and Wickham, initially constructed for workers in the mining industry, only 40 and 10 kilometres away respectively. (These towns are now also home to many Roebourne people, with people moving from Roebourne as housing becomes short, or to be near employment, or because they want to live outside of Roebourne and now have the freedom to do so.)

Roebourne has a population of approximately 1600 people, 95 per cent of whom are Aboriginal, and includes those people living in the nearby Aboriginal communities of Cheeditha and Mingullatharndo. It is the traditional 'country' of the Ngarluma¹ and Yinjibarndi² people. It is also the place where many Gurrama and Banjima people live, although the traditional 'country' of these people is more than 400 kilometres inland. These people have been progressively displaced from their 'country' over the last 150 years as part of the colonial process, through the impact of the pastoral industry and, more recently, through the impact of the mining industry.

For people in Roebourne it is only 40 years since they were living in their own tribal groups on the old reserve, the stations and in the out camps at Millstream and Letterbox (20 kilometres from Millstream).³ It is only 40 years that people have been living in the village. The village is a group of approximately 50 houses located two kilometres from the centre of town. It is on the south side of the river, and is adjacent to the old cemetery. It is approximately four kilometres from the old reserve on the northern side of the river. The village was built between 1972 and 1974 by the State Department of Housing. The old reserve was officially closed and people were obliged to move to the village. A small group of about 12 older people live in the ruins of an old stone building on the main street in the centre of town. These people do not have a roof, do not have any furniture, and do not have running water or a toilet. The time since the people have moved to the village has seen a marked difference in: the ways that groups interact; the way that customary law operates; the roles that people play in their families – most particularly men who no longer have significant hunting responsibilities; and people's health (particularly in relation to the effects of alcohol).

1. Ngarluma – pronounced, nar-la-ma.

2. Yinjibarndi – pronounced, in-ja-barn-dee.

3. Millstream is a series of permanent deep water holes in the Fortescue River and is thus an oasis. It is approximately 130 kilometres inland from Roebourne and is the traditional home of Yinjibarndi people. It is a designated National Park.

Customary law

For many of the people living in Roebourne, their customary law systems continue to regulate their lives as they had always done, even if the law is at times ignored, and for some people not well known. The concept of customary law has been dealt with in other papers produced for the Commission's reference;⁴ for the purpose of this paper, it is important to understand that Aboriginal people do not think of customary law in the sense that non-Aboriginal people think of law and the general legal system. It is also important to appreciate that it is not possible to make a simple division between customary law and life generally: Aboriginal people in Roebourne do not do this.

While doing some previous work I discussed customary law with Harriet Ketley, a lawyer for the Miriuwong and Gajerrong peoples during their native title case. Harriet made an important observation when I asked her how Miriuwong and Gajerrong peoples defined customary law. She said that elders did not define law. Rather, *'they gave examples or explanations of events with reference to their ancestors. They collapsed 'ancestors' into 'old people' ⁵ and dreaming people'* without distinction. They also made a distinction in the law when they spoke about punishment. She said, *'Younger people in the group would talk about law in our way; they were more emphatic, and said "We have to keep it" ⁶* (that is, we have to maintain customary law).

Many Aboriginal people draw on spiritual or cultural beliefs to explain everyday events such as car accidents, illness and death. Similarly, they may explain a young person's antisocial behaviour (for example, breaking windows), as the result of his or her parents' 'wrong'⁷ marriage and therefore inability to bring the child up properly. They do not limit customary law to payback or punishment.

It is also important to remember that Aboriginal language groups or tribes are distinct groups with their own local customs and traditions, which sometimes translate into, at least subtly, different beliefs including variations in customary law. In Roebourne, as there are people from a number of Aboriginal groups living together, there is not 'a customary law'; rather, there is a mix of laws. It is not the purpose of this paper to provide details of Aboriginal customary law in Roebourne, nor, for customary law reasons, is it appropriate to do so. Consequently, while this paper provides some general information about customary law in Roebourne to facilitate understanding, it does not provide an analysis of the differences between the law of each group of peoples. I note, however, that in relation to the Ngarluma and Yinjibarndi, these groups are closely related because of the proximity of their country and traditional camping areas and intermarrying between the groups and so, as I understand, the customary law differences between the groups are not major. Further, for all groups, it is possible to say that in Roebourne customary law 'defines a person's rights and responsibilities, it defines who a person is, and it defines the person's relationship to everybody else in the world'.⁸

As Roebourne is a town, customary law cannot operate in the same way that it might in communities such as Jigalong or Cotton Creek.⁹ In these communities, elders or councillors may exclude people who break laws and disrupt other people's lives. This is not possible in a town (as a woman who spoke about the activities of a drug dealer in the town pointed out); a fact that Aboriginal people appreciate.

Customary law and general law

Customary law is much broader than the general legal system. It is an expression of tradition and a means of expressing the rules that allow communities to operate effectively. However, the issues that people have to deal with are now often outside the limits of what they traditionally used customary law to deal with. Further, the general legal system governs people's lives irrespective of customary law. At the same time, customary law operates irrespective of the general legal system. As a consequence, in many instances, people are punished according to customary law and must still face punishment in the general legal system. All the people I spoke with talked about the need for the general legal system and customary law to work together, where appropriate, if punishment and rehabilitation are to help them to 'fix' their community.

4. See for instance, Toohey J, 'Aboriginal Customary Laws Reference – An Overview', Background Paper No 5, above pp 173–185.

5. Interview with Harriet Ketley, directions lawyer for the Miriuwong and Gajerrong native title case, 2004.

6. *Ibid.*

7. A 'wrong' marriage refers to a marriage outside of the skin group system. This is explained further below.

8. Northern Territory Law Reform Committee (NTRC), *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 10.

9. Jigalong and Cotton Creek are two Western Desert Aboriginal communities in the Pilbara. They have their own management, have implemented community by-laws and are relatively autonomous.

Current socio-economic conditions

The socio-economic conditions in which people in Roebourne live affect all aspects of their lives. How people engage with culture—whether they are able to spend time on their country, visit sacred sites, teach children about culture, take part in law ceremonies—is greatly influenced by their general wellbeing. In my discussions about the role of customary law today and in the future people linked it to the standards of health, education, housing and living conditions as well as levels of employment.

Health

Poor diet

Health standards in Roebourne are poor. Most people have inadequate diets. They eat too many processed foods, including white bread and sugar, and not enough fresh fruit and vegetables. There are only two small shops and a service station in the town where foodstuffs (particularly fresh produce) are costly. Most people do not have cars to get to the bigger towns where there are more choices and prices are cheaper. Additionally, many people often do not have the means to go hunting and so do not eat enough kangaroo, bush turkey, fish and other traditional foods.

Among other illnesses, inadequate and inappropriate food has led to a high incidence of heart disease, diabetes, chest, nose and ear infections and the birth of underweight babies. It also leads to tiredness and lack of concentration.

Alcohol and drug abuse

As reports from the Gordon Inquiry and discussions with the Roebourne Primary School and High School Annexe, the Women's Safe House, Strong Women's Group, the Men's Group, Mawangkarra Health Service and other organisations all show, alcohol and drug abuse in Roebourne is high.

People first started drinking alcohol in Roebourne in 1967. Of those who began drinking at this time, many passed away early because of alcohol related illnesses, accidents and violence. As a result, there are a markedly small number of people in the 45 to 60 year old age group. This has left an enormous gap, which has impacted on the passing down of cultural knowledge, on teaching young people to respect and look after others, on care of children, on the number of elders and the number of grandparents, and much more. We are yet to be able to measure the continuing effects of alcohol abuse on mortality rates, and, therefore, the corresponding influence on customary learning.

Excessive drinking and, for some people, drug use exacerbates other health problems. It leads to depression, psychosis, emotional and irrational behaviour, lack of inhibitions, disregard for rules of sociable behaviour and respect for others, and violence. It greatly impacts on levels of domestic violence and sexual abuse in the community. Drinking also leads to babies being born with foetal alcohol syndrome, low birth weights and other health issues. It is a direct cause of neglect of children, which in turn causes health problems for the children.

Sexual abuse

The 2002 report of Western Australia's Gordon Inquiry, *Putting the Picture Together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities*,¹⁰ discusses the effects of neglect and sexual abuse on the development and wellbeing of Aboriginal children. The commissioners for the Gordon Inquiry spoke to people in Roebourne; the report therefore reflects their problems and concerns and is thus useful to consider in relation to the role of customary law and the general legal system.

The Report includes the findings of the Telethon Institute for Child Health Research, which lists some of the effects of child sexual abuse as:

- sexualised behaviour and age – inappropriate levels of sexual knowledge;
- anxiety and depressive symptoms;
- development of suicidal thoughts;
- school difficulties relating to academic performance, behaviour and peer relationships;

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

- behavioural problems – running away, offending;
- dissociative symptoms – amnesia, daydreaming, trances;
- increased impulsivity – hyperactivity, aggression;
- emotional distress – fear, somatic complaints, nightmares, bed-wetting;
- lowered self-esteem – 'damaged goods syndrome', sense of responsibility for the abuse, increased sense of vulnerability and futility;
- difficulties with identity formation;
- physical consequences – sexually transmitted diseases, HIV/AIDS, unwanted pregnancy and damage requiring medical attention or surgical repair; and
- precipitation of psychotic symptoms/disorders in adolescence following an experience of sexual assault.¹¹

Many people in Roebourne described these symptoms when speaking about adults and children who have been sexually abused and/or have experienced other forms of family violence. They focused on this as a vital issue that the law, both the general legal system and customary law, needs to address.

Education

Most of the older Aboriginal people in Roebourne have little or no formal (non-traditional) schooling. Today children attend primary and secondary schools and a small but increasing number go on to undertake trades courses or university degrees. However, for most people literacy and numeracy levels remain low, hindering access to the limited employment opportunities available in the nearby larger towns.

The school is an important site in relation to customary law and the general legal system. Children have to go to school and obey school rules or they risk being disciplined, which for a few children often means being suspended or excluded from the school for a period of time. The Roebourne Primary School operates a[n] Yijbarndi language programme, taught by members of the community, and employs a number of local people as aides in some classrooms. The level of involvement of community members in the school depends on the principal and the teachers of the school. There is no formal integration of cultural systems (except for the language classes) which would allow for customary rules of how children should behave towards adults, other children and property to exist in the school. Teachers often have problems getting some children to stay at school, interact productively with other children and show respect to the teachers. They also have trouble making the curriculum relevant and interesting to the children.

Some adults said that if the children had the opportunity to learn about their own culture at school, including skin and respect systems and cultural stories of place and the seasons, they would learn better and it would help them feel that school is a part of their everyday life rather than something extra. This would be consistent with customary teaching practices. Some adults explained that their fathers, mothers and grandparents taught them all the time. They also said that parents should not still feel that the school is a place that they stay away from and that what the children learn there is not part of their everyday/home life.

All the people said that they wanted their children to go to school. Some people said that they had enjoyed going to school and that what they learnt helps them in their lives, and for some, in the jobs they do now and in teaching their children. They remembered the old people coming in to the school and telling stories and being taken outside to learn how to cook or collect bush tucker. Other people said that although they enjoyed some of it, what they learnt in school does not mean anything to them now. They said that their experience of school makes them not want to participate in the school now. They explained that they do not feel they could go there and be allowed to help. Everyone said that the school should always ask the old people and others in to tell stories, teach the kids to sing and dance and teach them their respect systems; and not just to do this on special occasions like RAIDOC week (Roebourne's version of NAIDOC). They felt that this might help the teachers because the kids would behave better.

Housing and living conditions

The village, where most of the people live, was built in the 1970s. For the most part, the houses are poor quality, three bedroom, one bathroom and toilet, asbestos houses. They have no large verandas or breeze-ways for outdoor living (Homeswest is currently replacing some of the houses with more appropriate ones, but this is a very slow process).

11. Gordon Inquiry, ibid 24.

There is very little furniture in the houses; many people do not have a fridge or enough beds for everyone. The houses at Cheeditha, the small community three kilometres from the village, although newer, are equally poor. The last census shows that 17 to 20 people often live in a house. As a consequence, there is no privacy and no space for children to be away from adults or for women to be alone. The lack of adequate housing impacts on family violence, sexual assault and breakdowns in respect systems.

Employment

The unemployment rate in Roebourne is approximately 25 per cent with a further 10 per cent of community members participating in Community Development Employment Program (CDEP) activities (work-for-the-dole). Most employment is concerned with local services such as the TAFE, schools, the hospital, the prison and shops. However, a few local people are running their own small businesses, employing themselves and other local people.

The lack of employment means that many adults have little to do with their time and therefore spend much time in or around their houses. A high proportion of people are on some form of government benefit payments. The combination of these factors means that many people, especially men 16 years and older, spend most of their time sitting with little to occupy them. Consequently, many people, particularly men, have low morale, which leads to increases in drinking and family violence.

Part II: Customary law

Defining customary law and inadequacy of language

To understand customary law it is necessary to appreciate the relationship between the inadequate concepts of 'dreamtime' and 'law'. These terms are both impositions on Aboriginal cultures. Both the use of English and needing to speak to people outside their language groups has required Aboriginal people to use such terms (or variations of them). 'Law' and 'customary law' are inadequate because they cannot be free of the western concepts and power ascribed to the word 'law' and the status of law as somehow above or separate from other aspects of our daily lives. 'Dreamtime' is a derisory and simplistic term for an ancient belief system. It is necessary to have the information in both of these concepts, and a sense of spirituality, to understand customary law, because they are indistinguishable.

Scott Cane, author of *Pila Nguru: The Spinifex People*, provides a useful discussion of the inadequacy of language when people have to discuss, for outsider's benefit, the interconnectedness of customary rules with people's wider belief system and spirituality. He writes that the Spinifex people use the term 'Tjukurrpa' to describe this and argues that they too inadequately translate it as 'law', when they are obliged to speak of their beliefs to outsiders. Cane writes:

This equation of the Tjukurrpa with 'law' conveys something more than Europeans might associate with conventional legislation. The Spinifex perception of law incorporates elements of fear, power, complexity, reason and authority but also conveys something universal and metaphysical. It is, in both practice and content, more spiritual than judicial. Spiritual beings are described as belonging to 'the Law' and country is seen as part of 'the Law'. Sacred boards are said to be 'the Law' and ceremonial acts are conducted as expressions of 'the law'. Senior holders of the Tjukurrpa are 'Law men'. When travelling through country people will often point to physical features and describe it as 'Law' or they might not speak at all, whispering, 'big Law'.¹²

Cane argues that Tjukurrpa is a combination of the components, law, spirituality and ceremony or business and it is 'nature, philosophy and psychology'.¹³ He writes that it:

provides an explanation of nature, establishes a social code, creates a basis for prestige and political status within the community, acts as a religious philosophy and forms a psychological basis (if not psychological controls) for life.¹⁴

Cane suggests that it is best described 'as the European concept of tradition'.¹⁵ This is consistent with the Northern Territory Law Reform Committee's statement that:

12. Cane S, *Pila Nguru: The Spinifex People*, (Fremantle: Fremantle Arts Centre Press, 2002) 81.

13. *Ibid* 82.

14. *Ibid*.

15. *Ibid*.

Aboriginal members of the committee and many others ... have emphasised Aboriginal tradition as an invisible body of rules laid down over thousands of years and governing all aspects of life, with specific sanctions if disobeyed. The expression 'customary law' is therefore correct, as containing both concepts in the one expression.¹⁶

The remainder of this Part discusses some of the key elements of customary law for the Aboriginal people of Roebourne. For a comprehensive account of traditional belief systems, other aspects of customary law, the effects of drinking rights and life in the village, I recommend that people watch *Exile and the Kingdom*, a documentary film made by Frank Rijavec, Noelene Harrison, Roger Solomon and the Ngurin Corporation. This documentary provides a rich account of many aspects of life for Yinjibarndi and Ngarluma people.

Traditional belief systems

In Roebourne, Ngarluma and Yinjibarndi people use the phrase, Nguru~Nujung~Gammu or 'when the world was soft', to describe their genesis and spiritual system, including Bidara or Law. For them, this phrase represents a time when the maarga or creation spirits 'got up from the ground' and 'lifted the sky and the world out of the sea'.¹⁷ The maarga still live in the hills and gullies and can be seen 'in the early morning mist over the water', which 'is smoke from their breakfast fires'.¹⁸ If people do not approach the maarga in the correct ways, they will get hurt. For example, when people visit Deep Reach Pool at Millstream, the traditional home of some Yinjibarndi people, you have to put a handful of water into your mouth, spit it out and call, 'nguru' to say that you are there and that you belong to the land. Elders in the group do this first and they explain to the spirit who any strangers with them are so that they too are protected.

Approaching maarga, the warlu or water-snake¹⁹ and other beings correctly is significant for understanding Ngarluma and Yinjibarndi explanations for accidents and deaths of people in the area. For Ngarluma and Yinjibarndi people there are strong links between spirituality and danger. For example, at Millstream, there is a warlu mudji, or hole in the ground, where Barrimindi, a large warlu or snake, who was travelling from the sea along the Fortescue River, which runs underground, broke the surface to look around. He was searching for the two boys, who killed the birds in what is now Deep Reach Pool. The hole now remains, and when people go to the area, they tell the story of the warlu and warn people not to stand so that your shadow crosses the hole. They are afraid that it will disturb the warlu, who may see the person and take them.

There are other manifestations of this notion of danger for Ngarluma and Yinjibarndi people, which they link clearly to caring for the land and respecting laws. In other instances where people are disrespectful or do the wrong thing the 'feather foot', a small spiritual/magic being that is often malevolent, may annoy them, cause trouble or even harm them until they put things right.

As well as the maarga, Ngarluma and Yinjibarndi people also refer to Mingkala, the sky god. Together, the maarga, the spirits of the earth, and Mingkala, god of the sky, named and shaped the land, plants and animals and finally the people themselves. For the Yinjibarndi, the people, Ngarda~ngali, came from the maarga, who are depicted in many rock engravings along the Fortescue River. Understanding that the people come out of the maarga helps us appreciate that the Nguru~Nujung~Gammu time is part of the Ngarluma and Yinjibarndi peoples' own time rather than mythical. Today when older people in Roebourne speak of events they most often do not distinguish between the creation time and an event that happened last week.

Traditional belief systems and Christianity

Since colonisation, many Aboriginal people have accepted Christianity as their religion. The similarity between Nguru~Nujung~Gammu and the role of the maarga and Mingkala and the biblical account of 'Genesis' may help explain why many Aboriginal people are able to reconcile Christianity and their traditional spiritual beliefs. During the Ngarluma and Yinjibarndi native title hearing in 2001, there was a strong example of how these belief systems interrelate for some people. In the hearing, an elder stood on the Bundut—this is a large area of rock in the floor of the Fortescue River and is the first law ground for Yinjibarndi people—and explained its past and continuing significance and sang the songs of the site. Later, under the marquee in the formal court, he was sworn in. He said that he would

16. NTLRC, above n 8, 11.

17. Rijavec F, *Know the Song, Know the Country* (Roebourne: Ieramugadu Group Incorporated, 1995) 2.

18. *Ibid.*

19. Ngarluma and Yinjibarndi people both have a warlu (wah-loo) a powerful creation being that created waterways and protects and punishes people. People tell the story of the Yinjibarndi warlu coming down the Harding River, meeting and fighting the Ngarluma warlu and both warlus remaining in the river to protect their respective tribes.

swear on the bible because he 'is a Christian man'. After he had sworn an oath, the court officer turned to Justice Nicholson to proceed. However, the elder intervened and said that we would now pray because he had just sworn an oath. To him an oath was not a formality. He then prayed that Mingkala would make the court understand the significance of the country for Ngurlama and Yinjibarndi people.

Ngurlama, Yinjibarndi, Gurrama and Banjima people's conversion to Christianity in Roebourne is largely the result of the Roebourne Aboriginal Church and its previous pastor, David Stevens. In the 1970s the church did a great deal of work trying to help people overcome the first years of alcohol and in the process saved many people's lives and created strong connections between them and the church. Today it plays an important part in many aspects of life. Christianity, however, has not taken over from traditional spiritual beliefs. Rather, people negotiate between Christianity and traditional beliefs; they attend church, read the bible, say there is only one God, take part in law ceremonies and take care not to anger feather foot. If someone has wronged a member of the church, in one case by taking the life of her daughter, they may say that because Jesus takes care of all their problems they do not want to exact traditional punishment. But because not all members of all families are part of the church other family members may want traditional punishment. In this situation the church member may want to support their family regardless of the church; but without choosing one set of beliefs to the exclusion of the other.

Skin systems

All the Ngarluma, Yinjibarndi and people from other groups living in Roebourne have skin systems. Skin systems are the rules of marriages and respect and come from the Bidara or the Law. Ngarluma and Yinjibarndi people call their skin system Galtharra~na.²⁰ The maarga passed the system on to the people during the learning times, or Nguru~Nujung~Gamu, and they regard it as the most important information. The Galtharra~na covers all people, plants, animals, rain, wind and country, which reinforces the relationship between people and country and explains the need to respect the country, flora and fauna. There are four skin groups in the Galtharra~na—Bananga, Burungu, Balyari and Garimarra—and all people, animals, and plants belong to one of them. People are born into their skin group, which is determined by that of their parents and must marry into the correct group, that is, their marriage must be 'straight'.

A Bananga man must marry a Burungu woman and all their children are Balyari. A Burungu man marries a Bananga woman and their children are Garimarra ... Garimarra men must marry Balyari women and their children are Burungu. Balyari men marry Garimarra women and their children become Bananga.²¹

Further, when people from one tribe marry into another tribe, they adhere to their appropriate skin group. The skin system operates between tribes, via equivalent rather than identical terminology.

One of the senior women I spoke with said that in the past girls would be married when they were 13 or 14 but she explained that they did not live with the men until they were older. They did not go to their new family until two or three years later. According to Gordon Lockyer, a Guruma elder, men were taught not to hurt their wives or give them a hard time. He said they were told to look after their wives and be good friends. Lockyer also said that men were told:

You're not to go running around anywhere else, nothing, because a lot of big fellas watching you. Spears wouldn't hurt you if you're doing the right way, easy as that.²²

This is important in relation to some Aboriginal men today claiming that physical violence towards women is cultural.²³

Many things in the community follow people's Galthara~na relationship to one another. Take our Bidara Law for example it is run by strict rules which guide everyone in the part they have to play in the ceremony. They understand their job by knowing their Galthara~na relationship to the boy going through the Law and his parents.²⁴

As part of the skin system, most Aboriginal groups have a system of family relationships that determines respect and obligation. It is similar to western families in that people have grandfathers, grandmothers, father, mother, uncles,

20. Rijavec F, Harrison N & the Ngurin Corporation, *Exile and the Kingdom* (Australian Film Commission, 1993). This documentary explains Ngurlama and Yinjibarndi peoples' law.

21. Rijavec, above n 17, 20.

22. Guruma Elders, *The Guruma Story*, Brehaut L & Vitenbergs A (eds) (Alice Springs: Jukurrpa Books, 2001) 22.

23. A Ngungar pastor explained that Aboriginal men's claim that violence towards women is cultural comes from the dysfunctional lives that many Aboriginal men have experienced since drinking was introduced. He said that five to seven generations of boys and men have grown up with family violence and think that this is the norm. He suggested that before people could deal with family violence they need to understand its origin and stop falling back on the 'cultural claim'.

24. Rijavec, above n 17, 20.

aunts, brothers, sisters and grandchildren. However, it is unique in that these positions are not assigned to one person only. For instance, if a woman has three sisters they are all 'mother' to her children, her partner's sisters will also be mother. People always need to have someone in all the relationship roles. This makes respect systems very complicated for outsiders. Children can talk to their uncles but cannot joke with them or mess around, but they can joke with their grandfathers. The skin system determines how men relate to their mothers-in-law; how children are looked after; how people speak to each other; and, if and when people cannot speak to each other.

Today when this skin system works well it provides protection, identity and self esteem to people. However, where it is neglected it causes people to feel alienated and at a loss in many ways. One young woman said that because of the way her life went she does not know who she is related to. She expressed disappointment in herself and said it makes her feel bad not knowing her family connections: *'Sometimes the older people come up to me now and when I don't talk to them and ask if I know who they are. You feel ashamed of yourself for not knowing. But I've just never been taught, and I do feel badly.'* She said that *'You learn who is related to you if your family talk about law and culture'*. She gave the example of a cousin brother who is always around the old people; he can talk to them all the time and so knows a lot. She said, *'But I don't have those connections, probably because I've gone away and then come back. I can't ask just anyone. Nanna was the main connection for the family.'* Other people gave similar accounts of how they have missed out knowing about cultural information and now feel inadequate because of it.

Many Aboriginal people in Roebourne speak about traditional knowledge, values and law. They fear the loss of traditional knowledge as elders pass away and younger people realise there is much they have not learnt. As well as their concern for the loss of family and knowledge many associate traditional life with safer lives in which violence and acts of disrespect were less frequent.

Law ceremonies

Law ceremonies, such as initiation, which many non-Aboriginal people focus on as representing customary law, are only part of customary law. They are times when elders and other initiated people pass information on to younger members of the community. Men and women have their own ceremonies and responsibilities during the law time. Boys must go through the law for the community to regard them as men and for them to have responsibility for carrying knowledge and passing it down to others. At this time people learn how to be responsible for others and pass on spiritual teachings about the land and animals. Although people are only initiated once, they usually take part in ceremonies throughout their lives as part of the ongoing transmission of knowledge. In Roebourne law ceremonies are still practised and young men are choosing to go through the law.

Law ceremonies in 2004

Preparations for initiation of this year's induction of young men in Roebourne have been underway for several months. On 21 October the communal aspect of law ceremony got underway at the Woodbrook law grounds near Roebourne. Initially six young men were scheduled to undergo initiation, but as the meeting unfolded, another seven young men were inducted.

This unusually large number of initiates resulted in one of the largest law gatherings in recent history. All the yartha²⁵ on the law grounds were occupied with an overflow of families camping out in the open. Besides a very strong turnout of Roebourne families, Aboriginal people from the Kimberley community of Looma, as well as people from Yandeyarra, the Banyjima lands and many other parts of the Pilbara, attended. At its peak some 400 people were in attendance.

The initiation ceremonies continued for four days through to Sunday, 24 October. Families of the initiates and many other community members will remain at the law ground for up to five weeks camping with and caring for the initiates in a cooperative holiday atmosphere that is the highlight of the community social calendar for the year. This law meeting is only the first wave of initiations for this summer. Plans made during this meeting have scheduled another round of initiations for Christmas.

Roebourne people say that there was a slump in attendance and vibrancy of law gatherings after a succession of deaths of elders over the last decade. This year's meeting represents a strong revival led by a younger generation

25. Shade structures.

who are in their thirties and who have given an enormous boost to the generation of their fathers and mothers in the organisation of the meetings. This augurs well for the future of law practice in the community, suggesting that in future years the depth of talent and energy for law will increase, bridging the gaps of leadership that were covered for by the generation of grandfathers that passed away over the last decade.

While the gathering of families and community at these law meetings from near and far afield is motivated by initiation of young men and the consequent ceremonial and social activity, the gatherings provide a forum for resolution of many other issues between individuals and families. Matters of customary law are negotiated and resolved, issues of responsibility and failure of duty are aired, and matters of improper behaviour and injury are confronted in public forums. Some of these involve both men and women; others are reserved for men or women alone.

Dispute resolution

The Galtharra-na system is integral to law and therefore to how families solve disputes with each other. It is particularly important in incidents when people die or are badly hurt and payback is involved. It is fundamental in deciding who can exact punishment and who should be punished. Law in all communities is also about dealing with or punishing wrongful acts. According to Crawford and Kirkbright, for the purpose of dispute resolution, Aboriginal customary law can take a wide variety of forms, depending on factors such as:

- the locality, the sex, status and previous history of the wrongdoer;
- the sex, status and conduct of the victim and of the person(s) required or expected to respond;
- the community's perception of the seriousness of the offence and the surrounding circumstances;
- the extent of (or concern about) external intervention.²⁶

Traditionally, punishments might have included:

- death (either directly inflicted or by 'sorcery' or incantation, spearing (of greater or less severity) or other forms of corporal punishment;
- individual 'duelling' with spear, boomerang or fighting sticks;
- collective 'duelling' (including specially structured encounters such as makarrata or minungudawada);
- shaming or public ridicule;
- more rigorous forms of initiation or training;
- burning the hair from the wrongdoer's body;
- certain arrangements for compensation (eg through adoption or promised marriage);
- exclusion from the community (eg to a particular outstation or community, or more rarely, total exclusion).²⁷

These findings are true for people in Roebourne, except perhaps for 'burning the hair' which no-one spoke of.

According to Gurrama elder Peter Stevens, traditionally, punishment for breaking a rule was harsh. He said, '*They'll spear you or anything – give you a hiding ... They get the punishment spear and spear you in the leg*'.²⁸ He said elders would punish men and women in this way for breaking up a family, fighting, or telling lies that caused trouble. Stevens says that because the punishment was harsh, people were good and therefore spearing was infrequent. Stevens also says that if a person keeps '*breaking the Law, they break your neck, or they spear through you: finish – you wouldn't cause anymore trouble ... The old people decide if he's no good, you can't do anything with him, finish him off*'.²⁹

One day I was sitting with an old man in his eighties, a juju, who was resting his leg that was often very painful. I asked him about it and he recounted the story of when he was a young man, in his thirties, and would come into the town and make trouble when he was drinking. He said that he would get into fights and worry the women and at first the elders told him to leave town and not drink, and when this did not work they yelled at him trying to shame him. He said they wanted him to be respectful to other people, not to cause harm to others physically or by causing jealousy when he went after the women. He explained that after a number of warnings, which he ignored, some of the men speared him

26. Crawford JR & Kirkbright CJ, *Reference on Aboriginal Customary Law – Aboriginal Customary Law and the Substantive Criminal Law*, Australian Law Reform Commission, Report No 31, Research Paper No 6 (1983) 35–36.

27. *Ibid.*

28. Gurrama Elders, above n 22, 25.

29. *Ibid.*

in the leg. The juju said he never drank after this; he settled down, looked after his own family, and later helped others to stop drinking. When I asked him how he felt about being speared, given that he was still suffering from the damage to his leg, he said that it was the right thing for them to do because it made him change his life and stopped him hurting other people.

A group of women explained that traditionally, the families who were wronged and the offender's family negotiated punishment. They said that seniority and relationship to the person who was injured or killed would determine who took responsibility for the punishment. They described how if the offender and family of the injured person lived in separate places, the offender's family would take the offender to the injured person's family for punishment. They said that both families would take part in the punishment to ensure that people carried it out properly and fairly. There is an example from Yandeyarra later in this paper.

A senior man talked about how the community dealt with major breaches of law when they were living on the old reserve (1940s to 1975). He explained that if someone committed a serious breach, such as abusing another person or stealing someone's wife, the whole community would come together to deal with the problem. He said they would put the offender in the middle of the circle so that *'...everyone was watching and talk sense into him. Talking to people and making them feel shame for what they had done wrong was usually enough to make people behave properly and show respect to others. If someone kept offending, the elders would hit them or spear them. If they hurt a child, like the sexual abuse now, they would have been killed for that'*. One of the women added that, *'White men don't even know what happened on the reserve'*. She explained that white men would not have understood the severity of punishment.

One of the senior women talked about the old reserve. She described a tank in the middle where people would bring troublemakers. She said, *'It might be a young man who has married the wrong way. They would get the family of that person and they would flog him. The grandparents would know what was enough for him was. There was respect for the grandparents'*. She gave another example of two women fighting over a man who may have done bodily harm to each other. She said the grandmothers would get the women and sort it out. She explained that the women may not have liked what the grandmothers decided but there was respect for them and the women would do as they were told. This woman said that she blamed the welfare system for breaking down this family discipline. She said, *'They should never have moved people into the village; instead they should have built a bridge across the river'*.³⁰ She explained that in the old reserve people lived in their family groups and had to obey the marriage and respect laws, but in the village everyone was mixed up so elders were not with their children and grandchildren.

Respect

A senior Ngarluma man described traditional law as: *'Going right back before free rights, alcohol or people moving into town'*. He said that *'respect is the basis of traditional law'*. He explained that this is respect for land, visiting sites, telling the stories of sites, teaching young people about the site; respect for plants and animals, including what people can hunt and when; respect for all people in the community, elders, adults, children; and, respect for the rules of marriages and avoidance, which the skin system determines. He said, *'In the past people had to get permission to go into another group's country or family camp and now people have a house not a camp, and people can't just go into that house without being asked'*. He explained that when kids and adults do this they are disregarding traditional law and the respect for others that it requires even though they did not traditionally live in houses.

This Ngarluma man explained that it is grandparents who have always taught young people the basic rules of life, including the rules of marriage, who people are straight for (that is, who they can marry), how they must relate to their mother-in-law, sister-in-law and other family members. He said it is uncles (or dads) who 'put the reins on you' if you are a boy or young man who is misbehaving in any way and in the same way aunties (or mothers) do this for girls and young women. He and one of the women said it is important that all these people 'play their roles in raising and teaching children and young people'. They said that unfortunately this is not happening in a large number of families now and the 'kids are doing whatever they like'.

30. See Part I – Roebourne for description of the village and its location to the river.

Part III: Problems in the community today – how customary law and general law operate to deal with them

This Part deals with some of the major issues being faced by the Roebourne community today, as voiced by the people I have spoken to in the context of this paper. In summary, these issues can be attributed to the breakdown of family and community structures, largely due to the effects of drugs and alcohol, but more generally, due to the breakdown of adherence to the rules of customary law. As will be seen, many people believe that there is a role for customary law to operate in the community, even though traditionally it has not been used to deal with these types of problems. At the same time, most people also feel there is a role for the general law and would like assistance from general law structures to deal with the issues identified.

Key issues for the Roebourne community

Respect: disciplining children

A senior man commented: *'Kids' attitudes are changing now; they do not have respect for laws any more'*. He suggested that because children now go out to Woodbrook³¹ at law time and don't get much other teaching out in their country they can't learn the laws. He said they need to know about the hills, the kangaroos, birds, and the sacred sites or the law doesn't mean much. He said, *'Now they watch TV and listen to reggae music they have more American ideas, and that is culture for them now'*. He is concerned that changes in culture mean that the rules that children need to live by go. This worries him because he says children need guidelines, they need to know that there are rules and that all the adults will work together to make sure the children obey them. He gave the example of Mingulatharndo, or Five Mile, a small community seven kilometres north of Roebourne. He said all people living there have the same purpose, that is, to allow no drugs or alcohol, to look after the children, to make sure that all children go to school, and to look after the houses and the yards. He said, *'Any adults in the community can discipline the kids, and teach them, and spend time with them'*; because everyone is working towards the same thing the children learn to respect the rules and do the right thing.

I asked a woman of about 40, a mother and grandmother, what should happen when children do the wrong thing, for example, steal, break things or yell at and disobey adults. She replied, *'In the past any other adult who was there would give them a smack'*. She said it would be all right because everyone wants the children to learn: but now if another parent tells off a child or gives them a smack the parents will often fight. She said, *'They will say, "You can't touch my kid". But in our ways we all looked after the children, especially if you are a mum or an uncle (a brother or sister to either of the parents) to that child. This also now means that if adults see children who should be in school they often will not send them back, so the children run off if they want to and do other things that they should not be doing'*. One of the other women, also a mother and grandmother, said that she would want another adult to tell her grandchild off if he was doing the wrong thing. Both women said that this is an aspect of customary law that everyone in Roebourne needs to get back to.

Younger and older women said that there is a problem of whitefellas saying that it is not all right to hit a child. They said, *'The children hear this and get cheeky to people and say that they are not allowed to hit them'*. One of the old women said that when she was raising her children she would hit them or throw a stone at them if they were doing something that was wrong. She said that all her children are good people who know how to behave and to look after their children. She said that while she had had some trouble with one of her children this was only when he had been drinking and he was still responsible and looked after his family. This woman said that she would still hit her children and grandchildren if it was necessary. In her opinion, the white law was wrong for taking their system of discipline away from parents and not telling them what else they could do to discipline their families.

One of the women, who is a mother and grandmother, said that the 'parents need discipline'. She said they need to know how to look after their children and how to discipline them. She said that this is something the whitefella law should help with by teaching parents how to successfully discipline their children. The discussions we had about

31. Woodbrook is a pastoral station approximately 12 kilometres south east of Roebourne. One area of the station, also referred to as Woodbrook, is now a law ground. This site is both close enough to Roebourne for people to get to for the law ceremonies but far enough away that they cannot go back into town easily because most people do not have cars.

disciplining children are very interesting because they make it clear that the strategies for raising children to be responsible and respectful are embedded in customary practices; these are part of the everyday aspects of customary law and perhaps in some ways the most important. The women explained that when customary ways of life and practices are disrupted, for example, by changes in living conditions, coupled with the imposition of a set of beliefs about appropriate child rearing that are different to those that a group of people have used, significant problems must follow.

Dispute resolution: child sexual abuse

Abuse and housing

A young woman in her twenties who I spoke with said that the inadequate housing makes it impossible to keep people who have been drinking away from the children. Older women have confirmed this. The young woman said that everyone may be in the yards and on the streets, playing with the other kids until after dark but when they go inside they cannot isolate themselves from the drinkers and often they will not know that they need to try and do this. She said this often results in neglect, family violence and sexual abuse of women and children. As one older woman said, *'They might just crawl over people and get to a girl. They don't even know what they are doing'*.

Abuse and pornography

One young woman said that the danger of children being sexually abused is increased because of the pornography that is in so many of the homes. She said that in some houses there are pornographic movies and magazines everywhere. She explained that often when people have been drinking the men will sit and watch the movies. She recalled how when she was a teenager, she and others looked in to see what the men were doing and were shocked and embarrassed. They did not know what to think. She said, *'We're females, what can we think?'* She said that for her, this explains why so many kids are sexually active: *'It is what they see and is normal to them'*. Several other women have confirmed that pornography is an enormous problem in Roebourne and Wickham and one that they do not have any solution to. Some women said that because in the past old people would stop men hurting children they would probably have speared men for doing something like this, that incites them to abuse the children and women. These women said that the police, the elders and some of the older people should get together and see how the whitefella's law and their law can stop this happening.

Abuse and how to deal with it

I spoke with a group of four senior women about the sexual abuse that is happening. One of the women said that she did not know it was happening until fairly recently. She said that sexual abuse had not been a problem for her, her sisters or family when they were children. She went on to discuss a talk that a government agency had organised where one of the speakers presented information about the abuse of children in Roebourne. This woman said she was shocked: she asked the speaker where and when she got the information and found that she had got it from people in the community a year before but had not done anything with it until writing the paper she was now presenting. She challenged the woman for not bringing that information back to the community and said that they needed to deal with it. Since then she has heard people start to talk about some of the problems. She said it has not been happening in her family but that she would 'watch out for it'.

The women said that since the drinking rights more women have been getting hurt and domestic violence is a huge problem, but the abuse of children is much more recent. They did not have any strategies for stopping the abuse but did say that the whitefella's law and their law needed to work together. They said that there are not enough strong men to help and this needs to be a big part of the solution because in the past the men would not have let someone abuse their daughter or sister.

A woman in her eighties said that in the past a man who abused a child may have been speared with a blunt spear. However, if he committed the offence again he would have been killed. She said that the elders would have dealt with this; but now no-one does anything about what is happening to the kids. A senior man agreed that if a man in his group abused kids the elders would have speared him. Another woman said that on the old reserve and on the stations the old people had been very protective of them. She said they stayed with their grandmothers until they were older and the boys only stayed with them while they were little.

Sexual abuse by children

While it is difficult to have discussions about sexual abuse of children it is even more difficult to talk about the fact that children in Roebourne are now sexually active and in some cases sexually abusing other children. This is an issue that several people raised. One of the teachers at the Roebourne School said that there are a number of indications that the children are sexually active. She said that some of the little girls do sexually suggestive dances; the boys try to mount the girls and pull at their clothes. She said children often make sexual comments telling girls 'to suck them' and that 'they will root them'. She said that it is very clear that the children are seeing and experiencing things that they should never see and are imitating this.

One old woman said that she worries about her little grannies. She said that in her house she has seen one of the boys, aged nine, taking the little girls up to the bush. She calls them back and tells the little girls to stay away from the boys. I spoke to another woman who was also involved with this young boy and she said that she knew he was doing this and realised she would have to talk to her own children so that they could protect themselves. A young woman with little children told me that she has caught boys trying to have sex with her little girl, who is only four years old. Another young woman, who had not realised that there was such a problem with the children, said that she was walking into town and saw a seven year old boy sitting on a step masturbating. She said that she walked by and pretended not to notice. All these women said that the police and health workers must know what is going on but no one does anything about it. They said that the whitefella's law is not enough because even when someone has been caught and gone to gaol he did not stop abusing children. They said that somehow the community, the police and the health workers have to get together and find out what to do. They said the community should shame people who do the sorts of things that make children try and have sex with other children because this will let everyone know and people will know who to watch out for.

While I was at the local pool, chatting to the children, one boy and two girls, all about nine years old, told me that the boys 'break in' the girls so that it will not hurt as much when the older men do it later. I talked to one of the grandmothers about the conversation. A key problem for her was the lack of any official (she referred to the police) who she could approach to talk to about the issue.

I talked with two young women about how girls learn about themselves and their bodies, including the development of their bodies. This discussion showed that teaching traditionally provided by grandmothers and mothers is not happening, at least for some young women. They said that mostly you learn about what's happening to you at school, which provides sanitary pads and related items. They said if you are not at school and you want pads, some girls might steal them or they might try and find their mothers' and use them. They said that their mothers would have learnt about maturing and becoming women from their grandmothers and mothers, who would have taught them how to look after themselves. One of the young women said that now it is a problem for most girls each month when they want sanitary pads but they don't have any money to buy them. She said, '*Girls can't just use grass or stay away from people like they used to, but no one thinks about this*'.

Dispute resolution: alcohol abuse

Many people spoke about drinking as a regular part of life in the village. One man, in his late 40s, said that 'all his drinking friends are gone'. He said this is a big group of men in the mid-40s to mid-50s age group. He explained that when they were drinking they did not know what the effects would be because they were in the first group that grew up with drinking rights. He said, '*Now people think it will not happen to me, even when they see their friends getting sick and passing away*'. As one young woman said, '*Children grow up thinking that excessive drinking is normal because Wednesday, Thursday and Friday each week people get family payments, pensions or CDEP payments and they buy alcohol and just drink*'. She said of her little brother, '*He'll just have to look after himself because adults don't do that*'. Grandparents and great grandparents, who do not drink, are burdened by people drinking and taking drugs. They often look after large numbers of children when parents are drunk. In many cases, they provide for the children from their own small pensions.

Dispute resolution: drugs

Many people spoke about the problems of drugs in the town. Older women and men down to young people of 15 said that drugs are a real problem. They said drugs are easy to get in Roebourne and Wickham: '*Everyone knows who sells them and the police do not stop them from selling them*'. People said the drug sellers do not care who they sell to; they

don't think about the children and what it is doing to them. They said that on paydays and when families are gambling the children will get money from them and use it to buy drugs. They said lots of parents don't ask the children what they are doing with the money and sometime they are drinking themselves and don't want to be worried by the children.

However, as with all the problems in the town, there are people who are very worried about the effects of the drugs and want to find solutions. One of the women said that everyone in Roebourne knows who the local drug dealer is: *'He drives around in a new flash car but does not work'*. I asked if people in the town had thought of dealing with him themselves as happens in some of the more remote communities. One of the women said that people have talked about it and some would like to do something. She said they can't make him leave because it is a town and they don't have a say about who lives there. She also said that some of the men would punish him; they might beat him or spear him but are worried about what the police would do to them. She said, *'The whitefella's law should let the families deal with this man because he is hurting their children'*. She said the law should let people know that it is all right for them to do this because *'they should not have to worry about getting into trouble and going to gaol when they need to protect their kids and the police don't do it'*. The woman said that under customary law they could do this even though drugs was not a problem they had had to deal with in the past: *'We can still use our rules and punishments on things today'*.

Dispute resolution: respect – gambling and effect on families

A senior Yinjibarndi woman spoke about the problems of gambling and the neglect and abuse of children. She said that on gambling nights many mums (and the number is increasing) are not at home to feed the children. She said that instead the mothers, fathers and caregivers are all playing cards. She said sometimes the children have a nanna or other family that do not play cards; but too often they walk around the streets with the other children and sometimes people give them money to go to the Caltex (a service station on the great northern Highway) for food, which means they are walking away from the village. She said that some of the families lose all their money at the gambling; those who win usually share their money with close family.

Some people said that in the past 'cops used to stop the game; they used to put people in gaol for playing. Now what authority do they have over gambling? They don't do anything'. Some people suggested that the police should try and stop the gambling: 'They don't need to put people into gaol but they should be talking to people about it and telling them to look after their kids'. One woman said that 'when the police pick up the kids or tell them to go home instead of being down at the Caltex they are tough on them but it is the parents who have to take responsibility'. She suggested that the police should find the parents of those children and make them stop gambling and look after their children.

General comments on the role of customary law today and general law

Importance of customary law today – still part of their lives

As a way of explaining that customary law is still a vital part of their lives, a senior woman and a man spoke about the traditional obligation on people to let the families know if someone is very ill or has passed away. They said that not doing this correctly can cause a great deal of pain and anger that might go on for a long time and cause other problems and fights between people. The woman spoke of a time when a little boy in her father's family had passed away (about 60 years ago) and the family had not come and told people immediately. She said that the family were camping on one of the stations and they were 'having a hard sorry time'. She described how later family hit them with boomerangs and shields because they had not given all the family this sad news immediately. This punishment had logic; it was a response to grief and a disregard for other people's feelings and rights to the child.

The senior man explained that this can still happen today. He gave the example of a recent funeral in his own family, saying that if he had not told people that his mum (mother's sister) had passed away so people could come and pay respect, they could pay him and his immediate family back for that. He was using this as an example to say that 'the feeling is still there': 'White people can't understand the anger that can happen around funerals and this gets people into trouble with the police, but they have to get their feelings out and no-one should stop this'.

One of the older women spoke about the recent passing away of a man in the community. According to her, the death could not have resulted from a heart attack as the doctor claimed. She explained, 'This man was happy; he always had kindness in his heart so his heart would not have stopped'. She believed that someone who was angry at the man, and identified this person, must have caused him to die. The woman explained that she and others now felt angry at the man who caused the death. She did not say whether anyone would punish this person.

In Part III there is a detailed account of recent payback, which clearly demonstrates the ongoing effects of the punishment aspect of customary law.

The effect of a lack of Elders on the role of customary law

Many people identified a lack of elders as a reason why the rules for behaving that they get from customary law are not obeyed as they should be but are still important to how they think. One of the women said that they needed to recognise some of the younger people as elders because many of the 'old people were finished and there is no-one in the middle'. She named three women, about 50 years of age, who are active in many community services and therefore in contact with most people. She said that in the past you could not be a leader unless you went through a number of tests. She explained that these tests were part of your everyday interactions with the elders as you learnt things such as cooking or looking after a sick person or hunting. She said the elders would notice what you did and would say what things you are doing well and decide that this woman or man will make a good leader. She explained that then the person would spend more time with the elders, learning from them; not just the things that happen at law time.

One woman explained that a most important part in the process was being told off by the elders: *'To be an elder you had to be told off by the elders and show that you can take it properly'*. She described watching an elder telling off a senior man at a meeting. She said the elder *'watched to see how he took it; he was testing that man'*. The woman explained that you have to be able to *'take it properly, take it in, listen, and shake hands'*. However, some people felt that there is now a problem with some of the younger people stepping up and wanting to act as elders. They said that there are not enough elders who can keep people in line and teach people to become elders. This is a big problem for the community because the elders always had the final say if there was a problem that families or people fighting could not work out. They said that what the elders decided was usually accepted even if people didn't like it. They also said that now it is often the strongest person who wins even though they might be wrong and they are looking after themselves and their family not the community.

According to one woman, in the past old people were protective. She said that when white people came to the reserve and tried to take the children away the old people would stand up for them. She says that today many of the problems come from the alcohol and drugs and lots of the men are not strong enough to help the kids. *'They do not deal with the sexual abuse or stop the kids from abusing each other; don't know what to do, just like the women.'* She said that sometimes it is them or members of their family who are abusing women and children; when it's their uncles, their own kids or other members of their family they don't know how to do anything. She said, *'You can't just go to the police about your family and there aren't the elders to go to because there are not many left'*.

Young men's perception of customary law and the general law

I asked a group of young men, who would regularly drink too much, fight, disrespect others and sometimes mistreat women when they were drinking what law they wanted to answer to. One of these young men has been in prison often, others had been there once and others not at all. Each of them said, *'The whitefellas law'*. They said that Yinjibarndi law would be hard on them, they *'could get beaten with wadi (clubs) and it could be quite bad if they had caused a lot of trouble'*.

Young women and customary law

In a conversation with a group of young women we talked about how the customary law operates for them. They spoke about marriages and said that some families make a big deal of people marrying or being with someone who is straight for them, but it depends on how much power they think they can have. They said that, *'...some adults growled, and some of them even flog the kids; but they don't do anything much else'*. They said the young people talk about wrong way marriages more once they have babies and especially if anything goes wrong, because people will think it is because they have married the wrong way. One young woman said that even if the doctor explained what caused the problem, *'they won't take it'*. One young woman said that she had been afraid to tell people she was having a baby because it was with someone who is an uncle to her and some of the older women would be very angry and may try and hit her.

These young women said that you are lucky if your family is one who talks about law and culture because then you know things. They said that their parents only want to teach the kids culture when they are drunk: *'Then you don't want*

to listen to them because you know they are not really thinking about what they are doing and it is not meant to happen that way'. They said that they should have visits to the bush, the boys should learn to shoot and the girls should learn to make damper. They think it would be good to have projects where kids find out who they are related to. They said that even though kids watch movies and do other things most of them want to go out bush and learn about their families, its just that their parents are drinking and don't do it with them.

I asked these young women what law is. They explained that it is *'how we live; the way we do things. We need to abide by the law'*. They said that for boys the purpose of going through the law is to become men. One of the young women said that she knew almost nothing until her brother went through the law. She said no one had prepared her for what her role in the ceremony would be: *'I only knew that I was involved but didn't know how. When I went to the law ground I learnt my skin group, my nuba or straight'*. She explained that *'it is a good thing when the boys are initiated because it takes you away from Roebourne. You learn how to carry on law and you get something from it'*.

One of the young women explained that when the boys go through the law *'they don't tend to go to school after that'*. She said, *'The community treats them differently but the school does not recognise this'*. She suggested that *'the school should try to understand this and do things differently so that the boys can keep going because they need to learn and have something to do'*. She said, *'It is a problem because once they learn more about culture, they feel more empowered but what do they do with it?'* She said that when the boys have gone through the law they hang out with their Ngoojul, a person responsible for them in the law, and they drink.

The need for customary and general law to work together – example of domestic violence

A woman who is actively involved in the school, the church, the strong women's group and takes part in customary law ceremonies said that while customary law is still operating this does not mean that the people have to be tied to the old ways. She says that the community has both laws and that they can work together well. She gave domestic violence as an example of where she thinks the whitefella law should be operating because living conditions and relationships have changed in response to poor living conditions, loss of the opportunity to live culturally and alcohol and drug use.

She said that in the past, which is within her life time, 'men would hit women, it is not a new thing' (however, she said that in her grandmother's time it was different). She said, *'These beatings would usually happen if a woman had broken the law'*, for instance *'if they chased after another man, but it was also because they were drinking, after the drinking rights had come in'*. She said today many beatings happen because people are drinking. She said that she tells her daughter not to drink too much or her husband will beat her. Her daughter likes to drink and play cards and because of this she is 'living scared' of her husband. She said when her daughter has been drinking or playing cards she comes home to her. She said, *'I want my daughter to come home to me because I'm strong and I protect her'*. She said when the daughter's husband comes she sends him away until he is sober; the next day all is well and they live as a family. She said it is a weekly cycle that corresponds to paydays.

This woman said that some men will say that hitting women is their right. She said they say that they have always done it; if the woman deserves it. She said, *'This is a problem because the women aren't strong enough to say anything against this and the men who are drinking and hitting their women won't listen anyway'*. She said, *'This is why the whitefella's law and our law have to work together. We want the women to look after their kids and not drink but we don't want the men bashing them and scaring the kids; so we need the whitefella's law too'*.

An example of difficulties in the application of the general law without consideration of circumstances – driving licences

A group of young men identified driving, licences, car registration, roadworthiness of vehicles and police chasing people in old cars as key problems of the whitefella law. I asked them whether they had licences: none of them did but they all drove. One man was drinking and lost his licence, another had just never applied for one. One man said, *'I don't know who to come to'*, while another confessed that he could not read or write. Often when people started driving they did not understand that they had to have a licence, particularly because they were only driving around their own community in unregistered cars. They said that most people do not have copies of their birth certificates, they don't have passports or other identification for applying for a licence, and many people do not read or write well enough to do the written test. They said that people use the cars to go fishing, hunting or to the shops. There are very few accidents. They think that the police should help people get their licence and should stop picking up cars that do not meet the normal standards when they are being used off-road.

One of the older women joined in the conversation about the use of cars. She spoke strongly about the need for the police to make getting a licence easier. She suggested they get people together in groups, go through the rules of driving using models and test people by asking questions and letting them answer orally. She said that at times people in the town have organised for people to learn the driving rules using mats, toy cars and listening to information, but it does not happen very often and it is something that the police should do.

Punishment – customary law and general law

To understand how the severe physical punishment that is part of customary law impacts on some people from Roebourne I spoke with a family, whose son/nephew was responsible for the death of a young man from Yandeyarra, a community 350 kilometres northeast. The death occurred nearly four years ago. The young man served two years imprisonment after which he was placed on parole for nine months. The circumstances of the death were unclear because all the boys involved had been drinking.

The police arrested the young man, 16 years old, shortly after the incident occurred. They sent him to Perth for trial in the Children's Court. He was found guilty and sentenced to three years in a juvenile detention facility. During that time, he attended school and spent time learning woodwork. After two and a half years, the Parole Board released him into the care of his aunt, who lives in Wickham, a small town 10 kilometres from Roebourne.

I spoke with the young man's aunt about his parole. She explained that he is her nephew through marriage: *'I was married to his dad's brother'*. While he was in detention he contacted her and asked if he could stay with her. Before the Parole Board would release him he had to have someone to stay with who could help him keep the parole conditions or he would be put back into detention. His aunt said, *'I'm in Wickham, away from his friends so he won't get into trouble. I told him he could stay but he had to obey my rules. I told him he could not leave the house. He was not to make any trouble'*. She said that because he knew she meant what she said and would not put up with him breaking her rules 'he was good' and the parole time went without any problems.

We talked about when her nephew finished his parole and was taken by his family up to Yandeyarra to meet the family who had lost their son and her feelings about him being punished. She said that this was hard for her, that it does not happen in Roebourne very much now. She also said that she is now going to the church and they deal with things differently. At the same time, she understood that his family felt obliged to take him to be punished. She did not like the fact that his aunts and uncles were also punished, especially those who also go to church. It is not just the offender who is punished; the mothers and fathers (aunts and uncles) are also shamed, yelled at, hit, isolated depending on the offence and the feelings of the family.

This woman has her own tragic story of loss. Her 20 year old daughter passed away three years ago after the daughter's partner, who was drinking, bashed her, covered her with a blanket and left her for the night. The woman found her the next morning. She was still alive, though her head was swollen and bruised and she was unconscious. She was flown to a hospital in Perth and put on life support. Two days later the hospital staff turned off the machine and her daughter passed away. The man was gaoled for 12 months and then released on parole. His parole period has now finished and he wants to meet her so he can apologise for what he has done. She said, *'That man who killed my daughter wants to come and see me. He sent a message to apologise but I don't want to see him. It's too soon. I can't face him'*. At this time, she does not want to punish him or have her family do this; this is, at least in part, because of her Christian beliefs. However she wants to move forward with her life and her daughter's death is not resolved yet. That someone has gone to gaol is not enough because it does not let the family who have suffered the loss deal with their feelings.

After speaking with the young man's aunt I spoke with another aunt (and mother), this time his father's sister, who is one of the young man's primary care givers and his uncle (father). His aunt is a committed member of the Roebourne Aboriginal Church, where her husband is one of the Ministers. She leads church services, organises bible studies and prayer meetings for the women and teaches Sunday school to the children. The young man's uncle is married, has children and grandchildren. He has been in gaol in the past for minor offences. He explained that he had been in the 'Regional' (the Roebourne Prison) when someone from the Law Reform Commission came to talk to them but they didn't ask him about what had happened to their boy and family and he would like to have a say.

I asked the aunt to tell me about what has happened with her nephew since the incident. She said that he had done his time in gaol and he has paid the family, which 'has made a man of him'. She explained that, *'Roebourne doesn't have payback. The old people used it all the time but we don't now. Now the police are here'*. However, the family took

the young man up to Yandeyarra to face the family who lost their son. I asked whether the Yandeyarra family had made them take their nephew up there. The uncle said, *'No, when he got out we rang up the family and organised to take him up there'*. I also asked whether they thought it is the right thing to do after he has already been in gaol for a long time. They both agreed it was the only thing to do.

The aunt explained that, 'The whole family had to go, the mum and dad and everyone. We all went up to Yandeyarra'. She said they had to do this because until they faced the other family, 'We couldn't go up to Yandeyarra, we couldn't even go for a funeral. We couldn't roam around free'. The uncle said, 'If we keep him here they'll think he meant to do it and then they'll keep doing things to the family. We couldn't roam around free. Those feather foot would come after us and we couldn't do anything. If he didn't go and face the family we couldn't go up there again, not for funerals or anything. And we're family to that mob'.

The aunt then asked whether I know what feather foot are and said, 'They could be around here, just waiting. You don't know when they are going to come. So we had to take him up there and face the family. We all went – his dad and his mother and uncle, all the mums and dads for him (uncles and aunts). They are spirit creatures that may be all around you. They do things to hurt you, put bad ideas into people's heads and cause trouble if you have broken rules and not fixed this with whoever you hurt or took something from'.

Both his aunt and uncle explained that it was not just the young man who had to be punished, they all had to be. The young man's aunt from Wickham said that this was the hardest thing for her, that all the family had to be punished. At various times, other people said that this was the hardest part. One woman was quite upset that the aunt who is a soft caring person was punished by being hit with wadi so that she was bleeding and bruised. But the aunt explained that it was important that the whole family answers for it: 'You have to support them, show them that you are there for them'. And, the uncle said that 'the family are all OK now'.

We talked about the problems that can happen when an offender is punished by people who are drinking and therefore don't really know what they're doing. And, the continuous harassment and fighting that can occur when the offender has to face people every time they have been drinking, in many cases on a weekly basis. The uncle explained that in his nephew's case, *'there was no drinking. We went there the night before and all slept on the flats. The other family were in their places, they never made any trouble. They want us to come and face them. The whole family went with him, to support him and to show that we are all together on it. You got to give the support'*. The young man has not had to deal with people giving him trouble because of drink.

When we talked about the severity of the punishment the young man's aunt said that, 'They broke his leg, at the back near his ankle, and they hit his arms and back with sticks and broke open his head (he was unconscious). And, they hit all of us with the sticks'. One of the elders from Yandeyarra, who I asked about this particular punishment, said that when they could see that he had had enough she and another elder, a man, threw their bodies over the young man. This signals that the families are to stop. 'It is important that the punishment is done properly and that no-one just takes out their anger'. She said that families in Yandeyarra were pleased that the Roebourne family had done the right thing because now they can all go to funerals and see each other in town.

The uncle said that when the punishment was finished, 'we took him straight to Hedland hospital. He was unconscious and his head was split, his leg was broken too. But he didn't want to stay there. He was too afraid to, (because Port Hedland is not their country and his family would not be there) so we took him down to Nichol Bay (the hospital at Karratha, 30 kilometres west of Roebourne) even though he was badly hurt'. The uncle said there have not been any further punishments and there will not be. 'No, it's finished now. He can go where he wants to. He can go to Yandeyarra. We can go there for funerals and anything.'

In response to my question of whether the whiteman's law or Aboriginal customary law should deal with troubles like this with their nephew, both aunt and uncle said that both laws are important. His uncle said, *'Both laws. The police took him to the police station, then he was in remand. After he did his time in whiteman's way and when he finished his time (parole) the family took him for punishment'*. His aunt said that the time away was good for him. *'He came back with his woodwork. He learnt to do that there. He gave what he made to his family, it was really good. I've tried to tell him to keep doing it. We talked to him about going to the college. They might give him a job, teaching that woodwork. But he hasn't done it'*.

I asked whether customary law or the whiteman's law should deal with people first because all the time that someone is in gaol they have to think about what is going to happen to them when they get out and they are already worried being

in gaol. I gave the example of an incident in Kalgoorlie some months ago when a man took the life of another man and the people speared him before he went to gaol. In this case, his leg could heal while he is in gaol and he had access to medical help. I then asked whether it was better for their nephew (son) to face the family first or go through the whiteman's law first.

The uncle said: *'It's good to go to the whiteman's law first. It gives the family a chance to settle down. At first they would be angry and want to kill him. They wouldn't know when to stop, because they've just lost their son. They can't think then. But when he's been locked up they can think about it and they can think about him too. Cause they're related to him too'*. I put this same question to one of the elders from Yandeyarra who had thrown her body over the young man to signal the end of the punishment. She agreed that it is best for the whiteman's law to deal with the offender first; *'Because the family always take time to settle down after something bad has happened'*.

We spoke about how difficult it is for families in this type of situation where the one who is lost and the offender are related. I related some details of a situation in the Kimberley where a family who lost an adult son/brother took a child from the family who were responsible. I explained that when I spoke to the family who had taken the child it was clear that they loved and respected the child. They did not want to harm him or make him unhappy. Rather, he was someone for them to love and to help fill the gap left by their own loss. I asked the uncle if he knew of this sort of thing happening and what he thought about it. He said, *'I agree with that. That family will respect that baby, they'll look after it. It gives them someone. But my nephew he is family for that mob at Yandeyarra. They care about him'*. This was clear from speaking to the elder at Yandeyarra, who was involved in the punishment. She was pleased that the young man and his family are now able to visit without any problems, because they did not want to lose him too.

After the young man had been punished at Yandeyarra his family put him through the law. They did this because: *'It makes a man of him'*. His uncle said that they invited the Yandeyarra mob to take part in the ceremony, which brings them closer to him because the people who put a young man through the law have a special bond with him. The Yandeyarra mob was happy with this. The young man has said that he wanted to face the family and doing this has let him feel respect for himself. Now he knows they don't hold their anger to him and he feels right.

There are other people who the young man's family have suggested speaking to but as yet this has not been possible.

Several people, including those involved in this punishment at Yandeyarra said that today traditional punishment is complicated by the breakdown of traditional structures and alcohol (although this is not a problem at Yandeyarra). Some people suggest that today, it is often the strongest families who determine the extent of punishment, which can lead to harsher punishments being carried out than were once given. Further, where punishments were once carried out and that was the end of it, today, if people have been drinking, they may attack the offender or his or her family repeatedly.

Part IV: Conclusion

There are no simple answers to questions about the place of customary law in the general legal system. However, we do know that communities such as Roebourne are facing devastating problems of violence and abuse and that people want this to stop. To date, the general legal system has not been able to provide solutions and so it must consider other possibilities. People also have the moral right to their own beliefs and customs; although, Aboriginal people have been effectively denied this in many aspects of their lives since colonisation.

The Northern Territory Law Reform Committee's view

The Northern Territory Law Reform Committee's *Report on Aboriginal Customary Law* concluded that:

Each Aboriginal community will define its own problems and solutions. Models may deal with family law, civil law, criminal law, or the relationships between Aboriginal communities and government officers, private contractors while in Aboriginal communities, and so on.³²

It further concluded that:

³² NTLRC, above n 8, 21.

Aboriginal communities should be assisted by government to develop law and justice plans, which appropriately incorporate or recognise Aboriginal customary law as a method in dealing with issues of concern to the community or to assist or enhance the application of Australian law within the community.³³

The Committee justified this conclusion by stating that:

Traditional law can sometimes be better than Australian law at solving disputes in Aboriginal communities. The committee agrees that at least some disputes may be better dealt with under traditional law. However, sometimes, Australian law may be better suited.³⁴

The Committee is not ignorant of the problems that may occur in communities where customary law is provided official state recognition. It acknowledged that some people were concerned that 'customary law may in practice mean increased control by male elders who may themselves be perpetrators of violence, or have kinship obligations to perpetrators'.³⁵ This has significant ramifications for women in communities, who are most often subordinate to the men and in many cases are looking after their families in abusive circumstances. The Committee therefore concluded that, any interaction between the general law and customary law must:

insure that the voices of Aboriginal women, young people and less dominant groups are heard and taken into account. Their rights to equal protection under the Australian law must not be compromised.³⁶

The Roebourne people's view

The people in Roebourne are very concerned about what is happening in their community. Old and young people alike talk about the breakdown in systems of respect, which causes them to worry for the future of themselves and their children. All people that I spoke with said that they wanted strategies for dealing with problems of family violence, sexual abuse, neglect of children, stealing, breaking down of respect, and kids not going to school. They said that:

- People need proper housing so that young families can have their own living spaces;
- People need proper health care, including help with drug and alcohol problems and, knowledge of sexually transmitted diseases;
- The kids need to go to school so they can learn and will one day have jobs;
- People need work or other meaningful things to do (some people talked about station work training for young people, cultural tourism, art, sport).

People also spoke of positive strategies that are already in place, including the Minggu Patrol, which picks up people who have been drinking and feeds them; the women's safe house; the men's house; the strong women's group; the men's group; programmes for supporting families; and the church. They talked about the importance of the law ceremonies for keeping their culture strong and look forward to the next ceremonies. In the last year they lost two senior men, one in tragic circumstances and the other unexpectedly, which stopped the usual ceremonies occurring.

In the discussions that I had with people about the place of customary law and the general legal system in their everyday living, people suggested that the whitefella's law and their law need to work together. They said that their law is their lives and that respecting it will allow them to build a healthier and safer community. *'Just because it looks like people don't respect our law [it] doesn't mean its not there for us', people 'still have feelings about who they are and their country' and 'they know when they ignore their culture, their skin groups and respect then they have violence and all the other problems'. 'We can't just be like whitefellas you might think we can be in a hundred years'.*

A senior man and five senior women said that if they are to have a safe and healthy community again they need to work with the police and other services to make this happen. No one that I spoke to said that they wanted only customary law to deal with all problems or crimes in the community. Some of the young men said that customary law is too hard and they prefer the whitefella's law, even when they have to go to gaol. People said that:

- Sometimes gaol is the right thing;
- Sometimes people need to answer to the community and be talked to and maybe shamed by the elders and senior men and women;
- Strong women, men, police, health workers, the schools all need to work together especially for the kids;
- The police need to help them deal with violence, abuse and gambling;

33. Ibid 22.

34. Ibid 15.

35. Ibid.

36. Ibid 22.

- People should not go to gaol for not having a licence;
- The whitefella's law should let them deal with people who hurt the kids, like the drug trafficker and he should go to gaol.

Author's view

Towns such as Roebourne, where 90 per cent of the population are Aboriginal people from largely four interrelated tribal groups, face different issues than Aboriginal communities, which are more autonomous. People in Roebourne have a great deal of interaction with non-Aboriginal services, mining companies, tourists and other people who are not members of the Roebourne Aboriginal community. They are also highly policed, but with little input from the local people into how policing should operate in the town. The overwhelming result is that this model does not work in Roebourne.

It may well be that through the Western Australian Law Reform Commission's findings, when they are available, people in Roebourne will be able to participate in the justice system in ways that incorporate their values and law to the benefit of the community. According to the Northern Territory's findings, 'there should be no limit on the issues that Aboriginal communities can use traditional law for'.³⁷ They could therefore use it in conjunction with the general legal system.

From my discussions with people in Roebourne I suggest that there is a need and an obligation for the general legal system to work through options for involving Aboriginal people in aspects of the law. In Roebourne poverty, displacement, alcohol and drugs, and social dysfunction all contribute to violence and an increase in other crime. At this time, the general legal system has not been able to make a positive contribution to changing this trend. As many of the problems are socio-economic, it is unrealistic to expect the legal system to remedy them. However, communities want to improve their living conditions, they are seeking ways to deal with family violence, child sex abuse and other crimes, and therefore all parties need to consider all options.

Customary law needs recognition for what it can offer; for example, dispute resolution processes. The way forward clearly involves finding an appropriate mix of aspects from each legal system.

Difficulties of combining customary law and the general law system

There will be some difficulties in incorporating customary law dispute resolution processes into the general legal system. From my discussions with the people of Roebourne, the key difficulties appear to be:

- The breakdown in traditional social structure, which results in a lack of elders and senior people who can administer punishment, in its many forms.
- Stronger families determining what punishment is meted out to a person or family who offend them and who carries out the punishment.
- People and families feeling obliged to agree to customary punishment because they cannot afford to offend stronger families, even when they may not agree with the severity of punishment.
- Alcohol and other substance abuse. When people have been drinking, they may become physically or verbally abusive towards someone who has offended against them or their family. This is contrary to traditional notions of agreement about the form of punishment, which provides closure for an offence so that all involved can move on.

At the same time, not incorporating customary law into the general legal system also has some difficulties for the Aboriginal community. For Aboriginal offenders, their victim and both the families' of the victim and the offender, their need for closure is an important aspect of punishment. For them the general legal system does not deal with closure sufficiently. The general legal system regards imprisonment as the severest form of punishment and when someone has done their time, they are free to resume their life. In many cases, this does not work for Aboriginal people because they have not faced the family who they have offended and, therefore, their own family is in debt to the victim's family until they meet and settle the debt. Sometimes a victim's family will punish another member of the offender's family because they want to have closure but the offender is in prison. Additionally, as well as serving time in prison, an Aboriginal offender may also face customary punishment on release from prison.

Whether the general legal system integrates aspects of customary law or not, it is necessary to appreciate that it does operate and that Aboriginal people in Roebourne are often subject to both systems of law.

37. NTLRC, above n 8, 21.