

# background paper 8

## A new way of doing justice business? Community justice mechanisms and sustainable governance in Western Australia

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## 1. Introduction

This paper explores the current and potential contribution of Aboriginal community justice mechanisms to the goal of improving security and safety in Aboriginal communities and ensuring the maximum possible ownership of justice and justice related processes by Aboriginal communities. The main focus of the paper is on developments in remote regions; however, many of the issues raised have resonance for Aboriginal people in rural and urban areas. The paper is based on evidence from the community consultations undertaken as part of the Aboriginal Customary Laws Reference,<sup>1</sup> a literature review, and experience gained from a decade of researching Aboriginal justice issues.

The emergence of Aboriginal community justice mechanisms in a variety of forms across Australia may signal an important long-term shift in the way the justice 'business' is transacted between Aboriginal communities, government and the judiciary. Community-based projects designed to involve Aboriginal communities have been in existence across Australia for a number of years; however, most of these have been relatively ad hoc and informal. Such projects have, therefore, tended to lack sustainability, being dependent on the energies and good will of a few key players (Aboriginal and non-Aboriginal) and prey to shifts in government policies and priorities.

## 2. Community-based or community-owned?

While there is some consensus between government and Indigenous communities about the need for greater Indigenous involvement in the justice process, there is considerable uncertainty over the precise form this involvement should take and how it can best be achieved. There is also some disagreement over what the term 'involvement' means. Aboriginal people and justice agencies may hold radically conflicting definitions of the meanings attached to the term. Many community justice initiatives generated by government and criminal justice agencies have tended to be what I will refer to as *community-based* as opposed to *community-owned*. Community-based services simply relocate the service to a community setting, rather than reformulate the fundamental premises upon which the service is constructed. Expressed another way, the community setting becomes a kind of annex to the existing structures of the system.

Unfortunately, many justice agencies have tended to mistake community-based for community-owned and have, often unwittingly, appropriated the notion of community justice to further unreconstructed administrative and legislative agendas. Aboriginal notions of justice reform should not be confused with processes simply designed to either extend the reach of the existing justice system or make the existing justice system run more smoothly. They may, in fact, challenge some dominant assumptions about the role of law and justice mechanisms in Aboriginal communities. As I will demonstrate later,<sup>2</sup> community consultations in remote areas, conducted by the Law Reform Commission of Western Australia (LRCWA), revealed a number of instances where community-defined priorities differed significantly from those of law and justice agencies.

### Improving service delivery

There is a marked tendency for government to see the role of community justice as either improving service delivery or involving the community in discrete initiatives that are fundamentally the invention of non-Indigenous organisations. One gathering of Aboriginal women in Western Australia in the mid-1990s, who came together to discuss the problem of Aboriginal family violence, made an incisive distinction between *programmatic* solutions to issues of communities (where resources are used to expand the capacity of government agencies to resolve a particular problem)<sup>3</sup> and *community* solutions (where resources are invested in communities in a way that empowers them to resolve the particular problem). This shrewd observation goes to the heart of current debates about the nature of partnerships between Aboriginal communities and government agencies. I am not trying to suggest that discrete programs are not important or that government agencies should not involve communities in the delivery of services; rather that these processes should not be presented as strategies designed to expand Aboriginal control over justice business or as self-governance strategies.

1. The paper draws heavily on the face-to-face discussions with communities and Aboriginal organisations as well as a number of non-Aboriginal government and non-government organisations. However, the interpretations placed on these discussions are those of the author, and do not necessarily reflect the views of the Law Reform Commission of Western Australia as a whole.

2. See below pp 321–23.

3. Aboriginal Women's Task Force and the Aboriginal Justice Council, *A Whole Healing Approach to Family Violence* (Perth: Aboriginal Justice Council, 1995). In this particular instance, women wanted to see investment in community structures, such as women's safety committees, run by Aboriginal women.

The issues of community/government partnership in the design and delivery of community justice mechanisms featured prominently in the LRCWA's consultations with Indigenous people. This concurs with the 1986 review of Aboriginal Customary Laws by the Australian Law Reform Commission (ALRC), which found a significant investment by Indigenous people in the development of what they termed 'local justice mechanisms', involving 'increasing Aboriginal input in various ways in application of the general law'.<sup>4</sup> Indeed, the ALRC found that communities were more interested in discussing these matters than the 'application of Aboriginal customary laws or practices'.<sup>5</sup>

### Constructive hybridity

The LRCWA consultations similarly found that many Aboriginal people, particularly in remote areas of the state, want to see official recognition given to Aboriginal forms of adjudication and punishment. However, more attention has been devoted to identifying ways in which Aboriginal values and principles can be incorporated into the non-Aboriginal justice system, through a process of what I will term 'constructive hybridisation'.

This emphasis on constructive hybridity is in keeping with emerging national and international good practice where Indigenous populations are concerned. For example, one recent review of emerging practices in Australia, New Zealand and Canada, refers to a 'synthesis and synergy' approach to reform, involving a gradual convergence of Indigenous and non-Indigenous values, beliefs and practices.<sup>6</sup> This is not the same thing as bringing Aboriginal law and non-Aboriginal law together in their entirety or as part of some single template. From the LRCWA consultations it was apparent that many Aboriginal people who continued to practice law in their daily lives (i.e., performed ceremony, practised skin relations, spoke Aboriginal language/s, etc) did not see much scope for combining Aboriginal law and non-Aboriginal law within a single written framework.

## 3. Law and representations

The most frequently voiced reasons for this were that the Aboriginal and non-Aboriginal laws were simply too different and, perhaps most importantly, they had some well-grounded fears that Aboriginal law would inevitably be appropriated by the white man's law if written down, classified and codified (these being essentially non-Aboriginal practices). It would then no longer be 'their' law – ownership would pass to lawyers instead. Aboriginal law would, they feared, inevitably be subordinated and colonised by non-Aboriginal forms of legal process and subject to its ways of conducting business that would further disempower Aboriginal people. Should the two laws be brought together through a process of written codification, because the general law claims sovereignty over the written legal form, then inevitably the general law would come to *represent* non-Aboriginal law; perpetuating what Edward Said referred to as 'orientalism': that powerful tendency for the 'west' to dominate, reconstruct, subjugate and 'speak for' the cultures of colonised societies.<sup>7</sup>

Many Elders consulted by the LRCWA wanted to see their law acknowledged as a form of law (rather than simple 'lore') and wanted Aboriginal people to be allowed to practise it in their traditional ways. The Elders wanted to see the two laws working 'side by side' in a situation of mutual respect and recognition. But many did not feel Aboriginal law could survive even the most benevolent annexure by the 'whitefella' legal system. To remain an integral whole it had to remain separate.

### Indigenous knowledge

Through generations of negative interaction with the western legal system, Aboriginal people have a very clear perception that their own mechanisms for storing, presenting and transmitting legal knowledge are often in conflict with those of the non-Aboriginal law and, moreover, are held to be inferior. Generally, 'oral' histories are rarely granted an equivalent 'truth status' as written accounts in western paradigms of knowledge:

[T]raditional Indigenous sources are seldom ever consulted, their exclusion typically justified on the grounds that the oral literatures characteristic of so many Indigenous societies are less reliable than written forms.<sup>8</sup>

4. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986).

5. *Ibid* 7.

6. Havermann P (ed), *Indigenous People's Rights in Australia, Canada and New Zealand* (Oxford: Oxford University Press, 1999) 7. Havermann suggests that in postcolonial societies there currently exists what he calls a 'diasporan space, where cultures collide and combine...inexorably constructing hybrid identities'. However, 'settler' states are still reluctant to share power with Indigenous populations: at 5.

7. Said E, *Orientalism* (Hammondsworth: Penguin, 2003).

8. Marshall-Beier J, 'Beyond Hegemonic Statements of Nature: Indigenous Knowledge and the Non-state Possibilities in International Relations', in Chowdhry G & Nair S (eds), *Postcolonialism and International Relations: Reading Race, Gender and Class* (London: Routledge, 2004) 88.

Traditional knowledge falls on the wrong side of a system of binary oppositions (what Marshall-Beier refers to as 'discursive dichotomies') constructed by white colonists to mark the boundaries between the 'superior west' and its 'inferior other'. These binary oppositions include: order versus anarchy, culture versus nature, rational versus irrational, civilised versus savage, etc.<sup>9</sup> Historically, they have functioned to marginalise Aboriginal forms of knowledge and to legitimate European cultural hegemony.

To avoid this cultural appropriation the simple solution is to leave the core of Aboriginal law alone and 'unwritten', focusing instead on creating a series of non-colonising agreements and partnerships between Aboriginal and non-Aboriginal communities on issues of concern. There are numerous points of intersection between Indigenous and non-Indigenous domains, and these generate issues that could not be dealt with easily by traditional law and penalty – they include alcohol-related issues, family violence, juvenile crime and antisocial behaviour. The non-Aboriginal system has also struggled to provide solutions to these crises in Aboriginal communities. It is around these issues that some constructive hybrids could be seeded and nurtured. However, to do so, we need to constantly be on guard against imposing non-Aboriginal values on Aboriginal people and perpetuating systemic forms of discrimination.

## 4. Institutional racism

While Indigenous people in Australia are among the most imprisoned people in the world,<sup>10</sup> the systems that police, judge and incarcerate them have tended to remain stubbornly eurocentric in philosophy and practice. Urban, rural and remote communities consulted by the LRCWA have expressed a deep sense of alienation from the criminal justice system. Many believe that the present system has failed them and cannot provide adequate levels of security and justice. Furthermore, it cannot take adequate account of the specific cultural needs of Aboriginal people at all levels of the criminal justice system. This tendency has been variously described as structural, institutional or systemic racism.

### Racist outcomes

These forms of racism are different from individual racism because they describe the *outcomes* of activities and processes rather than *intentions* and *attitudes*. They reflect organisational, rather than individual, failure to understand the impact of policies and procedures on marginal and excluded groups in society.<sup>11</sup>

Bowling offers the following definition of institutional racism:

Institutional racism is the *process* by which people from ethnic minorities are systematically discriminated against by a range of public and private bodies. If the result or *outcome* of established laws, customs or practices is racially discriminatory, then institutional racism can be said to have occurred. Although racism is rooted in widely shared attitudes, values and beliefs, discrimination can occur irrespective of the intent of the individuals who carry out the activities of the institution.<sup>12</sup>

Work recently undertaken in Victoria, for example, suggests that the ongoing over-representation of Indigenous Australians in the criminal justice system cannot be accounted for solely in terms of greater levels of offending by Indigenous people or the prejudices of individuals within the system, although that may play an accompanying role.<sup>13</sup> It is the intrinsic nature of the structures themselves that should be the major focus of attention and the ways they, albeit unintentionally, disadvantage socially excluded and marginalised groups in the population.

### Unintended consequences

Laws and policies that may appear to be 'facially neutral' may have greater impact on particular groups in ways not envisaged when they were promulgated.<sup>14</sup> Systemic forms of racism have been recognised as a contributory factor

9. Marshall-Beier, *ibid*; Said, above n 7.

10. Aboriginal people in Western Australia are 'the most imprisoned of the imprisoned': Blagg H, 'Aboriginal Youth and Restorative Justice: Critical Notes from the Australian Frontier', in Morris A & Maxwell G (eds), *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Oxford: Hart, 2001).

11. Blagg H, Morgan N, Cunneen C & Ferrante A, *Systemic Racism as a Factor in the Over-Representation of Aboriginal People in the Victorian Criminal Justice System* (Paper presented at the Equal Opportunity Commission and Aboriginal Justice Forum, 2004).

12. Bowling B, cited in Sir William Macpherson of Cluny, *The Stephen Lawrence Inquiry* (London: Home Office, February 1999) [6.33].

13. Blagg, Morgan, Cunneen and Ferrante, above n 11.

14. See Morgan N, Blagg H & Williams V, *Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth* (Perth: Aboriginal Justice Council, 2001); Blagg, Morgan, Cunneen and Ferrante, above n 11.

in high rates of Indigenous incarceration across the world.<sup>15</sup> There are a number of examples of this. Western Australia's mandatory sentencing laws<sup>16</sup> have, in ways not foreseen by the architects of the laws, clearly impacted greater on youths from remote Aboriginal communities whose offences, if committed in Perth, would have been eligible for a caution or referral to a family group conference.

Overcoming unintended forms of discrimination against Indigenous people requires structural reform and a willingness to think outside the square. Most importantly, it requires deep and ongoing dialogue with Aboriginal people before such policies are implemented, and a greater investment in structures and processes that genuinely empower Indigenous communities. Aboriginal-owned community justice mechanisms might hold the key to empowerment.

## 5. Aboriginal community justice mechanisms

In recent years there have been several promising developments in Australia that offer, if not exactly a road map, then certainly a number of potential pathways to change. These include:

- developments in Queensland, following the Cape York Justice Study and the Aboriginal Women's Task Force on Violence, particularly the establishment of local Community Justice Groups;
- community capacity building initiatives across Australia under the Council of Australian Governments – in Western Australia this is the Kutjungka/Tjurabalan process;
- innovative structures and processes introduced under Aboriginal Justice Agreements in New South Wales and Victoria, leading to initiatives such as Circle Sentencing and Aboriginal Courts, as well as some very proactive mechanisms for ensuring Aboriginal participation, such as the Regional Aboriginal Justice Councils in Victoria;
- initiatives in the Northern Territory as part of the Territory's Law and Justice Strategy, such as the Kudjula Crime Prevention Committee structure; and
- a number of processes of local consultation as part of Western Australia's Aboriginal Justice Agreement and the development of local justice plans.

Space precludes a full examination of these initiatives. However, some brief reference will be made to them in the following sections of this paper. However, before doing so, it is worth briefly describing some of the salient features of Aboriginal-owned community justice mechanisms. Ideally, they combine a number of key ingredients, including:

- a strong focus on achieving sustainability, durability and resilience in structures, processes and programs;
- a willingness to take into account Aboriginal law and culture in the way structures, processes and programs are devised and executed;
- a commitment to nurturing the necessary governance structures; and
- a process of capacity building, both in Aboriginal communities and in the government agencies that partner with them.

The two diagrams on page 322 provide a representation of community justice structures and mechanisms.

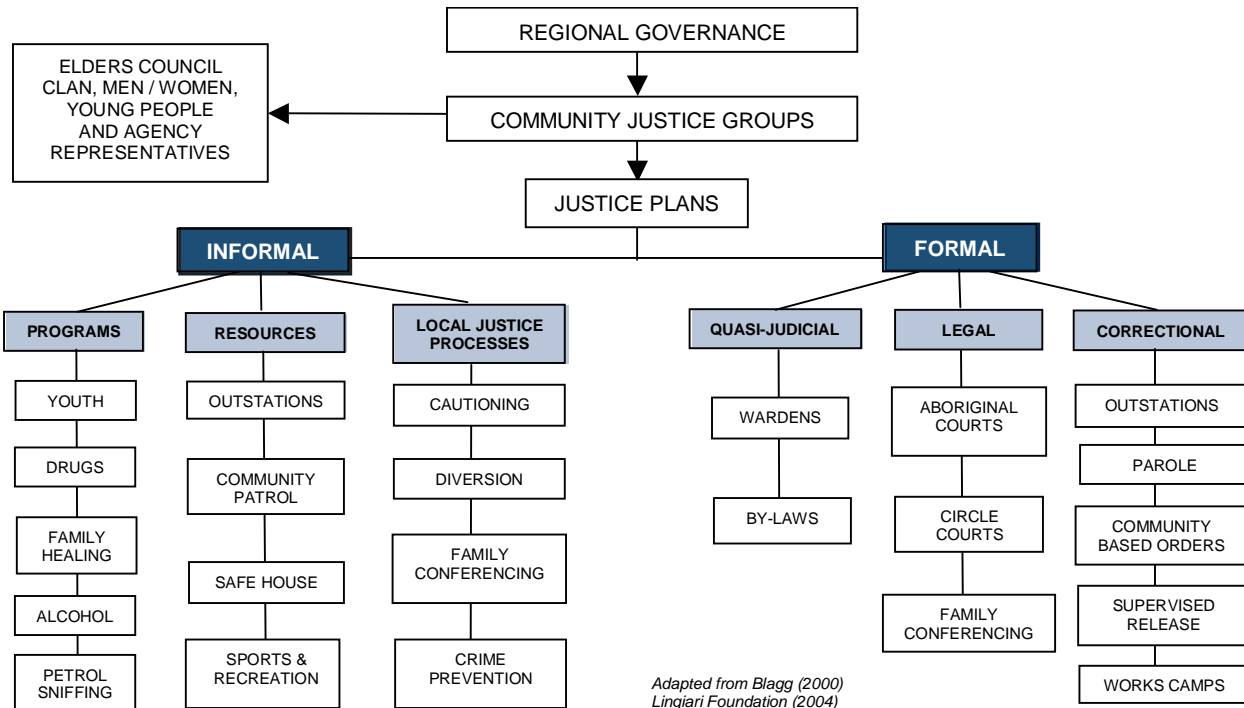
### Top-down versus bottom-up approaches to crime prevention

A distinguishing feature of these new initiatives is the extent to which they are, what are called in the crime prevention literature, 'bottom-up' as opposed to 'top-down' initiatives, and have involved significant dialogue between Indigenous communities and non-Indigenous government organisations. Sustainability, sound governance, capacity building and a respect for traditional practices are now widely acknowledged as key factors in achieving long-term success. The road to justice reform in Aboriginal Australia is littered with the wreckage of promising one-off initiatives, pilot projects and local strategies that have failed to be refinanced, nurtured and maintained by all levels of government. Despite the energies of both Aboriginal and non-Aboriginal people involved in running programs in Aboriginal communities, they eventually fail, leaving bitterness and disillusionment in their wake.

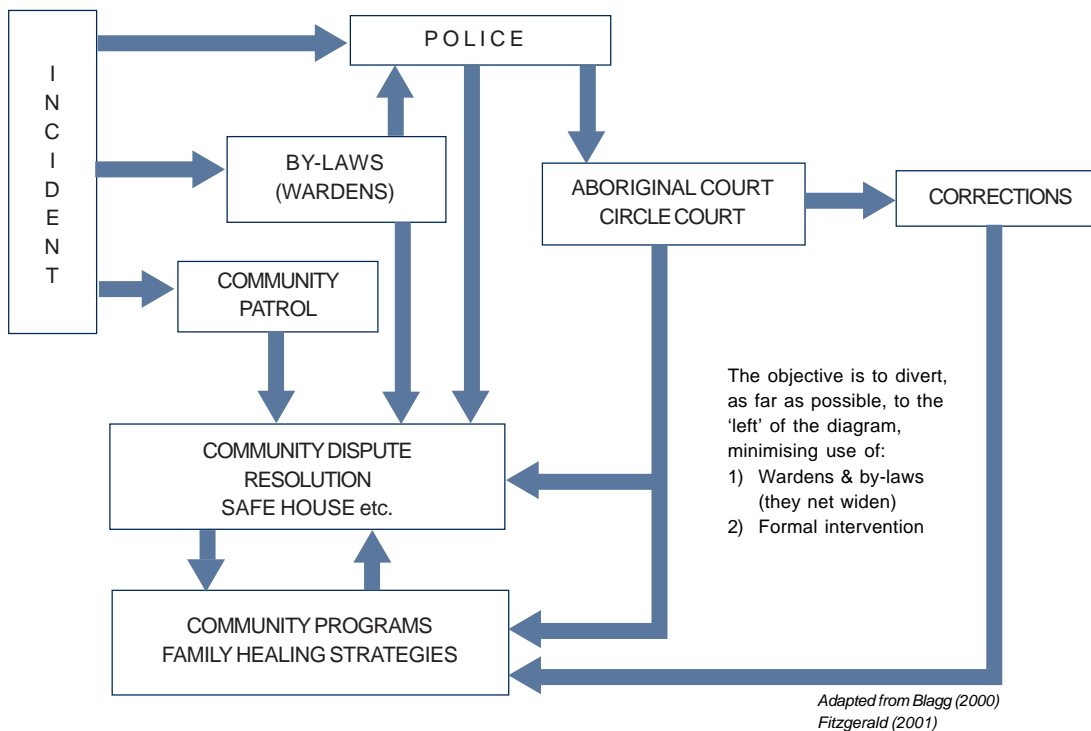
15. Capobianco L & Shaw M, *Crime Prevention and Indigenous Communities: Current International Strategies and Programmes* (International Centre for the Prevention of Crime, July 2003).

16. See Morgan, Blagg and Williams, above n 14; Morgan N, 'Going Overboard? Debates and Developments in Mandatory Sentencing, June 2000 to June 2002' (2002) 26 *Criminal Law Journal* 293.

## Regional Governance – Main Table



## Intervention Options



Preventing crime and disorder in Aboriginal communities is of crucial importance. Not only is crime prevention an important goal in itself, reducing levels of crime and disorder may also be an essential pre-requisite for establishing other healthy structures in communities, which may otherwise be rendered dysfunctional by alcohol and substance abuse, family violence and antisocial behaviour. States and territories are attempting to devise means of engaging with Aboriginal people in urban, rural and remote parts of Australia on crime prevention issues.<sup>17</sup> Western Australia's Office of Crime Prevention has been involved in funding a number of grassroots crime prevention initiatives targeting Aboriginal issues.<sup>18</sup> There are some valuable lessons to be learned from the crime prevention experience.

## 6. Crime prevention and community safety

One recent review of crime prevention and Aboriginal people<sup>19</sup> suggests that initiatives are needed to counter the failure of the mainstream criminal justice system to reduce levels of offending and victimisation in Aboriginal communities or reduce levels of over-representation. A number of inquiries into problems of disorder and victimisation in Australian Indigenous communities have also pointed to systemic failure by the justice system.<sup>20</sup> Cunneen argues that simply rolling out crime prevention programs devised for urban, non-Indigenous contexts into Aboriginal communities without considering issues related to Indigenous participation and control, the principle of self-determination and the diverse needs of Aboriginal people in urban, rural and remote locations, is a recipe for continued failure.<sup>21</sup> Crime prevention programs most suited to Aboriginal contexts are those providing a holistic framework, as Cunneen observes in relation to family violence prevention:

The common themes in evaluations of family violence programmes include the need for holistic approaches, the utilisation of community development models which emphasize self-determination and community ownership, the provision of culturally sensitive treatment which respects traditional law and customs and involves existing structures of authority such as elders, including women.<sup>22</sup>

Community-based crime prevention initiatives of this kind are badly needed within Aboriginal communities. These initiatives should be tailored through consultation with Aboriginal communities to meet the specific needs of the communities and focus on developing mechanisms for reducing contact with the formal criminal justice system. The Cape York Justice Study identified community crime prevention as a priority area for action on the Cape. The study astutely observed:

In the area of crime and justice, these strategies will need to be complemented by more specific community-based crime prevention and intervention strategies and initiatives. As far as the formal criminal justice system is concerned, these community-based strategies must be supported by efforts to divert offenders to these community-based interventions wherever possible.<sup>23</sup>

There is an embedded recognition that the existing criminal justice system must work with and support community initiatives and 'be more sensitive and responsive to Indigenous needs and circumstances to ensure that it does not, as is presently the case, make things worse'.<sup>24</sup> The three key strategies identified in the study—crime prevention, diversion and improved mainstream justice—are emblematic of a new approach to Indigenous justice issues.

### Nurturing a community base

Crime prevention strategies may need nurtured, stable, community structures as a prerequisite for the successful intervention in a number of areas. However, many Indigenous communities lack the necessary infrastructure within which to embed social crime prevention initiatives. As Hazelhurst argues:

When considering the social reconstructive potential of crime prevention, we quickly realise that it may well be futile to attempt to separate objectives to reduce crime from social development issues. In the absence of a 'community base', 'community based crime prevention' is a theory in search of reality.<sup>25</sup>

17. For a list of state/Commonwealth initiatives see the Commonwealth Attorney-General's website: <<http://www.ncp.gov.au/agd/www/ncphome.nsf>>.

18. For a summary, see <<http://www.crimeprevention.wa.gov.au/>>.

19. Cunneen C, *The Impact of Crime Prevention on Indigenous Communities* (Sydney: Institute of Criminology, 2001).

20. Fitzgerald T, *The Cape York Justice Study* (Brisbane: Department of the Premier, 2001) <<http://www.communities.qld.gov.au/community/publications/capeyork.html>>; Aboriginal and Torres Strait Islander Women's Task Force on Violence, *Report* (Brisbane: Department of Aboriginal and Torres Strait Islander Policy and Development, revised ed, 2000) <<http://www.indigenous.qld.gov.au/pdf/taskforce.pdf>>; Memmott P, Stacy R, Chambers C & Keys C, *Violence in Indigenous Communities* (Canberra: National Crime Prevention, 2001).

21. Cunneen, above n 19.

22. *Ibid* 9.

23. Fitzgerald, above n 20, 113.

24. *Ibid*.

25. Hazelhurst KM (ed), *Legal Pluralism and the Colonial Legacy: Experiences of Justice in Canada, Australia, and New Zealand* (Sydney: Avesbury, 1995) xxi.

Thinking differently about crime prevention may involve having to nurture the community base at the same time as developing crime prevention strategies. This is a complex process (which is why we so often get it wrong) requiring considerable inter-agency coordination and constant attention to the issues of participation and control highlighted in Cunneen's study.<sup>26</sup> While reviewing practice on a global level related to Indigenous crime prevention, Capabianco and Shaw argue:

Crime prevention can take many forms, but strategies which focus on social development, and recognise the cross-cutting nature of the causes of crime and victimisation, have much potential for developing the capacities of individuals and communities to tackle causes. Given the severity of the problems facing Indigenous populations, the arguments for building programmes which are cross-cutting and 'whole of government' are even greater. The urgency of a proactive approach to community safety which recognises the strong links between social and economic factors, and the health of their communities, is greater among Indigenous populations than in any other population group.<sup>27</sup>

Expanding the notion of crime prevention to include broader issues of community safety is very much a feature of contemporary crime prevention thinking in Australia and stems from work on international best practice.<sup>28</sup>

## Multiple risk factors

It is now widely accepted, that risk factors linked to unemployment, family breakdown, disengagement from education, poverty and social exclusion are important in shaping criminal careers and contribute to repeated forms of victimisation. Studies involving Indigenous communities identify additional, multiple risk factors. These encapsulate the above but also involve a catalogue of issues linked to the specific historical experiences of Indigenous people and their ongoing marginalisation, including forced removal policies, dispossession and institutional racism. These experiences are rarely taken into account in criminal justice programs as situating factors.

[M]any contemporary criminal justice systems use classification systems ... based on research on general offending populations rather than minority groups.<sup>29</sup>

On the other hand, the criminal justice system has also been slow to evolve strategies which work with the particular strengths of Indigenous cultures, particularly possible sources of cultural resilience.<sup>30</sup> Working *with* Aboriginal culture, as opposed to working against the cultural grain, will also require an understanding that Aboriginal people may view invitations to become involved in local crime prevention initiatives with some misgivings. As Hommell suggests, the very term 'crime' deters many Aboriginal people due to its association with over-policing and deaths in custody. Additionally, many crime prevention strategies have involved excluding Aboriginal people, tagging them as the stereotype 'crime problem' in urban shopping malls and the streets of country towns.<sup>31</sup>

## 'Solving the Aboriginal problem'

Aboriginal people may not see criminal justice agencies as being in existence to *solve their problems*, when they have existed, historically at least, to *solve the Aboriginal problem*. One group of Aboriginal women consulted in Bandyup Prison (the majority of whom had histories of abuse, violence, abandonment and neglect) were asked whether they would report violence against them to the police. They said they 'would never go to the police for help ... The police are not a service – the service is to lock you up'.<sup>32</sup>

An emphasis on community safety will result in stress being placed on the neglected issue of Aboriginal victimisation and on the 'multiple'—rather than simply criminogenic—risks factors identified by Capabianco and Shaw.<sup>33</sup> Indeed, some important preventive programs may not even describe themselves as crime prevention initiatives at all. For example, structured youth activities programs (always in high demand in remote communities) may not be directly

26. Cunneen, above n 19.

27. Capabianco & Shaw, above n 15, 6.

28. Sherman L, Gottfredson D, MacKenzie D, Eck J, Reuter P & Bushway S, *Preventing Crime: What Works, What Doesn't, What's Promising* (Washington DC: National Institute of Justice, 1997).

29. Capabianco & Shaw, above n 15, 7.

30. Hommell R, Lincoln R & Herd B, 'Risk and Resilience: Crime and Violence Prevention in Indigenous Communities' (1999) 32 *Australian and New Zealand Journal of Criminology* 2.

31. Blagg, above n 10; C Cunneen, 'Constructing a Law and Order Agenda' (1989) 38 *Aboriginal Law Bulletin* 6–9.

32. Law Reform Commission of Western Australia, *Thematic Summaries of Metropolitan Prison Consultations* (2004)

33. Above n 15. I have called these elsewhere those 'multiple or compound forms of crisis' that tend to exist in the Aboriginal context: Blagg H, *Crisis Intervention in Aboriginal Family Violence: Summary Report and Strategies and Models for Western Australia* (2000) <[http://www.padv.dpnc.gov.au/projects/crisis\\_interv\\_summ.pdf](http://www.padv.dpnc.gov.au/projects/crisis_interv_summ.pdf)> 28.

targeted at crime reduction but may reduce crime nonetheless as a spin-off from positive engagement with young people.

The national picture in relation to Aboriginal crime prevention initiatives and those that show particular promise has been comprehensively painted by Cunneen.<sup>34</sup> One of the longest running initiatives in Western Australia is the Derby Family Violence Prevention Project, established in the late 1990s. The project operates in Derby and the Mowanjum Aboriginal community and has evolved to take into account cultural factors by, for example, having separate young men's and young women's spaces and programs, and working with close support from local Elders. The project is supported by the local shire and an inter-agency support group, and has had a strong focus on alcohol issues (the project was initially situated in the sobering-up shelter), as well as on the philosophy of early intervention. The latter is particularly important in the Aboriginal context. Firstly, Aboriginal youths tend to form intensive relationships, often involving violence, earlier than many non-Aboriginal youths (so we may not just be preventing violence in later relationships but also intervening in current ones). Secondly, there are some embedded myths about Aboriginal men's lawful entitlement to violence (based on a distorted version of Aboriginal law) that need to be challenged early.<sup>35</sup> Thirdly, there are some very damaging cultural practices (that affect adults as well as young people) such as the destructive practice of 'jealousing'.<sup>36</sup> The LRCWA's consultations in Derby and Mowanjum revealed a strong sense of ownership of the program locally.<sup>37</sup>

## Value adding

The Derby model breaks free of some old, rigid thinking in the crime prevention field. Local people have been allowed to create initiatives in light of their own priorities and, rather than constantly creating new systems and structures, the initiatives have tended to rely on existing local structures and networks, adding value to them in the process. Critical writing on Aboriginal community initiatives has focused attention on the need for government to relinquish control and allow Aboriginal communities to define the issues for themselves and then work in partnership with government agencies to implement strategies. The principle of self-determination underpins this approach.

## 8. Self-determination and devolution

Self-determination does not necessarily imply complete independence; indeed, such a process could be devastating for communities. It speaks, instead, to Aboriginal aspirations for a renewed social contract between Aboriginal and non-Aboriginal Australia. One prominent commentator suggests that:

[S]elf-determination does not necessarily entail secession or the creation of separate states but can be articulated through the *restructuring* and *renewal* of existing relations between Indigenous organizations and Government to create arrangements to reflect and support a diversity of Indigenous circumstances.<sup>38</sup>

'Restructuring and renewal' have a similar resonance to Havemann's notion of 'synthesis and synergy'.<sup>39</sup> Both imply dialogue and a willingness to think imaginatively (in current parlance, to 'think outside the square') when dealing with Aboriginal communities and to let go of pre-existing forms of 'common sense'. Self-determination also involves being aware of the different life circumstances of Aboriginal people – there cannot be a 'one fits all' solution.

### A 'vibrant and decentred Aboriginal law'

A similar awareness informs the approach taken by the Cape York Justice Study to the question of self-determination, which envisages a role for a 'vibrant decentred Aboriginal law' within a pluralistic framework, rather than one 'single imposed system'.

34. Above n 19.

35. Because these myths of Aboriginal male entitlement to violence draw on, supposedly, cultural factors, they need to be challenged on a cultural plane, and only Aboriginal people are equipped to do this. The reason why so many violent offender programs fail with Aboriginal men may be the fact that they neglect the cultural dimension in favour of purely cognitive/behavioural forms of treatment.

36. Blagg H, *Working with Adolescents to Prevent Domestic Violence: The Aboriginal Town Model* (Canberra: Attorney General's Department, 1998) vol 2. I describe 'jealousing' as a set of deliberate strategies, often involving multiple players, designed to arouse jealousy in relationships to test out commitment. Jealousing generally leads to or involves violence. Jealousing is viewed as a form of family violence in the West Kimberley, due to its tendency to destabilise family life. People in the Derby area believe it results from the disruption of skin relationships since colonisation, the interpolation of western ideas about relationships, and the general sense of insecurity engendered by community fragmentation. See also Crime Research Centre and Donovan Research, *Young People's Attitudes to Domestic Violence* (Canberra: Attorney General's Office, 1999).

37. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Derby and Mowanjum*, 4 March 2004. For recent positive appraisal of the program, see Polina A & Perdrisat I, *A Report of the Derby/West Kimberley Project: Working with Adolescents to Prevent Domestic Violence* (Canberra: Attorney General's Department, 2004).

38. Jonas W, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Community Justice, Law and Governance: A Rights Perspective* (Speech given at the Indigenous Governance Conference, Canberra, 3–5 April 2002) 2 <[http://www.hreoc.gov.au/speeches/social\\_justice/community\\_justice.html](http://www.hreoc.gov.au/speeches/social_justice/community_justice.html)> (emphasis added).

39. Havemann, above n 6.

There needs to be an institutional space or spaces created for the accommodation of Aboriginal law within the broader Australian legal system. There must be institutional design for the administration of local order by Aboriginal communities. There must be 'pods of justice' distinct in form and function, autonomous but contributing to a federal whole. Authority must be devolved to Aboriginal communities so that they may first determine the law and order issues of theirs.<sup>40</sup>

Fitzgerald's vision of devolution shifts discussion firmly in the direction of negotiated settlements with Aboriginal communities, creating new 'sub-contracts' with Indigenous communities with '[c]entralised government deferring to local institutions to organise local life to the greatest extent possible'.<sup>41</sup>

Similarly, the Aboriginal and Torres Strait Islander Social Justice Commissioner argues for an approach based on the development of 'governance structures and regional autonomy' and identifies community justice mechanisms as 'an integral component of Indigenous governance'.<sup>42</sup> They are essential, the Commissioner insists, to deal with the damage that both violent communal behaviour and the practices of the justice system continue to inflict on Indigenous communities. However, to be successful, community justice mechanisms 'must be accompanied by a return of control and decision making processes to Indigenous communities'.<sup>43</sup> Current forms of government control are 'based on a perpetuation of the marginalised position of Indigenous people, combined with a denial of any collective or historical dimension to Indigenous people's experiences'.<sup>44</sup>

## 9. The Northern Territory

The Northern Territory experience is instructive in a number of areas. The development of law and justice initiatives in remote communities, as part of the Territory's Aboriginal Law and Justice Strategy, reveals the importance of nurturing credible structures of self-management on Indigenous communities and the importance of government agencies working in partnership with these structures. The success of initiatives such as Night Patrols<sup>45</sup> and community owned Safe Houses (generally women's initiatives), backed up by the authority of community law and justice committees, community councils and clan structures, provides a number of valuable insights into the potential for Aboriginal self-management and self-policing.

### Establishment practices and the cycle of failure

A number of reports<sup>46</sup> illustrate the importance of what they call 'good establishment practices' when developing initiatives for remote communities. While the authors are writing mainly about Night Patrols, the lessons are applicable to other community justice initiatives. They note the tendency for initiatives in remote communities to be established, enjoy brief success, then fail – a process they call the 'cycle of failure'. This cycle is largely a consequence of 'poor establishment practices', including inadequate community consultations and planning, and a lack of appropriate outside support for initiatives by government agencies.<sup>47</sup> Ryan also blames the breakdown of 'traditional social management and control structures under the impact of social change' as well as 'alcohol related issues' and 'inter-generational and inter-familial conflicts'.<sup>48</sup>

To break the cycle of failure, Ryan recommends a 'phased process of support' for remote communities wanting to establish patrols.<sup>49</sup> This process would be designed to assist the community in assessing its preparedness (culturally and structurally) for the patrol, and then to assist it in setting up community support structures and operational support mechanisms. These principles have informed a number of successful law and justice initiatives within communities in the Northern Territory (such as Lajamnu and Ali Curong) where Women's Night Patrols and Safe Houses work with traditional 'Elders' committees and a community 'Law and Order' council to police 'no grog' policies and prevent family violence. There is no quick fix; these strategies may take up to two years to mature.

40. Fitzgerald, above n 20, 113.

41. Ibid.

42. Jonas, above n 38, 2.

43. Ibid 3.

44. Ibid.

45. Night Patrols, or Community Patrols as they are known in Western Australia, originated in the Northern Territory. The original scheme was the Julalikari Patrol in Tennant Creek, praised by the Royal Commission into Aboriginal Deaths in Custody as a model for local self-policing and crime prevention. They are discussed later in the paper.

46. See, for example, Ryan P, *Lajamanu Night Patrol Service* (Darwin: Office of Aboriginal Development, 2001); Ryan P & Antoun J, *Law and Justice Plans: An Overview* (Darwin: Office of Aboriginal Development, 2001).

47. Ryan, *Lajamanu Night Patrol Service*, *ibid.*

48. Ibid 2.

49. Ibid 5.

## Community safety and justice planning workshops

Ryan also summarises a number of critical issues in a paper on Aboriginal Law and Justice Strategy (ALJS),<sup>50</sup> including the lessons from 30 Law and Justice workshops,<sup>51</sup> called 'Community Safety and Justice Planning Workshops', kindred processes to the 'Negotiating Table' proposed in the Kimberley region<sup>52</sup> and the 'round table' approach currently being adopted in the far north of Queensland as part of the government response to the Cape York Justice Study.

Ryan notes the importance of 'workshopping' issues:

The experience of the ALJS is that workshopping with the communities is important in order to understand and work constructively with the traditional and contemporary history of individual communities that often shaped the community dynamics, management systems and community responses and concerns. Workshopping was also useful in identifying community capacity, and the likely strengths and impediments that may affect the process. These can vary from community to community.<sup>53</sup>

The workshops provided the forum from which community law and justice committees emerged. These became 'the vehicle which communities have used to address many of the safety and violence concerns they were reporting'.<sup>54</sup>

The workshops had a number of purposes: they were a means of gathering information; engaging the community through a participatory planning process; ensuring that local 'accumulated knowledge' provided the basis for strategies; and facilitating community debate on 'complex and sensitive issues'. Importantly, the workshops stimulated a 'process of community cohesion building' by bringing together a diversity of groups and organisations.<sup>55</sup>

## Gender and communication

The workshops included a number of separate male and female sessions, followed by joint meetings. This culturally appropriate process was necessary so that the divergent views of men and women could be identified – they often defined the issues in different ways and had different priorities; men saw alcohol and women saw family violence as the main problem. Moreover, separate workshops reflected (and respected) the different roles men and women performed in terms of ceremony and their contrasting (though complimentary) roles and responsibilities. It was recognised that in many forums women were often unable to access decision-making processes due to 'vested interest male groups' who controlled the agenda and dictated the recommendations from the meetings.

Other issues encountered that have direct bearing on conditions in remote Western Australian communities included problems associated with clan and family differences, Ryan writes:

Systems for communicating information around an Aboriginal community are often complex and can be difficult to use for the unwary. Communication systems are often predicated on obligatory and affiliate systems and are linked to responsibilities for clan and extended family.<sup>56</sup>

Ryan also notes a number of other salient factors: the presence of different language groupings can lead to frequent failures of information sharing around the whole of the community; and different tribal and clan groups may not wish to meet together – a not uncommon scenario in Western Australian communities such as Balgo where separate 'top' and 'bottom' camp meetings are normal practice.

## Law and justice planning

The significance of the law and justice planning process lies in its capacity to finely tune strategies that meet the requirements of individual communities and to work with the grain of local culture and tradition. Each plan is unique to that particular community; however, there are a number of common processes and strategies. A typical remote community Law and Justice Committee would have a dual role, one formal and the other informal. On the one hand, it would act as the point of interface with the formal criminal justice system, be involved in pre-court conferences,

50. Ryan P, *Indigenous Community Engagement in Safety and Justice Issues: A Discussion Paper* (Darwin: Aboriginal Law and Justice Strategy, 2004).

51. The remote communities involved included Ali-Curing, Ngukurr, Numbulwar, Port Keats, Lajamanu, Yuendumu and Willowra.

52. Discussed below p 336.

53. Ryan, above n 50, 3.

54. *Ibid.*

55. *Ibid* 4.

56. *Ibid* 5.

make recommendations to the courts, develop diversionary strategies and act as a focal point for community justice issues. On the other hand the committee would be involved in community-level dispute resolution, coordinating community responses to law and order issues, and maintaining relations with outside agencies (police, corrections, family and children services, and others).<sup>57</sup>

## Northern Territory Law Reform Committee

The recent *Report of the Committee of Inquiry Into Aboriginal Customary Law* by the Northern Territory Law Reform Committee supports the practice of law and justice planning within communities. Furthermore, the Committee sees Aboriginal customary law playing a role in this process.

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.<sup>58</sup>

The Committee noted that issues within communities differ enormously and that there cannot be a 'one-size-fits-all' solution; rather solutions needed to be tailored to meet community defined needs 'in any way that the community thinks appropriate'.

The inquiry's general view is that *each Aboriginal community will define its own problems and solutions*. Models may deal with alternative dispute resolution, family law issues, civil law, criminal law, or with relationships between Aboriginal communities and government officers/private contractors while in Aboriginal communities, and so on.<sup>59</sup>

The committee recognised—based upon a wealth of oral and written testimony—that traditional law and its forms of dispute resolution can work very effectively on some community issues. For example, the Committee envisaged scenarios where, suitably resourced, communities would develop protocols with police on the cautioning of juvenile offenders – a practice also advocated in the Cape York Justice Study. The only limitation placed by the Committee on community plans was that they should not infringe human rights.<sup>60</sup>

However, there were other issues that may require the involvement of the general law. Family violence was identified as an area where Australian law might have advantages, given concerns that customary practices in this area may simply reinforce the power of male Elders, who might themselves be perpetrators. At the same time the Committee acknowledged that Aboriginal dispute resolution mechanisms, which have a basis in traditional law, have been effective in family violence in some communities.<sup>61</sup> The Northern Territory experience reveals instances where Aboriginal law has been unable to meet the demands placed upon it by alcohol and family violence. The Ngaanyatjarra, Pitjantjatjara, Yankunytjatjara (NPY) Women's Council has been a consistent advocate for white law and white police to deal with issues it sees as being beyond the competence of Aboriginal law in the NPY region. Other Aboriginal women's voices, however, argue that Aboriginal law can be effective in combating family violence and provide examples of the two laws working together on these issues.

## The Kurduju Committee

The Kurduju Committee brings together the communities of Ali-Curong, Lajamanu and Yuendumu. Each community has been involved in developing law and justice strategies for some years under the Territory's Aboriginal Law and Justice Strategy. Each community has its own law and justice committee which implements the community's law and justice plan. The Kurduju Committee was formed because of frustration with government agency strategies on family violence in remote communities, particularly the lack of recognition given to existing work on communities that has proven successful.<sup>62</sup> The community committees felt that the image being portrayed of Aboriginal women in remote communities was one of helpless, docile victims of traditional violence, incapable of developing strategies to combat violence. The implication being that only law and policing strategies driven from outside the community and based

57. Ibid.

58. Northern Territory Law Reform Committee, *Report of the Committee of Inquiry Into Aboriginal Customary Law* (Darwin, 2004) recommendation 4.

59. Ibid [1.5].

60. Ibid [6.10].

61. Ibid [5.2].

62. During a visit to Lajamanu and Ali-Curing by the author in 2000, the law and justice committees expressed some unease at the views being expressed in urban areas about the inability of communities and community structures to work on family violence issues. In one instance a family violence prevention lawyer in Katherine publicly suggested that Lajamanu was incapable of dealing with family violence and that the male elders ran the policy on family violence to their own ends. This outraged the women on the committee who ran their own Night Patrol and Safe House and worked with the police to combat the problem. The lawyer was forced to publicly retract her statement.

upon the general law could be effective. In its submission to the Northern Territory's Committee of Inquiry Into Aboriginal Customary Law, the Kurduju Committee rejects this view.<sup>63</sup> It also raises questions about the relevance of strategies devised in urban areas to the realities of life in remote communities. This was particularly the case in regard to policies and programs on family violence based upon western feminist principles and targeted towards increased criminalisation of family violence. The submission is particularly critical of 'legal services' that are simply dropped onto communities with no understanding of the cultural context or the fact that these communities operate under two laws, not one. The Committee sees its role as fostering better coordination and cooperation between agencies and the communities and providing sound advice on appropriate strategies. It sees a need for community capacity building, improved access to legal services (providing these are willing to work within a community building paradigm), and mechanisms for ensuring that matters relating to Aboriginal law are taken fully into account by the courts and other justice agencies.<sup>64</sup>

## 10. Community structures

As I have intimated earlier, we have to be on guard against tendencies to impose non-Aboriginal definitions of 'community' onto Indigenous communities. The term is problematic when used in connection with Aboriginal notions of collectivity, obligation and loyalty. The notion of community is heavily value laden and resonates with images of collective solidarity and *gemeinschaft* that are quite inappropriate to Indigenous communal practices, which tend to be labile and fluid and only consistent in relation to the demands made by family, clan and skin.<sup>65</sup> Moreover, Aboriginal townships are artificial constructs, fractured along numerous demographic, racial, religious, affiliate and elective fault-lines. Mosey writes in relation to the *Kutjungka* region in the East Kimberley:

The word 'community' is very deceptive when applied to the conglomerate of language groups, ages, families, and vastly differing agendas, both Aboriginal and non-Aboriginal, existing in the Kutjungka region. In fact, most 'communities' seem to only operate as a community of people with a common purpose when they are supporting their football team, or for the purposes of external administration and funding service provision.<sup>66</sup>

Another dimension of this issue that needs to be addressed is the way government administration created 'regional' structures that do not correspond to Aboriginal patterns of life. Aboriginal communities which associate with the spinifex areas of the state voiced some concerns that they were governed from salt-water regions. It is only recently that this problem has been addressed, through developments such as the 'cross-border' policing arrangements being negotiated between Western Australia, the Northern Territory and South Australia on joint policing of the NPY lands, and the kinds of arrangements being proposed in relation to self-management in the Kutjungka/Tjurabalan region.<sup>67</sup>

A number of professionals with significant experience working in the desert/spinifex areas of the state voiced enthusiasm for some governance structures linking communities from the Balgo area, through to Wiluna and Warburton, rather than constantly feeding initiatives through existing regional governance structures (which run from west to east).<sup>68</sup> The abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC) regional councils in June of 2005 raises particular concerns in this regard. ATSIC regional councils represented one of the only alternatives to the rigid geographical administration of government. There is a real danger that future regional structures that replace ATSIC regional councils will bear little relation to the traditional groupings of Aboriginal people. Government defined regions are artefacts of the bureaucratic imagination and bear little resemblance to the lines of connection operating in Indigenous communities. Community consultations suggested that 'town' agencies (Broome and Port Hedland for example)—even Aboriginal ones—did not understand desert issues where Aboriginal law still governed most aspects of daily life. A number of remote communities consulted by the LRCWA wanted to see some big meetings organised specifically to deal with the law issues that faced people living in these remote regions.

63. Combined Communities of Ali-Curong, Lajamanu and Yuendumu Law and Justice Committees, *The Kurduju Committee Report* (December 2001) <[http://www.dcdsca.nt.gov.au/dcdsca/intranet.nsf/Files/RDPublications/\\$file/Kurduju.pdf](http://www.dcdsca.nt.gov.au/dcdsca/intranet.nsf/Files/RDPublications/$file/Kurduju.pdf)>.

64. *Ibid.*

65. The notion of community within the 'western' tradition is heavily imprinted simultaneously with images of the rural idyll and what Benedict Anderson called the 'imagined community' of the nation state. Anderson B, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso and New Left Books, 1983). There are significant tensions between these constructions of community and those operating within the Aboriginal domain.

66. Mosey A, *Dry Spirit: Petrol Sniffing Interventions in the Kutjungka Region (WA) 1999–2000* (Mercy Community Health Service and Office of Aboriginal Health, 2002) 8.

67. See below pp 334–35.

68. Thanks to Trevor Jewel of Mercy Community Health Services for discussing this issue.

## Desert meetings and desert facilities

For example, Elders at the Kunuwaratji community consultation wanted to convene a 'bush meeting' where all Elders in the area would meet with members of the judiciary to talk about Aboriginal law; the meeting would be open to all communities in the East Pilbara. Similarly in the Goodabinya community (Marble Bar) the men's meeting wanted to hold a big meeting involving all the East Pilbara communities and representatives from the key agencies, police and judiciary to discuss a range of issues; they were especially concerned with issues of alcohol, drugs (ganja, amphetamines) and antisocial behaviour.

The Jigalong community had been discussing the possibility of establishing an Outstation Program for some years, and there had been regular discussions with government agencies regarding the process. A camp at Puntawari, 40 kilometres east of the community, had been established but with only rudimentary infrastructure. One potential use of the Puntawari camp was as a place to send young 'troublemakers' who, away from town influences, would be taught the traditional ways by Elders. There had also been plans to use Puntawari as a 'family healing centre' – a place for families who had been experiencing family violence, as well as for men after release from prison; the view being that many were not ready to be just dropped back into family/community life. The problem was that government agencies saw this as too costly, as places such as Puntawari were too 'remote' from existing centres. Aboriginal people in these areas want to see the necessary capacity generated for such structures to be viable.

During the LRCWA's meetings with prisoners, this problem was also voiced in relation to prison building. There were demands for investment in rural and remote facilities as well as outstations.

Instead of prisons, build a community facility that can be used regionally or by several communities. Its main purpose is rehabilitation and restoration through education/training, employment training, courses for employment opportunities, drug, alcohol, violent and sex offending. Staffed by trained Aboriginal people and non-Aboriginal people who are not prejudiced. A place that family can come to and stay especially when death occurs in or out of prison, or when children are born so people in facility can do the cultural business and family is not made to suffer because person is in prison.<sup>69</sup>

And:

Why build a new prison in Roebourne, when you could build a facility run by Elders, out in the desert? Allow people to shame their own people; relations might be best [for this].<sup>70</sup>

Holistic strategies are premised on the assumption that systemic problems require systemic solutions rather than piecemeal reforms. Past reforms in the area of Indigenous over-representation in the criminal justice system have suffered from a tendency to see the issue as a suite of discrete problems that can be resolved by simply expanding services employed in the non-Aboriginal context. Agencies are permitted to work in a piecemeal and fragmented fashion, working on their own discretely defined set of problems, in isolation from other agencies and from the communities themselves. Furthermore, strategies are often enacted with little thought given to the unintended consequences they may have on other initiatives in play. Examples of this abound in the area of policing, perhaps the most sensitive issue in relation to Aboriginal people and the justice system.

## 11. Policing communities and community policing

Problems occur when the aims and goals of intervention are determined in advance rather than arrived at through negotiation with Aboriginal communities. The community—that is, the community-based service delivery model I criticised in the introductory section—becomes simply the focus of intervention rather than partners in defining the priority issues.

The tension between 'effective' policing and reducing levels of contact with the system was apparent in the LRCWA's community consultations. It occurred, for example, in situations where priorities and campaigns defined as important in the metropolitan area—such as road safety—were implemented in an unmediated fashion on remote communities in ways that undermined community cohesion by imposing unrealistic norms of lawful behaviour.

69. Law Reform Commission of Western Australia, *Thematic Summaries of Regional Consultations – Pilbara*, 6–11 April 2003, 17.

70. Author's field notes from Law Reform Commission of Western Australia, *Thematic Summaries of Regional Consultations – Pilbara*, 6–11 April 2003.

Communities wanted to see a police presence to halt the violence and disorder and break the cycle of crime in communities that ensured high levels of contact with the system (family violence, grog running, sniffers out of control, young people 'humbugging' and running amok). At the same time they were bewildered when the police then focused excessively on what were perceived by the community as minor, *non-destructive* acts of law infringement, essential under the realities of Aboriginal life in remote communities, leading to *increased, not reduced, contact with the system* (fines and incarceration) and seriously disrupted life in the community.

The LRCWA's thematic summaries of consultations with Aboriginal people in remote communities and in prison identified such concerns. These involved situations where unlicensed drivers drove only around the community or on dirt roads, or where, so called, 'un-roadworthy' vehicles were using dirt roads. The police maintained that they were simply imposing the law. The communities considered this to be unfair because these laws do not take into account the unique conditions of remote Aboriginal communities.

### Roadworthy: where are the roads?

The communities question the relevance of notions such as 'roadworthy' to situations where roads (in the urban and rural sense) do not exist. They suggest that before imposing these laws the government should first fix up the roads – equal implementation of the law is not matched by equal treatment in terms of infrastructure. Below are some typical examples from the consultations.

It is the case that many Aboriginal people do not have driver's licences; however, they are not driving on main roads or in towns.<sup>71</sup>

A lot of Aboriginal people were jailed for driving without a licence or for travelling between communities but not on a gazetted road ('back roads'). Jailing for minor offences, such as these 'doesn't make sense'. Aboriginal people need to travel between communities and the back roads allow them to move freely between the communities. The police sometimes close back roads. The communities use the back roads to travel to and from court and to transport the sick to enable them to receive medical treatment.<sup>72</sup>

Aboriginal people in the communities without a driver's licence may still have to travel to court and there is usually no other option but to drive.<sup>73</sup>

Funeral business is very important business, people have to go and have no choice. The police know this and wait for you up the roads, check vehicle and licences. Put the people in gaol.<sup>74</sup>

You will break Aboriginal law if you don't go to a funeral.<sup>75</sup>

Police are strict on transport – pull you in for cracked headlight, even going to funerals.<sup>76</sup>

The meeting voiced considerable criticism of police behaviour at funerals and their tendency to lie in wait for Aboriginal people driving to them. There was also some anger that the police treated driving conditions in the area as similar to urban areas, imposing standards of roadworthiness inappropriate in places where there were no roads.<sup>77</sup>

These aren't sealed roads, you have more problems with cars, this is the desert.<sup>78</sup>

### Problem-oriented policing

The problem in relation to policing remote communities is the tendency for the police (although this applies equally to other agencies engaged with communities on issues as diverse as health, mental health, education and family violence) to arrive with a predetermined formula and simply impose it on the community. This model of policing has been criticised as being rigid and mechanistic, and unsuited for work in diverse cultural settings. Problem-oriented approaches, a concept first popularised by Herman Goldstein, are decentralised and proactive, where police work with communities to define the key or 'hot' issues in the locality, as defined by the community. The problem in some

71. Ibid.

72. Law Reform Commission of Western Australia, *Thematic Summaries of Regional Consultations – Pilbara*, 6–11 April 2003, 14.

73. Ibid.

74. Ibid 13.

75. Ibid.

76. Author's field notes from Law Reform Commission of Western Australia, *Thematic Summaries of Regional Consultations – Pilbara*, 6–11 April 2003.

77. Ibid.

78. Law Reform Commission of Western Australia, *Thematic Summaries of Regional Consultations – Jirrugadji Village, Nullagine*, April 2003.

remote areas is the tendency for the police to operate in isolation from key priorities as defined by the community.<sup>79</sup> This problem has been identified elsewhere, when police arrive to fulfil what they perceive to be their overriding goal, which conflicts with locally established priorities. McNamara, for example, provides evidence from Canada where Native Constable programs were established on Aboriginal lands, operating on a traditional incident-driven model of policing.<sup>80</sup> The underpinning approach was to impose law and order on communities, without reference to the impact this may have on other important strategies, reducing over-representation and increasing self-determination:

Native Constable programmes were primarily concerned with making policing more effective. They were not fundamentally concerned with reducing incarceration rates of Aboriginal people, though supporters of the programme would likely prefer this to happen. If it didn't, however, the programme would not be seen to have failed. Social control, not self-determination, was the main concern.<sup>81</sup>

The LRCWA was told by senior police officers that rolling out police services on to remote communities, as part of the Gordon Inquiry implementation strategy,<sup>82</sup> would inevitably mean an increase in the number of Aboriginal people being arrested and jailed. Communities might consider this to be an acceptable price to pay for reduced levels of family violence and child abuse. They may not, however, see increases in already unacceptable levels of incarceration for vehicle and property related offences as acceptable, just or fair.

## Warden schemes and by-laws

This has occurred in relation to justice initiatives such as warden schemes and by-laws. Unfortunately they have been sold as a panacea for a host of law and order and security issues on remote communities and have been over-sold as a solution.

The history of warden schemes in Western Australia is linked to the *Aboriginal Communities Act 1979* (WA), which originally applied to areas in the West Kimberley region. The Act provides for Aboriginal councils to make by-laws for certain purposes. 'The council of a community to which this Act applies may make by-laws relating to community lands for or with respect to a number of specified matters'.<sup>83</sup> However, the question of enforcement of the by-laws constructs a tension between the council's ability to develop law and its inability to implement it. Under s 7(2)(a), the enforcing authority is clearly the police: the by-laws 'may empower a member of the police force'. Although, one critic of the Act noted the intent of the law was that the police officer would be an Aboriginal Police Liaison Officer.<sup>84</sup>

McCallum also reports consultations with communities on the issue:

Time and again, it was stressed by community member councillors that they are unable to implement or enforce their by-laws adequately, as they lack the legislative power under the current terms of the Act to enforce by-laws. Despite the original intentions of the Act, enforcement is still the domain of a member of the Police force. Unfortunately, this does not address the reality that most Aboriginal communities simply do not have access to frequent Police support.<sup>85</sup>

McCallum recommended that the Act be amended to give enforcement powers to wardens. However, experience suggests that this, itself, may create more problems than it resolves. Consultations with communities suggested that enforcement powers might not always be utilised with the interests of the whole community in mind. There were a number of competing views on the question, with some people in communities believing that wardens should have strong powers to enforce community by-laws, while others were of the view that wardens should work under the police, with the latter retaining the enforcement powers. Others firmly believed that police and wardens should work in partnership but independently of one another.

There is an inherent tendency for coercive policing powers to be misused unless restrained by oversight, visibility and mechanisms of accountability. This is recognised in both law and policy in Western Australia. One senior Aboriginal man in the Kimberley said that it was unreasonable to expect Aboriginal people in communities to behave any

79. Goldstein H, *Problem Oriented Policing* (London: McGraw Hill, 1990).

80. McNamara L, 'Aboriginal Justice Reform in Canada: Alternatives to State Control', in Hazelhurst K (ed), *Perceptions of Justice: Issues in Indigenous and Community Empowerment* (Sydney: Amesbury, 1995).

81. Harding R, cited in McNamara, *ibid* 3.

82. 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').

83. *Aboriginal Communities Act 1979* (WA) s 7.

84. McCallum A, *Final Report to the Aboriginal Affairs Planning Authority on the Review of the Aboriginal Communities Act, 1979* (WA), as it Applies to the Kimberley Region of Western Australia, Vol 1 (Peth: Aboriginal Affairs Planning Authority, 1992).

85. *Ibid* 7.

differently from anyone else when granted wide coercive powers without legal and administrative constraints. In his view, warden schemes and by-laws should be abolished, in favour of self-policing based on Aboriginal customary principles, supported by more effective policing by the general police.

Whatever the views on warden schemes and by-laws, there was a virtual unanimous desire in communities for a full-time police presence. The view from Warburton was typical.

The situation persists that there is no full-time police presence between Laverton in Western Australia and Marla Bore in South Australia, in spite of the fact that the area is occupied by 4 500 predominantly Ngaanyatjarra and Pitjantjarra people with well-documented problems of serious offending, chronic substance abuse and community safety. Similarly, the administration of justice occurs on the basis of a visiting magistrate on circuit, who has little exposure to the law and justice issues in the social and cultural contexts of those communities.<sup>86</sup>

New post-Gordon strategies will see a full-time police presence on nine remote communities, including Balgo and Warburton. It is hoped that these strategies will improve law and order on these communities, perhaps making by-laws and warden schemes redundant (many offences under by-laws are offences under the general law). Running both simultaneously could be a recipe for net-widening; offenders being charged with both by-law and general law offences. The LRCWA has witnessed instances where offences against by-laws and the general law have combined to create a new kind of 'trifecta' in remote areas. During consultations in the Pilbara there were situations where by-laws and warden schemes were being offered to communities close to towns, with a police presence as a solution to law and order problems in the communities. Surely, improved liaison with the police would be a better solution. On the other hand, warden schemes and by-laws do enjoy support in some communities. Bidyadanga in the West Kimberley has had some success in developing by-laws on alcohol related issues that have wide community support.

## Aboriginal community patrols

Aboriginal community patrols provide an alternative means of self-policing in remote Aboriginal communities. This is the model currently being employed in the Northern Territory and Queensland, where patrols run by communities without formal police powers work through mediation and Aboriginal forms of dispute resolution, leaving enforcement to the police. Patrols fulfil a diversity of functions, largely determined from within Aboriginal communities. A recent review of night patrols in the Northern Territory by the Tangentyere Remote Area Night Patrol Unit, for example, found a diversity of activity typical of Indigenous patrols:

Night Patrols perform a huge range of functions, according to the needs of their communities and the resources they have available. They act as a nexus to connect people and services such as clinics, courts, Police, community government councils, and family. They mediate disputes, remove people from danger, keep the peace at events such as sports carnivals, are consulted by agencies such as courts for input into sentencing, and play a crucial role in the development of community justice groups.<sup>87</sup>

Aboriginal Patrols and Community Justice Groups across Australia are the 'major and longest running crime prevention programs in Indigenous communities'.<sup>88</sup> Cunneen argues that local evaluations of patrol programs have been positive, showing reduced levels of juvenile offending (including criminal damage, motor vehicle theft and street offences), reduced fear of crime, and reductions in drug and alcohol related problems.<sup>89</sup> Cunneen's review of crime prevention initiatives confirms reviews by Blagg and Valuri<sup>90</sup> and Memmott;<sup>91</sup> the latter arguing that patrols are a 'tried and proven program type', effective on a local level in reducing crime and antisocial behaviour by:

intervention, mediation and dispute resolution between people in conflict, and the removal of potentially violent persons from public or private social environments.<sup>92</sup>

Western Australia has a number of long-running and well-established Aboriginal community patrols operating across the state. There are currently 21 community patrols in Western Australia, active in rural towns and in metropolitan

86. The Shire of Ngaanyatjarraku and Warburton Community, *Ngaanyatjarraku Community Law and Justice Submission to the Attorney General of Western Australia* (Warburton: Shire of Ngaanyatjarraku and Warburton Community, 2002).

87. Walker J & Forester S, 'Tangentyere Remote Area Night Patrol' (Paper presented at the Crime Prevention Conference, convened by the Australian Institute of Criminology and the Commonwealth Attorney General's Department, Canberra, 12–13 September 2002).

88. Cunneen, above n 19, 50.

89. *Ibid* 50.

90. Blagg H & Valuri G, *An Overview of Night Patrols in Australia* (Canberra: National Crime Prevention and ATSC, 2003); Blagg H & Valuri G, 'Self-Policing and Community Safety: The Work of Aboriginal Patrols in Australia' (2004) 15 *Current Issues in Criminal Justice* 205–220.

91. Memmott, above n 20.

92. *Ibid* 67.

Perth. The role of patrols varies significantly from place to place and includes crime prevention, reduction in the fear of crime, and community safety. The majority of patrols are funded principally with grants from the Department of Indigenous Affairs, with support from Community Development Employment Projects for patrollers' wages. However, a number (in Perth, Geraldton and Kalgoorlie) have been selected for increased funding due to factors associated with the larger scale of their activities.<sup>93</sup>

Aboriginal patrols differ markedly from mainstream police, in that they are largely staffed by volunteers, operate without an arsenal of formal police powers and do not offer a 'commodified' security service, in the manner provided by private security. There are similar developments in other post-colonial societies (such as in South Africa and South America) where devolved local governance structures are developing their own forms of policing. These are called 'local capacity policing' because the forms of policing developed are owned by the community and are aware of local sensibilities and needs. They are directly involved in strengthening the capacities of communities to develop resilient governance structures.<sup>94</sup> They have emerged particularly in situations where Indigenous people have been unable to attract consistent and adequate forms of policing by state authorities.<sup>95</sup> A number of patrols, such as the Zwelethemba program near Cape Town in South Africa, combine self-policing with local dispute resolution.<sup>96</sup> In some ways these are reminiscent of the law and justice strategies in the Northern Territory.

Aboriginal community patrols are, essentially, local policing initiatives by Aboriginal people, evolved to intervene in situations where Indigenous people are at risk of enmeshment in the criminal justice system, or where they face multiple hazards associated with community disorder, alcohol, drugs and violence.<sup>97</sup> The term 'policing' is employed in a very wide sense to describe a range of preventive measures designed to head off disorder and ensure community safety. Bayley and Shearing describe these broad forms of policing as 'anticipatory regulation and amelioration'.<sup>98</sup> The resilience of community patrols, both in Western Australia and nationally, illustrates that it is possible to develop strategies that involve Aboriginal people in policing their own communities without an arsenal of formal police powers. Patrols rely on good working relationships with the police and other agencies but, because they are not involved in the direct implementation of the criminal law, they can remain functionally independent of them. This could be said of community justice mechanisms generally.

## 12. The Kutjungka/Tjurabalan regional process

The need for sound coordination and capacity building processes is now widely acknowledged by government (in theory, if not always in practice). The recent inquiry into child abuse and family violence in the Aboriginal community assigns considerable importance to capacity building and the improved coordination of services as necessary steps to reducing family violence in the long term.<sup>99</sup> The capacity building approach informs new initiatives around work with children, young people and families by the Department of Community Development. The approach is intended to 'work with', rather than 'work for', these groups and find common solutions.<sup>100</sup> There is little one can take issue with in these ideals – the problems begin when the ideals are operationalised. Some recent initiatives reveal the difficulties associated with the constructing capacity in remote regions. Developments in the Kutjungka (East Kimberley) region

93. A note on the 'Ten Man Committee'.

Patrols have been in existence in some form or another in Western Australia for a considerable period of time. During the consultations, Elders in the Pilbara region recalled the 'Ten Strong Men' or 'Ten Man' committee, which operated from the Strelley community some years ago (until the mid/late-1980s) to pick up people drinking in Port Hedland and Roebourne and take them back to the community. A variant of the committee also operated out of Jigalong (covering Newman). The Ten Man committee is mentioned by the ALRC, in relation to 'Dispute Settlement' and 'Self Policing' along with a number of other self-policing initiatives across Australia: see ALRC, above n 4, 105. They would pick up drunken, rowdy people from Port Hedland/Roebourne and transport them back to the Strelley community to face a community meeting: '[T]he community selects what is called the 'tem-man' committee. The committee's function is to apprehend and bring wrong-doers before a community meeting. The meeting will ... determine an appropriate punishment' (at 106). The scheme ceased operating because of complaints about violence and loss of police support. Many Aboriginal people, as well as the non-Aboriginal law, would have difficulties with the degree of coercion and violence used to 'apprehend' and 'punish' wrongdoers. The LRCWA consultations found no clear consensus as to whether the structure would be appropriate—or acceptable—today. Some from the Port Hedland area said it would not work, or be tolerated, any more (for example, due to the degree of coercion employed). They said that they could no longer force people to come back to the community. The LRCWA was told that the Ten Man committee was accused of 'kidnapping' by church and welfare groups and also lost the support of the police. On the other hand, elders from Jigalong and Kunawaradj in the remote East Pilbara, said that the Ten Man committee had been effective and that the situation in regards to alcohol and violent behaviour had worsened in its absence.

94. Wood J & Font E, 'Building Peace and Reforming Police in Argentina: Opportunities and Challenges for Shantytown' (Paper presented at *In Search of Security: An International Conference on Policing and Security*, Montreal, February 2003); Leach P, 'Citizen Policing as Civic Activism: An International Inquiry' (Paper presented at *In Search of Security: An International Conference on Policing and Security*, Montreal, February 2003); Johnston L & Shearing C, *Governing Security: Explorations in Policing and Justice* (London: Routledge, 2003).

95. Leach, *ibid*; Shearing CH, 'Transforming Security: A South African Experiment' in J Braithwaite and H Strang (eds), *Restorative Justice and Civil Society* (Cambridge: Cambridge University Press, 2001).

96. Shearing, *ibid*.

97. Blagg & Valuri, *An Overview of Night Patrols in Australia*, above n 90; Blagg & Valuri, 'Self-Policing and Community Safety', above n 90.

98. Bayley DH & Shearing CH, 'The Future of Policing' (1996) 30 *Law and Society Review* 592. It is becoming common practice in the literature on policing to distinguish between the police as an agency and *policing* as a broader activity carried out by a diversity of government and non-government organisations as well as the private sector.

99. Gordon Inquiry, above n 82.

100. Department for Community Development, *Capacity Building Strategic Framework, 2004 to 2006*, Draft Report (Perth: Department of Community Development, 2004).

provide an interesting case study. Conditions in the Kutjungka region of Western Australia, particularly around the remote Aboriginal community of Balgo Hills, have been the source of considerable disquiet for some time.

A recent coronial inquiry into the deaths of two young petrol sniffers by suicide at Balgo<sup>101</sup> in November 2002, identified a catalogue of problems facing the community. The coroner cited a South Australian coronial inquiry regarding a number of deaths in similar circumstances in the Anangu Pitjantjatjara Lands identifying a cluster of interconnected factors at work, including poverty, despair, lack of hope, family violence, extreme marginalisation and dispossession, absence of educational and employment prospects; noting that these factors were also present in the Balgo case. While acknowledging that steps are being undertaken in the area to combat the problem, the coroner sombrely observed:

Regrettably, at the time of the inquest hearing living conditions are still poor, health standards and hygiene standards are low, available food is of questionable quality, there are no jobs and in spite of the commitment to funding by various Governments, the quality of life does not seem to be improving.<sup>102</sup>

The crises identified in the Kutjungka region in the coroner's report have been well documented in previous surveys, inquiries and reports on the area. An inquiry by Mosey<sup>103</sup> on petrol sniffing recommended the urgent need to establish youth-focused facilities in Balgo, along with exploring the potential for setting up out-station programs similar to the successful Mount Theo program established by the Yuendumu community in the Northern Territory. Mosey also saw a need to work with the families of sniffers, not just with them in isolation. He noted that some successful initiatives in the Northern Territory had worked with families to build resilience and capacity and had chosen not to work with the sniffers directly.

There is agreement among close observers of official reaction to sniffing outbreaks that the issue tends to induce panic and paralysis, and a stampede towards the next quick solution:

There is something about the 'petrol sniffing syndrome' which makes holes in human beings capacity to think. The failure to think, or maybe it is the failure to know how to think about it, seems to lead to repetitive paralysis of concerted action.<sup>104</sup>

This stampede tends to trample over painstakingly seeded knowledge on the issue, while searching for the panacea. The view from those with considerable experience living with people in the Kutjungka region tends to suggest a profound fracturing of identity—particularly male—caused by the changes forced upon Aboriginal society by contact with the non-Aboriginal world. McCoy explores the issues employing the Kutjungka notion of *kanyininpa*, which he takes from the earlier work in the region by the anthropologist Myers. *Kanyininpa* translates as 'holding', 'looking after', 'nurturing', and refers to the 'ritual occasion when older men mediated the authority of the *tjukurrpa* (dreaming) to younger men at Law time'.<sup>105</sup> In a sense, issues such as petrol sniffing reflect the difficulties some young men have in finding a meaningful passage to adulthood in the absence of this 'holding' process and the care of older men that came about as a result. Inexorably, it seems, issues such as petrol sniffing link back to questions of Aboriginal law and how it can be granted a respectful space within community building initiatives. The ongoing Kutjungka/Tjurabalan regional initiative offers some valuable ideas on how this can be achieved.

## The Munjurla study: 'a roadmap through the spinifex'

The Munjurla study is a 'scoping, profiling and planning process' carried out as part of the Western Australian Council of Australian Governments' trial.<sup>106</sup> The trials are being conducted in all states and territories and are essentially attempts to forge stronger links between state and Commonwealth governments and Aboriginal communities. The Western Australian initiative is in the Kutjungka/ Tjurabalan region – a 39 000 square mile area of the East Kimberley, that includes the Tjurabalan Native Title Determined Area and communities such as Balgo, Mullen, Billiluna, Ringers Soak and Yagga Yagga.<sup>107</sup>

101. Hope A, *Record of Investigation into Deaths of Owen James Gimme and Mervyn Miller* (Perth: Coroners Court of Western Australia, 2004).

102. *Ibid.*

103. Mosey, above n 66. I am extremely grateful to Trevor Jewel of Mercy Community Health Services for forwarding the papers by Mosey and for discussing the issues.

104. San Roque C, *Petrol Sniffing: An Exercise in Surviving Psychic Pain*, Background Paper (Carpa Manual: Intjartname Aboriginal Corporation, undated).

105. McCoy BF, *If We Come Together Our Health Will Be Happy: Aboriginal Men Seeking Ways to Better Health* (Melbourne: School of Population Health, University of Melbourne, 2003).

106. Lingjari Foundation, *The Munjurla Study: A Scoping, Profiling and Planning Process in Respect of the WA COAG Site Trial for the Purposes of Informing the Negotiation of a Comprehensive Regional Agreement* (Broome: Lingjari Foundation, 2004).

107. The determination of these places as constituting a 'region' is in itself a significant break from the 'west to east' regional construction.

The Munjurla study should be required reading for anyone involved in law and governance issues in remote areas, not least because of the respectful stance it adopts towards Aboriginal law and custom while breaking out of the blame and finger-pointing style that often harms initiatives of this kind. The focus is very much on reconciliation rather than recrimination. The style in which the research for the report has been conducted has been strongly influenced by the values of an Appreciative Inquiry,<sup>108</sup> which deliberately focuses on potential strengths rather than dwelling on perceived weaknesses.

[The report s]pells out a new way of doing business with remote Aboriginal communities based on strong and enduring partnerships between the region, governments and the private sector, and an acceptance of shared responsibility for joint action to meet agreed outcomes. In particular, it is about identifying practical ways in which people of the Tjurabalan-Katjungka region, governments and the non-government sector can work collaboratively and cooperatively together.<sup>109</sup>

The study focuses on issues of great significance for the construction of resilient communities, pointing to a profound lack of capacity for self-governance in the region exacerbated by an 'absence of strategic relationships and networks to the outside world'.<sup>110</sup> The report places emphasis on, amongst other things, the need to nurture new partnerships, a regional approach, a commitment to best practice, sustained involvement and capacity building; the aim being to enable increased social stability, participation and engagement, sustainability, governance capacity and economic independence.<sup>111</sup>

The study sees the crux of the problem in 'relational' terms. There are relationships, which have been fractured and broken that need a process of reconciliation and trust building, and there are others that have never truly existed and need to be nurtured. Relationships between the region and government 'have been damaged by an historic pattern of unequal interaction'; relationships with philanthropic organisations and the private sector 'have not been built'; relationships between different Aboriginal interests 'need to be reconciled'; and relationships that historically 'bonded community members together that have been damaged by substance misuse and violence' need to be healed.<sup>112</sup>

The report recommends 'new structural arrangements and processes'.<sup>113</sup> These include the creation of a Regional Forum (representing the disparate Aboriginal voices and interests in the area), a partnership process it calls a 'Main Table' to negotiate formal agreements with government, and a series of 'Side Tables' or working groups comprising government, non-government and community representatives to tackle priority issues such as alcohol, community safety, education and training, health, housing and infrastructure, land and cattle.<sup>114</sup> The Side Tables could function similarly to Community Justice Groups, providing a space within which communities could negotiate directly with relevant organisations on the development of relevant community owned justice mechanisms

The process is holistic in the sense that it draws together a variety of strands, such as economic empowerment, community development and capacity building, crime prevention and community safety (usually dealt with as discrete issues) within a single envelope. It is also noteworthy that the process nests levels of government (local, regional, state, Commonwealth) with other interests (philanthropic, private sector) and Aboriginal self-governance as a necessary prerequisite for progress:

What makes the arrangements fundamentally different from those that currently exist is the that social capital and capacity is purposely built into the structures by ensuring that decisions and action are informed by people with relevant knowledge, skills and experience. In particular these structures are designed to strategically link the region to relevant expertise and networks including access to the highest levels of government, the philanthropic and private sector.<sup>115</sup>

The Munjurla Study illustrates that progress in remote areas is a long-term process requiring a diversity of inter-linked strategies. Community justice is an important dimension of this evolving process.

108. Appreciative inquiries are underpinned by the belief that workers in organisations have invaluable knowledge – as well as a tacit and intuitive understanding – of their domain: they are also a primary source of 'energy' for innovation and change. It is an approach to organisations, 'based on strengths rather than weaknesses, on visions of what is possible rather than what is not possible'. As Leibling and Price argue: 'Unlike traditional social science research, which tends to focus on problems and difficulties, AI tries to allow good practice to emerge, and aims to understand what makes good practice possible. What are the conditions under which we perform best?', Leibling A & Price D *The Prison Officer* (London: Waterside Press, 2001) 6.

109. Lingiari Foundation, above n 106, 8.

110. *Ibid.*

111. *Ibid.*

112. *Ibid.* 11.

113. *Ibid.*

114. *Ibid.* 13.

115. *Ibid.*

A number of the law and justice strategies discussed in this paper involve working with the courts as well as police and other justice agencies. There has been significant growth of interest in this particular area of Aboriginal involvement in recent years, culminating in some interesting developments.

### 13. Aboriginal people and the courts

Innovation in the 1990s, in the wake of the Royal Commission into Aboriginal Deaths in Custody, tended to focus on the 'front end' of the criminal justice system through the creation of diversionary options for juvenile offenders, such as police cautioning and family conferencing. These were very successful in taking out of the system a population of first and minor offenders and increasing the opportunities for families and victims to participate in the justice process – although success rates have been greater for non-Aboriginal young offenders, who have been the main beneficiaries of diversionary mechanisms.<sup>116</sup> One underpinning reason for these initiatives was a belief that they would increase Indigenous involvement in the justice process.

Less attention was paid to the courts themselves as a place for Indigenous participation. While the involvement of Indigenous people in sentencing has taken place on a local level for a considerable length of time, arrangements have tended to be relatively ad hoc and dependent upon the energies and commitment of local magistrates, prosecutory authorities and senior members of the Indigenous community. Recently, however, there has been a tendency to give these proceedings greater formal recognition in some states and link them to broader Aboriginal justice strategies designed to increase Indigenous involvement in the criminal justice system.

Urban, rural and remote Aboriginal communities consulted by the LRCWA have expressed a sense of alienation from the criminal justice system. Many believe that the present system has failed them. The LRCWA's consultations have identified a desire for a greater role by Indigenous people in the court process, and for a reconfiguration of the layout of the court itself to make it more accessible and comprehensible to Indigenous people.

The LRCWA has seen a number of local initiatives, such as the Circle Court at Yandeyarra, which do enjoy the backing of Indigenous communities. Such initiatives do not involve changes to fundamental legal principles, significantly increasing the level of involvement by Indigenous people; although in other states some legislative reform has enabled similar processes. Aboriginal Courts and Sentencing Circle Courts as currently being rolled out in Victoria (Koori Courts), New South Wales (Circle Sentencing Courts), Queensland (The Murri Court and Rockhampton Court) and South Australia (Nunga Court) fit into the definition of a creative hybrid. While they have not all been community initiated in the first instance, most initiatives (certainly those in Victoria and New South Wales) have been energised and supported by Aboriginal justice strategies in those states and have the strong backing of the relevant Aboriginal Justice Council. For reasons of brevity I intend to concentrate on the New South Wales Circle Sentencing Court and the Victorian Koori Court.

Aboriginal Courts are not based upon Aboriginal Customary Law as such, and operate within the framework of the general law. This is not to say that Aboriginal values and principles are excluded from the process. These courts may reduce the sense of estrangement many Aboriginal people feel when confronted by the non-Aboriginal system.

#### Alienation from the court

Lack of understanding of cultural issues in courts raises some considerable difficulties for Aboriginal people, as one Aboriginal person told the LRCWA:

White man doesn't understand the black man law. There is no understanding of Customary Law protocols. Pre-sentence and Court reports should include cultural matters, such as the significance of avoidance relationships. Lack of understanding of these avoidance principles sometimes causes Aboriginal people to break their law and get punished when they return to the community and even while a trial is going on. The trial itself creates situations where law is broken. For example, where a mother-in-law testifies about a son-in-law, people coming into Court who have avoidance relationships and are forced to sit or stand with each other.<sup>117</sup>

Furthermore, as they are currently configured, courtrooms are spatially, culturally and linguistically non-Indigenous – there are no Indigenous cultural points of reference. Moreover, they are presided over by figures of authority to whom

116. Blagg, above n 10.

117. Author's field notes from Law Reform Commission of Western Australia, *Thematic Summaries of Regional Consultations – Pilbara*, 6–11 April 2003.

Indigenous people usually cannot relate and with whom they have little or no connection. Aboriginal people maintain that the alienation many experience in the system is a factor in the high rates of repeat contact with the system, failure to attend court, and failure to comply with court orders.

Aboriginal people have told the LRCWA that they would ultimately wish to see Aboriginal judges and magistrates, as well as mechanisms for ensuring that non-Aboriginal judicial officers are correctly briefed about Aboriginal defendants. The Geraldton consultations, for example, found support for an Aboriginal Court 'parallel to the existing ones' (the Victorian Koori Court being identified as a useful model), while consultations in Bunbury, Broome and Fitzroy Crossing found considerable support for establishing an Aboriginal Court in those regions.

## Why Aboriginal courts, why sentencing circle court?

Multiple influences have contributed to the emergence of Aboriginal Courts. They include a number of factors discussed already in this paper, such as the continuing over-representation of Indigenous people in the criminal justice system and the failure of the established system to deal with Indigenous offenders. This has encouraged the search for alternative solutions to the problem. Some working close to the problem, such as magistrates, have been keen to implement key recommendations of the Royal Commission into Aboriginal Deaths in Custody, including those focusing on Indigenous involvement in the justice process.<sup>118</sup> Also, though having less direct influence, the emergence of restorative justice philosophy and practice has provided a further rationale for experimenting with alternative forms of justice. Restorative justice philosophies tend to support initiatives seeking to relax the rigid uniformity of legal process, and encourage a relative plurality of justice mechanisms to flourish. The interest in Aboriginal Courts comes along at the same time as other initiatives (such as 'therapeutic jurisprudence') which attempt to make the court process more sensitive to particular problems or issues – such as offending linked to drug use. However Marchetti and Daley reject claims that Aboriginal Courts are simply another variant of therapeutic jurisprudence, arguing that they exist in a category of their own 'due to the greater role played by the Indigenous community in the process, and the changes they bring to the ways business is conducted'.<sup>119</sup> They suggest an increasing synergy between Indigenous and non-Indigenous values; 'the black robe appears to be deferring to the black face, at the same time, Indigenous people are embracing portions of white law'.<sup>120</sup>

This approach has some support from experts in jurisprudence, who maintain that the Westminster system, and its system of common law, is sufficiently robust and flexible to accommodate a diversity of customary rules.<sup>121</sup> Aboriginal Courts and Circle Sentencing Courts share similar objectives, such as reducing Aboriginal over-representation in the prison system, providing credible alternatives to imprisonment, reducing the failure to appear rate in court, and reducing the rates at which court orders are breached.<sup>122</sup> At the community level they may empower Aboriginal communities and overcome some of the alienation many experience. Circle Sentencing Courts, already being piloted in Yandeyarra, also provide a valuable means of involving Indigenous people more directly in the justice process. Having evolved in Canada to suit conditions in remote communities, this model may well be appropriate to conditions in outlying areas, because it is more 'portable' – requiring only basic infrastructure.

New South Wales has thus far pursued the Circle Sentencing option, with strong backing from the state's Aboriginal Justice Advisory Council.<sup>123</sup> The initial scheme was piloted in Nowra and is being rolled out in other parts of the state. Lilles offers this description of the circle:

It engages the community and the criminal justice system as partners and to lesser extent victims and offenders in the resolution of criminal justice disputes... It is not a panacea and its use should be restricted to motivated offenders who have the support of the community.<sup>124</sup>

In New South Wales, Circle Courts are designed for more serious or repeat offenders (excluding sexual offences and family violence) and aim to achieve full community involvement in the sentencing process. It aims to broaden the

118. Marchetti E & Daley K, 'Indigenous Courts and Justice Practices in Australia' (2004) 227 *Trends and Issues in Criminal Justice*, 4; Harris M, 'From Australian Courts to Aboriginal Courts in Australia: Bridging the Gap?' (2004) 16 *Current Issues in Criminal Justice* 26–52.

119. Marchetti & Daley, *ibid* 5.

120. *Ibid*.

121. McIntyre G, 'Aboriginal Customary Law: Can It Be Recognised?', Background Paper No 9, below pp 341–80.

122. For a full review, see Potas I, Smart J, Brignell G, Thomas B & Lawries R, *Circle Sentencing to New South Wales: A Review and Evaluation* (Sydney: Judicial Commission, 2003); Marchetti & Daley, above n 118.

123. The enabling legislation is the *Criminal Justice Interventions Act 2002* (Cth). Circle sentencing originated in Canada – the first officially recorded case was in the Yukon Territorial Court: *R v Moses* (1992). For a discussion, see Lilles, below n 124.

124. Lilles H, 'Circle Sentencing: Part of the Restorative Justice Continuum', in Morris A & Maxwell G (eds), *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Oxford: Hart, 2001) 167.

sentencing phase so that it can fully examine the underlying issues of offending behaviour and the needs of victims of crime. The experience of Circle Courts in New South Wales reveals them to be more labour intensive than Aboriginal courts. Circle Courts require anything up to three hours to complete, plus a follow-up meeting to determine whether the plan developed in the Circle Court has been completed. Circle Courts are similar in some respects to the Family Group Conferencing process.

The focus in the process is on informality. The Circle Court, as the term implies, breaks up the hierarchical model of the court and establishes a circle which includes the presiding judicial officer, the offender and the other participants. The defence council sits with the offenders and his/her family or support people. Others participating in the sentencing are free to sit anywhere in the circle. The discussion that follows would focus on a broad range of issues, often of a nature considered irrelevant in criminal procedure, such as the role of the community in preventing further offending and the extent of similar crimes in the community. The circle is reconvened several months later and the court hears from the support group about the offender's progress. If the offender has successfully met the conditions, these may be extended or modified as probation conditions. If the offender has shown no willingness to meet the conditions then the circle may be abandoned and the offender sentenced in a regular court.<sup>125</sup>

## Koori courts in Victoria

The development of the Koori courts is an initiative of the Victorian Aboriginal Justice Agreement and was developed in collaboration with the state's Regional Aboriginal Justice Coordinating Committees.<sup>126</sup> The Department of Justice's Indigenous Issues Unit has responsibility for the development of the courts. The first court was established in the rural town of Shepparton in 2002 followed by metropolitan Broadmeadows in late 2003 and, most recently (January 2004) in the rural town of Warnambool.

Business is conducted at an oval table rather than from the bench. The offender sits at the table beside his or her solicitor and is permitted to have a support person. Once the charges have been read and the defence counsel has responded, the offender and the support person are invited to speak directly to the magistrate about the offender's behaviour. Others in the spectators' area may also be asked to speak. The degree of informality adopted by the court varies by jurisdiction and magistrate but, in general, considerably more time is taken for each matter than would be the case in a regular court. Importantly also, there are attempts to incorporate Indigenous symbols and ways of conducting business: through modifications to the physical layout of the court to make it less hierarchical and didactic; and through the introduction of the Aboriginal flag and Aboriginal artefacts into the court.

## Indigenous justice workers and Elders

The magistrate of the Shepparton Koori Court insists that 'the Elders are the court'. Active participation by Elders is essential if the court is to be an Aboriginal Court – as opposed to simply a court with Aboriginal Elders' participation. The Koori Justice Workers (Justice Department employees) play a pivotal role in the process, acting as the link with the Koori community and giving advice to the magistrate. In many respects the Koori Justice Workers are the lynchpin of the process, bringing their local knowledge of offenders and their families to the table.

Alongside Elders, the role of the Indigenous court-worker is fundamental to the successful operation of the court – indeed, it is difficult to see how the court could operate optimally without this position as it cements together the community, Elders, the offender and the court. In Victoria the Aboriginal Justice Officer actively participates in the court process as well as in pre-court discussions.

The new initiatives deserve careful evaluation. Some preliminary monitoring of the New South Wales process suggests that it has been successful in gaining the support of many participants, the Indigenous community and relevant agencies.<sup>127</sup> Evidence also suggests that the process assists in breaking the cycle of recidivism, introduces more relevant and meaningful sentencing options for Aboriginal offenders, and is reducing the barriers that currently exist between the courts and Aboriginal people.<sup>128</sup>

125. For more information, see the Aboriginal Justice Advisory Council website: <<http://www.lawlink.nsw.gov.au/ajac.nsf>>.

126. The Koori Court is enabled under the *Magistrates' Court (Koori Court) Act 2002* (Vic), which establishes a Koori Court Division of the Magistrates' Court. The legislation has the objective, at 1(b), of 'ensuring greater participation of the Aboriginal community in the sentencing process ... through the role to be played in that process by the Aboriginal elder or respected person and others.' The Act goes on to define a family member, an elder and an Aborigine for purposes of the Act, and sets out the kinds of offences that can be dealt with and those proscribed (sexual offences, family violence). The defendant must enter a guilty plea (s 4F(c)(ii)); and intends to consent to involvement in a diversionary program (s 4F(c)(ii)).

127. Potas et al, above n 122.

128. Ibid.

The initiatives demonstrate the potential for systemic reform that increases levels of Aboriginal involvement. Over time it is possible to envisage a larger role for Aboriginal people in these processes, with Elders being involved in the trial rather than just the sentencing stages – a practice to be established in Victoria in the juvenile justice area.

## 14. Concluding comments

There is a strong case for expanding the capacities of Aboriginal communities, in partnerships with levels of government and a diversity of justice and policing agencies, to devise and develop active local justice mechanisms to deal with issues of local concern. I have argued that establishing community justice mechanisms involves a focus on achieving sustainability, durability and resilience in structures, processes and programs; acknowledging that many Aboriginal communities operate on two laws, rather than one; being committed to nurturing the necessary governance structures; and being willing to participate in capacity building processes both in Aboriginal communities and in government agencies.

I have suggested that both the language and the practice of *community-based* services often works to ensure that power and control are retained by government agencies, perpetuating that meticulously embroidered fiction that it is possible both to 'empower' communities and not to give up any of one's own. Many forms of 'consultation' by government agencies are about manufacturing consent to ideas and practices defined in advance by those organisations.

There is a tendency for government departments across Australia to think of capacity building and governance in extremely narrow terms and equate them simply with enhanced service delivery.<sup>129</sup> In opposition to this, recent thinking has favoured a focus on governance structures and capacity building as opposed to simply improving service delivery. Law and justice structures and processes constitute primary links in the chain of governance and are, as such, prerequisites for the development of healthy communities.

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129. Aboriginal and Torres Strait Islander Social Justice Commissioner, *2003 Report* (Sydney: Human Rights and Equal Opportunity Commission, 2004).