

# background paper 15

## Aboriginal people, criminal law and sentencing

Philip Vincent\*

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## Introduction

Readers will appreciate that the subject matter of this background paper is bound to raise difficult and controversial questions – indeed, some of the most difficult and controversial that our community faces. Nevertheless, they must be faced squarely. We see an alarming picture when we examine the full impact of the current Western Australian justice system upon the lives of Aboriginal people. The major impact falls upon Aboriginal people themselves, as victims of crime and as people caught up in a system that is totally alien, yet to which they are hostage. It also, of course, affects the wider community.

Consultations with Aboriginal people by the Law Reform Commission of Western Australia (LRCWA) have shown that the current justice system insofar as it affects Aboriginal people is simply not working, other than in a negative way, and that significant changes are needed to make justice relevant to and effective for Aboriginal people. These changes involve the recognition and utilisation of Aboriginal customary law.<sup>1</sup>

One of the most alarming features of the current situation, which indicates the need for serious reform, is the over-representation of Aboriginal people in the prison system compared with non-Aboriginal people. Although Aboriginal people comprise only 3.2 per cent of the state's population,<sup>2</sup> they make up approximately 41 per cent of the state's prison population.<sup>3</sup> This level of over-representation of Aboriginal people in the prison system (12.81) is even worse than at the time of the Royal Commission into Aboriginal Deaths in Custody in 1991.<sup>4</sup>

In terms of current rates, Western Australia has a greater rate of Aboriginal imprisonment than any other state or territory of Australia, standing at around 2,400 Indigenous persons per 100,000 of the adult Indigenous population.<sup>5</sup> The national rate is 1,800 per 100,000.<sup>6</sup>

The recent Gordon Inquiry into family violence and child abuse in Aboriginal communities in Western Australia<sup>7</sup> reported that in this state during the period 2000–01 Aboriginal children were 7.6 times more likely to be subjected to substantiated child abuse than non-Aboriginal children<sup>8</sup> and that family violence is endemic in many Aboriginal communities.<sup>9</sup> The Inquiry concluded that this type of violence and child abuse is not something sanctioned by Aboriginal customary law,<sup>10</sup> and that the loss and destruction of Aboriginal culture has contributed to the current crisis in which many Aboriginal people find themselves.<sup>11</sup>

Aboriginal people thus suffer twice – as an imprisoned population and as victims of their own offending. This bleak picture means, amongst other things, that mainstream law (i.e. non-Aboriginal law, sometimes also called 'whitefella law') has failed as a system to properly address problems in Aboriginal communities and other alternatives are now clearly necessary.

In its consultations with Aboriginal communities as part of this project the LRCWA heard time and again that Aboriginal customary law was still strong and could be useful in dealing with Aboriginal offenders, particularly young people, but that it has been 'cut back' by mainstream law and not given a chance.

At Laverton, LRCWA representatives were told that 'Aboriginal law is strong and is being actively practised. But white law does not recognise this and does not respect Aboriginal customary law'.<sup>12</sup> In the Pilbara, Aboriginal people said that: 'The Elders know their law and are able to control the behaviour of young people when they were on the community'.<sup>13</sup>

In a report to the Western Australian and Commonwealth governments on community–government affairs, the Ngaanyatjarra Council, which has responsibility for the large central reserve area of Western Australia, stated:

1. For those who wish to do so, the views expressed in the consultations can be accessed on the LRCWA's website: <[www.lrc.justice.wa.gov.au](http://www.lrc.justice.wa.gov.au)>.

2. Australian Bureau of Statistics, *Census* (2001).

3. Policy Planning and Review, Department of Justice, *Number of Aboriginal Persons in Prison by Percentage and Gender from January 2000: Monthly Graph Report for November 2004* (December 2004).

4. See Biles D & McDonald D (eds), *Deaths in Custody Australia 1980–89: The Research Papers of the Criminology Unit of the Royal Commission into Aboriginal Deaths in Custody* (Australian Institute of Criminology, 1992) 92, Table 6.3 'Aboriginal Over-representation in Prison'. This shows a level of over-representation in Western Australia of 11.49 based on a percentage Aboriginal population in the state of 2.69 with an Aboriginal prison population of 30.91%.

5. 'Crime and Justice Article – Indigenous Prisoners' in Australian Bureau of Statistics, *Year Book Australia* (2002), Table 11.31 'Indigenous Imprisonment – 30 June 2002'.

6. *Ibid.*

7. 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 Report').

8. Gordon Report, *ibid* 41.

9. *Ibid* 48.

10. *Ibid* 70.

11. *Ibid* 71.

12. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, [1].

13. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, [4].

There is also strong interest in greater recognition of customary Ngaanyatjarra law and in how Ngaanyatjarra people can work with the Government through the WAPS [Western Australian Police Service] and the DOJ [Department of Justice] to make sure that customary Ngaanyatjarra law and Australian or mainstream law and order can both be applied on the Ngaanyatjarra Lands.<sup>14</sup>

In this paper I look at the place of Aboriginal customary law (sometimes called Aboriginal 'traditional' law or, more usually, by Aboriginal people themselves, simply 'the law') in mainstream law and examine some changes that might be considered to make customary law stronger to deal with community problems. This would, according to Aboriginal people consulted by the LRCWA, be in the interests of Aboriginal people and also in the interests of the rest of the community as it would cut down on offending and the vicious cycle of imprisonment.

## **Part I: Aboriginal customary law today**

### **Aboriginal customary law continues**

The LRCWA, in its consultations for this project, was told of the continuing strength of Aboriginal customary law in Western Australia. In Laverton the Commission was told that 'Aboriginal law is strong and is being actively practised. But white law does not recognise this and does not respect Aboriginal customary law'.<sup>15</sup>

Anthropologists Ronald and Catherine Berndt in a chapter on 'Law and Order' in their book *The World of the First Australians* explain customary Aboriginal law:

The pattern or blueprint of behaviour is everywhere in traditional Aboriginal Australia framed in terms of the past. To put it a little differently, the mythical characters instituted a way of life which they introduced to human beings; and because they themselves are viewed as eternal, so are the patterns they set.<sup>16</sup>

Thus aspects of Aboriginal law embrace a wide range of matters, including how to relate to kin (there are avoidance rules), marriage rules, places where people can and can't go, behaviour at funerals and burials, the distribution of food, the showing of respect, the ownership and care of land, procedures for entering other people's country, ritual matters, the passing on of knowledge and a host of other aspects.

Aboriginal law and culture have historically been subject to attack and degradation by the non-Aboriginal society ever since colonisation. It is only in more recent times that the understated uniqueness of Aboriginal culture has become appreciated. Its value in terms of sustainability of community, Australia's fragile environment, sensitive spirituality, art, dance and song is now internationally recognised.

In our minds, reinforcement of the continuing existence and importance of Aboriginal law and culture in Western Australia has in recent times come about through the series of cases heard in the Federal Court of Australia under the *Native Title Act 1993* (Cth). Although it is not necessary under the terms of reference of this project to report on native title, the findings of the courts dealing with the issue and the outcomes of native title applications are highly relevant. Recognition of native title under the Act must be based, amongst other things, on a finding that the native title rights and interests are possessed under 'the traditional laws acknowledged, and the traditional customs observed' by the Aboriginal people concerned.<sup>17</sup>

There are to date 10 determinations where native title has been held to exist in Western Australia. They cover vast community areas.<sup>18</sup> Cases in other areas are yet to be heard. By way of example, in the north-east Kimberley case brought by the Miriung Gajerrong people in the Full Court of the Federal Court, Lee J concluded:

[T]he evidence was 'clearly sufficient' to hold that the Miriung and Gajerrong community retained a form of practice of traditional laws and customs that showed that, as far as practicable, the community had a connection with the land attributable to an ancestral community. His Honour said he had no doubt that the community relied upon links with forbears for the right to enjoy, or the obligation to perform, the numerous activities identified in the evidence.<sup>19</sup>

14. Ngaanyatjarra Council, Aboriginal Corporation, *Doing Business with Government* (Alice Springs, July 2003) 33.

15. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, [1].

16. Berndt RM & Berndt CH, *The World of the First Australians, Aboriginal Traditional Life: Past and Present* (Canberra: Aboriginal Studies Press for the Australian Institute of Aboriginal Studies, 1988) 336 (emphasis added).

17. *Native Title Act 1993* (Cth) s 223.

18. National Native Title Tribunal <[www.nntt.gov.au](http://www.nntt.gov.au)> 'current determinations'.

19. *Western Australia v Ward* (2000) 99 FCR 316, 360.

Activities identified in the evidence referred to by his Honour included:

- almost without exception members of the Miriuwung and Gajerrong community retain, and are known to each other by Aboriginal names, in addition to European names;
- the subsection or 'skin' names still form part of the organisation of the community;
- marriage rules based on the subsection system have yielded to the influence of the surrounding European lifestyle, but the avoidance rules and taboos of that system remain relevant to community behaviour and are adhered to;
- avoidance of places according to the requirements of traditional laws is observed, and the names of the recently deceased are not spoken;
- traditional ceremonial practices are still followed, including initiation ceremonies;
- the passing down of ritual knowledge incrementally from elders to others continues to be followed; rules on the restriction of access to such knowledge are rigidly applied;
- Ngarranggarni stories are known and referred to regularly and the elder members of a community regard themselves as obliged to transfer this knowledge to the younger members. (His Honour referred to important Ngarranggarni stories relating to the claim area, which were spoken of in evidence);
- rules relating to control of knowledge of separate men's and women's law are followed and regarded as important in the organisation of a community;
- there is a deep community interest in the preservation of Miriuwung and Gajerrong languages;
- traditional skills handed down through generations remain; for example, the making of spears still serves a purpose in fishing in riverine pools; and members of the community continue to hunt fish and gather traditional foods;
- the members of the Miriuwung and Gajerrong community retain substantial knowledge of the location and use of bush foods and bush medicines; and
- hunting and fishing practices are not only motivated by the desire for sustenance but by the desire to maintain a connection with the land and with ancestors: there was evidence of specialised knowledge of the methods for hunting certain animals, and for the proper or customary way to prepare and cook them.<sup>20</sup>

Other cases in Western Australia where native title has been held to exist have involved similar findings by the court or have been consented to by the respondent parties, which in all cases have included the state government. The importance of these cases is that a determination of native title necessarily rests upon the legal recognition of a community or society that is living under a legally recognised system of law. Thus, in the High Court in the case *Members of the Yorta Yorta Community v State of Victoria*,<sup>21</sup> judges explained that 'to speak of rights and interests possessed under an identified body of laws and customs is ... to speak of rights and interests that are the creatures of the laws and customs of a particular society that exists as a group'.<sup>22</sup> They explained that the word 'society', in the context of native title, is to be understood as 'a body of persons united in and by its acknowledgement and observance of a body of law and customs'.<sup>23</sup>

Aboriginal people have said—in the LRCWA consultations and elsewhere—that it is now time to fully respect Aboriginal law and culture and allow it to have proper operation in the field of human relationships and social order. If this is not done, the destruction of Aboriginal society will continue through the ravages of alcohol and self-destructive violence which have been referred to earlier.

## Community aspect of customary law

There are differences between the approach taken in Aboriginal customary law and mainstream law. Anthropologist Robert Tonkinson explained:

[T]he Aborigines see a wholeness in their cosmic order, which comprises human society, the plant and animal world, the physical environment and their spiritual realm... To maintain this unity and ensure a continual outpouring of power or life-force from the withdrawn spiritual powers, each generation of Mardu is charged with the regular and proper performance of rituals and obedience to the Law.<sup>24</sup>

20. Ibid 360–361 per the Full Court on appeal, which did not disturb these findings. Nor were the findings disturbed in the further appeal to the High Court.

21. [2002] HCA 58 (12 December 2002).

22. Ibid [50].

23. Ibid [49].

24. Tonkinson R, *The Mardudjara Aborigines: Living the Dream in Australia's Desert* (New York: Holt, Rinehart & Winston, 2nd ed., 1991) 22, n 3.

According to Tonkinson, despite its wide operation, Aboriginal law is concrete and 'mineable'. In discussing Mardu people Tonkinson wrote that:

[T]his legacy [of the dream time past] is now connoted in [the Mardu's] use of the English word 'law', the coining of which suggests that they see parallels in terms of obedience to a set of powerful dictates and of punishment for non-conformity since, in both systems, human agents are involved in the punishment process.<sup>25</sup>

Anthropologist Geoffrey Bagshaw has similarly described the Law of the Karajarri people of the south-west Kimberley in the following terms:

Karajarri Law can be said to exist and operate as an objectified, integrated and highly prescriptive expression of normative cultural meanings, values, beliefs and practices. From this purely analytical point of view, the Law constitutes the principal ideological mechanism by means of which Karajarri culture both images and regulates itself.

... Karajarri Law implicates and conditions diverse aspects of the natural and social worlds. Such aspects include, inter alia, the origins, attributes and maintenance of floral and faunal species, the nature and form of social organisation (including kinship, marriage and the section system of social classification), human relationships to country (including knowledge of cultural geography, economic resources and technology), the conduct of traditional religious activity (including initiation rituals), and the constitution of personal and group identity.<sup>26</sup>

These extracts suggest that Aboriginal law plays a part in maintaining the natural order of all things, not just of a particular individual. This is reflected in the description often used of the operation of Aboriginal law as a 'healing' or 'restorative' process with a community focus. Thus, offending against the community is seen as being caused by a type of sickness. Mainstream law, on the other hand, tends to focus on the misdeeds only of an individual and punishes largely on the basis of a tariff—that is, what the offence deserves—whilst looking also at mitigating factors personal to the offender.<sup>27</sup>

Aboriginal law also differs in its approach to causes of offending. For example, during its consultations the LRCWA representatives were told that '[e]veryone involved in a fatal car accident is liable to Aboriginal law punishment – not only the driver'.<sup>28</sup> I was once told about a driver being punished under Aboriginal law when a woman passenger stepped out of his parked car and was run over by a passing vehicle. The explanation given to me was that the driver should not have taken the woman away in the car in the first place.<sup>29</sup> This, of course, is not the way the mainstream law would look at the matter, but it has its own logical basis in looking at social causes of the incident rather than the merely immediate, mechanical causes.

Mainstream law looks only in a limited way to community responsibility for wrongs. The *Criminal Code*, which sets out the law on criminal matters, limits the class of offenders to those who actually commit the offence, aid in its commission, advise or help bring about the offence or conspire together to commit a wrong.<sup>30</sup>

## The place of kinship

Crucial to the operation of Aboriginal law are kinship relationships. Anthropologist AP Elkin explained:

[T]he obligations of kinship govern a person's behaviour from his earliest years to his death, and affect life in all its aspects: in conversation, visiting and camping; at the crises of life, namely child-birth, initiation, marriage, sickness and death; and in quarrels and fights.<sup>31</sup>

Ronald and Catherine Berndt refer to Aboriginal kinship as:

[T]he articulating force for all social interaction [in being] in effect a shorthand statement about the network of interpersonal relations within that unit – a blueprint to guide its members. It does not reflect, except in ideal terms, the actuality of that situation; but it does provide a code of action which those members cannot ignore if they are to live in relative harmony with one another. And kinship, in this situation, pervades all aspects of social living.<sup>32</sup>

25. Tonkinson, *ibid.*

26. Bagshaw G, *The Karajarri Claim: A Case Study in Native Title Anthropology*, published as 'Oceania Monograph 53' (Sydney: Oceania Publications, 2003) 80–81 (footnotes omitted).

27. See, for example, the sentencing criteria set out in the *Sentencing Act 1995 (WA)* s 6.

28. Law Reform Commission of Western Australia, 'Thematic Summaries of Consultations: Cosmo Newbery' (6 March 2003) [4].

29. Personal communication with the author.

30. *Criminal Code (WA)* ss 7, 8, 558.

31. Elkin AP, *The Australian Aborigines: How to Understand Them* (Sydney: Angus & Robertson, 3rd ed., 1954) 112.

32. Berndt & Berndt, above n 16, 90.

Kin relationship is still strong in Aboriginal life in Western Australia. In its Kalgoorlie consultations the LRCWA heard that 'Aboriginal law has a complex set of protocols governing family relationships'.<sup>33</sup> In Wiluna/Meekatharra the Commission was told that 'family is everything'.<sup>34</sup>

It is important in this context to remember that by family or kin relationships, Aboriginal people use family terms in an extended way to refer also to 'classificatory' kin or family and some also refer to 'skin group' relations. This was explained by Merkel J in the native title determination his Honour made in favour of the Yawuru people at Broome. He said:

Central to the kinship system is the concept of skin groups. There are four different 'skin groups' in the community, and the skin group to which Yawuru persons belong places them in a certain kin relationship with everyone else. A Yawuru person at birth takes his or her skin relationship from the person's mother. Skin determines who the person may marry and governs the person's role in rituals and ceremonial activities, such as burials, as well as behaviour towards others. An important aspect of the skin concept is the obligation of skin brothers to take responsibility for putting young men through the law.<sup>35</sup>

Arising from its importance, there are various offences based on kin under customary law, such as marrying the 'wrong way', breaking rules about communicating with certain relations, neglecting or harming members of the family or treating them badly, fighting or 'humberging' and causing shame. These types of offences are not always recognised in mainstream law, yet the rules are crucial to Aboriginal community wellbeing. Ironically, and sadly, people's responses to these breaches of Aboriginal custom often result in their being brought to court under mainstream law because of their response to the breach. Sometimes a response is regarded as disproportionate to a situation in mainstream legal terms, but is perfectly understandable when the Aboriginal cultural context is taken into account.

For example, some offences under Aboriginal law have an extra dimension. They relate to important breaches of sacred law, often relating to special places or objects, as well as to behaviour. For reasons of Aboriginal law it is not appropriate to discuss such matters in this paper. However, it is important to note that they are significant matters, which Aboriginal people deal with in traditional ways within their own society.

## Punishments

Some non-Aboriginal people express concern that Aboriginal punishments (generally thought incorrectly by them to solely involve spearings) are 'barbaric' and should be abolished. International human rights covenants involving prohibitions against cruel and degrading punishments are sometimes mentioned in this context.<sup>36</sup> On the other hand, Aboriginal people often see their treatment at the hands of the mainstream justice system as inhumane. At the LRCWA's consultations at Wuggubun, Aboriginal delegates stated that the international obligations relating to physical punishments needed to be looked at from the Aboriginal point of view. For them, they said, prison is cruel and inhumane.<sup>37</sup>

In some communities, for serious offences, people may get hit or be speared as punishment. For this to happen in a proper way, permission is required from the appropriate authority and the degree of punishment is supervised. A person to be punished will often give themselves up for punishment because they believe that it is the right thing to do.<sup>38</sup>

Aboriginal law differentiates between physical punishment that is done properly and with proper permission and physical punishment that is done outside of proper processes—for example, by a person who has a grudge or is intoxicated. It is recognised that if the latter happens it can cause more trouble with the close relatives of the person who has been hurt and the initial problem is not solved.

In the LRCWA's consultation at Kalgoorlie, Aboriginal delegates impressed upon the Commission that:

33. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, [3(a)].

34. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Wiluna and Meekatharra*, 27–28 August 2003, [2(a)].

35. *Rubibi Community v Western Australia* (2001) 112 FCR 409, 437.

36. For example, the *International Covenant on Civil and Political Rights* Art 7, which prohibits torture or cruel and degrading treatment or punishments. The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* has provisions to the same effect. The United Nations *Rules for the Protection of Juveniles Deprived of Their Liberty* and *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('The Beijing Rules') have brought in standards to this effect for dealing with and punishing juveniles. On the other hand, the *International Labour Organisation's Convention Concerning Indigenous and Tribal Persons in Independent Countries* (ILO No 169) provides in Article 8 that in applying laws and regulations to indigenous peoples due regard shall be had to their customs or customary laws. Article 10 provides that in punishing Indigenous persons account should be taken of economic, social and cultural characteristics, and preference should be given to methods of punishment other than imprisonment. It should be noted that Australia's stated dedication to international legal precepts has declined in recent years.

37. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, [6].

38. See for examples the descriptions in Berndt & Berndt, above n 16, 351. During consultations, the Warburton community referred to spearing as being something that people agreed to ('offering a leg'), but advised that there was also a wide range of other non-physical punishments used: see Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, [5(a)].

It is most important to realise what tribal punishment is not: it is not wanton destruction of property, nor is it done drunk, and it does not produce feuds. It is ritualised, measured, final and relentless, without limitation periods.<sup>39</sup>

Aboriginal society in fact has a variety of ways of dealing with people who break the rules. As with non-Aboriginal Australian society in more recent times, children are shown and told how to behave, often through stories, but it is rare for them to be physically punished to any large degree. The initiation process is designed to introduce young people to the responsibilities of adult life and the law and to the implications of breaking it through a system of 'pre-punishment'. The age at which boys begin their initiation is not uniform throughout Australia, ranging apparently from as early as six or eight years to about 16 years.<sup>40</sup>

[A]lthough there is so much variation in these rituals, the majority contain some common themes: in simplest terms, removal from the main camp and total or partial enforced segregation; performance of some rite to emphasise the fact of transition; revelation of secrets of a religious nature; and finally, return to the main camp as a social adult.<sup>41</sup>

At the level of kin offences, shaming people or speaking strongly to them by 'growling' is often used. Mythological ('dreamtime') stories, some of which are secret, are used to teach young people about how they should behave and about the dangers of not following the law. May O'Brien has produced a series of books of non-secret mythological stories of the Wongatha people, which well illustrate this educational technique.<sup>42</sup>

Often difficulties arise for Aboriginal people because the mainstream law does not recognise Aboriginal customary law and those who punish under it can put themselves at risk of action in the courts. This may be so even though the person punished consents to the punishment. This breaks down Aboriginal authority structures and leads to adverse social consequences. This is a topic discussed in Part III.

## Part II: Special laws

### Parliament and the courts

The High Court has held that the legal existence of Aboriginal customary criminal law is not recognised by Australian mainstream law as having continuance in the legal system, as it has been 'extinguished' (abolished) by the introduction into Australia of mainstream criminal law.<sup>43</sup> Efforts to support Aboriginal people within the legal system have been piecemeal, inadequate and often counter-productive. At one time a 'protectionist' approach was adopted; for example, by requiring Aboriginal people to obtain the permission of the government 'protector' to marry or to move within the state. These days such laws would be regarded as paternalistic and inappropriate. Little, if anything, has been done to reflect the actual Indigenous legal system.

Recognition of Aboriginal customary law by mainstream criminal law is confined to some isolated special laws from parliament and some decisions and practices of the courts. Such laws include: the *Aboriginal Heritage Act 1972* (WA) relating to the protection of places and objects of importance to Aboriginal people; the *Aboriginal Affairs Planning Authority Act 1972* (WA) which has replaced earlier native welfare legislation; and the *Aboriginal Communities Act 1979* (WA) which was introduced to enable Aboriginal communities to make and administer their own by-laws schemes. This system has received criticism as being relatively weak and ineffective. There are also legislative provisions according certain protections for Aboriginal people to hunt, fish and gather.

### Protection of Aboriginal sites and objects

It will be clear from Part I of this paper that land is of great importance in Aboriginal customary law and that there are some places (or 'sites') that are particularly significant. Likewise, certain objects are also important, but are usually so secret that they cannot be discussed.

The *Aboriginal Heritage Act 1972* (WA) is designed to protect Aboriginal sites from destruction and also to protect Aboriginal cultural objects from destruction, disposition or alienation from the state. The Act's regime puts such

39. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, [1].

40. Berndt & Berndt, above n 16, 166.

41. *Ibid* 180.

42. See O'Brien ML, illustrated by Wyatt S, *Barn-Barn Barlala, the Bush Trickster*, (Fremantle: Fremantle Arts Centre Press, 1992); *Wunambi the Water Snake*, (Perth: Aboriginal Studies Press, 1991); *Why the Emu Can't Fly*, (Fremantle: Fremantle Arts Centre Press, 1992).

43. *Walker v New South Wales* (1994) 182 CLR 45

places and objects under the control of the relevant state minister, who acts on the advice of the Aboriginal Cultural Material Committee. Persons who disturb or destroy Aboriginal sites or destroy, sell, alienate or conceal Aboriginal objects without the permission of the minister commit an offence and are liable to a penalty. For a first offence the maximum penalty is a fine of \$20,000 or 9 months imprisonment, and for a subsequent offence a fine of \$40,000 or 2 years imprisonment, or both.<sup>44</sup>

The state regime for Aboriginal heritage protection is 'backed up' by the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), which gives the ability to the federal minister to make emergency declarations to protect Aboriginal sites and objects that are threatened.

Although the terms of reference for this project specifically exclude dealing with matters under the *Aboriginal Heritage Act 1972* (WA), it is important to mention the existence of these laws in discussion. It gives an understanding of where this important aspect of Aboriginal customary law finds some protection in the mainstream law. However, any debate about whether the *Aboriginal Heritage Act 1972* (WA) is strong or effective enough will need to be carried out in another forum.

## Protection from interference

Aboriginal communities often express the wish to be able to get on with their community life undisturbed by outsiders. Such disturbing influences can include developers, tourist operators, taxi drivers bringing in alcohol,<sup>45</sup> hawkers and others.

Those of us who have heard evidence in native title claims will have heard that there are also issues of customary law that make protection from disturbance even more important.<sup>46</sup> These include the privacy that is required at ceremony times and during 'sorry time' after a death.

Further, under Aboriginal law, certain Aboriginal grounds must not be entered upon or viewed by uninitiated people. This is particularly important when ceremonies are being prepared or conducted. Aboriginal people generally know about these rules, but some outsiders are ignorant of them and can break rules either deliberately or through ignorance.

There are other areas which are dangerous because of association with mythology or because they are otherwise significant. Strangers may not know the dangers associated with such places.

Aboriginal people often express their concern that outsiders may fall ill or die if they enter areas that are forbidden under Aboriginal law. Some limited protection for Aboriginal communities from unwanted intrusion has been provided under Western Australian law. The *Aboriginal Affairs Planning Authority Act 1972* (WA) and the regulations under the Act provide for a permit system in respect of certain Aboriginal reserve lands. The system requires non-Aboriginal people to obtain permits from the minister before entering Aboriginal reserves that have been proclaimed under the Act. Going onto such a reserve without a permit is an offence for which penalties of \$1,000 or nine months imprisonment for a first offence and \$5,000 or 12 months imprisonment for a subsequent offence are set.<sup>47</sup>

In practice, the minister seeks advice through the Department of Indigenous Affairs on whether a particular permit for entry onto land should be given. The Department, in turn, seeks the views of the local Aboriginal community; however, these views are not binding and can be overridden by the minister. In situations where mining companies seek permits to undertake mining development on a reserve, it is not uncommon for a minister to override the local Aboriginal community's wishes.

In consultations with the LRCWA, the Kimberley communities at Wuggubun complained that the entry permit system was not being enforced.<sup>48</sup> By-laws can be made by Aboriginal communities under the *Aboriginal Communities Act 1979* (WA). These can provide for prohibition or regulation of entry onto Aboriginal land and provide for a penalty of up to \$5,000 for breach and \$250 compensation for any damage.<sup>49</sup> It is usual in community by-laws for entry to be subject to

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44. *Aboriginal Heritage Act 1972* (WA) s 57.

45. The author has heard many complaints against taxi drivers from Aboriginal communities.

46. Such issues are commonly expressed by indigenous witnesses in their evidence.

47. *Aboriginal Affairs Planning Authority Act 1972* (WA) ss 31 and 50.

48. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, [4].

49. As to matters that can be addressed in by-laws made under the Act and the penalty that may be provided, see *Aboriginal Communities Act 1979* (WA) s 7.

approval by the community council.<sup>50</sup> Again, regulation of entry can be overridden in the case of mining or other development, as the Act provides<sup>51</sup> that the by-laws do not make something unlawful if it is done under some other statutory power. An example of such an override would be a prospector entering land under a prospecting licence issued under the *Mining Act 1978* (WA).

I have heard complaints from Aboriginal community representatives on many occasions that penalties under the by-laws are too inadequate to enable them to have any real control over entry and other matters. The by-laws scheme under the *Aboriginal Communities Act 1979* (WA) is discussed further in Part VI.

The right of Aboriginal communities to prohibit unwanted access on their lands needs to be strengthened. This may mean giving Aboriginal communities and traditional owners—rather than the minister—the direct right to say who can come and go on their lands and providing for significantly higher penalties to ensure compliance.

## Protection of Aboriginal rights to hunt and gather

Traditionally, Aboriginal people have hunted and gathered bush foods and medicines on their lands at will, subject only to their own customs and law. There is now a mass of laws and regulations that prohibit or regulate the taking of fauna and flora.

Some statutory measures within these laws recognise and protect Aboriginal traditional rights to hunt and gather. To some extent courts have also recognised such rights by way of defences. This recognition has come about in light of developments in the law relating to native title. These defences are discussed separately in Part III.

Under the *Wildlife Conservation Act 1950* (WA) all fauna is protected—unless gazetted as being exempt from protection—and cannot be taken except under a licence. The Act also provides that all flora is protected. A licence for the taking of flora from Crown lands and the permission of the owner for the taking of flora from private lands is required. Certain rare flora cannot be taken from any land, even by persons holding a licence or by the person who owns the land. A \$4,000 fine applies for breach of the Act.<sup>52</sup>

The *Wildlife Conservation Act 1950* (WA) provides a qualified exemption to Aboriginal people from the operation of these provisions.<sup>53</sup> Under the Act people of Aboriginal descent can take fauna and flora from Crown land, other than a nature reserve or wildlife sanctuary, and from unoccupied private land without a licence or permission for the purposes of food for themselves or their family, but not for sale. The protection is augmented by s 104 of the *Land Administration Act 1997* (WA) which provides that Aboriginal people 'may at all times enter upon any unenclosed and unimproved parts of the land under a pastoral lease to seek their sustenance in their accustomed manner'.

However, the Governor can, by regulation, generally suspend or restrict the operation of the rights given to Aboriginal people under the *Wildlife Conservation Act 1950* (WA) if satisfied that it is 'being abused' or if species are being unduly depleted. Therefore, Aboriginal people's protection from prosecution in respect of hunting and gathering is in reality only discretionary and not absolutely guaranteed. By way of example, it is noted that by regulations made on 14 August 2001<sup>54</sup> the government indefinitely suspended Aboriginal people's right to hunt dugong, six varieties of turtle, and saltwater and fresh water crocodiles, and to take all flora declared 'rare'.

Further, the right under the Act to hunt and gather is only for the purpose of sustenance for a person's family. This rules out the ability of Aboriginal people, without being subject to a penalty, to trade in flora and fauna pursuant to traditional law and custom and to provide food to members of their community, such as to old people who are not members of their family.<sup>55</sup> Also, the collection of flora for use as bush medicines or in ceremonies significant under customary law is not covered.<sup>56</sup>

50. See, for example, *Warmun Community (Turkey Creek) Inc By-Laws* reg 4.

51. *Aboriginal Communities Act 1979* (WA) s 13.

52. See *Wildlife Conservation Act 1959* (WA) ss 14, 16, 23B, 23D, 23F and 26.

53. *Wildlife Conservation Act 1950* (WA) s 23.

54. *Wildlife Conservation Regulations* reg 63.

55. Tonkinson, for example, refers to the importance of trade in foodstuffs, including vegetables amongst the Mardu in that it 'affirms and reinforces a continuing bond' within the group: above n 24, 53.

56. Marcia Langton explains the place of medicine and healing in Aboriginal women's traditional law in these terms: 'Keeping of practical and spiritual bodies of medicinal and healing knowledge which [women] apply in ritual acts for the benefit of individuals, groups, sometimes for marriages, and sometimes for states of being within groups which are seen to be detrimental to the wellbeing of people or places invested with the spirits of ancestors': Langton M, 'Grandmothers' Law, Company Business and Succession' in Edwards WH (ed), *Traditional Aboriginal Society* (South Yarra: Macmillan Education Australia, 2nd ed., 1998) 112.

The *Conservation and Land Management Act 1984* (WA) makes it an absolute offence to take fauna and flora from any nature reserve or marine park, with a penalty of \$10,000 or one year's imprisonment for breach.<sup>57</sup> No special provisions are provided for Aboriginal people against this prohibition. The extent of nature reserves and marine parks is entirely within the power of the government to determine.<sup>58</sup>

Under the *Fish Resources Management Act 1994* (WA) Aboriginal people are not required to hold a recreational fishing licence 'to the extent that the person takes fish from any waters in accordance with continuing Aboriginal tradition if the fish are taken for the purposes of the person or his or her family and not for a commercial purpose'.<sup>59</sup> This has the same limitations that affect Aboriginal people's rights under the *Wildlife Conservation Act 1950* (WA). It does not permit fishing by Aboriginal people in areas prohibited under the *Conservation and Land Management Act 1984* (WA).

Protection for Aboriginal people against prosecution for hunting, gathering and fishing pursuant to Aboriginal law and custom needs to be strengthened to ensure that the protection is granted absolutely by parliament and is not merely discretionary to the government of the day. The protection should also take account of needs under Aboriginal law and custom to trade, to distribute to other members of the community and to use bush medicine.

## Consideration of Aboriginal customary law by courts

Courts have grappled with Aboriginal customary law in various aspects of criminal law, including in relation to defences and sentencing. Aboriginal customary law, language and culture is relevant in procedural matters such as bail, the need to suppress names of parties, fitness of a person to plead to charges, the question of interpreters and whether police-generated confessions or admissions should be allowed to stand. These matters are dealt with in specific parts below.

In addition, there are a multitude of government programmes run by various departments and agencies that are designed to divert Aboriginal people from the justice system.<sup>60</sup> Unfortunately, these programmes have not shown any decrease in the high rate of Aboriginal imprisonment.

## Part III: Defences to criminal charges

Consideration of Aboriginal customary law has been given by courts from time to time in the context of defences to criminal charges under mainstream law. However, it needs to be understood that as the law currently stands there is no separate and distinct defence of Aboriginal customary law, other than in certain limited circumstances where native title can be shown. Generally, in order for customary law to be considered as a defence it must be shown to somehow 'fit' into one of the mainstream defences at law.

In Western Australia, the *Criminal Code* provides a code for criminal matters, including available defences. Some decisions in other states and territories also have relevance.

### Honest claim of right

Section 22 of the *Criminal Code* provides that a person is not criminally responsible for an act done, or not done, relating to property in the exercise of 'an honest claim of right' and without an intention to defraud.

In some cases it has been argued that an Aboriginal person may have been acting under an 'honest claim of right' based on his or her traditional law and therefore has a defence. To be able to take advantage of the defence it is necessary for Aboriginal defendants to show that they had a belief that they were entitled to do what they did under Aboriginal customary law and that the relevant customary law was recognised by mainstream law.

57. *Conservation and Land Management Act 1984* (WA) s 101C.

58. *Conservation and Land Management Act 1984* (WA) s 41; s 13 (marine nature reserves and marine parks); *Land Administration Act 1997* (WA) s 6 (nature reserves).

59. *Fish Resources Management Act 1994* (WA) s 6.

60. These include anger management, substance abuse, sex offender and mediation programmes of various types.

Such a matter went on appeal to the High Court of Australia in a case involving an Aboriginal man charged over the shooting of a bush turkey,<sup>61</sup> which was protected fauna under the *Fauna Conservation Act 1974* (Qld). The court, by a majority of judges, held that although it was open for an Aboriginal person to claim a right under traditional Aboriginal law and qualify for a defence of 'honest claim of right', the offence under the *Fauna Conservation Act 1974* (Qld) was not an offence 'relating to property' which was a pre-requisite to the operation of the defence. Other cases in which 'honest claim of right' based on rights claimed under Aboriginal traditional law have also largely been unsuccessful.<sup>62</sup>

I have met many Aboriginal people who hunt, fish and collect bush plants on their lands under their own system of law, without any thought that they are not permitted to do so by some law made by white people. Given the spirit of the defence of 'honest claim of right' and the High Court's in-principle endorsement of it in relation to customary law, it would be appropriate and fair for the defence, subject to some limitations as to nature and severity of acts done, to be extended to all circumstances where a person acts pursuant to Aboriginal customary law. This would provide real protection for persons who genuinely live under their own system of customary law, with no understanding of the implications of their actions under mainstream law.

Limitations on certain actions under traditional law would need to be included in any scheme in order to meet now commonly accepted norms of behaviour in both Aboriginal and non-Aboriginal society. These would include acts of murder, doing or intending grievous bodily harm and—although it is likely that it forms no part of currently practised Aboriginal traditional law, but to put it beyond doubt—sexual assault.

Consideration should be given to broadening the benefit of the 'honest claim of right' defence in s 22 of the *Criminal Code* from those limited to offences 'relating to property' to all types of acts and omissions sanctioned by Aboriginal customary law, subject to appropriate limitations consistent with current norms recognised by both Aboriginal and non-Aboriginal society such as murder, grievous bodily harm and—to put it beyond doubt—sexual assault.

## Defence of 'native title'

Defence of native title is similar to the defence of 'honest claim of right', but differs in that it is based upon the defendant's entitlement to do the thing complained of because under native title he or she has a right at law to do it—not just an honest belief in a right. 'Native Title' is excluded by the terms of reference from this project. However, it is important to note that this defence has been recognised in the mainstream criminal courts, quite independently of the *Native Title Act 1993* (Cth).

The basis of the defence of 'native title' stems from the recognition in the famous case of *Mabo (No 2)*<sup>63</sup> that Australia was not terra nullius (vacant land) at the time of European settlement, but a land in which Aboriginal people lived and exercised their own system of laws. At common law, this system of laws is recognised where it still operates and where it has not been 'extinguished' (abolished) by the exercise of some law or act of the government.

The Supreme Court of Western Australia has explained that if a person wishes to raise 'native title' as a defence, the onus is on the person charged to give evidence of the details of the native title to the extent that a reasonable doubt can be cast on guilt.<sup>64</sup> In the case referred to, the native title claimed was the right to fish.

In another case involving prosecution for breach of oyster regulations in New South Wales, a judge set out what would need to be shown to support the defence; namely, that traditional laws and customs gave a right to fish to the defendant's ancestors prior to sovereignty, that the laws and customs had continued to be observed to the current time, and that the fishing was an exercise of those laws and customs.<sup>65</sup>

The High Court has held that legislation that merely regulates the taking of fauna—and by extension, fishing and the like—does not necessarily extinguish native title rights to hunt, and therefore the defence of 'native title' is still available

61. *Walden v Hensler* (1987) 75 ALR 173.

62. See, for example, the cases referred to in Williams V, 'The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law', Background Paper No 1, above p 1, 44–46.

63. *Mabo v Queensland (No2)* (1992) 107 ALR 1.

64. *Dershaw v Sutton* (1996) 17 WAR 419.

65. See *Mason v Tritton* (1994) 34 NSWLR 572, 584 (Kirby P).

in such cases.<sup>66</sup> Naturally, it would still be up to a defendant to show the existence of the traditional laws and customs which give them such a right and that they were being acted on at the time. Unfortunately, this is not a simple matter. In recent times stringent tests have been administered by courts for proof of native title.<sup>67</sup>

It is unsatisfactory for Aboriginal people in exercising their rights of hunting and gathering under customary law to have the risk of prosecution under mainstream law and then be obliged to rely on the uncertain defence of native title, especially when there is such well-documented evidence of the crucial importance of traditional bush foods to the health of Aboriginal people.

Authors, J Taylor and N Westbury, report:

There is considerable evidence for a significant shift in Aboriginal diet and nutritional status as a consequence of European colonisation and the subsequent sedentarisation of Aboriginal peoples. A key element was the move from consumption of 'slow release type' carbohydrates of traditional diets to the 'fast release type' carbohydrates of contemporary Western diets, and from a low fat, low salt diet to a high fat, high salt diet. The nutritional impact of this shift is well illustrated by the demonstrated effect of temporary reversion to reliance on hunter gathering, which generally leads to significant weight loss as well as a reduction in biochemical abnormalities and in risk factors for cardiovascular disease and diabetes.<sup>68</sup>

Another expert, Dr Gracey, has stated:

The rapid transition of Australian Indigenous people from a hunter-gatherer lifestyle and diet to a predominantly westernised one has had detrimental effects on their health and wellbeing. Among Indigenous children, poor growth and weight gain are consequences of poor nutrition experienced in the first few years of life. A deficit of systematic, longitudinal information on growth of Indigenous children from age 5 years to teenage years points to a need for more attention to be directed to eating patterns among Indigenous children, and the consequences of these patterns on growth, nutritional status and long-term health.<sup>69</sup>

Uncertainty as to legal ability to access bush foods by Aboriginal people will continue to lead to high rates of morbidity and mortality amongst them. Recommendations to strengthen the right to hunt, gather and fish have been made in Part II.

## Consent

It is sometimes the case that Aboriginal people will 'give themselves up' to traditional punishment when they have committed some wrong under Aboriginal law.<sup>70</sup> However, if they get hurt in the course of that punishment, the persons who have inflicted the punishment may end up being prosecuted under the mainstream law for assault, unlawful wounding or similar offences. The police may decide upon the prosecution of such matters without necessarily taking into account the wishes of the person who has been punished.

In cases brought as forms of assault, consent of the person to the punishment may be a defence. Under the *Criminal Code* the definition of assault includes that the force—or threat of force—is without the other person's consent.<sup>71</sup> This defence in the context of Aboriginal customary punishment has been used in at least one Western Australian case.<sup>72</sup>

For other cases, which may not be brought as assault cases, such as unlawful wounding<sup>73</sup> or occasioning grievous bodily harm,<sup>74</sup> consent is, by law, not available as a defence. Whether a charge is brought as a form of assault (such as assault occasioning bodily harm)<sup>75</sup> where the defence of consent is available or in the form of a different charge (such as unlawful wounding) where the defence is not available is up to the police or prosecutor.

It is worth noting in this regard that assault occasioning bodily harm (defence of consent available) and unlawful wounding (defence of consent not available) have the same maximum penalty and, therefore, were regarded by parliament to be

66. See *Yanner v Eaton* (1999) 166 ALR 258.

67. As reflected, for example, in such cases as *Members of the Yorta Yorta Community v State of Victoria* (2002) 194 ALR 538.

68. Taylor J & Westbury N, *Aboriginal Nutrition and the Nyirranggulung Health Strategy in Jawoyn Country*, CAEPR Research Monograph 19 (Canberra: ANU, 2000) 29 (footnotes omitted).

69. Gracey M, 'Historical, Cultural, Political and Social Influences on Dietary Patterns and Nutrition in Australian Aboriginal Children' (2000) 72 *American Journal of Clinical Nutrition* 1361S–1367S.

70. See the advice from Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003.

71. See *Criminal Code* (WA) s 222, but note that s 223 refers to the fact that some assaults may be unlawful even though done with the consent of the person assaulted.

72. *R v Judson* [1996] (unreported, District Court of Western Australia, O'Sullivan J, 25 April 1996), referred to by Williams, above p 42.

73. *Criminal Code* (WA) s 301.

74. *Criminal Code* (WA) s 297.

75. *Criminal Code* (WA) s 317.

as serious as each other. In practical terms, a spearing inflicted under Aboriginal law and custom would usually only amount to a wounding. Thus, there is certainly an argument for extending the defence of consent at least to the charge of unlawful wounding.

However, it could be argued that it is unfair for a person carrying out Aboriginal customary punishment to be charged for an offence and then be obliged to rely on the defence of 'consent' to justify the system of law. A broader basis of justification needs to be available. A possible alternative is referred to below.<sup>76</sup>

There other benefits from the decriminalisation of consensual punishment. These are in relation to bail (a topic dealt with later in Part V) and sentencing (Part IV). Courts could be reinforced in their desire to order defendants to return to their communities to undergo traditional punishment as a condition of bail or sentence in the knowledge that such punishments are no longer unlawful.

It is unsatisfactory that the defence of consent to traditional punishment is required to escape liability for its imposition, in particular that it is dependent upon the nature of the charge that has been brought. If there has been consent by the person punished under traditional Aboriginal punishment, through their acknowledgment of customary law, the law should be consistent in stating that this is a defence to a charge arising out of its imposition.

## Compulsion

The mainstream criminal law provides several grounds of defence under the heading 'compulsion'. In the *Criminal Code* these are made available when:

- (a) an act was committed in execution of the law; or
- (b) was in obedience to the order of a competent authority; or
- (c) was done to resist actual and unlawful violence to oneself or another person; or
- (d) where there are immediate threats of death or serious harm.<sup>77</sup>

The defences are not absolute and limitations apply. For example, wilful murder and certain other serious offences are not necessarily covered. Defences of the type referred to in paragraphs (c) and (d) above are sometimes referred to as defences of 'duress'.

In a case in South Australia<sup>78</sup> defendants relied on the defence of duress, saying that they had given a man a beating because they were required to do it under Aboriginal law and would be punished if they did not do so. The South Australian Supreme Court, on appeal, upheld their right to bring such a defence, but restricted the basis for the defence to type (d) above – that is, they were merely afraid of the consequences of not carrying out the beating, not that there was some lawful obligation on them to administer it. The basis also contains the restriction that threats of retribution for failure to carry out a punishment must be immediate.

This approach does not give actual recognition to Aboriginal customary law or the right or duty to act under it. Indeed, to get the benefit of a defence under type (c) or (d) above it is necessary to assert that the violence threatened to the person carrying out the traditional punishment was unlawful. This does not give the respect to Aboriginal traditional law that is required by Aboriginal people.

The fact of the matter is that Aboriginal traditional punishment is usually carried out not because of threat of retribution if it is not carried out, but because the system of traditional law is accepted as legitimate and proper. For this reason one can agree with the Australian Law Reform Commission's view that the defence of duress is inappropriate to cover situations of customary law.<sup>79</sup> By way of reform, it would be better to provide for a scheme that specifically authorises traditional punishment where it is accepted that Aboriginal traditional law applies. Some limitations as to the nature and severity of authorised punishments would need to be included in order to meet norms now commonly accepted by both Aboriginal and non-Aboriginal sectors of society. These are discussed below.<sup>80</sup>

76. See below pp 562–63.

77. *Criminal Code* (WA) s 31.

78. *R v Warren Coombes and Tucker* (1996) 88 A Crim R 78.

79. See the discussion on this dilemma in Northern Territory Law Reform Committee, *Legal Recognition of Aboriginal Customary Law*, Background Paper No 3 (2003) 35.

80. See below pp 562–63.

Rather than having to rely on the defence of duress it would be preferable to provide that—subject to certain limits as to the nature and severity of the punishment—where Aboriginal customary law is accepted as being applicable, those persons who are authorised to order and carry out traditional punishments in pursuance of customary law may do so.

## Provocation

A person is said to act under provocation when there is a wrongful act or insult done which causes the person to suddenly lose self control and would be likely to cause any other 'ordinary person' to also lose their self control.<sup>81</sup> As with 'consent', the defence of 'provocation' is available under mainstream law to charges brought as assaults, but not to other similar charges such as unlawful wounding and occasioning grievous bodily harm.<sup>82</sup> It is difficult to understand why this is so because, as was mentioned above in relation to the defence of consent, assault occasioning bodily harm (defence of provocation available) and unlawful wounding (defence of provocation not available) have the same maximum penalty and therefore were regarded by parliament to be as serious as each other.

Importantly, it should be noted that provocation does provide a defence to reduce wilful murder or murder to the lesser offence of manslaughter.<sup>83</sup> The High Court has held that in taking into account the seriousness of a provocation—that is, whether it is 'wrongful'—the ethnic background of a person may be relevant, but it is not relevant in assessing the power of self control of an 'ordinary person', which is also part of the test (see above).<sup>84</sup>

In a Northern Territory case it was held that a breach of Aboriginal traditional law can be properly regarded as a provoking 'wrongful act or insult'.<sup>85</sup> However, that is as far as it goes.

One of the judges in the High Court has been critical of the restrictive approach taken to the tests used in relation to provocation and has expressed concern about it. In his judgment in one case he stated that:

The ordinary person standard would not become meaningless ... if it incorporated the general characteristics of an ordinary person of the same age, race, culture and background as the accused on the self-control issue. Without incorporating those characteristics, the law of provocation is likely to result in discrimination and injustice.<sup>86</sup>

As well as being too restrictive, the test set by the High Court can also be criticised as being confusing in requiring a 'double test'; namely, what an Aboriginal person would regard as being wrongful behaviour but also what an 'ordinary member' of the community—not necessarily Aboriginal—would be likely to do in response to it. The Supreme Court of Western Australia has applied the High Court's approach in a recent case.<sup>87</sup>

It would be useful for the test of provocation to be clarified so that the self-control of an 'ordinary person' is regarded as the self-control of 'an ordinary person of that culture and environment'. This would enable a jury to fully take account of the impact of Aboriginal culture in their assessment.

## Specific authorisation of application of customary law

As already mentioned, except in some circumstances where the holding of native title provides a defence, there is presently no specific defence available to persons who act under Aboriginal customary law. This leaves Aboriginal law enforcers extremely vulnerable.<sup>88</sup>

It was suggested under the heading 'compulsion' that rather than rely on defences of duress it would be better to specifically provide that, where Aboriginal customary law is accepted as being applicable, persons are authorised to

81. See, for example, the definition and defence of provocation in relation to assault contained in the *Criminal Code* (WA) ss 245 and 246, and in relation to homicide at s 281.

82. *Kaporonovski v The Queen* (1973) 133 CLR 209.

83. *Criminal Code* (WA) s 281.

84. In *Stingel v The Queen* (1990) 171 CLR 312; *Masciantonio v The Queen* (1995) 183 CLR 58, 66–67 (Brennan, Deane, Dawson & Gaudron JJ).

85. *Lofty v The Queen* [1999] NTSC 73.

86. *Masciantonio v The Queen*, above n 84, 73. McHugh J repeated his comments in *Green v The Queen* (1997) 191 CLR 334, 368.

87. See *Hart v The Queen* (2003) 27 WAR 441.

88. This problem is also mentioned in Northern Territory Law Reform Committee, above n 79.

carry out traditional punishments. This authorisation should be subject to limitations as to the nature and severity of punishments in order to meet norms now commonly accepted by both Aboriginal and non-Aboriginal society. To achieve this scheme, it would probably require amendment to s 31 of the *Criminal Code*, recognising that persons who order punishments or other acts to be done under Aboriginal customary law are 'competent authorities' who may be obeyed in accordance with customary law, without mainstream criminal consequences.

Appropriate limitations as to the nature and severity of punishments could be spelled out in terms similar to the current proviso found in s 31(4) of the *Criminal Code* restricting the ambit of the defence of compulsion (namely, wilful murder and grievous bodily harm) and also extended to exclude from protection any acts of sexual assault (to put it beyond doubt, although it is unlikely that any currently practised traditional punishment would include such acts). There is also the need to protect persons, usually Aboriginal Elders, who order the carrying out of the punishments.

At Wuggubun the LRCWA was told:

We need to know where we stand with our law. We would like to be able to punish cattle thieves in the traditional way, with a flogging. We don't want to be sued for practising our law.

Police in our community have watched on as traditional punishment is administered. Sometimes, when we cannot spear, but must sing, this makes the problem worse.<sup>89</sup>

The *Criminal Code* already provides that a person is not criminally responsible for acts and omissions carried out in execution of 'law'.<sup>90</sup> The situation could be put beyond doubt by including a provision that 'law' in this situation includes Aboriginal customary law, where Aboriginal customary law is accepted as being applicable.

Whether Aboriginal customary law is accepted as being applicable by the parties—including the victim—in any particular case, and whether the acts were genuinely in accord with Aboriginal customary law, will be a matter for prosecuting authorities to be satisfied about or if, there is a doubt, determined by the court. As the delegates at the consultations at Wuggubun explained: 'Aboriginal people are born into the law, they maintain it as their choice. Authority comes from their Elders and comes from the community'.<sup>91</sup>

This explanation as to the basis of law (namely, its common acceptance by members of the community) is not unlike that understood as the basis of mainstream law. It is a question of fact that can be determined in any particular case in ways similar to that of native title.

The *Criminal Code* should be amended to provide that persons who act in execution of Aboriginal customary law, and those who act in obedience to orders from those in authority under and in accordance with Aboriginal customary law, are protected from criminal responsibility. The protection would be subject to limitations that would not permit wilful murder, grievous bodily harm and, to put it beyond doubt, sexual assault.

## Part IV: Sentencing

### General principles

In sentencing Aboriginal offenders, courts take account of two principles; namely, that a person should not be discriminated against in the sentencing process on the ground of race and also that factors associated with a person's membership of a race—such as social, economic and other disadvantages—are matters that must be taken into account as mitigating factors.<sup>92</sup> Thus courts are not permitted to sentence a person differently simply because they are Aboriginal, but courts can take into account factors that exist because of their Aboriginality where those factors are relevant to sentencing. In a similar way, it is not permissible to sentence a female differently just because she is a female but if, for example, she were pregnant, then that fact may be relevant.

89. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, [4].

90. *Criminal Code* (WA) s 31(2).

91. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, [1].

92. See *Rogers and Murray v The Queen* (1989) 44 A Crim R 301, 307 (Malcolm J); *Neal v The Queen* (1982) 42 ALR 609, 626 (Brennan J); *R v Fernando* (1992) 76 A Crim R 58, 62–63 (Wood J) (the 'Fernando principles').

One of the accepted matters is the often crushing impact of a sentence of imprisonment on an Aboriginal person.<sup>93</sup> It is well known that serious problems, including mental illness sometimes leading to suicide, can result from taking an Aboriginal person away from their land and culture, as well as the fact that imprisonment is a foreign concept under Aboriginal customary law. There are practical consequences for many Aboriginal people from remote areas, especially children, who are imprisoned far away from their families with no likelihood of visits for extended periods of time or even the possibility of telephone calls.

The *Young Offenders Act 1994 (WA)* provides that the cultural background of offenders is to be taken into account when dealing with them.<sup>94</sup> However, apart from this one provision that relates to children, there are no other statutory provisions in Western Australia which require a court to consider the cultural background of an offender, or more specifically, the Aboriginal cultural background.

The position in Western Australia for adults is to be contrasted with that under the *Crimes Act 1914 (Cth)* which by s 16A(2)(m) requires cultural background to be taken into account. It would be appropriate for Western Australia to take a lead from the Commonwealth and include cultural background as a mandatory consideration.

## Traditional punishments and sentencing

When calculating a sentence, courts in Western Australia today usually take account of the fact that an offender has been subjected to Aboriginal customary punishment or that it is to take place. At the same time, courts are careful not to state that tribal punishment is condoned or encouraged.<sup>95</sup>

The principle of ensuring that a person should not be punished twice for the same offence is also recognised as being important in this context. This feature has been mentioned in at least two cases.<sup>96</sup> The principle against being punished twice was at one time enshrined in the *Criminal Code*, but the provision has in recent times been repealed.<sup>97</sup> It is now reflected in a more restricted form in the *Sentencing Act 1995 (WA)*<sup>98</sup> in terms that do not suggest an absolute prohibition against punishing under mainstream law following punishment under Aboriginal traditional law. However, it is still regarded as a principle of fairness and is taken into account in sentencing.

It is useful to understand how the courts have approached sentencing in cases where there is also Aboriginal traditional punishment. In one recent case in Western Australia, the sentencing judge suspended a sentence of imprisonment imposed on an Aboriginal woman for manslaughter on the basis that she genuinely intended to give herself up to traditional punishment and that this was likely to happen.<sup>99</sup> In another recent Western Australian case, the court took into account as mitigation the fact that the offender had been speared and hit by way of traditional punishment and reduced a sentence for manslaughter.<sup>100</sup>

These cases are merely examples of the approach of individual judges to sentencing situations where customary law has been shown to be a factor. However, there is no clear direction either by statute or from the courts as to how punishment under the two systems of law should inter-relate.

Sometimes an Aboriginal community will have definite views on how one of its members should be dealt with in the mainstream justice system and wish to convey this to the court. They may wish to have offenders returned to them for punishment or, on the other hand, have them banished from the community for a period of time as part of punishment.<sup>101</sup>

Courts have endeavoured to take note of Aboriginal communities' wishes in their sentencing decisions; however, they are cautious in stating that without legislative permission the wishes of the community cannot override the duty of a judge to sentence according to law.<sup>102</sup> Presumably 'according to law' means according to the sentencing criteria that are currently found for adults in the *Sentencing Act 1995 (WA)*,<sup>103</sup> for juveniles in the *Young Offenders Act 1994 (WA)*<sup>104</sup> and

93. *R v Juli* (1990) 50 A Crim R 31.

94. Section 46 (2)(c).

95. See for example the Full Federal Court decision of *Jadurin v The Queen* (1982) 44 ALR 424, 429.

96. *R v Desmond Gorey* (unreported, Northern Territory Supreme Court, Gallop J, 20 June 1978), referred to in Australian Law Reform Commission, *The Recognition of Aboriginal Traditional Law*, Report No 31 (Canberra: AGPS, 1986) [508]; *R v Minor* (1992) 59 A Crim R 227.

97. Formerly it comprised *Criminal Code (WA)* s 16, but this was repealed by Act No 78 of 1995.

98. *Sentencing Act 1995 (WA)* s11

99. *R v Thompson* (unreported, Supreme Court of Western Australia, Roberts-Smith J, 20 February 2001), referred to in Williams, above pp 16–17.

100. *R v Richter* (unreported, Supreme Court of Western Australia, McLure J, 30 April 2002), referred to in Williams above p 17.

101. See *R v Miyatatawuy* (1996) 87 A Crim R 574; *Mamarika v The Queen* (1982) 5 A Crim R 354 respectively.

102. See for example *Mamarika v The Queen*; *ibid*; *Jadurin v The Queen*, above n 95; *R v Miyatatawuy*, *ibid*.

103. *Sentencing Act 1995 (WA)* s 6.

104. *Young Offenders Act 1994 (WA)* s 46.

at common law. The statutory criteria do not specifically refer to the effect of Aboriginal customary punishment,<sup>105</sup> or the place of the wishes of the community in sentencing. It would be useful if the matter was clarified by legislation.

There should be a statutory requirement in relation to all offenders—both adults and juveniles—that in sentencing the court must take into account an offender's cultural background and, specifically, any Aboriginal customary law matters which relate to the commission of the offence and sentencing.

## Requirement of evidence

Several cases have emphasised the need for evidence of customary punishment to be placed before the court before it can be considered.<sup>106</sup> Such evidence is important so that courts can ensure that traditional punishment has in fact taken place or is likely to take place. It is also received in order to ensure that punishment is actually traditionally sanctioned and is not only in the nature of a personal revenge or vendetta.

Evidence may also be required by courts, even by way of explanation, where customary considerations or belief systems have played a part in generating offences. In a South Australian case, the offence in question had been caused by a fear on the part of the offender that he was being pursued by a kadaitcha man.<sup>107</sup> The appeal court explained that the original sentencing judge would have been greatly assisted if there had been some expert evidence (such as from an anthropologist) as to what a kadaitcha man was. In another South Australian case, evidence was necessary about a belief of the offender, shared by other Aboriginal people, that a spirit existed in a house the offender had burnt down.<sup>108</sup>

'Evidence' of such matters involving Aboriginal beliefs has been given in a variety of ways in Western Australia.<sup>109</sup> Courts often seem nervous about receiving such information and usually rely on the Crown's acceptance of statements about traditional punishment before accepting them as fact.

In some cases it can be difficult for a defendant or their representative to produce 'evidence' or information of aspects of traditional law and punishment. This is because some traditional laws are secret. Also, providing details to a court may be difficult because of language and cultural differences or community isolation.

How Aboriginal communities are to have their views taken into account in sentencing is a part of the larger topic of having a system that can give Aboriginal people a greater say in the justice system. However, certain changes could be introduced, even in mainstream law, to obtain greater understanding by sentencing courts of traditional law culture and to provide input into the sentencing process by Aboriginal communities. This could be done by the appointment of Aboriginal people to act as assessors to assist the courts in these matters.

During rounds of consultations by the LRCWA, various Aboriginal delegates referred to the need to ensure the integrity of Aboriginal customary law matters that came before the courts. In Geraldton, people referred to the need to use Aboriginal knowledge within the court regarding traditional punishment, so that the court would know if a defendant was 'pulling the wool over [their] eyes'.<sup>110</sup>

At Laverton, it was explained by Aboriginal delegates that sometimes lawyers and others use customary law as an excuse or as mitigation in the wrong cases, such as when a person was drunk. They pointed to several key indicators that courts could use to assist them in deciding whether there were truly customary law considerations, such as whether Elders were there, whether the person had gone back to the community or family and whether there was a clear mind.<sup>111</sup>

In the Pilbara, the Aboriginal community told the LRCWA delegates that sometimes actions were taken in the name of traditional punishment, which should not be accepted. An example given was a flogging by someone who was drunk, as traditional punishment must be done sober and administered properly using the appropriate tools and in the appropriate place.<sup>112</sup>

105. Although, by s 67 of the *Young Offenders Act 1994* (WA), the court may, in relation to juvenile offenders, refrain from imposing punishment upon being satisfied that such punishment as the court may approve has been or will be given. This section could be used to take customary law punishment into account as a substitute for other punishment.

106. See *R v Brand* [1998] WASCA 279, [8]–[10]; *R v Gordon* [2000] WASCA 401, [22].

107. *Shannon v The Queen* (1991) 57 SASR 14.

108. *Goldsmith v The Queen* (1995) 65 SASR 373.

109. See, for example, the cases referred to in Williams, above n 62, 6–8 where the author refers to 'evidence' being given on occasions by Elders, anthropologists, written statement from relatives and by counsel.

110. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, [6].

111. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, [4].

112. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, [6].

A common theme was the need for more involvement of Aboriginal people in the court process. Involvement of senior Aboriginal people in the adjudication process concerning Aboriginal customary law matters is required and is being called for by Aboriginal people. In Broome, the Aboriginal participants suggested to the LRCWA that Aboriginal Elders should advise the judge before claims relating to traditional law are accepted. In this regard they referred to the practice in Turkey Creek of Elders sitting with the local magistrate.<sup>113</sup> People in Broome also suggested that it would be beneficial if courts could order that offenders undergo a form of training in Aboriginal law as part of a sentence where they have breached both mainstream and traditional laws.<sup>114</sup>

Later in this paper, in Part VI, I refer to proposals for the establishment of Aboriginal courts dealing with their own matters. However, until they are set up or alongside them, involvement of Aboriginal people in mainstream courts is urgently required to address issues of customary law as and when they arise.

To address the need for providing understanding of traditional law and punishments applicable in particular cases and the views of the relevant community concerning how an offender should be dealt with, it would be useful if court-appointed Aboriginal assessors could be selected to work with the sentencing court in such matters.

## Other alternatives

Other alternatives to imprisonment are desperately sought by Aboriginal people, and indeed judges, in order to reduce the scandalously high rate of imprisonment of Aboriginal people in Western Australia. The submissions by Aboriginal people in this regard have been referred to earlier in this paper.

In an article 'The Sentencing of Aboriginal Offenders', John Nicholson SC, Deputy Senior Public Defender (New South Wales), observed:

[T]he Anglo-Australian system is built upon impartiality, authority, and rank obedience in the face of punishment, while the customary law relies upon relationship, traditions, emotions and methods of dealing directly with each other. The Anglo-Australian system of criminal law is based upon a retributive model, while the customary law focus is upon restoration, healing and prevention.<sup>115</sup>

Nicholson made the point in his article that:

The courts must also recognise that present sentencing law is doing little to lessen the rate of offending. In the face of increased rates of Aboriginal offending how can it be argued that general deterrence is working. It seems worse than futile, indeed pigheaded, to keep applying to a problem a solution that is ineffective or perhaps even counter-productive.<sup>116</sup>

In her background paper, Victoria Williams stated that there are only two cases—apparently Australia-wide—where courts have imposed sentences upon a convicted person with a structure designed to ensure that traditional punishment takes place.<sup>117</sup> This indicates the current constraints experienced by courts in handing down sentences that can positively use Aboriginal culture to reduce offending.

Aboriginal communities often canvass alternative proposals for dealing with offenders, particularly young offenders. These frequently include the proposal to keep them out in the bush under the custody of Elders, where they can learn or re-learn traditional values, laws and skills.<sup>118</sup> Experiments with such alternatives have often been successful, but need government support.<sup>119</sup> These proposals are certainly in the public interest in terms of reducing crime and the cost savings of lower imprisonment figures.

Areas where mainstream law can co-operate with Aboriginal communities to ensure that Aboriginal offenders are dealt with under customary law are available through such schemes as community-based sentences and early release

113. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, [2(d)].

114. *Ibid* [2(c)].

115. Nicholson J, 'The Sentencing of Aboriginal Offenders' (1999) 23 *Criminal Law Journal* 85, 87.

116. Nicholson, *ibid* 88 (footnote omitted).

117. See Williams, above p 13.

118. Personal communications to the author from many Aboriginal community members.

119. For example, the Wiluna community held a successful programme of taking people from Wiluna to Mangkilli (some 500 kms away). However, continued funding has not yet been made available.

schemes. To implement these it is necessary to adequately resource them and to recognise the expertise that is required to accomplish this. In a report in May 2001, the Western Australian Auditor General advised that the supervision of offenders is a specialised activity which most organisations and agencies do not have experience with, and for which they receive insufficient training and support.<sup>120</sup> This is a problem that many Aboriginal communities experience,<sup>121</sup> although they are keen to involve themselves.

The government needs to assist Aboriginal communities in dealing with offenders through increased support and funding of community-based alternatives.

## Part V: Policing and procedures

### Police

The history of Aboriginal–police relations in Western Australia has been a vexed one. Reports of harsh treatment of Aboriginal people by police were investigated in the Western Australian Roth Royal Commission (1904) and the Moseley Royal Commission (1934). Inquiries into poor police and Aboriginal relations were also examined by the Royal Commission into Aboriginal Deaths in Custody (1991) and continue to today.

In its rounds of consultations with Aboriginal people in Western Australia the LRCWA heard many descriptions of poor treatment of Aboriginal people by police from both metropolitan and remote communities. Examples included:

Generally speaking the police do not respect Aboriginal people.<sup>122</sup>

There is disrespectful behaviour from police towards our children.<sup>123</sup>

The police think they know best, they ignored the view of the Elders.<sup>124</sup>

The police do not give the same resources to the investigation of all crimes. In particular, crimes involving an Aboriginal offender and an Aboriginal victim are not given the same priority as where the victim is non-Aboriginal.<sup>125</sup>

Targeting of Aboriginal youth still occurs.<sup>126</sup>

Police need to be properly trained and understand Aboriginal heritage and culture.<sup>127</sup>

The police come – don't ask permission from the community and don't tell us the reasons. They say 'just open the door and let us in'. We are still waiting to work properly with the police.<sup>128</sup>

On the other hand, it is clear that there are many police in remote areas who work well with Aboriginal communities on a basis of mutual respect and trust. Many police respect Aboriginal law and co-operate to allow Aboriginal customary ways of dealing with offenders to take their course or 'mediate' between the two systems.<sup>129</sup>

However, as can be seen from the type of comments from Aboriginal communities set out above, there are less-experienced officers who do not understand the complexity of Aboriginal law and custom and seek to 'bulldoze their way through' unadvised. More than often these efforts simply cause long-term community harm.

There are a variety of views amongst Aboriginal people, which have emerged from the LRCWA's consultations, as to whether there should be a significant police presence in their communities. Some communities say that they can look after their own affairs and simply wish to be left alone. Others state that they need assistance dealing with community problems and they should have the right to a police presence just as other non-Aboriginal communities do.<sup>130</sup> The reality of domestic violence and substance abuse in many communities means that assistance from mainstream police will be required at least in the short term until alternative community policing systems are established.

120. Auditor-General of Western Australia, *Implementing and Managing Community Based Sentences* (May 2001).

121. See, for example, Ngaanyatjarra Council, *Doing Business with Government*, above n 14, 33–34.

122. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Derby*, 4 March 2004, [5].

123. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Albany*, 18 November 2003, [12(a)].

124. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, [5].

125. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Midland*, 16 December 2002, [1].

126. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Mirabooka*, 18 November 2002, [3(a)].

127. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, [12].

128. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, [7].

129. For example, the Wiluna community spoke highly of their local sergeant in this: see Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, [11(a)].

130. Compare the LRCWA's various thematic summaries in this regard.

Police officers are often greatly assisted in their duties by Aboriginal Police Liaison Officers ('APLOs'). Over the years there has been some reform of the position of APLOs (formerly called 'Aboriginal Police Aides'), but more reform may be necessary.<sup>131</sup>

APLOs should be regarded as specialists who are to primarily provide liaison between police and Aboriginal people. They do not see themselves as having a primary function as frontline police. However, APLOs are attached to local police stations, under the control of the local officer in charge, and are called on to perform ordinary policing duties as an extra pair of hands. Their specialist function is often—depending on the officer in charge—undervalued and underutilised. One unusual feature of the scheme worth noting is that their powers of arrest under their instrument of appointment are limited to only arresting Aboriginal people, unless they act under direction. The discriminatory aspect of this deserves review.

Previously there was an Aboriginal Affairs Directorate within the Police Service, but this was recently abolished. APLOs do not have a promotion stream within the Police Service above the rank of senior APLO (two stripes), for which eight years' service is required. An application for APLOs to be able to attain sergeant rank (three stripes) was refused by the Police Service hierarchy.

The role of APLOs can be crucial in assisting police and judicial officers to gain an understanding of Aboriginal cultural dynamics and also assisting Aboriginal people to understand mainstream legal processes. It is important that their skills are recognised and used to maximum advantage. Also, to ensure the trust of the Aboriginal community, a degree of independence is required.

In consultations at Kalgoorlie the LRCWA representatives were told that:

[T]he role and function of APLOs needs to be reviewed. Currently it is to verify that Aboriginal suspects understand the charges against them and to explore the evidence. However, this role is being compromised by the use of the APLOs as ordinary police. The original conception should be restored, by suitable provisions in the *Police Act*, excluding ordinary policing.<sup>132</sup>

It was also suggested that 'Police Standing Orders might be revised to require other police officers to bear in mind the advice of APLOs'.<sup>133</sup>

One means of reinforcing the role of APLOs would be to constitute a separate part of the Police Service under which APLOs operate. Within this they could have their own promotional structure and their own standing, functions and ways of operating.

It was mentioned earlier in this part of the paper that some police make a decided effort in an endeavour to make the two laws—Aboriginal and mainstream—work together. Several communities in consultations with the LRCWA stressed the importance of this approach.

At Warburton it was reported that:

The strongest concern was that the white system does not allow Aboriginal law to take its course in a timely manner. This undermines the authority of Aboriginal law and creates consequences in terms of harmony and good order in the community. There was a strong view that there needs to be more of a balance between the two systems.

'White law is slow, Aboriginal law is swift.' This creates problems when Aboriginal punishments are not carried out before the person is taken away by the white system: 'The police should wait until a person has been through punishment'. The fact that the police take people away before Aboriginal law has taken its course shows that 'the white system does not respect Aboriginal law: it is crucial to get punishment done first' and 'we have no power, no rights to get the police to bring a person back'.<sup>134</sup>

At Fitzroy Crossing it was explained by community members that police do not understand that Aboriginal families will face retribution if offenders do not face punishment. Police fear that the person subject to punishment might die and that they will be held responsible.<sup>135</sup> It is clear that this problem needs to be addressed in terms of authorising

131. The following information is from an experienced APLO, given to the author on the basis of confidentiality.

132. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, [8(b)].

133. *Ibid.*

134. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, [3].

135. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, [1].

traditional law to be carried out.<sup>136</sup> By removing the fear of unlawfulness, both Aboriginal people and police will feel more comfortable about positively encouraging and putting in place traditional law sanctions for conduct harmful to the community.

Dealing with these matters requires considerable experience and sensitivity on the part of police officers. Unfortunately, the Police Service does not necessarily reflect and respect that this cultural knowledge is a specialisation in its rules relating to postings. Rules that require constant turnover of staff in remote areas—apparently a maximum stay of only four years—are too inflexible. Such turnovers have been criticised by Aboriginal communities in the course of the LRCWA's consultations.<sup>137</sup>

The special expertise police officers in working with Aboriginal communities' law should be recognised and supported by the Police Service in its postings policy.

## Prosecuting practices

The overriding consideration as to whether to prosecute someone is whether a prosecution is required in the public interest. This is clear from the Prosecution Policy and Guidelines made under the *Director of Public Prosecutions Act 1991 (WA)*.<sup>138</sup> For instance, there may be situations where, although an offence may technically be made out, a prosecution does not proceed as the public interest does not require it.

The Prosecution Policy and Guidelines set out matters that may be considered as factors to be taken into account and also matters that are said to be irrelevant to the public interest. It is noted that the race, colour, ethnic origin and cultural views of an alleged offender are said to be irrelevant to a consideration of the public interest.<sup>139</sup> On the other hand, relevant considerations are said to include an alleged offender's antecedents, the likely effect on public order and morale, and whether a sentence has already been imposed which adequately reflects the criminality of the matter.<sup>140</sup>

In relation to circumstances where Aboriginal customary punishment has taken place or is sought to take place, it can be argued that the public interest would not require a prosecution as the person is being otherwise punished for the offence in an effective way. This is especially the case where the Aboriginal community concerned, and the victim, endorse the process.

The Prosecution Policy and Guidelines could give specific guidance that a prosecution is not necessary where an offender lives subject to Aboriginal customary law, is likely to be punished under it, and the Aboriginal community and victims are satisfied with a customary law resolution of the matter.

## Bail

Many Aboriginal people have considerable difficulty in obtaining bail. Research published in 2001 reveals that of all arrested people who are not released on bail, almost half of them are Aboriginal.<sup>141</sup> The question of bail usually comes up for decision first at the police station stage after arrest and later in court pending the hearing of the matter.

The *Bail Act 1982 (WA)* sets out various considerations for the granting of bail, including, in appropriate cases, requirements for sureties – persons willing to pledge money to ensure another person's attendance at court. As many Aboriginal people are economically disadvantaged, obtaining a surety with sufficient assets to satisfy monetary requirements is often difficult. Other aspects of compliance, such as having a proper place to stay while on bail or the ability of persons from remote communities to turn up at court when required, also impact upon the suitability of bail schemes.

136. See above pp 562–63.

137. See, for example, the comments at Broome, where there was criticism of the considerable turnover of police: Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, [2(a)].

138. *Director of Public Prosecutions Act 1991 (WA)*, Statement of Prosecution Policy and Guidelines (1999), Policy Guideline 19.

139. Statement of Prosecution Policy and Guidelines (1999), Policy Guideline 29.

140. Statement of Prosecution Policy and Guidelines (1999), Policy Guidelines 27(c), (o) and (p) respectively.

141. Ferrante AM, Fernandez J & Loh NSN, *Crime and Justice Statistics for Western Australia: 2000* (Perth: UWA Crime Research Centre, November 2001) 47.

These difficulties have been touched upon in various other inquiries, such as the Royal Commission into Aboriginal Deaths in Custody (1991) and, more recently, the Western Australian Legislative Council Standing Committee on Estimates and Financial Operations inquiry in relation to Financial Management of Prisons of 29 June 2000. Some reforms, such as a bail hostel scheme, have been introduced as a result of these inquiries. Nevertheless, difficulties still persist.

Sometimes there may be a conflict between ordinary bail criteria and the obligations of a person awaiting trial to undergo punishment under Aboriginal customary law. Communities prefer the return of a person who has offended as soon as possible, so that punishment can take place straight away. This gives the community the chance to undergo the healing process and get back on track. Long delays while people are in custody waiting trial do nothing for the restoration of community harmony.<sup>142</sup>

The *Bail Act 1982* (WA) sets out various criteria for granting bail,<sup>143</sup> although they do not specifically include as a reason for granting bail that a person would undergo punishment if returned to their community. In Western Australia it has been held that the *Bail Act 1982* (WA) criteria are not exclusive and common law principles concerning bail apply. This means that a judge has an overriding discretion to grant bail and to take into account all relevant questions and matters in considering the issue.<sup>144</sup>

Judges in Western Australia, therefore, have the power to grant bail for the purposes of the defendant returning to the community to receive traditional punishment. Whether they are bold enough to exercise that power is another matter. Indeed, one of the criteria for bail set out in the *Bail Act 1982* (WA), which the court must consider, is 'whether the defendant needs to be held in custody for his own protection'.<sup>145</sup>

In at least one case, a court has felt bound to consider this prospect of possible traditional punishment.<sup>146</sup> In this case the judge held that there was, in the circumstances of that case, only a small risk of possible payback as the defendant would be staying in a church centre while on bail. Bail was therefore granted.

If the carrying out of traditional law is specifically authorised, as has been suggested in this paper, then the 'own protection' clause in the *Bail Act 1982* (WA) would not be relevant. Traditional punishment would be lawful.

Where bail is to be granted, the Act permits the court to place certain conditions on the defendant, including conditions as to place of residence and conduct. There is also provision for making it a condition that a person on bail attends courses or programmes for the purpose of addressing 'behavioural problems'. Thus, under the *Bail Act 1982* (WA) a judicial officer can order a person to return to his or her community to live and to abide by the directions of an Elder. It would be useful also if the court could direct that a person on bail attend a programme set by the community under which customary law could be administered. Under the Act such courses or programmes are limited to 'prescribed' ones.<sup>147</sup> This means prescribed by a regulation made by government.<sup>148</sup> Therefore, to enable a 'course' or 'programme' of customary law to be made a condition of bail, the government would need to specifically include them by regulation. This procedure, in reality, is too cumbersome and its need should be dispensed with by amendment of the *Bail Act 1982* (WA).

Fitzroy Crossing communities complained to the LRCWA about the uncertainty of court bail practice. They complained that practices are very ad hoc. Sometimes magistrates will not bail/remand offenders so that they can face punishment and in other instances they will do so.<sup>149</sup>

To put the matter beyond doubt, the *Bail Act 1982* (WA) should be amended to include as a criterion for the granting of bail, where customary law is acknowledged to apply,<sup>150</sup> the community's wishes for an accused person to return to the community for the purpose of customary punishment.

142. See the comments from Warburton community, above p 568.

143. *Bail Act 1982* (WA) Sch 1, Pt C, cl 1.

144. *Jemielita v The Queen* (1995) 78 A Crim R 91; *WCVB v R* (1989) 1 WAR 279.

145. *Bail Act 1982* (WA) Sch 1, Pt C, cl 1(b).

146. *Unchango v The Queen* [1988] WASC 186.

147. See *Bail Act 1992* (WA) Sch 1, Pt D cl 2(2b).

148. By reason of s 5 of the *Interpretation Act 1984* (WA).

149. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, [1].

150. See comments on acknowledgment, above pp 21–22.

Additionally, the limitation in the *Bail Act 1982* (WA) that courses or programmes to address behavioural problems be 'prescribed' should be dispensed with. This will enable the court to make submission to customary punishment a condition of bail.

## Fitness to plead

Previously, s 631 of the *Criminal Code* provided for an inquiry process in appropriate cases as to whether a person might be unable to understand the court proceedings and, therefore, not fit to stand trial. The test was whether it appeared to be 'uncertain for any reason' that the person was not capable of understanding the proceedings to be able to properly defend him or herself. It was used on occasions to ascertain whether Aboriginal people were unable to understand the proceedings due to cultural, language and other difficulties.<sup>151</sup>

Section 631 was repealed in 1997 and replaced by the *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA). The new provisions restrict the question to unfitness on the ground of mental impairment – defined as intellectual disability, mental illness, brain damage or senility.<sup>152</sup> This is much narrower than the *Criminal Code* section and does not cover people who are unable to understand proceedings due to cultural or language factors.

However, there is authority that at common law on a serious charge the court must be satisfied that the accused person is able to understand the proceedings and the evidence against him or herself so as to be able to properly instruct counsel as to the defence.<sup>153</sup> This duty would seem to apply in the case of Aboriginal people who are incapable of understanding the proceedings because they come from a background where customary law, language and culture dictate their worldview.

It has not always been clear what should happen to a person who is found to be unfit to plead. There is a danger that such a person could be locked up indefinitely in a psychiatric facility.<sup>154</sup> However, the better view is that the person should simply be discharged. This seems to be the result under the recently introduced *Criminal Procedure Act 2004* (WA) discussed below.

Overlapping with the common law ability of a court to assess an accused person's fitness to plead and discharge the person has been the recently repealed<sup>155</sup> protective provision s 49 of the *Aboriginal Affairs Planning Authority Act 1972* (WA). This was designed to give some protection against a court receiving pleas of guilty, admissions or confessions from Aboriginal people where they did not 'understand the nature of the circumstances alleged, or of the proceedings, or were not capable of understanding that plea of guilt or that admission of guilt or confession'.

An examination under s 49 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) was required whenever it appeared reasonably likely that an Aboriginal person might not understand the matters mentioned in the section.<sup>156</sup> If the court was satisfied that the accused person did not understand the matters referred to in s 49, a plea of guilt was not accepted. Instead, a plea of 'not guilty' was entered. Likewise, any admissions or confessions previously made by the accused person were rejected.

Even if s 49 resulted in a plea of not guilty being entered, it was arguable that the court still had a duty to go further and ascertain whether the accused person was fit to go on trial at all. This was on the basis of the common law duty of a court to ascertain whether the accused person can properly participate in a trial.<sup>157</sup> With s 49 of the *Aboriginal Affairs Planning Authority Act* repealed, in order to see what protections there are for Aboriginal people who may not be able to understand proceedings, one must now look to provisions in the recently introduced *Criminal Procedure Act 2004* (WA).

151. See eg L Davies L, 'The Yupupu Case' (1976) 2 *Legal Service Bulletin* 133.

152. See definition in *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) s 8.

153. See *Ngatayi v The Queen* (1980) 147 CLR 1, 7–8; *Kunnuth v The State* [1993] 4 All ER 30; *Ebatarinja v Deland* (1998) 444, 454; *Eastman v The Queen* [2000] HCA 29, [59] (Gaudron J).

154. In *Ngatayi v The Queen*, *ibid* [7], Barwick CJ made the point that the *Criminal Code* (WA) s 631 was based on the wording of the English *Lunatics Act 1800* (39 & 40 Geo III c 94) and that an early Queensland case, *R v Willie* (1885) 7 QLJ (NC) 108 where Aborigines who could not understand the proceedings in the absence of an interpreter had been discharged, did not 'disclose any authority, statutory or otherwise, for taking this course'.

155. By Act No 84 of 2004, coming into effect in May 2005.

156. *Smith v Grieve* [1974] WAR 193; *Webb v The Queen* (1994) 13 WAR 257; *Green v The Queen* [2001] WASCA 162.

157. See Wickham J in *R v Grant* [1975] WAR 163, a case decided when s 631 of the *Criminal Code* (WA) was still in place.

Section 59(2) of the *Criminal Procedure Act 2004 (WA)* provides that in the lower court, before requiring an accused to plead to the charge, the court must 'be satisfied that the accused understands the charge and the purpose of the proceedings'. However, the section does not instruct on, or indeed seem to contemplate, what is to eventuate if the accused cannot understand these things. Section 59(3) simply states that after complying with s 59(2) the court must require the accused to plead.

By s 90 a superior court hearing a prosecution may stay the prosecution permanently 'in the interests of justice' and discharge the accused. This power is presumably designed to allow for an investigation as to whether an accused is fit to plead or undergo trial; however, it is not made clear. Further, the section is followed by the rather ominous s 91, which provides that a court may require an accused to plead to a charge at any time after an indictment is lodged with the court. This suggests that a decision to stay a prosecution—even 'permanently'—might be able to be revisited at any time, leaving an accused who has been so discharged never free from the threat of a revival of the proceedings.

Section 130 of the Act refers to mental fitness to stand trial. It states that this question must be dealt with under the *Criminal Law (Mentally Impaired Accused) Act 1996 (WA)*. I have already mentioned that the provisions of the latter Act do not pick up the situation of Aboriginal people who may lack comprehension because of cultural and language difference.

Obviously the *Criminal Procedure Act 2004 (WA)* is very new and guidance on interpretation of the Act by court decisions can be expected in the future. However, it does seem that the Act provides less protection for Aboriginal defendants than the repealed s 49 of the *Aboriginal Affairs Planning Authority Act 1972 (WA)*. The new Act does not, for example, highlight the socio-cultural disadvantage of Aboriginal people in the mainstream court process by imposing a specific statutory duty of examination or address the question of the admission of confessional material. It may be that even more reliance will need to be put on the development of common law protections in this area, along the lines referred to above.

Clarity will be required from the courts as to the extent of protection now available for Aboriginal people who are unable to understand proceedings, in light of the recent repeal of s 49 of the *Aboriginal Affairs Planning Authority Act 1972 (WA)*. This should be monitored with a view to the possible need for reinstatement of legislative protections.

## Interpreters

In a Queensland case in 1885, a trial judge ordered the release of four Aboriginal persons who had been charged with murder as there was no interpreter to be found who could adequately interpret for them in the proceedings.<sup>158</sup>

General principles requiring procedural fairness in trials suggest that there is a right to an interpreter where required by a defendant to properly understand and participate in the proceedings.<sup>159</sup> However, there is no statutory guidance for courts as to the use of interpreters and this has led to inconsistent use.

Michael Cooke in his background paper for this project advised that interpreters are under-utilised in Western Australian court proceedings and by police in cases involving Aboriginal people, certainly in the Kimberley.<sup>160</sup> In its consultations for this reference the LRCWA was told that in the Pilbara interpreters were needed in court but were only used 'now and again'. Also, there was no interpreter service at the Broome court, despite the need for such a service.<sup>161</sup> This under-utilisation of interpreters occurs even though a good proportion of Aboriginal people in Western Australia can only 'get by' at a simple level with English and would not be in a position to adequately address the complex issues of a criminal trial unassisted.<sup>162</sup>

Complexity of language and cultural difference may be masked. The danger of courts working on a veneer of supposed understanding of the court process was highlighted by Dr Diana Eades in her study of a court case involving 'urban'

158. *R v Willie* (1885) 7 QLJ (NC) 108

159. See for example *Deitrich v The Queen* (1992) 177 CLR 292, 363 (Gaudron J), 330–31 (Deane J); *Ebatarinja v Deland*, above n 152, 454; *Re East; ex parte Nguyen* (1998) 196 CLR 354, 390.

160. M Cooke, 'Caught in the Middle: Indigenous Interpreters and Customary Law', Background Paper No 2, above p 77, 114–15.

161. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations: Pilbara*, 6–11 April 2003, [12 (c)].

162. Cooke, above n 159, 79–80.

Aboriginal juveniles.<sup>163</sup> She identified that there was serious disadvantage to the juveniles in the proceedings arising from lack of understanding of cultural differences. Difficulties included: failure to understand the need of the juveniles for a period of silence before answering questions; the cultural trait of avoiding eye contact; and the use of pressure cooker questioning by prosecutors, such as raising of the voice which simply resulted in 'gratuitous concurrence' – agreeing with the proposals put, whether correct or not. In the Northern Territory, Mildren J has highlighted continuing difficulties for Aboriginal people in the court process.<sup>164</sup> He has stated: 'It is widely recognised that the trial process operates unfairly to Aboriginal witnesses and accused, because that process is often outside of their experience'.<sup>165</sup>

In terms of the subtlety of these difficulties, Michael Cooke refers to customary law considerations that are even involved in the question of choosing an interpreter and the way the interpreter carries out his or her task. These include considerations of kin relationship and style of language to be used.<sup>166</sup>

It is often difficult to obtain accredited interpreters in Aboriginal languages. Courts are reluctant to use interpreters who are not accredited so all parties, including the court, end up being disadvantaged in proceedings as there is no clear understanding of what is being said and done. Therefore, the training and accreditation of more interpreters is required. This will, of course, require resources.

Statutory guidance should be given to judicial officers to ensure that interpreters are used when this is shown to be necessary. The training and accreditation of more Aboriginal interpreters should be resourced.

## Juries and gender restricted evidence

At common law juries are required to be representative of the general community and are to be selected at random.<sup>167</sup> This means that a jury for a trial involving Aboriginal people will not necessarily be comprised of, or even contain, any Aboriginal people. This presents problems to Aboriginal persons in having their matters determined by people who have no understanding of their law and customs. Various attempts have been made to challenge juries on the basis of lack of Aboriginal representation; however, they all appear to have been unsuccessful.<sup>168</sup>

There are other difficulties in relation to juries. Sometimes it is inappropriate, for reasons of customary law, for persons of a particular gender to hear about a matter that is the subject of a court hearing. Therefore, Aboriginal witnesses may be unable or unwilling to disclose relevant matters in front of a jury comprising the wrong gender. Although there is a right to challenge jurors, the number of challenges available is limited, and an appropriate jury might not be able to be achieved. In some cases, the Crown has consented to an all-male jury,<sup>169</sup> but in the absence of such consent there is no power in the court to order a jury of a specific gender.<sup>170</sup>

It is common in native title cases, which are heard by a judge in the Federal Court, for restrictions to be imposed on the gender of persons hearing particular parts of evidence. This has meant that only male (or only female) members of the public, counsel, solicitors and court officers have been able to listen to the evidence. It has been applied to matters relating to men's business or women's business, in which under customary law it would be wrong for a person of the other gender to hear about such matters. The courts have then made consequent orders that restrict the publication of the transcript of such evidence.<sup>171</sup> Even these procedures are not totally satisfactory, as the judge (of whatever gender) must hear the evidence and this can restrict what can comfortably be disclosed.

Under the *Criminal Procedure Act 2004* (WA) there is now the ability for a criminal court to exclude all or specific classes of persons from the court in the interests of justice and restrict publication of the proceedings.<sup>172</sup> At this stage the reach of this newly introduced provision is not clear; however, it is unlikely that a juror would be excluded on gender

163. Eades D 'Cross-examination of Aboriginal Children: The Pinkenba Case' 1995(3) 73 *Aboriginal Law Bulletin* 10.

164. Mildren D 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21 *Criminal Law Journal* 7.

165. *Ibid* 12.

166. Cooke, above n 159, 83, 119.

167. *Cheatle v The Queen* (1993) 177 CLR 541, 560.

168. Eg *R v Grant & Lovett* [1972] VR 423; *R v Walker* (1989) 2 Qd R 79.

169. *R v Sydney Williams* (1976) 14 SASR 1

170. *R v A Judge of the District Courts; ex parte Attorney General (Qld)* [1991] 1 Qd R 170; cf Australian Law Reform Commission, above n 96, 595, [440], which suggested that the court could exercise its inherent jurisdiction to order a specific gender jury and should do so in certain circumstances.

171. See the appeal to the Full Court of the Federal Court in *Western Australia v Ben Ward* (1997) 76 FCR 492, where the practice was approved. Leave to appeal the decision was refused by the High Court.

172. Pursuant to s 171(4).

grounds under this section. The result is that in criminal trials where an Aboriginal person is unable to give evidence about a particular matter because of customary law, it is unlikely that the court will hear about it even though it may be crucial to the proceedings. This is unfair both to victims and accused persons.

The *Juries Act 1957 (WA)* should be amended to permit the judge, in a trial to exercise discretion in a particular case, to order that a jury be drawn from persons of a particular gender.

## The giving of evidence

Aboriginal people can feel disadvantaged and even dishonoured when giving evidence in a mainstream court. This came through clearly in the LRCWA's consultations for this project. For example, the Commission's representatives were told that the course of recent evidence taken in native title hearings in Laverton were 'very degrading and are still causing pain for Aboriginal people because of the matters that were revealed and the hearing processes'.<sup>173</sup> They were also informed that 'Aboriginal people could even be endangering others and themselves by saying some things'.<sup>174</sup>

Special issues also arise for witnesses who are victims of family violence or sexual assaults. These types of difficulties have been the subject of an earlier LRCWA report in 1991<sup>175</sup> and a report in Queensland in 1996.<sup>176</sup> Problems of shame arising from the discussion of sexual matters in public, pressure and feelings of lack of support in an alien system were highlighted in the Queensland report.<sup>177</sup>

The LRCWA report was followed by amendments to the laws of evidence providing for video evidence, the giving of unsworn evidence and other special arrangements for children or vulnerable adult witnesses in proceedings.<sup>178</sup> Such special arrangements can be made where, amongst other things, cultural factors or the subject matter of the proceedings indicate that witnesses will be intimidated or stressed.<sup>179</sup>

These provisions are in addition to s 100A of the *Evidence Act 1906 (WA)*, which was already in place when the other initiatives were introduced. Section 100A allows for accepting evidence on an unsworn basis where a person does not understand the nature of swearing or giving an affirmation as to the truth of evidence, but otherwise understands the requirement to tell the truth to the court. The section has been used for receiving evidence from traditionally oriented Aboriginal people, who lack understanding of oaths and affirmations.<sup>180</sup> However, the section indicates that the evidence is not necessarily to be regarded as having the same force as evidence given on oath or affirmation.<sup>181</sup> This is not the case with evidence given under the procedures introduced for children and vulnerable witnesses and there is no logical reason why there should be a difference.

Section 100A of the *Evidence Act 1906 (WA)* is out of step with the amendments introduced after the 1991 Law Reform Commission report in suggesting that unsworn evidence of Aboriginal people given under the section is less reliable than evidence given on oath or affirmation. The section should be amended to do away with that suggestion.

## Suppression of names and other information

In many Aboriginal communities it is inappropriate under customary law to refer to the name of a person who is deceased. Aboriginal law can also prohibit the publication of other information, such as the details of a particular person going through the law. The *Criminal Code*<sup>182</sup> gives power to the court to suppress information that may emerge in cases of a certain class; namely, those which involve extortion or blackmail.

As mentioned above, under the *Criminal Procedure Act 2004 (WA)* a criminal court has the power to restrict publication

173. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, [3].

174. *Ibid.*

175. Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses*, Project No 87 (April 1991).

176. Queensland Criminal Justice Commission, *Aboriginal Witnesses in Criminal Courts* (June 1996).

177. *Ibid.* 93–96.

178. See *Evidence Act 1906 (WA)* ss 106A–106T.

179. *Evidence Act 1906 (WA)* s 106R(3)(ii).

180. *Lau v The Queen* (1991) 6 WAR 30, 39, 40.

181. See s 100A(2).

182. In s 399A.

of the proceedings in the interests of justice. This includes all or a portion of the proceedings.<sup>183</sup> This should enable courts to restrict publication of culturally sensitive material where this is required.

## Confessions and admissions

Evidence against an accused person may include statements that were made to police or others confessing the alleged offence or admitting various aspects of it. It is important that these confessions or admissions can be relied upon. If, for example, there were threats or promises involved, a court cannot be sure that what was said was true or whether the accused person 'made up' his statement in order to avoid the threats or to obtain the benefit of the promises.

For these reasons courts are on guard to make sure that confessional material has been given voluntarily and in fair circumstances. Courts are assisted by the fact that interviews of suspects in serious matters must now, by law, be videotaped.<sup>184</sup>

Many Aboriginal people encounter special difficulties in the police interview process, due to the alien cultural situation and language differences. Some of these difficulties have been referred to earlier.<sup>185</sup>

In addition to s 49 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) which, prior to its repeal, enabled a court to examine an Aboriginal accused person in order to see if he or she understood the nature of the interview process, the courts have adopted guidelines—the Anunga Guidelines (or Rules)—designed to guide police in their dealings with Aboriginal suspects. Although the guidelines originated in the Northern Territory,<sup>186</sup> the courts in Western Australia have adopted them as appropriate guidelines to be considered in examining the fairness and reliability of the police interview process.<sup>187</sup> There is some difference of emphasis between judges in Western Australia as to the extent to which the Anunga Guidelines should be followed. Some judges have emphasised the need for flexibility in their use.<sup>188</sup> While this is understandable, such a direction can have the effect of eventually 'watering down' the effectiveness of these safety measures.

The Anunga Guidelines, among other things, stress the need for interpreters and a support person for the person being interviewed (a 'prisoner's friend'). They also state that the 'caution' (the explanation that the person being interviewed has a right to remain silent) should be carefully explained, that questions are appropriately formulated so as not to suggest the answer (no leading questions), and that the person should be put at ease in various ways.

Mildren J reviewed the effectiveness of the Anunga Guidelines—which are now 28-years-old—and suggested that a review of them is necessary on the basis that they are not being satisfactorily implemented.<sup>189</sup> In regard to the use of interpreters '[did] not think that courts should too readily reach the conclusion that simply because the interview was conducted in simple English the required level of mutual understanding had been achieved'.<sup>190</sup> Mildren J also made the point that the choice of a prisoner's friend is often inappropriate as they may have a similar lack of comprehension of proceedings to that of the person being interviewed.<sup>191</sup> He also suggested that the problem of 'gratuitous concurrence' is still prevalent by people agreeing to an interview when the form of caution remains inadequate. Also, leading questions are still used.<sup>192</sup>

Lawyers and judicial officers in Western Australia will recognise the inadequacies referred to by Mildren J in many of the interviews involving Aborigines that come before the courts.

It is time for an updating of the Anunga Guidelines in Western Australia by setting new rules for police when conducting interviews with Aboriginal people. These should emphasise the need for fully informed consent to the interview process and provide safeguards to ensure proper understanding of the process, questions and answers. Adherence should, along with other considerations of fairness, be determinative of admissibility of confessional material.

183. Pursuant to s 171(4).

184. *Criminal Code* (WA) s 570D.

185. See above pp 572–73.

186. (1976) 11 ALR 412.

187. *R v Williams* (1992) 8 WAR 265; *Webb v The Queen* (1994) 13 WAR 257

188. See, for example, *R v Njana* (1998) 99 A Crim R 273.

189. Mildren, above n 163, 8.

190. *Ibid* 9.

191. *Ibid* 9–10.

192. *Ibid* 10–12, 14.

## Part VI: Alternative Aboriginal justice schemes

For many years Aboriginal people have called for their right to 'self-determine' their affairs, including those concerning justice. This has been related to the issue of Aboriginal sovereignty. In Geraldton the LRCWA's representatives were told that 'sovereignty was the key issue today and goes to the status of Aboriginal peoples. Aboriginal jurisdiction was [the] key to establishing law again'.<sup>193</sup> The Ngaanytjarra Council, in its consultations with the LRCWA, asked that it be formally recorded that the 'number one issue is the Constitution' and stated that Aboriginal law must be recognised. They explained that there is a lack of respect for Aboriginal law across Australia and the lack of formal recognition weakens the authority of Aboriginal law.<sup>194</sup>

In its consultations in Kalgoorlie, the Commission was advised that 'it is most important for Aboriginal customary law to have Aboriginal judges who can deal with Aboriginal customary law on its own terms'.<sup>195</sup> Similar views were expressed during other consultations conducted by the Commission.

As mentioned in earlier parts of this paper, it is in the public interest, and indeed essential, that Aboriginal ways of dealing with offending be facilitated in light of the evidence that the mainstream law is failing in its role of maintaining protection for Aboriginal communities.

### Alternative justice schemes

There have been various schemes introduced in Australia, in both urban centres and remote communities, in which more involvement of Aboriginal people in the justice system at the sentencing stage has been attempted. Elena Marchetti and Kathleen Daly have described the major initiatives as follows:

Examples of the first kind include the Nunga and Aboriginal Courts in South Australia, the Koori Courts in Victoria, the Murri and Rockhampton Courts in Queensland, and Circle Sentencing in New South Wales. The second comprises sentencing circles in more remote parts of Western Australia and New South Wales, and Justice Groups in Queensland. There is some overlap between the two; however, the differences reflect the varied contexts of Indigenous justice practices (urban, country, remote) and the different modes of Indigenous participation in the sentencing process.<sup>196</sup>

Attempts in Western Australia still seem to involve the operation of mainstream law and the prime position of a mainstream—usually non-Aboriginal—judicial officer, although with varying degrees of input from Aboriginal community members.<sup>197</sup> In its consultations with the LRCWA, the Wiluna community, which has gone down this track, pointed out that while their form of court system was regarded as an advance, it was nevertheless focused on the non-Aboriginal magistrate with court formalities.<sup>198</sup> All of the courts which have introduced these initiatives only operate in the lowest tier of criminal courts (namely, at magistrate court level) and only in the sentencing process.

At the moment the only scheme available where Aboriginal communities can operate under their own laws is the by-law scheme under the *Aboriginal Communities Act 1979* (WA). The long title of that Act describes it as 'an Act to assist certain Aboriginal communities to manage and control their community lands and for related purposes'.

The act provides the ability for Aboriginal communities to make by-laws about certain matters. Such by-laws are then duly gazetted. Jurisdiction relates to prohibition or regulation of entry onto the community land, regulation of alcohol and some other matters largely in the nature of 'nuisance' offences.<sup>199</sup> By the Act, enforcement of the by-laws is vested in police officers and a maximum penalty of a fine of \$5,000 is set.<sup>200</sup> The by-laws only apply within the boundaries of the community land in question<sup>201</sup> and their operation is subject to other statutory rights and powers.<sup>202</sup>

The by-law legislation has been accompanied by an administrative scheme to support it, involving the appointment of Aboriginal wardens (although unless police officers or 'special constables', they have no power of enforcement) and the

193. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Geraldton, 26–27 May 2003*, [5].

194. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Warburton, 3–4 March 2003*, [1].

195. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Kalgoorlie, 25 March 2003*, [8(c)].

196. Marchetti E & Daly K 'Indigenous Courts and Justice Practices in Australia' (2000) 277 *Trends and Issues in Crime and Criminal Justice* 1.

197. Examples include the magistrate courts at Wiluna, Yandeyarra, Geraldton and in the Ngaanytjarra 'lands'.

198. Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Wiluna, 27 August 2003*, [11(b)].

199. *Aboriginal Communities Act 1979* (WA) s 7(1).

200. Section 7(2).

201. Section 9.

202. Section 13.

appointment of community Justices of the Peace to hear and determine charges under the by-laws. The power of Aboriginal Justices of the Peace in relation to *Aboriginal Communities Act 1979 (WA)* matters has recently been significantly eroded by the *Magistrates Court Act 2004 (WA)* and regulations there under, which effectively place control in the hands of the local magistrate as to when justices can sit.<sup>203</sup>

It is clear that Aboriginal communities still see a useful role for the *Aboriginal Communities Act 1979 (WA)*, but also see that the scheme needs to be significantly strengthened.<sup>204</sup> Although the introduction of the by-law system was commendable at the time,<sup>205</sup> the scheme now needs serious reform if it is to be effective. On the other hand, if properly reformed, the Act could provide an appropriate vehicle for enabling Aboriginal communities to enjoy significant legal power, including through the use of customary law.

Damien McLean JP, the President of the Shire of Ngaanyatjaraku, in a covering letter to the 'Ngaanyatjarra Community Law and Justice Submission' says:

The survival of traditional Aboriginal law in the Ngaanyatjarra Communities has led to conflicting perceptions of responsibility for the maintenance of law and order. Government has a preference and expectation that Aboriginal Communities will deal with minor matters and reserve the major offending to be dealt with by the Justice system. The Communities have a preference for involvement with the more serious matters in conjunction with the Justice system, leaving the lesser offences to be dealt with by the Justice system alone.<sup>206</sup>

Reforms to the *Aboriginal Communities Act 1979 (WA)* scheme should include:

- (a) extending jurisdiction to Aboriginal communities to more serious matters, including offences involving breaches of Aboriginal custom, violence, sexual abuse, burglary and dishonesty;
- (b) providing for flexible, although significant, ways of dealing with offenders, including the ability for people to be dealt with under customary law;
- (c) extending the range of community areas over which by-laws can operate, including in appropriate cases extra-territorial operation;
- (d) enabling the by-laws to be administered by a range of community members, rather than only by the police and Justices of the Peace;
- (e) ensuring that offenders are not dealt with twice, both under the Act and also under mainstream law; and
- (f) ensuring that the scheme—including the drafting of the by-laws themselves—is flexible to take account of the non-written tradition of Aboriginal communities and also the fact that different communities will seek different ways of doing business.

## Resourcing and commitment

It is important that calls for measures in the nature of self-determination within the justice system are not misinterpreted by government as requiring Aboriginal people to do everything for themselves without providing necessary resources. Aboriginal people cannot be expected to deliver justice services to the community free of charge, when everyone else who is involved in justice service delivery (judicial officers, lawyers, departmental officers) is paid. There are also infrastructure and other expenses, such as the costs of training support personnel, which will need to be addressed.

Whatever schemes are introduced in response to the current crisis, adequate resources and support will be necessary. The quality of the justice system should be the same throughout the community.

In a 'Statement of Commitment to a New and Just Relationship Between the Government of Western Australia and Aboriginal Western Australians' signed by the government and Aboriginal peak bodies, the parties set out that the Statement 'commits the parties to work together to build a new and just relationship between the Aboriginal people of Western Australia and the Government of Western Australia'.<sup>207</sup> The new and just relationship will be furthered by


203. See *Magistrates Act 2004 (WA)* s 7 and *Magistrates Act Regulations* regs 4 and 8.

204. See, for example, Law Reform Commission of Western Australia, *Thematic Summaries of Consultations – Mowanjum*, 4 March 2004, [4]; Shire of Ngaanyatjarra and Warburton Community, 'Ngaanyatjarra Community Law and Justice Submission to the Attorney General of Western Australia' (Kalgoorlie, April 2002).

205. The scheme was introduced by the Coalition Government's Attorney-General Ian Medcalf MLC following pioneering work in the area by Terry Sydall SM.

206. Shire of Ngaanyatjarra and Warburton Community, above n 203, ii.

207. Government of Western Australia and ATSIC (10 October 2001) 3.



empowering Aboriginal communities to control their affairs through recognition of, and support for, their own customary laws and processes.

Alternative schemes involving Aboriginal communities in the delivery of justice services will need commitment by government to the principle and be adequately resourced.