

# APPENDICES

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# Appendix A: Proposals and Invitations to Submit

## Summary of Proposals

### Aboriginal Peoples in Western Australia

#### Proposal 1

[p 43] That the Western Australian government adopt a genuine whole-of-government approach to the delivery of services to Aboriginal people in Western Australia requiring the constructive communication between agencies at the state, regional and local levels and the consideration of cooperative multi-agency joint-funded programs to achieve real outcomes that effectively address the current state of Indigenous disadvantage in Western Australia.

#### Proposal 2

[p 44] That employees of Western Australian government agencies who work directly, or have regular dealings, with Aboriginal people be required to undertake cultural awareness training. Such training should include presentations by Aboriginal people and be delivered at the regional level to allow programs to be appropriately adapted to take account of regional cultural differences and customs and concerns of local Aboriginal communities.

That consideration be given to agency-arranged cultural awareness training being a condition of the contract where contractors or sub-contractors to any Western Australian government agency are required to work directly, or have regular dealings, with Aboriginal people.

### Recognition of Aboriginal Customary Law

#### Proposal 3

[p 49] That s 5 of the *Interpretation Act 1984* (WA) be amended to include the following standard definitions of 'Aboriginal person' and 'Torres Strait Islander person' for all written laws of Western Australia:

#### 5. Definitions applicable to written laws

'Aboriginal person' means any person who is wholly or partly descended from the original inhabitants of Australia.

In determining whether a person is an Aboriginal person the following factors are of probative value:

- (a) genealogical evidence;
- (b) evidence of genetic descent from a person who is an Aboriginal person;
- (c) evidence that the person self-identifies as an Aboriginal person; or
- (d) evidence that the person is accepted as an Aboriginal person in the community in which he or she lives.

'Torres Strait Islander person' means any person who is wholly or partly descended from the original inhabitants of the Torres Strait Islands.

In determining whether a person is a Torres Strait Islander person the following factors are of probative value:

- (a) genealogical evidence;
- (b) evidence of genetic descent from a person who is a Torres Strait Islander person;

- (c) evidence that the person self-identifies as a Torres Strait Islander person; or
- (d) evidence that the person is accepted as a Torres Strait Islander person in the community in which he or she lives.

For the purposes of Western Australian written laws the term 'Aboriginal person' is taken to include a Torres Strait Islander person.

#### **Proposal 4**

[p 60] That, at the earliest opportunity, the Western Australian government introduce into Parliament a Bill to amend the Constitution to effect, in s 1, the recognition of the unique status of Aboriginal peoples as the descendants of the original inhabitants of Western Australia. The provision should also acknowledge Aboriginal peoples as the original custodians of the land, acknowledge their continuing spiritual, social, cultural and economic relationship with lands and waters in Western Australia, and acknowledge the special contribution that Aboriginal peoples have made to Western Australia.

The Commission commends the provisions of s 1A of the *Victorian Constitution Act 1975* as precedent for the drafting of a similar provision for Western Australia's Constitution.

## **Aboriginal Customary Law in the International Law Context**

#### **Proposal 5**

[p 76] Recognition of Aboriginal customary laws and practices in Western Australia must be consistent with international human rights standards and should be determined on a case-by-case basis.

## **Aboriginal Customary Law and the Criminal Justice System**

#### **Proposal 6**

[p 101] That the mandatory sentencing laws for home burglary in Western Australia be repealed.

#### **Proposal 7**

[p 103] That the Western Australian government provide adequate resources for the development of cultural awareness training programs for legal practitioners.

#### **Proposal 8**

[p 104] That employees of the Department of Justice who work directly with Aboriginal people (such as community corrections officers, prison officers and court staff) be required to undertake cultural awareness training.

That cultural awareness training be made available to volunteer workers.

That cultural awareness training be specific to local Aboriginal communities and include programs presented by Aboriginal people.

#### **Proposal 9**

[p 106] That the relevant criteria for an application for an extraordinary drivers licence as set out in s 76 of the *Road Traffic Act 1976 (WA)* be amended to include:

- That where there are no other feasible transport options, Aboriginal customary law obligations be taken into account when determining the degree of hardship and inconvenience which would otherwise result to the applicant, the applicant's family or a member of the applicant's community.
- In making its decision whether to grant an extraordinary drivers licence the court should be required to consider the cultural obligations under Aboriginal customary law to attend funerals and the need to assist others to travel to and from a court as required by a bail undertaking or other order of the court.

### Proposal 10

[p 106] That the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) be amended to provide that an Aboriginal person may apply to the registrar of the Fines Enforcement Registry for the cancellation of a licence suspension order on the additional grounds that it would deprive the person or a member of his or her Aboriginal community of the means of obtaining urgent medical attention, travelling to a funeral or travelling to court.

### Proposal 11

[p 120] That the *Aboriginal Communities Act 1979* (WA) be repealed. As an alternative, Aboriginal communities should be empowered to establish community justice groups and decide their own community rules and sanctions. For this purpose the Commission has proposed the 'Aboriginal Communities and Community Justice Groups Act' – see Proposal 18.

### Proposal 12

[p 121] That the definition of public place in s 1 of the *Criminal Code* (WA) be amended to include a discrete Aboriginal community declared under the proposed 'Aboriginal Communities and Community Justice Groups Act' other than an area of that community which is used for private residential purposes.

### Proposal 13

[p 122] That s 73 of the *Road Traffic Act 1974* (WA) be amended to bring lands of an Aboriginal community declared under the proposed 'Aboriginal Communities and Community Justice Groups Act' within the definition of 'driving'.

### Proposal 14

[p 123] That the proposed 'Aboriginal Communities and Community Justice Groups Act' include a provision relating to the prohibition and restriction of people on community lands. This provision should state that the community council of a discrete community which has been declared under the Act has the right, subject to the laws of Australia, to refuse the entry of any person into their community and, if permission for entry is granted, to determine on what conditions the person may remain on the community. It is an offence, without lawful excuse, to fail to comply with the conditions or enter without permission. This offence has the same penalty as the offence of trespass under the *Criminal Code* (WA).

Further, that a specific provision in relation to community members provide that the community council can, by giving reasonable notice, ask a member of the community to leave the community or part of the community for a specified period of time. Failure to leave the community, or returning to the community during the specified period, without lawful excuse constitutes an offence of trespass. Where a community has established a community justice group the community council can only ask a member of the community to leave if it has been recommended by the community justice group.

That these provisions expressly state that a member of the police force can remove a person who has not complied, within a reasonable time, with the request of the community council to leave the community.

### Proposal 15

[p 124] That the definition of 'public place' in the *Protective Custody Act 2000* (WA) be amended to include discrete Aboriginal communities which have been declared under the proposed 'Aboriginal Communities and Community Justice Group Act'.

That the Commissioner of Police seeks nominations from Aboriginal community councils for the appointment of persons as community officers under s 27 of the *Protective Custody Act 2000* (WA).

### Proposal 16

[p 126] That the Director-General of the Department of Indigenous Affairs be given the power to apply to the liquor licensing authority for regulations in relation to the restriction or prohibition of alcohol on behalf of a discrete Aboriginal community which has been declared under the proposed 'Aboriginal Communities and Community Justice Groups Act'. An application should only be made after it has been established that the majority of the community members support the application. The regulations should provide that breaching the restrictions or prohibition imposed is an offence.

### Proposal 17

[p 127] That the *Liquor Licensing Act 1988* (WA) be amended to provide that it is an offence to sell or supply liquor to a person in circumstances where the person selling or supplying the liquor knows, or where it is reasonable to suspect, that the liquor will be taken into an Aboriginal community which has prohibited the consumption of liquor under the *Liquor Licensing Regulations 1989* (WA).

### Proposal 18

[p 140] That legislation, the 'Aboriginal Communities and Community Justice Groups Act' be enacted to provide for the establishment of Aboriginal community justice groups upon the application, approved by the Minister for Indigenous Affairs, of an Aboriginal community.

That the Minister must approve a community justice group if satisfied that the membership of the community justice group is representative of all relevant family, social or skin groups in the community (to be defined in the Act); that there is provision for the equal representation of men and women; and that a majority of the members of the community support the establishment of a community justice group.

That the proposed 'Aboriginal Communities and Community Justice Groups Act' distinguish between the two types of Aboriginal communities which are covered by the legislation:

- Discrete Aboriginal communities which have been declared by the Minister for Indigenous Affairs to be a community to which the legislation applies.
- All other Aboriginal (non-discrete) communities.

That the Minister for Indigenous Affairs is to declare that an Aboriginal community is a discrete Aboriginal community to which the Act applies, if satisfied, that there are structures or provisions which require that the proposed community justice group consult with the members of the community in relation to the nature of the community rules and community sanctions.

That those communities that are currently declared to be a community to which the *Aboriginal Communities Act 1979* (WA) applies be deemed to be an Aboriginal community to which the proposed 'Aboriginal Communities and Community Justice Groups Act' applies.

That the proposed 'Aboriginal Communities and Community Justice Groups Act' include a definition of what constitutes community lands. For communities with a crown reserve lease or pastoral lease the definition should state that the community lands are the entire area covered by the reserve or pastoral lease. For other communities the Minister is to declare the boundaries of the community lands in consultation with the community.

That the proposed 'Aboriginal Communities and Community Justice Groups Act' provide that the functions of a community justice group in a discrete Aboriginal community include setting community rules and community sanctions subject to the laws of Australia. For all community justice groups the functions would include the establishment of local justice strategies and crime prevention programs; the provision of diversionary options for offenders; the supervision of offenders subject to community-based orders, bail or parole; and the provision of information to courts.

That the legislation include an indemnity provision for members of a community justice group to the effect that such members are relieved of civil liability for any act or omission in the performance of their functions within the criminal justice system.

That an Aboriginal Justice Advisory Council be established to oversee the consultation process with Aboriginal communities and to provide advice and support to communities who wish to establish a community justice group. The membership of the Aboriginal Justice Advisory Council should be predominantly Aboriginal people from both regional and metropolitan areas as well as representatives from relevant government departments including the Department of Indigenous Affairs, the Department of Justice and the Department for Community Development. This council is to be established within a framework that provides that its role is to advise and support Aboriginal communities and that government representatives are involved to provide support based upon their particular expertise.

#### **Proposal 19**

[p 157] That the Western Australian government establish as a matter of priority pilot Aboriginal Courts for adults and children in the metropolitan area and, subject to the views of the relevant Aboriginal communities, in other locations across the state. This pilot project must ensure adequate consultation with Aboriginal communities and other stakeholders and be sufficiently resourced and supported by government departments.

#### **Proposal 20**

[p 175] That relevant Western Australian government departments provide culturally appropriate information about changes to the criminal law that may significantly affect Aboriginal people. For the purposes of improving the communication of specific laws to Aboriginal people, government departments should consider engaging Aboriginal organisations and groups to assist with the design and delivery of any legal education program.

#### **Proposal 21**

[p 183] That s 31(4) of the *Criminal Code (WA)* be amended to remove the requirement that there must be a threat of *immediate death or grievous bodily harm*.

That s 31(4) be amended to provide that the threat may be directed towards the accused or to some other person.

That the defence be based on the defence in Australian Capital Territory and the Commonwealth.

#### **Proposal 22**

[p 189] That the Western Australian government continue to introduce strategies to educate Aboriginal communities about effective methods of discipline and inform Aboriginal communities of their right under Australian law to use physical correction that is reasonable in the circumstances. In doing this the focus should be on providing advice about the most effective methods of discipline. Aboriginal communities, in particular Elders and other respected members, including members of a community justice group, should be involved in the design and delivery of these education programs.

#### **Proposal 23**

[p 193] That Clause 1 of Part D to the Schedule of the *Bail Act 1982 (WA)* be amended to include, as a possible condition of bail,

(f) that before the release of the accused on bail a responsible person undertakes in writing in the prescribed form to ensure that the accused complies with any requirement of his bail undertaking. The authorised officer or judicial officer must be satisfied that the proposed responsible person is suitable.

#### Proposal 24

[p 193] That the *Bail Act 1982* (WA) be amended to provide that when setting the amount of a surety undertaking the financial means of any proposed surety should be taken into account.

#### Proposal 25

[p 194] That the *Bail Act 1982* (WA) be amended to provide that where an adult or juvenile accused has been refused bail or is unable to meet the conditions of bail that have been set by an authorised police officer, justice of the peace or authorised community services officer, the accused is entitled to apply to a magistrate for bail by telephone application if he or she could not otherwise be brought before a court by 4.00 pm the following day.

#### Proposal 26

[p 195] That the Department of Justice continue to develop, in partnership with Aboriginal communities, non-custodial bail facilities for Aboriginal children in remote and rural locations. In developing these facilities the Department of Justice should work in conjunction with any local community justice group.

#### Proposal 27

[p 197] That Clause 3 of Part C in Schedule 1 of the *Bail Act 1982* (WA) be amended to provide that the judicial officer or authorised officer shall have regard to:

(e) Where the accused is an Aboriginal person, any cultural or Aboriginal customary law issues that are relevant to bail.

Without limiting the manner by which information about cultural or Aboriginal customary law issues can be received by an authorised officer or judicial officer, the authorised officer or judicial officer shall take into account any submissions received from a representative of a community justice group from the accused's community.

#### Proposal 28

[p 198] That bail forms and notices (including the bail renewal notice handed to an accused after each court appearance) be amended to include culturally appropriate educational material in relation to the obligations of bail including what an accused person can do if he or she is unable to attend court for a legitimate reason.

#### Proposal 29

[p 208] That the *Sentencing Act 1995* (WA) include as a relevant sentencing factor the cultural background of the offender.

#### Proposal 30

[p 212] That the *Sentencing Act 1995* (WA) and the *Young Offenders Act 1994* (WA) be amended by including a provision that:

When considering whether a term of imprisonment is appropriate the court is to have regard to the particular circumstances of Aboriginal people.

#### Proposal 31

[p 220] That the *Sentencing Act 1995* (WA) and the *Young Offenders Act 1994* (WA) be amended to provide that when sentencing an Aboriginal offender a sentencing court must consider:

- any aspect of Aboriginal customary law that is relevant to the offence;
- whether the offender has been or will be dealt with under Aboriginal customary law; and
- the views of the Aboriginal community of the offender and the victim in relation to the offence or the appropriate sentence.

### Proposal 32

[p 224] That the *Sentencing Act 1995 (WA)* and the *Young Offenders Act 1994 (WA)* should be amended by inserting the following provision:

That when sentencing an Aboriginal person the court must have regard to any submissions made by a representative of a community justice group or by an Elder or respected member of the Aboriginal community of the offender or the victim.

Submissions for the purpose of this section may be made orally or in writing on the application of the accused, the prosecution or a community justice group. The court sentencing the offender must allow the other party a reasonable opportunity to respond to the submissions if requested.

### Proposal 33

[p 227] That s 16 of the *Sentencing Act 1995 (WA)* be amended to provide that:

The sentencing of an offender must not be adjourned for more than 12 months after the offender is convicted.

### Proposal 34

[p 232] That the *Criminal Procedure Act 2004 (WA)* be amended by inserting s 104A as follows:

- (1) A court may order, upon an application by the accused or the prosecution, that the jury be comprised of one gender.
- (2) The court may only make an order under s 104A (1) if satisfied that evidence that is gender-restricted under Aboriginal customary law is relevant to the determination of the case and necessary in the interests of justice.

### Proposal 35

[p 234] That s 129 of the *Criminal Procedure Act 2004 (WA)* be amended by providing that for all accused persons:

The court must not accept a plea of guilty unless, having considered whether there are any language, cultural or communication difficulties, the court is satisfied that the accused understands the nature of the plea and its consequences.

### Proposal 36

[p 239] That the Western Australia Police Service *COPs Manual OP-28* be amended to require relevant Aboriginal customary law issues to be taken into account in the decision to charge or prosecute an offender.

That the Director of Public Prosecutions consider amending the *Statement of Prosecution Policy and Guidelines 2005* to include that any relevant Aboriginal customary law issues should be taken into account in the decision to prosecute an offender.

### Proposal 37

[p 241] That Part 5, Division 1 of the *Young Offenders Act 1994 (WA)* be amended to provide that police officers must consider, in relation to an Aboriginal young person, whether it would be more appropriate for the caution to be administered by a respected member of the young person's community or a member of a community justice group.

### Proposal 38

[p 241] That the *Young Offenders Act 1994 (WA)* be amended to provide that any previous cautions issued under this Act cannot be used in court against the young person.

### Proposal 39

[p 242] That Part 5, Division 2 of the *Young Offenders Act 1994* (WA) be amended to provide that, subject to the young person's consent and acceptance of responsibility for the offence, a police officer must refer a young person to a juvenile justice team for a non-scheduled offence if the young person has not previously offended against the law, unless there are exceptional circumstances that justify not doing so.

In determining whether a young person has previously offended against the law, previous cautions cannot be taken into account.

### Proposal 40

[p 242] That the categories of offences listed in Schedule 1 and Schedule 2 of the *Young Offenders Act 1994* (WA) be immediately reviewed to enhance the availability of diversion to the juvenile justice teams for offences committed in circumstances considered less serious.

### Proposal 41

[p 242] That the *Young Offenders Act 1994* (WA) be amended to provide that any previous referrals by the police to a juvenile justice team cannot be used in court against the young person unless it is necessary to determine whether the young person should again be referred to a juvenile justice team.

### Proposal 42

[p 243] That the *Young Offenders Act 1994* (WA) include the relevant criteria (as set out in the *COPs Manual*) for the decision whether to arrest a young person or alternatively to issue a notice to attend court.

### Proposal 43

[p 244] That a diversionary scheme for young Aboriginal people be established to involve the referral by the police of young offenders to community justice groups. Initially, this scheme should be introduced via pilot programs in at least one metropolitan and one remote or regional location. After a suitable period the effectiveness of the scheme should be evaluated and the need for any legislative or policy changes should be considered. The scheme should ensure that:

- Aboriginal community justice groups are adequately resourced to institute diversionary programs.
- The scheme is flexible enough to allow different communities to develop their own processes and procedures.
- As an overriding safeguard the alleged offender must consent to being referred by the police to the community justice group.
- If the young person does not consent, if the community justice group does not agree to deal with the matter, or if the community justice group is not satisfied with the outcome, the matter can be referred back to police to be dealt with in the normal manner.
- A previous referral to a community justice group does not count as a conviction against the young person and is not to be referred to in a court unless, and only for the purpose of, considering whether the young person should again be referred to a community justice group.

### Proposal 44

[p 249] That the Western Australia Police Service and relevant Aboriginal interpreter services develop a set of protocols for the purpose of considering whether an Aboriginal person requires an interpreter during an interview.

### Proposal 45

[p 250] That the following rights be protected in legislation so as to render inadmissible any confessional evidence obtained contrary to them save in exceptional circumstances:

- That an interviewing police officer must caution a suspect and must not question the suspect until satisfied that the suspect understands the caution. In order to be satisfied that the suspect understands the caution the interviewing officer must ask the suspect to explain the caution in his or her own words.
- If the suspect does not speak English with reasonable fluency the officer shall ensure that the caution is given or translated in a language that the suspect does speak with reasonable fluency and that an interpreter is available before any interview commences.
- That before commencing an interview the interviewing police officer must advise the suspect that he or she has the right to contact a lawyer and provide a reasonable opportunity for the suspect to communicate (in private) with a lawyer.
- In the case of a suspect who is an Aboriginal person the police must notify the Aboriginal Legal Service prior to the interview commencing and advise that the suspect is about to be interviewed in relation to an offence and provide an opportunity for a representative of the Aboriginal Legal Service to communicate with the suspect. The interviewing officer does not have to comply with this requirement if the suspect has already indicated that he or she is legally represented by another lawyer or if the suspect states that he or she does not want the Aboriginal Legal Service to be notified.
- If the suspect does not wish for a representative of the Aboriginal Legal Service to attend or there is no representative available the interviewing officer must allow a reasonable opportunity for an interview friend to attend prior to commencing the interview. The interviewing officer does not have to comply with this requirement if it has been expressly waived by the suspect.
- That appropriate exceptions be included, such as an interviewing officer is not required to delay the questioning in order to comply with this provision if to do so would potentially jeopardise the safety of any person.

### Proposal 46

[p 253] That the Western Australian government provide adequate resources to ensure that every police officer who is stationed at a police station that services an Aboriginal community participates in relevant Aboriginal cultural awareness training.

This cultural awareness training should be presented by local Aboriginal people including, if appropriate, members of a community justice group.

### Proposal 47

[p 258] That the Department of Justice, in conjunction with Aboriginal communities, develop culturally appropriate policy and procedure manuals for all prisons to assist prisoners and prison officers with applications for attendance at funerals.

In drafting these manuals consideration be given to the potential role for community justice groups in assisting prisoners with the application process. Community justice group members could provide advice to prison authorities about the significance of the prisoner's relationship with the deceased and the importance of the prisoner's attendance at the funeral for the community.

### Proposal 48

[p 259] That the Department of Justice immediately revise Policy Directive 9 and Juvenile Custodial Rule 802 in relation to attendance at funerals. The eligibility criteria should include recognition of Aboriginal kinship and other important cultural relationships.

### Proposal 49

[p 260] That the Department of Justice should review and revise its current policy in relation to the use of physical restraints on prisoners and detainees during funeral attendances. The revised policy should recognise the importance of Aboriginal prisoners attending funerals in a dignified and respectful manner. Physical restraints should only be used as a last resort and, if required, they should be as unobtrusive as possible.

### Proposal 50

[p 260] That the Department of Justice revise, in conjunction with Aboriginal communities, its policy concerning the escorting of Aboriginal prisoners and detainees to funerals.

### Proposal 51

[p 261] That the *Sentence Administration Act 2003* (WA) and the *Young Offenders Act 1994* (WA) be amended to provide that the Parole Board and the Supervised Release Board can request to be provided with information or reports from a respected Elder in the offender's community or a member of a community justice group.

## Aboriginal Customary Law and the Civil Law System

### Proposal 52

[pp 291–92] That the present definition of 'person of Aboriginal descent' contained in s 33 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) be deleted.

That the requirement in s 35(1) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) that all property of an intestate Aboriginal deceased be automatically vested in the Public Trustee be removed so that the family or next of kin of such deceased may have the choice to administer the estate of the deceased by grant of formal letters of administration under the *Administration Act 1903* (WA).

That s 25 of the *Administration Act 1903* (WA) be amended to state that in the case of intestate Aboriginal estates, the Supreme Court need not know who is entitled in distribution to them, nor whether they wish to apply for a grant of letters of administration themselves.

That traditional Aboriginal marriage be recognised as a marriage and that children of a traditional Aboriginal marriage be recognised as issue of a marriage for the purposes of the *Administration Act 1903* (WA).

That s 35(2) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) be repealed and replaced with a provision directing that distribution of an estate of an intestate Aboriginal person shall follow the order of distribution contained in s 14 of the *Administration Act 1903* (WA); however, where a person or persons of entitlement cannot be ascertained under s 14, a person or persons who enjoy a classificatory kin relationship under the deceased's customary law may apply to succeed to the estate.

That a new s 35(2A) be inserted into the *Aboriginal Affairs Planning Authority Act 1972* (WA) directing that proof of entitlement to an intestate Aboriginal estate as classificatory kin under s 35(2) of that Act shall be determined upon application to the Supreme Court and that such application may be made after one year of the date of death of the deceased.

That s 35(3) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) dealing with moral claims be retained in its current form and that the regulations associated with moral claims (sub-regs 9(5) and (6) of the *Aboriginal Affairs Planning Authority Act Regulations*) also be retained.

That sub-regs 9(1)–(4) of the *Aboriginal Affairs Planning Authority Act Regulations 1972* (WA) be repealed.

### Proposal 53

[p 293] That the prescribed amount declared by proclamation pursuant to s 139(1) of the *Administration Act 1903* (WA) be reviewed and updated to an amount appropriate at the date of proclamation.

### Proposal 54

[p 294] That the Department of Indigenous Affairs and the Public Trustee be jointly funded to establish a program aimed at educating Aboriginal people about the value of wills and also about their entitlements, rights and responsibilities under Western Australian laws of succession.

### Proposal 55

[p 295] That the list of persons entitled to claim against a testate or intestate estate of an Aboriginal person under s 7 of the *Inheritance (Family and Dependants Provision) Act 1972* (WA) be extended to include a person who is in a kinship relationship with the deceased which is recognised under the customary law of the deceased and who at the time of death of the deceased was being wholly or partly maintained by the deceased.

That traditional Aboriginal marriage be recognised as having the same rights as a marriage and that children of a traditional Aboriginal marriage be recognised as having the same rights as issue of a marriage for the purposes of the *Inheritance (Family and Dependants Provision) Act 1972* (WA).

### Proposal 56

[p 298] That the State Administrative Tribunal assess the cultural appropriateness of its guardianship and administration procedures and consider the development of a set of protocols and guidelines for tribunal members in relation to the management of hearings involving Aboriginal people.

### Proposal 57

[p 299] That, in the absence of appointment under an administration order by the State Administrative Tribunal or other judicial body, the Public Trustee ensure that Aboriginal beneficiaries of deceased estates administered by the Public Trustee are made aware of alternatives for the financial management of their inheritance before accepting the administration of the financial and/or legal affairs of those beneficiaries. And, that these alternatives are communicated in a culturally appropriate way with the assistance of an independent legal or financial advisor and, if required, an interpreter.

### Proposal 58

[p 306] That the *Coroners Regulations 1997* (WA) be amended to include a direction that in making a decision whether or not to order a post-mortem examination on an Aboriginal deceased person, a coroner must have regard to the desirability of minimising the causing of distress or offence to relatives and extended family (including classificatory kin) of the deceased who, because of their cultural attitudes or spiritual beliefs, could reasonably be expected to be distressed or offended by the making of that decision.

### Proposal 59

[p 308] That the Department of Justice establish, at the earliest opportunity, a dedicated internet site for the Coroner's Court of Western Australia to enable public access to coronial guidelines, procedures, protocols and findings.

### Proposal 60

[p 325] That protocols relating to the use, sale and protection of Indigenous cultural and intellectual property be developed and promoted in Western Australia. Such protocols should inform Western Australian

government agencies and educational and cultural institutions in their dealings with Aboriginal artists and the observance of these protocols by all Western Australian industries, companies and individuals should be actively encouraged by government.

#### Proposal 61

[p 327] That the Western Australian government develop protocols aimed at addressing those issues that arise from the 'bioprospecting' of Aboriginal medical knowledge; that is, the exploration of biodiversity for commercially valuable genetic and biochemical resources. These protocols should aim to safeguard Indigenous cultural and intellectual property by ensuring that those who seek to benefit from traditional cultural knowledge:

- undertake direct consultation with Aboriginal people as to their customary law and other requirements;
- ensure compliance with Aboriginal peoples' customary law and other requirements;
- seek prior informed consent for the use of any Aboriginal knowledge from the custodians of that traditional knowledge;
- seek prior informed consent for access to Aboriginal land for any purposes including collection;
- ensure ethical conduct in any consultation, collection or other processes;
- ensure the use of agreements on mutually agreed terms with Aboriginal people for all parts of the process; and
- devise equitable benefit-sharing arrangements for Aboriginal people.

#### Proposal 62

[p 328] That the Western Australian government support and encourage the review of Commonwealth intellectual property laws and the institution of special measures to provide better protection for Indigenous cultural and intellectual property.

## Aboriginal Customary Law and the Family

#### Proposal 63

[p 334] That the Western Australian government include in the educative initiatives planned in response to the Gordon Inquiry, relevant information relating to the requirements under Australian law (and international law) of freedom of choice in marriage partners and the criminality of acts of sexual relations with children under the age of 16 regardless of marriage status under Aboriginal customary law.

#### Proposal 64

[p 337] That the following term be added to the *Interpretation Act 1984* (WA):

##### **5. 'Definitions applicable to written laws'**

'Traditional Aboriginal marriage' means a relationship between two Aboriginal persons, over the age of 18 years, who are married according to the customs and traditions of the particular community of Aboriginals with which either person identifies.

#### Proposal 65

[p 337] That the following section be inserted into the *Interpretation Act 1984* (WA):

##### **13B. Definitions of certain domestic relationships**

- (1) A reference in a written law to 'spouse', 'husband', 'wife', 'widow' and 'widower' will be taken to include the corresponding partner of a traditional Aboriginal marriage.
- (2) Section 13B(1) does not apply to the *Family Court Act 1997* (WA).

### Proposal 66

[p 338] That s 205U of the *Family Court Act 1997* (WA) be amended to read:

#### **205U. Application of Part generally**

- (1) This Part applies to de facto relationships and traditional Aboriginal marriages.
- (2) However, this Part does not apply to a de facto relationship or traditional Aboriginal marriage that ended before the commencement of this Part.
- (3) This Part does not authorise anything that would otherwise be unlawful.

### Proposal 67

[p 343] That following clause 3 of Schedule 2A of the *Adoption Act 1994* (WA) a new paragraph be added:

In applying this principle all reasonable efforts must be made to establish the customary practice of the child's community in regard to child placement. In particular, consultations should be had with the child's extended family and community to ensure that, where possible, a placement is made with Aboriginal people who have the correct kin relationship with the child in accordance with Aboriginal customary law.

### Proposal 68

[p 345] Recognising the custom in Aboriginal communities of making private arrangements to place a child in the care of members of the child's extended family where necessary for the proper care and protection of the child, the Department of Community Development should make available to Aboriginal communities information regarding support services and government benefits (whether Commonwealth or state) to assist extended family carers.

### Proposal 69

[p 346] That the Western Australian government take immediate steps to implement Recommendation 23 of the Family Law Pathways Advisory Group's Report *Out of the Maze – Pathways to the Future for Families Experiencing Separation* to enhance culturally appropriate service delivery to Aboriginal clients of the Family Court of Western Australia.

### Proposal 70

[p 353] That the Western Australian government actively encourage and resource the development of community-based and community-owned Aboriginal family violence intervention programs that are designed to respond to the particular conditions and cultural dynamics of the host community.

### Proposal 71

[p 355] That progress reporting and evaluation of programs and initiatives dealing with family violence and child abuse in Aboriginal communities be ongoing with an emphasis on positive, practical outcomes and demonstrate genuine consultation with those responsible for frontline service delivery and adaptation of programs to suit the changing needs and cultural differences of client communities.

## Customary Hunting, Fishing and Gathering Rights

### Proposal 72

[p 374] That the recognition of Aboriginal customary laws relating to hunting, fishing and gathering be subject to the genuine interests of conservation of Western Australia's diverse biological resources, but that they take a higher priority than commercial and recreational interests in the same resources.

That, in the application of conservation programs and decision-making in respect of conservation of land and resources in Western Australia, the Western Australian government and its conservation bodies actively consult, engage with and involve Aboriginal people.

### Proposal 73

[p 376] That relevant Western Australian government authorities take all reasonable steps to enhance communication of harvesting exemptions available to Aboriginal people and of any restrictions placed from time-to-time upon those exemptions.

### Proposal 74

[p 377] That the exemption currently provided by s 23 of the *Wildlife Conservation Act 1950* (WA) be subsumed into future wildlife and biological resource conservation legislation and be expanded to include the taking of flora and fauna (subject to conservation restrictions placed on certain species from time-to-time) for non-commercial purposes including for food, artistic, cultural, therapeutic and ceremonial purposes according to Aboriginal customary law.

That the exemption described above also apply to land designated under the *Conservation and Land Management Act 1984* (WA) subject to the provisions of conservation management plans over such land.

### Proposal 75

[p 377] That the exemption currently provided by s 23 of the *Wildlife Conservation Act 1950* (WA)—and its successor in future conservation legislation—remain applicable to all fauna and flora (subject to conservation restrictions), including introduced species.

### Proposal 76

[p 382] That s 267 of the *Land Administration Act 1997* (WA) be amended to make clear the legislative intention in relation to the use of firearms for customary hunting on Crown land pursuant to exemptions contained in s 104 of the *Land Administration Act 1997* (WA) and s 23 of the *Wildlife Conservation Act 1950* (WA).

## Aboriginal Customary Law in the Courtroom: Evidence and Procedure

### Proposal 77

[p 395] That the *Evidence Act 1906* (WA) be amended to provide that:

- The hearsay rule be excluded in relation to out of court statements which go to prove the existence or non-existence, or the content, of Aboriginal customary law.
- If a person has specialised knowledge, whether based on experience or otherwise, of Aboriginal customary law, then that person may give opinion evidence in relation to that matter where the opinion is wholly or substantially based on that knowledge.

### Proposal 78

[p 402] That adequate funding be provided for the training of Aboriginal interpreters.

That consideration be given to an accreditation system for Aboriginal language interpreters, in particular to a structure that enables more Aboriginal people to attain the requisite accreditation.

### Proposal 79

[pp 402–03] That the *Evidence Act 1906* (WA) provide that a person has the right to give evidence through an interpreter, unless it can be established that they are sufficiently able to understand and speak English.

A defendant in criminal proceedings who cannot sufficiently understand English shall be entitled to the services of an interpreter throughout the proceedings, whether or not they elect to give evidence.

That where the court has any reason to doubt the proficiency of a witness to either understand or speak English then the proceedings should not continue until an interpreter is provided.

That funding be made available to cover the cost of interpreters where required for witnesses and defendants in criminal proceedings.

#### **Proposal 80**

[p 403] That a qualified linguist be engaged by the Department of Justice to formulate tests to assist courts to determine when a particular witness or defendant requires the services of an interpreter.

#### **Proposal 81**

[p 404] That the Department of Justice, in conjunction with Aboriginal communities, provide education about the role of interpreters through:

- community education broadcasts; and
- the development of information videos to be distributed in communities and accessible at police stations, prisons and courts.

#### **Proposal 82**

[p 405] That guidelines be developed for the use by the Department of Justice in dealing with interpreters of Aboriginal languages, including:

- Using only trained interpreters.
- Establishing a pool of male and female interpreters from different family or skin groups and different communities.
- Providing information (such as the name of the parties and witnesses in a case and a brief outline of the subject matter) to the interpreter prior to the hearing to enable them to assess if there is a conflict under customary law.

#### **Proposal 83**

[p 410] That the *Evidence Act 1906* (WA) be amended to include a provision that if for reasons of customary law a witness is not able to give evidence in the normal manner then the witness may be declared a special witness and be able to give evidence using the protective measures set out in ss 106A to 106T on the application of the witness, or on the initiative of the court.

#### **Proposal 84**

[p 411] That the *Evidence Act 1906* (WA) be amended to provide that the court in the exercise of its discretion can allow evidence about customary law to be given by witnesses in groups.

#### **Proposal 85**

[p 411] That the *Evidence Act 1906* (WA) be amended to provide that the court in the exercise of its discretion can allow evidence about customary law to be taken on country.

#### **Proposal 86**

[p 413] That amendments be made to the rules governing procedure to allow an application to be made to the Chief Justice of the Supreme Court, the Chief Justice of Family Court, the Chief Judge of the District Court or the Chief Magistrate for a judge or magistrate of a particular gender to be assigned to a matter in which gender restricted evidence is likely to be heard.

#### **Proposal 87**

[p 413] That the *Criminal Procedure Act 2004* (WA) be amended to provide that a court may order that certain information not be referred to in proceedings if the court is satisfied that reference to that information would be offensive to an Aboriginal person or community because of Aboriginal customary law, provided that to do so is not contrary to the administration of justice.

### Proposal 88

[p 414] That the following sub-sections be added to s 171(4) of the *Criminal Procedure Act 2004* (WA):

- (d) On an application by a party or on its own initiative, a court may make an order that prohibits the publication of any evidence if the court is satisfied that publication of, or reference to, the evidence would be offensive to an Aboriginal person or community by reason of matters concerned with Aboriginal customary law.
- (e) The court must not make such an order if it is satisfied that publication of, or reference to, the evidence is required in the interests of justice.

### Proposal 89

[p 415] That the Department of Justice employ court facilitators to work with the Aboriginal Liaison Officer to the Courts to provide assistance to Aboriginal people giving evidence in court and to ensure that regard is given to issues of customary law in court proceedings.

### Proposal 90

[p 416] That all Western Australian courts (including the State Administrative Tribunal) implement Aboriginal cultural awareness training.

That the Western Australian government provide adequate resources to implement this proposal by ensuring that there are sufficient funds to develop programs, engage Aboriginal presenters without adversely affecting the work of the courts.

Where a judicial officer is required to regularly sit at a particular location, *local* cultural awareness should be encouraged.

The Commission encourages members of a community justice group to participate in cultural awareness training.

## Aboriginal Community Governance

### Proposal 91

[p 423] That the Western Australian government investigate ways of improving accountability of local governments for funding provided for the benefit of Aboriginal people in each local government area.

### Proposal 92

[p 436] That the Western Australian government explore the possibility of accessing federal funding for discrete Aboriginal communities under s 4(1)(b) of the *Local Government (Financial Assistance) Act 1995* (Cth) with a view to offering this autonomous option to functional Aboriginal communities that are not currently well-served by their local governments.

### Proposal 93

[p 438] That the starting point for reform of Aboriginal community governance in Western Australia be limited to a basic framework that can facilitate self-identifying and self-organising governance structures to emerge at a community level.

That reform of Aboriginal community governance in Western Australia be informed by the guiding principles of voluntariness; community empowerment and devolved decision-making power; 'downwards accountability'; flexibility in funding and institutional structure; and balanced clan and gender representation.

That Aboriginal communities be free to develop or choose a model of governance that is appropriate for their needs rather than have such model imposed on them by government.

# Summary of Invitations to Submit

## Aboriginal Peoples in Western Australia

### Invitation to Submit 1

[p 31] The Commission invites submissions on the problems faced by Aboriginal people in Western Australia in proving their Aboriginality, particularly for the purposes of accessing programs and benefits offered by Western Australian government agencies for the exclusive benefit of Aboriginal people.

## Aboriginal Customary Law and the Criminal Justice System

### Invitation to Submit 2

[p 116] The Commission invites submissions on the extent to which the defence of acting under a custom of the community has been relied upon by Aboriginal people accused of breaching a by-law enacted under the *Aboriginal Communities Act 1979* (WA) and whether the defence was successful.

### Invitation to Submit 3

[p 123] The Commission invites submissions as to whether (and if so, on what terms) there should be a customary law defence to the offence of trespass in the proposed 'Aboriginal Communities and Community Justice Groups Act'.

### Invitation to Submit 4

[p 161] The Commission invites submissions as to whether there should be a partial defence of Aboriginal customary law that would have the effect, if proved, that a person charged with wilful murder or murder would instead be convicted of manslaughter.

In the alternative the Commission invites submissions as to whether the mandatory penalty of life imprisonment for the offences of wilful murder and murder should be abolished and replaced with a maximum sentence of life imprisonment so that issues concerning Aboriginal customary law can be taken into account in mitigation of sentence where appropriate.

### Invitation to Submit 5

[p 172] The Commission invites submissions as to whether the *Criminal Code* (WA) should be amended to remove the distinction between assault occasioning bodily harm and unlawful wounding and, if so, whether:

- the *Criminal Code* (WA) should provide that consent is an element of an offence of unlawful wounding; or
- the offence of unlawful wounding should be removed; or
- the various categories of violence should be redefined as harm or serious harm and to provide that a person can consent to harm but not to serious harm unless in pursuance of a socially acceptable function or activity.

### Invitation to Submit 6

[p 187] The Commission invites submissions as to whether the ordinary person should be defined as an ordinary person of the same cultural background as the accused for the purposes of assessing both the gravity of the provocation and determining whether an ordinary person could have lost self-control.

### Invitation to Submit 7

[p 189] The Commission invites submissions in relation to the most appropriate agency to coordinate education strategies for Aboriginal people about effective methods of parental discipline.

### Invitation to Submit 8

[p 254] The Commission invites submissions as to whether, in light of the Commission's proposals in relation to criminal justice (or for any other reason), the Western Australia Police Service's former Aboriginal Policy and Services Unit should be reinstated and provided with additional resources.

## Aboriginal Customary Law and the Civil Law System

### Invitation to Submit 9

[p 293] The Commission invites submissions on whether, in circumstances where an Aboriginal person claims entitlement to distribution of an intestate Aboriginal estate but has no proof of relationship to the deceased (because his or her birth was not registered under Australian law or because the claimant was removed from his or her family pursuant to previous government policies in Western Australia), a recommendation of the Minister of Indigenous Affairs as approved by the Governor should be taken as conclusive evidence of entitlement to succeed to that estate.

The Commission also invites submissions on the appropriate body to conduct investigations to support recommendations to the Governor in this respect.

### Invitation to Submit 10

[p 299] The Commission invites submissions from interested parties on the capacity of the guardianship and administration system in Western Australia to adequately meet the needs of Aboriginal people. In particular, the Commission invites submissions on the cultural appropriateness of the guardianship and administration system and its interaction with Aboriginal customary laws and cultural beliefs.

### Invitation to Submit 11

[p 307] The Commission invites submissions on whether s 35(7) of the *Coroners Act 1996* (WA) should be amended to include a provision granting any person, or a specified class of persons, the right to apply to the State Coroner seeking an order that he or she should be regarded as the senior next of kin, having regard to the customary law of the deceased person, and granting the State Coroner a discretion to make such an order having regard to the totality of the available evidence.

### Invitation to Submit 12

[p 317] The Commission invites submissions on:

- Whether cultural and spiritual beliefs genuinely held under Aboriginal customary law should be considered by the court where there is a dispute in relation to the disposal of a body of an Aboriginal deceased. And if so, what significance should be attached to such cultural and spiritual beliefs?
- What would be the appropriate protocol to apply in cases where there are genuinely held but competing cultural and spiritual beliefs?
- What, if any, significance should be placed on the deceased's wishes regarding burial if embodied in a signed document (not necessarily a will)?
- Whether the Supreme Court of Western Australia is the appropriate forum for the determination of burial disputes and, if not, what would be the appropriate forum?

## Aboriginal Customary Law and the Family

### Invitation to Submit 13

[p 337] The Commission invites submissions on the extent to which polygamy is practised in Western Australian Aboriginal communities and the need for recognition of traditional Aboriginal polygamous marriages for particular purposes under Western Australian law.

### Invitation to Submit 14

[p 357] The Commission invites submissions on the effectiveness of the new police order regime in Aboriginal communities in the control of family violence and in securing the immediate protection of Aboriginal women and children.

### Invitation to Submit 15

[p 361] The Commission invites submissions on the possibility of introducing non-violent customary law strategies to address family violence in Aboriginal communities and the potential for such strategies to operate in tandem with protection and prevention strategies under Australian law.

## Customary Hunting, Fishing and Gathering Rights

### Invitation to Submit 16

[p 378] The Commission invites submissions as to whether the non-commercial barter or exchange of fauna or flora taken by Aboriginal persons pursuant to the exemption currently provided by s 23 of the *Wildlife Conservation Act 1950* (WA) be permitted and, if so, what, if any, restrictions should be placed upon such exchange.

### Invitation to Submit 17

[p 405] The Commission invites submissions to inform the development of protocols to assist witnesses, lawyers, parties and court officers when using the services of an interpreter.

### Invitation to Submit 18

[p 406] The Commission invites submissions as to whether it is necessary for amendments to be made to the *Evidence Act 1906* (WA) to allow for evidence to be given in narrative form, and to provide for regulation of that form of evidence.

