

Aboriginal People and the Criminal Justice System

The history of Aboriginal people and the criminal justice system in Western Australia has been marred by discrimination, over-regulation and unfair treatment.¹ Part II provides a brief discussion of the history of Aboriginal people and the impact of colonisation in Western Australia and emphasises that past government policies and laws have shaped Aboriginal peoples' contemporary perceptions of the justice system. The examples considered immediately below are not intended as a comprehensive overview of the history of Aboriginal people and the justice system; rather they should be understood as a snapshot of particular instances of discriminatory treatment.

Prior to 1967 Aboriginal people were commonly brought before criminal courts for reasons directly related to their Aboriginality. For example, laws concerning the possession of alcohol and movement on and between reserves only applied to Aboriginal people.² Until the 1950s Aboriginal people were banned from entering towns unless lawfully employed and it was an offence for them to leave their place of employment without the permission of the Commissioner of Native Affairs.³ The relationship between Aboriginal people and the police was significantly damaged by the role that police officers played in removing children from Aboriginal families and enforcing discriminatory legislation.⁴ This has created 'an all-pervading mistrust of authority'.⁵ During the period 1936–1954, Courts of Native Affairs were established to deal with cases of murder and serious assault where both the accused and the victim were Aboriginal. Although the legislation provided that 'tribal' issues could be taken into account, in practice

these provisions were ineffective. Further, there was no right to choose the mainstream system, no right to a trial by jury and no right of appeal.⁶ Until 1952 Aboriginal witnesses were placed in custody to ensure their attendance at court.⁷

During the Commission's consultations it was stated that the 'system was biased against Aboriginal people and discriminated against them at all levels'.⁸ Despite the abolition of blatant discriminatory laws and policies, 'structural racism' or bias within the Western Australian justice system remains. As explained by the Inspector of Custodial Services, structural racism refers to the discriminatory *impact* of laws, policies and practices, rather than individual racist attitudes.⁹ Structural racism is judged according to outcomes not intentions and is 'more insidious than overt attitudinal racism and more difficult to challenge and confront'.¹⁰ Structural racism contributes to the over-representation of Aboriginal people within the criminal justice system.¹¹

In 1991 the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) completed a comprehensive inquiry dealing with the treatment of Aboriginal people in the criminal justice system. It concluded that Aboriginal people throughout Australia were being arrested, imprisoned and detained at a disproportionate rate to non-Aboriginal people. The RCIADIC made extensive recommendations aimed at reducing the level of Aboriginal involvement in the criminal justice system (including proposals to reduce social, economic and cultural disadvantage as well as changes to the criminal justice system itself).¹² However, the recommendations

1. Royal Commission into Aboriginal Deaths in Custody (RCIADIC), *Regional Report of Inquiry into Underlying Issues in Western Australia* (1991) [5.1.1].
2. Johnston E, 'Aborigines and the Law' in Hinton M, Johnston E & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish Publishing, 1997) 102.
3. RCIADIC, *Regional Report of Inquiry into Underlying Issues in Western Australia* (1991) ch 2: 'Historical Perspective: Knowledge of the past to inform the present'.
4. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 239.
5. Eggleston E, *Fear, Favour of Affection: Aborigines and the criminal law in Victoria, South Australia and Western Australia* (Canberra: Australian National University Press, 1976) 10.
6. Written submission received Dr Kate Auty, August 2005.
7. RCIADIC, *Regional Report of Inquiry into Underlying Issues in Western Australia* (1991) [5.1.1].
8. Law Reform Commission of Western Australia (LRCWA), *Thematic Summaries of Consultations – Mirrabooka*, 18 November 2002, 9.
9. Office of the Inspector of Custodial Services, *Report of an Unannounced Inspection of Eastern Goldfields Regional Prison*, Report No 4 (August 2001), 9–10.
10. *Ibid.*
11. See discussion below under 'Over-representation in the Criminal Justice System', below pp 95–99.
12. Johnston E, 'Aborigines and the Law' in Hinton M, Johnston E & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish Publishing, 1997) 105.

have not been fully implemented.¹³ It has been asserted that:

Implementation is not support for recommendations or the planning of policies ... Implementation is outcomes. This means changing legislation, changing priorities, changing cultures and changing procedures.¹⁴

At the ten year anniversary of the release of the RCIADIC's report, the former Aboriginal and Torres Strait Islander Social Justice Commissioner stated that 'the sense of urgency and commitment to addressing Indigenous over-representation in criminal justice processes had slowly dissipated'.¹⁵ The Commission is of the view that meaningful recognition of Aboriginal customary law must be accompanied by a resolute determination to substantially reduce the level of over-representation of Aboriginal people in the criminal justice system in this state.

Over-representation in the Criminal Justice System

The Level of Over-representation in the Criminal Justice System

Statistics

The statistics in relation to the over-representation of Aboriginal people in the criminal justice system are so well known that 'we are in danger of no longer being troubled by them'.¹⁶ Although the disproportionate rate

of imprisonment of Indigenous peoples is not unique to Australia, it has been argued that Australia has the worst record.¹⁷ Western Australia should be particularly troubled: it has the highest disproportionate rate of adult imprisonment and juvenile detention of Aboriginal people in Australia.¹⁸

Although only constituting about three per cent of the state's population, in 2004 Aboriginal people comprised 40 per cent of the prison population.¹⁹ For juveniles the position in Western Australia is indefensible: approximately 70 to 80 per cent of juveniles in detention are Aboriginal.²⁰ The Inspector of Custodial Services has commented that there is only one type of juvenile institution in Western Australia: 'Aboriginal juvenile detention centres'.²¹ The rate of arrest of Aboriginal people is also alarming. The proportion of Aboriginal people (adults and juveniles) that were arrested by police increased from 20 per cent in 1991 to 28.5 per cent in 2003.²²

Neil Morgan and Joanne Motteram observed that, 'legislative and policy initiatives to reduce imprisonment have simply not reached Aboriginal people'.²³ In 1996, in order to reduce the general imprisonment rate, sentences of three months' imprisonment or less were prohibited.²⁴ In 2004 under the *Sentencing Legislation Amendment and Repeal Act 2003* (WA) this was increased to six months' imprisonment or less. However, at the same time, the maximum penalty for many common offences (such as damage, breaching a restraining order, false name and certain traffic offences) was increased to nine or 12 months' imprisonment.²⁵

13. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Social Justice Report 2001* (2002) 7–30; Cunneen C & McDonald D, 'Indigenous Imprisonment in Australia: An unresolved human rights issue' (1997) 3(2) *Australian Journal of Human Rights* 90, 110. The Commission notes that many Aboriginal people consulted for this project were concerned about the abolition of the Aboriginal Justice Council: see LRCWA, *Thematic Summaries of Consultations – Manguri*, 4 November 2002, 1; *Mirrabooka*, 18 November 2002, 7; *Geraldton* 26–27 May 2003, 17; *Broome*, 17–19 August 2003, 25; and *Aboriginal Legal Service*, 9 July 2003, 6. There is no longer an independent Aboriginal monitoring body in this state. The Commission has proposed the establishment of a statewide Aboriginal Justice Advisory Council to assist in the implementation of its proposal for community justice groups. This body could also take on the role of monitoring the implementations of the RCIADIC: see discussion under 'The Commission's Proposal for Community Justice Groups', below pp 133–41.
14. Dodson M, as quoted in Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Social Justice Report 2001* (2002) 18.
15. *Ibid* 7.
16. Northern Territory, *Parliamentary Debates*, 16 October 2002, Record No 8 (Dr Peter Toyne, Attorney-General of the Northern Territory).
17. Cunneen C & McDonald D, 'Indigenous Imprisonment in Australia: An unresolved human rights issue' (1997) 3(2) *Australian Journal of Human Rights* 90, 95–96.
18. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2003* (Perth: Crime Research Centre, 2004) 115, 137.
19. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 1, 17.
20. *Ibid* 1. The Commission notes that the disproportionate rate of Aboriginal detention has increased from 2003–2004. In 2003 Aboriginal children were 46 times more likely to be detained than non-Aboriginal children. In 2004 this figure increased to 52 times more likely. See Veld M & Taylor N, 'Statistics on Juvenile Detention in Australia: 1981–2004', Australian Institute of Criminology Technical and Background Paper No 18 (2005) 31.
21. Office of the Inspector of Custodial Services, *Report of an Announced Inspection of Rangeview Juvenile Remand Centre*, Report No 29 (August 2005) viii.
22. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2003* (Perth: Crime Research Centre, 2004) 40–42. When the arrest statistics are separated for adults and juveniles, the position in relation to Aboriginal juveniles is alarming. Nearly 48 per cent of all juveniles arrested by the police in 2003 were Aboriginal.
23. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 18. For a discussion of some the legislative and policy initiatives, see pp 8–14 of the background paper.
24. Morgan N, 'The Abolition of Six-Month Sentences, New Hybrid Orders and Truth in Sentencing: Western Australia's latest sentencing laws' (2004) 28 *Criminal Law Journal* 8, 9.
25. *Ibid* 15–16.

The abolition of sentences of imprisonment of three months or less did not reduce imprisonment rates and so far the abolition of sentences of six months or less does not appear to have had any positive impact.²⁶ Despite a fall in the general rate of imprisonment in Western Australia from 2001–2003, the rate of imprisonment of Aboriginal people has continued to rise.²⁷

Police diversion of juveniles

Since the introduction of the *Young Offenders Act 1994* (WA), there have been two formal methods of diverting juveniles from the criminal justice system: cautioning and juvenile justice teams.²⁸ It has long been accepted that throughout Australia Aboriginal juveniles are over-represented in the more punitive options (arrest and detention) and under-represented in diversionary options.²⁹ Eighty per cent of all non-Aboriginal juveniles that were formally dealt with by the police in 2001 were diverted. Only 55 per cent of Aboriginal juveniles formally dealt with by the police received the benefit of a diversionary option.³⁰ Statistics prepared by the Crime Research Centre for 2003 indicated that the proportion of Aboriginal juveniles being cautioned and referred to juvenile justice teams is improving.³¹ However, the introduction of cautioning and juvenile justice teams resulted in net-widening.³² In this context, net-widening means that a young person is formally diverted instead of being dealt with informally (such as by a verbal police warning). Because

diversionary schemes are intended to replace more punitive options any improvement in the rate of referral to diversionary options must take into account the effect of net-widening. Are Aboriginal juveniles being diverted in circumstances where non-Aboriginal juveniles would be dealt with more leniently?

The Commission stresses that even if Aboriginal juveniles are referred to diversionary options at the same rate as non-Aboriginal juveniles it will take a long time for the effects of past discriminatory practices to disappear. Earlier involvement in the system means that a young person accumulates a criminal record more quickly and this record is referred to in all future court appearances as a juvenile.³³ Although a juvenile record cannot generally be taken into account in an adult court,³⁴ a past criminal record may lead to increased and more intrusive attention by the police.³⁵

Aboriginal people over-represented as victims

Aboriginal people in Western Australia are also over-represented as victims. In 2003 Aboriginal people were eight times more likely than non-Aboriginal people to be victims of violence.³⁶ For Aboriginal women the position is disturbing; they are 45 times more likely than non-Aboriginal women to be victims of family violence by spouses or partners.³⁷ They are victims of violence and sexual offending at a rate 'unheard of in the rest of Australia'.³⁸ Aboriginal children are also more likely to suffer abuse than non-Aboriginal children.³⁹

-
26. Statistics provided by the Department of Justice indicated that from early 2004 the general rate of imprisonment was increasing and although there was a decline in May 2005 it appears to again be on the rise: see Department of Justice, *Monthly Graphical Report* (October 2005) 2. See also Parole Board of Western Australia, *Annual Report* (June 2005) 11.
 27. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2003* (Perth: Crime Research Centre, 2004) 137.
 28. *Young Offenders Act 1994* (WA) Pt 5, Div 1 and 2.
 29. Cunneen C & McDonald D, 'Indigenous Imprisonment in Australia: An unresolved human rights issue' (1997) 3(2) *Australian Journal of Human Rights* 90, 104, 108; Cunneen C, 'Community Conferencing and the Fiction of Indigenous Control' (1997) 30 *The Australian and New Zealand Journal of Criminology* 292, 297; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* (2002) 174; Luke C & Cunneen C, 'Aboriginal Over-representation and Discretionary Decisions in the NSW Juvenile Justice System' (1996) 1 *Australian Indigenous Law Reporter* 95.
 30. Loh N & Ferrante A, *Aboriginal Involvement in the Western Australian Criminal Justice System: A statistical review, 2001* (Department of Indigenous Affairs, 2003) 13.
 31. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2003* (Perth: Crime Research Centre, 2004) 50, 116.
 32. Loh N & Ferrante A, *Aboriginal Involvement in the Western Australian Criminal Justice System: A statistical review, 2001* (Department of Indigenous Affairs, 2003) 11.
 33. It has been acknowledged that Aboriginal juveniles come into contact with the criminal justice system at a much earlier age than non-Aboriginal juveniles. See Joint Committee of Public Accounts and Audit, 'Indigenous Law and Justice Inquiry', *Hansard*, 31 March 2005, PA 29.
 34. *Young Offenders Act 1994* (WA) s 189.
 35. Walker J & McDonald D, 'The Over-Representation of Indigenous People in Custody in Australia' (1995) 47 *Trends and Issues in Crime and Criminal Justice* 2.
 36. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2003* (Perth: Crime Research Centre, 2004) 16.
 37. 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* (2002) 47. See also discussion under Part VII 'Family Violence in Western Australian Indigenous Communities', below pp 349–51.
 38. Payne S, 'Aboriginal Women and the Law' in Eastaerl P & McKillop S (eds), *Women and the Law*, Australian Institute of Criminology Conference Proceedings No 16 (1993) 68.
 39. 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* (2002) 46.

[There is a] need to ensure that Aboriginal women and children are protected from violence and that [they] have an equal voice in matters concerning the criminal justice system.

Aboriginal women

Aboriginal women constitute about half of all female prisoners in Western Australia.⁴⁰ It has been observed that, in addition, Aboriginal women suffer indirectly as the 'wives, mothers and sisters' of the vast number of Aboriginal men and children in custody.⁴¹ Despite the increasing involvement of Aboriginal women in the criminal justice system:

Aboriginal women remain largely invisible to policy makers and program designers with very little attention devoted to their specific situation and needs. This is of critical importance, particularly because of the impact that imprisonment has on Indigenous families and communities (especially through separation from children).⁴²

As observed by the Inspector of Custodial Services, both Aboriginal women prisoners and Aboriginal female detainees are 'marginalised, under resourced, made to fit into male routines and priorities'.⁴³ When making



proposals the Commission is mindful of the need to ensure that Aboriginal women and children are protected from violence and that Aboriginal women have an equal voice in matters concerning the criminal justice system.

Causes of Over-representation in the Criminal Justice System

Offending behaviour

It is sometimes assumed that the *only* reason Aboriginal people are over-represented is because they commit more offences. However, 'crime statistics do not measure the incidence of criminal conduct as such, but rather who gets apprehended and punished for it, which is a very different thing'.⁴⁴ For the purpose of illustration, from July 2004 until June 2005 there were 26,813 home burglary offences reported to the police. Of these, approximately 17 percent were 'cleared-up' or solved.⁴⁵ While it may be the case that Aboriginal people are over-represented in 17 per cent of burglary offences, the level of involvement in the remaining 83 percent of reported home burglary offences is unknown. There are some offences that have a higher clearance rate, such as homicide, sexual assault and other violent offences.⁴⁶ For some of these categories it may be true that Aboriginal people commit more offences in some locations.⁴⁷

Even if it could be assumed that Aboriginal people commit more offences than non-Aboriginal people, higher rates of offending do not explain differences between jurisdictions in Australia. As stated by Morgan and Motteram:

-
40. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 1.
 41. Payne S, 'Aboriginal Women and the Law' in Eastale P & McKillop S (eds), *Women and the Law*, Australian Institute of Criminology Conference Proceedings No 16 (1993) 68.
 42. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Social Justice Report 2001* (2002) 15.
 43. Office of the Inspector of Custodial Services, *Report of an Announced Inspection of Rangeview Juvenile Remand Centre*, Report No 29 (August 2005) viii.
 44. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 245.
 45. Western Australian Police Service, *Monthly Reported Crime Statistics: 2004/05* (2005) 1.
 46. *Ibid.*
 47. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 245.

[U]nless one espouses the absurd notion that Aboriginal Western Australians are many times more evil than their inter-state colleagues, this cannot explain why Western Australia's Aboriginal imprisonment rate is so much higher than the rest of the country.⁴⁸

Although it is impossible to quantify, the Commission is of the view that a degree of structural bias within the Western Australian criminal justice system must account, at least in part, for the disproportionate rate of Aboriginal arrests, imprisonment and detention.⁴⁹

Underlying factors

The RCIADIC classified the causes of over-representation into two broad categories: underlying causes and issues within the criminal justice system (the latter is discussed below).⁵⁰ Underlying causes encompass both historical factors and contemporary socio-economic disadvantages. It has been stated that

much of the contact of Aboriginal people with the criminal law can be traced to their dispossession and the breakdown of their culture.⁵¹

The effects of the forced removal of Aboriginal children from their families and the institutionalisation that followed have been identified as a major cause of the high rate of involvement of Aboriginal people in the criminal justice system.⁵² Some commentators have stressed that socio-economic disadvantages (such as poverty and lack of education and employment opportunities) are the main reasons for this over-representation.⁵³ In addition, homelessness, family violence and substance abuse contribute to the offending behaviour of Aboriginal people.⁵⁴

The Commission acknowledges that there are numerous and complex underlying factors that contribute to high rates of Aboriginal offending and imprisonment. Many of the disadvantages faced by Aboriginal Western Australians have been considered earlier in this Discussion Paper.⁵⁵ The focus in this section is on issues within the criminal justice system; however, any significant reduction in the high rates Aboriginal imprisonment and detention will only be achieved through a comprehensive reform agenda, which includes improvements to the criminal justice system and reforms that focus on the underlying issues such as employment, education, housing, substance abuse and the 'strengthening of Indigenous cultural and family life'.⁵⁶

Issues within the criminal justice system

One factor that supports the notion of structural bias is that the level of Aboriginal over-representation increases at each progressive stage of the criminal justice system.⁵⁷ The proportion of Aboriginal people that are dealt with in the courts is less than the proportion of Aboriginal people that are sentenced to imprisonment or detention. For example, in 2003 in Western Australia between 17 and 26 per cent of people dealt with by adult courts were Aboriginal.⁵⁸ However, Aboriginal people constituted over 36 percent of all adult prisoners in 2003. Similarly, about a third of the juveniles dealt with in the Children's Court are Aboriginal but Aboriginal juveniles account for about 70 to 80 per cent of all juveniles in detention.⁵⁹

It has been argued that the increasing level of over-representation the further one goes into the criminal

-
48. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 135.
 49. According to the Mahoney Inquiry, the Department of Justice has acknowledged that systemic discrimination is one cause of the high rates of Indigenous over-representation: see Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [9.24]. It should be noted that, because of the proximity of the release of the Mahoney Inquiry to the finalisation of this Discussion Paper, the Commission has not had the opportunity to consider the recommendations and implications of the Mahoney Inquiry in detail.
 50. Cunneen C & McDonald D, 'Indigenous Imprisonment in Australia: An unresolved human rights issue' (1997) 3(2) *Australian Journal of Human Rights* 90, 90.
 51. *Welsh* (Unreported, Supreme Court of New South Wales, Hidden J, 14 November 1997) as quoted in Nicolson J 'The Sentencing of Aboriginal Offenders' (1999) 23 *Criminal Law Journal* 85, 86.
 52. Payne S, 'Aboriginal Women and the Law' in Eastaer P & McKillop S (eds.) *Women and the Law*, Australian Institute of Criminology Conference Proceedings No 16 (1993) 66.
 53. Walker J & McDonald D, 'The Over-Representation of Indigenous People in Custody in Australia' (1995) 47 *Trends and Issues in Crime and Criminal Justice*, 6.
 54. Blagg H, Morgan N, Cunneen C & Ferrante A, 'Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System' (in press) 10 .
 55. See discussion under Part II 'Issues Affecting Aboriginal Communities in Western Australia', above pp 20–42.
 56. Blagg H, Morgan N, Cunneen C & Ferrante A, 'Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System' (in press) 176.
 57. Luke G & Cunneen C, *Aboriginal Over-representation and Discretionary Decisions in the NSW Juvenile Justice System* (Sydney: Juvenile Justice Advisory Council, 1995) as referred to in Weatherburn D, Fitzgerald J & Hua J, 'Reducing Aboriginal Over-Representation in Prison' (2003) 62(3) *Australian Journal of Public Administration* 65, 66.
 58. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2003* (Perth: Crime Research Centre, 2004) 65, 75. The Commission notes that 17 per cent of all adults dealt with in the Magistrates Courts were Aboriginal and 26 per cent of all adults dealt with in the superior courts were Aboriginal. Thus the percentage of Aboriginal adults dealt with by all adult courts is somewhere between 17 and 26 per cent.
 59. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 1.

justice system can be explained by higher rates of more serious offending. Weatherburn et al contend that structural bias by police in over-charging Aboriginal people for offensive behaviour and alcohol-related offences cannot be the cause of high imprisonment rates because those types of offences do not generally attract custodial penalties.⁶⁰ However, this argument fails to acknowledge the cumulative effect of discriminatory practices. While an arrest for a charge of offensive behaviour may not directly lead to imprisonment it becomes part of that person's antecedents for all future court appearances and dealings with the police. As stated by Morgan and Motteram 'compounding/cumulative' factors should not be

underestimated. Less access to diversion leads to earlier entry to the formal criminal justice system; less access to specialist courts leads to incarceration; incarceration leads to cultural dislocation; and lack of programs causes delayed release and increased chances of re-offending.⁶¹

The argument that Aboriginal people are only disproportionately imprisoned for very serious offences cannot be sustained. The Crime Research Centre reported that in 2003 Aboriginal people constituted over half of all prison receivals for good order offences and 61.5 per cent of driving and traffic related offences.⁶² This has been acknowledged by the Minister for Justice, John D'Orazio, who has been reported as saying that the Department of Justice is currently considering alternatives (in consultation with Aboriginal communities) to imprisonment for minor offences, such as driving without a licence.⁶³

A number of specific problems encountered by Aboriginal people within the criminal justice system are discussed immediately below. The topics of bail, sentencing, defences, procedure, police and prisons warrant separate and detailed discussion.⁶⁴

Problems Experienced by Aboriginal People in the Criminal Justice System

Alienation from the Criminal Justice System

Aboriginal people feel alienated from the criminal justice system.⁶⁵ One of the reasons is the history of relations between criminal justice agencies and Aboriginal people. As one Aboriginal commentator has stated:

When I think of the legal system, I think of it as an enemy. It is not there for my benefit. It has imposed gross injustices on my people and crushed my people's way of life.⁶⁶

Other reasons stem from language, cultural and communication barriers which impact upon police questioning as well as the court process itself.⁶⁷ During the consultations the Commission heard from many Aboriginal people that the language used in court makes no sense to them.⁶⁸ A study of traditional Aboriginal prisoners in Western Australia observed that the failure to understand what is happening in court causes the criminal justice process to lose meaning and is therefore less likely to change future behaviour.⁶⁹ An Aboriginal person from the Northern Territory stated that, 'Dealing with whitefella law is like falling into a big, black hole and you can't get out'.⁷⁰

Differences between Aboriginal customary law methods for resolving disputes and those of the western criminal justice system also contribute to this sense of alienation. Although customary law processes are not necessarily immediate, once completed (because the purpose is the restoration of peace) the matter is at an end. Aboriginal people stated that they do not understand why the court process takes so long.⁷¹ In Albany it

-
60. Weatherburn D, Fitzgerald J & Hua J, 'Reducing Aboriginal Over-Representation in Prison' (2003) 62(3) *Australian Journal of Public Administration* 65, 67.
61. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 136.
62. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2003* (Perth: Crime Research Centre, 2004) 141. The Commission notes that the Mahoney Inquiry observed that Aboriginal people generally commit less serious crimes than non-Aboriginal people: see Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [9.27].
63. Spagnolo J, 'Action on Aborigine Jail Crisis', *The Sunday Times*, 20 November 2005, 31.
64. See individual sections of this Part and also see Part IX 'Aboriginal Customary Law in the Courtroom: Evidence and Procedure', below pp 385–416.
65. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 239.
66. Frankland R, 'Mr Neal is Entitled to Be an Agitator: Indigenous people put upon their country' in Auty K & Toussaint S (eds), *A Jury of Whose Peers? The cultural politics of juries in Australia* (Perth: University of Western Australia, 2004) 52.
67. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 246. See also Part IX 'Aboriginal Customary Law in the Courtroom: Evidence and Procedure', below pp 385–416.
68. LRCWA, *Thematic Summaries of Consultations – Casuarina Prison*, 23 July 2003, 6; *Bunbury*, 28–29 October 2003, 9; *Albany*, 18 November 2003, 19.
69. Duckworth A, Foley-Jones C, Lowe P & Maller M, 'Imprisonment of Aborigines in North Western Australia' (1982) 15 *Australian and New Zealand Criminal Law Journal* 26, 41.
70. The Law Society of the Northern Territory, *Indigenous Protocols for Lawyers in the Northern Territory* (2004) 2.
71. LRCWA, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 15; *Wiluna*, 27 August 2003, 22.

was explained that 'Aboriginal people do not understand the protracted European processes. Their own are quick and decisive'.⁷² Aboriginal people consulted also found it difficult to understand the effect of a prior criminal record. In Wuggubun it was said that a 'criminal record sticks, whereas once you have traditional punishment everyone is equal afterwards'.⁷³

Problems arising from language and communication barriers and the need for interpreters are dealt with below.⁷⁴ The general sense of alienation felt by Aboriginal people within the system can be improved by the establishment of Aboriginal courts;⁷⁵ the development of more effective cultural awareness training for those who work in the system; and greater involvement of Aboriginal people in justice issues.⁷⁶

Programs and Services

Aboriginal people have less access than non-Aboriginal people to services and programs within the criminal justice system.⁷⁷ Consequently, Aboriginal people are disadvantaged: they have fewer opportunities for rehabilitation and are therefore more likely to re-offend and come into contact with the justice system again. Aboriginal people are also disadvantaged in terms of diversionary options. Mainstream court programs that aim to divert offenders from imprisonment, such as drug courts and family violence courts, have been largely unsuccessful for Aboriginal people.⁷⁸ The lack of culturally appropriate programs and services in prisons, particularly in regional areas, causes delay in being released on parole. Aboriginal prisoners have to wait or be relocated to participate in the few programs that

are available.⁷⁹ During the Commission's consultations it was stated that:

Programs have to be devised for Aboriginal people. As there is no consultation with Aboriginal people it is not surprising that they are not culturally appropriate.⁸⁰

The Commission supports the establishment of Aboriginal community justice mechanisms and their involvement in crime prevention, diversionary and rehabilitative programs.⁸¹

Mandatory Sentencing

In 1996 the Western Australian government introduced mandatory sentencing laws for offences of home burglary (commonly known as the 'three-strikes' laws).⁸² The effect of these laws is that an adult offender who is convicted of burglary (on a place ordinarily used for human habitation) and who has two relevant prior convictions of home burglary must be sentenced to 12 months' imprisonment. For a juvenile the sentence must either be 12 months' detention or a 12-month conditional release order.⁸³

The mandatory sentencing laws in Western Australia have been subject to extensive criticism, especially in relation to the discriminatory impact upon Aboriginal youth. Although the laws apply to all people (and therefore appear to be neutral) Aboriginal children constitute approximately 80 per cent of all juveniles dealt with under the laws.⁸⁴ In regional areas (where there are no juvenile detention facilities) this figure escalates to 90 per cent. Young Aboriginal people from regional locations who are sentenced to detention are

72. LRCWA, *Thematic Summaries of Consultations – Albany*, 18 November 2003, 14.

73. LRCWA, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, 36.

74. See Part IX 'Aboriginal Customary Law in the Courtroom: Evidence and Procedure', below pp 385–416.

75. See discussion under 'Aboriginal Courts', below pp 142–57.

76. See discussion below under 'Aboriginal Community Justice Mechanisms', below pp 107–42; 'Cultural Awareness Training', below p 104; and 'Lack of Involvement of Aboriginal People in the Administration of Criminal Justice', below pp 104–105.

77. This problem has also been observed by the Office of the Inspector of Custodial Services: see, for example, Office of the Inspector of Custodial Services, *Directed Review of the Management of Offenders in Custody*, Report No 30 (November 2005) 119. For a detailed discussion of the programs and services that are available see Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004). See also discussion under 'Sentencing Options', below pp 224–30 and 'Prisons', below pp 255–62.

78. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 32. The Commission notes the one exception to this is the Geraldton Alternative Sentencing Regime: see discussion under 'Aboriginal Courts – Geraldton Alternative Sentencing Regime', below p 148.

79. Parole Board of Western Australia, *Annual Report* (June 2005) 8, 11.

80. LRCWA, *Thematic Summaries of Consultations – Bunbury*, 28–29 October 2003, 10.

81. See discussion under 'The Commission's Proposal for Community Justice Groups', below pp 133–41.

82. *Criminal Code Amendment Act (No 2) 1996* (WA).

83. A conditional release order is a sentence of detention with immediate release subject to conditions. Failure to comply with conditions may result in an order that the offender serve the period of detention set in the original order. See *Young Offenders Act 1994* (WA) s 114. For an outline of the laws, see Morgan N, Blagg H & Williams V, *Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth* (Perth: Aboriginal Justice Council, December 2001) 12.

84. Department of Justice, *Review of Section 401 of the Criminal Code* (2001) 24–25. Another example of a law or policy that appears to be neutral is the Northbridge curfew. Although it applies to all children, 90 per cent of those removed are Aboriginal youth: see Blagg H, Morgan N, Cunneen C & Ferrante A, 'Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System' (September 2005) 14. For a discussion of the discriminatory impact on Aboriginal youth of the Western Australian Northbridge curfew policy, see Koch T, 'Curfews: Aboriginal Legal Service of Western Australia' (2003) 5(27) *Indigenous Law Bulletin* 7.

taken from their families, communities and culture and must spend at least six months in a detention centre in Perth.⁸⁵ While Aboriginal children may commit more home burglary offences than non-Aboriginal children, part of the reason for the high numbers of Aboriginal children caught by the laws is that they have less access to diversionary options.⁸⁶ For the purposes of the 'three-strikes' laws a caution by police or a referral to a juvenile justice team does not count as a relevant prior conviction.

Despite the various inquiries and reports that have criticised the mandatory sentencing laws in Western Australia and the Northern Territory, the 'three-strikes' laws in Western Australia remain in force.⁸⁷ During the Commission's consultations for this project Aboriginal people were still expressing their concern over the discriminatory impact of the laws on young Aboriginal people.⁸⁸ In Mirrabooka it was stated that mandatory sentencing 'must be abolished'.⁸⁹ It is now well accepted that the mandatory sentencing laws have not reduced the rate of home burglary in Western Australia.⁹⁰ It has also been observed that, irrespective of the three-strikes laws adults would nearly always receive a sentence of more than 12 months' imprisonment for a third burglary conviction. Similarly, a large proportion of juveniles (especially those with a significant record of convictions) would also inevitably receive a sentence of detention.⁹¹ Therefore, the negative impact of the laws is felt by those offenders whose circumstances call for leniency.

Diversionary sentencing options, such as those that may be developed by Aboriginal communities in conjunction with an Aboriginal court, will not reach those offenders who fall within the 'three-strikes laws'. The Department of Justice's review of the mandatory sentencing laws acknowledged this same issue with respect to the operation of the Drug Court. Adults

who had accumulated two prior convictions for home burglary were often drug abusers and because of the mandatory sentencing laws they were not able to engage in drug rehabilitation.⁹²

Mandatory sentencing prevents a court from taking into account any relevant aspects of customary law in mitigation. The ALRC recommended that there should be a legislative exception to mandatory sentencing laws for homicide so that Aboriginal customary law can be taken into account.⁹³ The Commission has recognised the importance of Aboriginal community justice mechanisms and made a proposal in relation to community justice groups.⁹⁴ Any Aboriginal community processes, based on customary law or otherwise, to deal with young Aboriginal offenders will be impeded by mandatory sentencing laws. The Commission is of the view that the mandatory sentencing laws should be abolished. The laws are unjust and unprincipled and there is no evidence to suggest that they are effective in reducing crime. Further, as suggested by the former Aboriginal Justice Council, the laws should be repealed as a 'gesture of commitment to Indigenous concerns'.⁹⁵

Proposal 6

That the mandatory sentencing laws for home burglary in Western Australia be repealed.

Legal Representation

Due to the alienation from the justice system felt by Aboriginal people adequate legal representation is essential. For many Aboriginal people their first contact with the system is with police and that experience is rarely perceived as positive. The next point of contact may be with a legal representative. If cultural differences are not recognised at this point, serious injustices may

-
85. For a detailed discussion of the impact of the laws on Aboriginal children and a selection of case studies, see Morgan N, Blagg H & Williams V, 'Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth' (Perth: Aboriginal Justice Council, December 2001) 63–72.
86. Morgan N, 'Going Overboard? Debates and Developments in Mandatory Sentencing, June 2000 to June 2002' (2002) 26 *Criminal Law Journal* 293, 310.
87. Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 2000* (Commonwealth Parliament, 2000); Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing for Property Offences) Bill 2000* (Commonwealth Parliament, 2002); Morgan N, Blagg H & Williams V, 'Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth' (Perth: Aboriginal Justice Council, December 2001). The Commission notes that the Northern Territory laws were repealed in 2001.
88. LRCWA, *Thematic Summaries of Consultations – Mirrabooka* 18 November 2002, 8; *Pilbara*, 6–11 April 2003, 15.
89. LRCWA, *Thematic Summaries of Consultations – Mirrabooka*, 18 November 2002, 11.
90. Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing for Property Offences) Bill 2000* (Commonwealth Parliament, 2002) 21.
91. *Ibid* 13; Department of Justice, *Review of Section 401 of the Criminal Code* (2001) 21, 25.
92. Department of Justice, *ibid* 22.
93. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [522].
94. See discussion under 'The Commission's Proposal for Community Justice Groups', below pp 133–41.
95. Morgan N, Blagg H & Williams V, 'Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth' (Perth: Aboriginal Justice Council, December 2001). The Commission notes that the Northern Territory laws were repealed in 2001: see Morgan, Blagg & Williams, 8.

result: a judicial officer will generally assume that because an accused is legally represented all relevant issues will have been considered. It has been stated that:

The issue of the adequacy of legal representation for Indigenous people goes to the heart of questions of access, equity and the rule of law. It represents the ability of Indigenous people to use the legal system (both criminal and civil) to a level enjoyed by other Australians.⁹⁶

In Western Australia Aboriginal people are most often legally represented by the Aboriginal Legal Service of Western Australia (ALS). Some are represented by the Legal Aid Commission of Western Australia (LAC), community legal centres, private lawyers and smaller Indigenous-specific providers such as Family Violence Prevention Legal Services.⁹⁷

During the Commission's consultations, Aboriginal people identified problems with legal representation. Some suggested that lawyers persuade people to plead guilty.⁹⁸ The need for adequate funding of the ALS was also recognised.⁹⁹ In Rockingham it was stated that:

The ALS always seem to be too busy – lack of services to the 'black-man' – they are all white [staff] and why aren't the [ALS] employing Aboriginal people to do these jobs? ¹⁰⁰

Funding levels to Aboriginal and Torres Strait Islander Legal Services (ATSILS), Australia-wide, 'provide a cheap form of legal representation for Indigenous people'.¹⁰¹ In a recent inquiry it was recognised that ATSILS operate in a climate of static funding and increasing demand'.¹⁰² The inquiry also observed that ATSILS find it difficult to attract and retain experienced staff because remuneration levels are much less than those received by staff in the LAC.¹⁰³ This is yet another

example of structural bias within the system. It was recommended that the Commonwealth Attorney-General's department develop a comparative scale of remuneration between ATSILS and LAC.¹⁰⁴ The inquiry supported increased funding, particularly for family and civil law, to Indigenous-specific services dealing with family violence in order to improve access to legal services for Aboriginal women. It was not suggested that there should be gender-specific services because this would disadvantage women who should have access to the experience of ATSILS in dealing with criminal justice issues.¹⁰⁵

In the past, it has been noted that Aboriginal accused are less likely to obtain the services of a lawyer despite the existence of Aboriginal legal services.¹⁰⁶ This is particularly relevant in remote Western Australian locations where ALS representatives may not always be present. The Commission understands that the Department of Justice is currently considering the development of a management plan for self-represented persons in all areas of the legal system, including criminal justice.¹⁰⁷ Although the details of such a plan are not yet known, the Commission supports this development in principle.

Circuit or 'bush courts' (when a magistrate, prosecutor and ALS lawyer intermittently attend an Aboriginal community to hear cases over one day) are well-known for their difficulties.¹⁰⁸ In many places Aboriginal people do not speak English as a first language and there are inadequate interpreter services.¹⁰⁹ Natalie Siegel, after researching bush courts in the Northern Territory and Western Australia, concluded that excessively long lists (more problematic in the Northern Territory than Western Australia) and inadequate time to take appropriate instructions were serious impediments to proper legal representation for Aboriginal people from

-
96. Blagg H, Morgan N, Cunneen C & Ferrante A, 'Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System' (in press) 52.
 97. Joint Committee of Public Accounts and Audit, *Access of Indigenous Australians to Law and Justice Services* Report No 403 (Canberra, 2005) 1–2.
 98. LRCWA, *Thematic Summaries of Consultations – Rockingham*, 9 December 2002, 32; *Midland*, 16 December 2002, 36; *Bandyup Prison*, 17 July 2003, 3; *Broome* 17–19 August 2003, 29; *Albany*, 18 November 2003, 19; *Albany Prison*, 18 November 2003, 3.
 99. LRCWA, *Thematic Summaries of Consultations – Mirrabooka*, 18 November 2002, 10; *Broome*, 17–19 August 2003, 30.
 100. LRCWA, *Thematic Summaries of Consultations – Rockingham*, 9 December 2002, 32.
 101. Blagg H, Morgan N, Cunneen C & Ferrante A, 'Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System' (in press) 51.
 102. Joint Committee of Public Accounts and Audit, *Access of Indigenous Australians to Law and Justice Services*, Report No 403 (2005) 17.
 103. *Ibid* 40–44.
 104. *Ibid* 52.
 105. *Ibid* 37–38.
 106. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co Ltd, 1991) 231, 242.
 107. Letter to the LRCWA from Mr Ray Warnes, Acting Executive Director Court Services, Department of Justice, 28 February 2005.
 108. Siegel N, 'Is White Justice Delivery in Black Communities by "Bush Court" a Factor in Aboriginal Over-representation Within our Legal System?' (2002) 28 *Monash University Law Review* 268, 268. The Commission notes the recommendation of the Kimberley Aboriginal Reference Group that there should be a second Magistrate in the Kimberley: see Kimberley Aboriginal Reference Group, 'Kimberley Aboriginal Reference Group's Initial Recommendations Toward the Kimberley Custodial Plan' (October 2005) 8.
 109. For a detailed discussion on Aboriginal language interpreters, see Part IX 'Overcoming Difficulties of Aboriginal Witnesses in the Court Process', below pp 401–406.

remote communities.¹¹⁰ In *Putti v Simpson*¹¹¹ Muirhead J stated that:

The practice of appearing with only hurriedly-gained instructions, especially where language or cultural differences jeopardise understanding, may result in substantial injustice to individuals.¹¹²

Siegel notes that, due to language and cultural barriers, inadequate time for taking instructions may result in the accused entering the wrong plea; that is, pleading guilty in circumstances where the accused may have a defence to the charge.¹¹³ A further complication is that there is no time to properly explain to the client what has transpired during the court proceedings and accordingly the accused may leave the court with little or no understanding of his or her obligations. In one Northern Territory location it was reported that a young Aboriginal girl, who was the first person to be dealt with by the court, was still present at the court precincts at 4.00 pm because she did not know that she was free to leave.¹¹⁴

Suggestions for improvements in legal representation were made by Aboriginal people during the Commission's consultations. In Kalgoorlie it was suggested that there should be 'protocols to guide lawyers in their dealings with Aboriginal clients'.¹¹⁵ In Broome it was stated that lawyers need to know more about traditional law to avoid being misled.¹¹⁶ In 2004 the Law Society of the Northern Territory developed protocols for dealing with Indigenous people. The underlying theme of these protocols is to avoid problems arising from miscommunication between non-Indigenous lawyers and their Indigenous clients. There are three main protocols: a test to determine whether the client requires the services of an interpreter; an obligation on the lawyers to fully explain their role; and a requirement to use plain English. The protocols also contain information about cultural differences and aspects of Aboriginal customary law. The Law Society of Western Australia is in the process of adapting these protocols for use in this state.¹¹⁷ The Commission supports this approach. The protocols could be used

not only by the ALS but also LAC, community legal centres and private practitioners.

Lawyers employed by the Director of Public Prosecutions (DPP) should also be aware of Aboriginal cultural issues. Prosecutors are at times required to examine Aboriginal witnesses and therefore they must be sensitive to any language, communication or cultural issues that may impact upon the person's understanding of the process. Prosecutors may also be required to object to unfair or inappropriate questions put to an Aboriginal witness during cross-examination. The protocols, discussed above, could therefore also be used by the DPP.

The Commission is of the view that in addition to the development of protocols, lawyers who regularly work with Aboriginal people should undertake cultural awareness training, preferably presented by Aboriginal people. A cultural awareness program could be incorporated into the Articles Training Program. Of course, this would only reach people who had recently graduated from their law degree. Therefore, the Commission encourages all lawyers who regularly work with Aboriginal people to undertake cultural awareness training. The Commission is of the view that with adequate resources, the Law Society of Western Australia would be the most appropriate organisation to coordinate cultural awareness training programs for legal practitioners.

Proposal 7

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

Cultural Awareness Training

The need for more effective cultural awareness training for all who work in the criminal justice system was a consistent theme of the Commission's consultations with Aboriginal communities.¹¹⁸ In relation to sentencing

110. Siegel N, 'Is White Justice Delivery in Black Communities by "Bush Court" a Factor in Aboriginal Over-representation Within our Legal System?' (2002) 28 *Monash University Law Review* 268. See also Siegel N, 'Bush Courts of Remote Australia' (2002) 76 *Australian Law Journal* 640, 644.
111. (1975) 6 ALR 47.
112. *Ibid* 50–51.
113. Siegel N, 'Is White Justice Delivery in Black Communities by "Bush Court" a Factor in Aboriginal Over-representation Within our Legal System?' (2002) 28 *Monash University Law Review* 268, 273.
114. *Ibid* 277.
115. LRCWA, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, 27.
116. LRCWA, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, 23.
117. Telephone communication with Alison Gaines, Executive Director of the Law Society of Western Australia, 6 October 2005. See also discussion under Part IX 'Overcoming Difficulties of Aboriginal Witnesses in the Court Process', below pp 401–406.
118. LRCWA, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 9; *Geraldton* 26–27 May 2003, 16; *Broome*, 17–19 August 2003, 21–22; *Bunbury*, 28–29 October 2003, 11; *Albany* 18 November 2003, 19. Because of the differences between Aboriginal communities the focus was on localised training.

the Commission emphasises the need to consider Aboriginal customary law in its broadest sense. Judicial recognition of customary law by criminal courts in this state has been largely limited to issues of physical traditional punishment.¹¹⁹ More effective cultural awareness training will assist in a greater understanding of all relevant customary law issues. The Commission has made separate proposals in relation to cultural awareness training for judicial officers, police and lawyers.¹²⁰

The Commission understands that many (but not all) employees of the Department of Justice participate in cultural awareness training.¹²¹ The Gordon Inquiry observed that volunteer workers for the Victim Support Service and the Child Witness Service did not receive any cultural awareness training.¹²² In addition to proposing that cultural awareness training should be available for all volunteer workers in these services, it was also recommend that Department of Justice staff who work in regional areas should undergo specific training relevant to that region.¹²³



Proposal 8

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.

Lack of Involvement of Aboriginal People in the Administration of Criminal Justice

The lack of Aboriginal people working in the criminal justice system contributes to the sense of alienation and lack of understanding of the process. The Commission's consultations supported increased Aboriginal employment within government justice agencies.¹²⁴ In particular there was strong support for more Aboriginal justices of the peace and more Aboriginal judges and magistrates.¹²⁵ The Kimberley Aboriginal Reference Group has recently published its recommendations to the Department of Justice for the Kimberley Custodial Plan. This group found that many Aboriginal people in the Kimberley were eager to become more involved in the administration of justice.¹²⁶

The Commission supports the Department of Justice's *Aboriginal Employment Strategy (2004–2008)* which is designed to increase the number of Aboriginal people employed within the Department.¹²⁷ However, as argued by Morgan and Motteram one of the reasons for the difficulty in recruiting Aboriginal staff is the

119. See discussion under 'Aboriginal Customary Law and Sentencing', below p 212–20.

120. See discussion under 'Police – Cultural Awareness Training', below p 252 and Part IX 'Cultural Awareness Training for Judicial Officers', below pp 415–16. The Commission notes that the Office of the Inspector of Custodial Services has recommended that the current prison officer training program be reassessed and that Aboriginal cultural awareness training will likely be included in the new program. See Office of the Inspector of Custodial Services, *Directed Review of the Management of Offenders in Custody*, Report No 30 (November 2005) ch 8.

121. Correspondence by email with Carmel Musca, HR Consultant, Learning and Development, Department of Justice, 21 November 2005.

122. 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* (2002) 489.

123. *Ibid* 490.

124. LRCWA, *Thematic Summaries of Consultations – Kalgoorlie* 25 March 2003, 25; *Albany* 18 November 2003, 15.

125. LRCWA, *Thematic Summaries of Consultations – Mirrabooka*, 18 November 2002, 12; *Manguri*, 4 November 2002, 5; *Midland*, 16 December 2002, 37; *Laverton*, 6 March 2003, 14; *Geraldton* 26–27 May 2003, 15, 16.

126. Kimberley Aboriginal Reference Group, 'Kimberley Aboriginal Reference Group's Initial Recommendations Toward the Kimberley Custodial Plan' (October 2005) 7.

127. The Commission notes that this policy is now referred to as the *Aboriginal Employment Strategy (2005–2010)* and that the Mahoney inquiry recommended that the Department should give effect to this strategy as a matter of policy at the highest level: see Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [9.24].

simple fact that many Aboriginal people are unwilling to work in a system with which they or their families have experienced negative contacts – a perception that is not eased by spiralling Aboriginal imprisonment rates.¹²⁸

The establishment of Aboriginal courts and circle sentencing throughout Australia has provided one mechanism for increasing the participation of Aboriginal people in the criminal justice system.¹²⁹ In Victoria there is also a program recruiting Indigenous people to act as bail justices to hear applications for bail.¹³⁰ This program was developed as part of a commitment to increase Indigenous participation in the Victorian criminal justice system.

In the following section, the Commission proposes the establishment of community justice groups in Aboriginal communities throughout Western Australia. One important role for these groups is to be actively involved in criminal justice issues such as diversion, crime prevention, sentencing options and providing information to courts. The fact that members of a community justice group will be accountable to their community will provide a greater incentive for Aboriginal people to become involved in justice issues.¹³¹

Traffic Offences and Related Matters

Aboriginal people are disproportionately represented in custody for traffic offences. In 2003 Aboriginal prisoners accounted for 61.5 per cent of all prison receptions for motor vehicle and driving offences.¹³² Aboriginal people are also significantly over-represented in drivers licence suspension orders that result from fine default.¹³³ In a recent study it was recommended that the appropriateness of fines for Aboriginal people should be immediately reviewed and that culturally

appropriate sanctions should be considered.¹³⁴ The Commission has acknowledged that further research is needed in relation to the imposition of fines on Aboriginal people and has made proposals for more culturally appropriate sanctions.¹³⁵

During its Pilbara consultations the Commission was told that in remote locations when Aboriginal people are travelling to their law grounds police wait by the roadside with the intention of conducting vehicle and licence checks.¹³⁶ Similarly, it was stated that police target Aboriginal people in the same way when they are travelling to a funeral. Aboriginal people are then apprehended and are not able to attend the funeral. It was stated that there is 'no respect for Aboriginal law'.¹³⁷

In remote communities where there is no public transport, Aboriginal people will drive for the purposes of court attendance, appearance at customary law ceremonies or for the purpose of medical treatment.¹³⁸ Cultural obligations may also require an Aboriginal person to transport another for these purposes. It has been observed that it may constitute a breach of customary law to refuse a request to drive another person, if that person stands in a special relationship to the driver.¹³⁹ The Kimberley Aboriginal Reference Group has suggested that the system for obtaining drivers licences should be reviewed in terms of its suitability to remote conditions.¹⁴⁰

Pursuant to s 76 of the *Road Traffic Act 1976* (WA) a person who has been disqualified from holding or obtaining a drivers licence may apply to a court for an extraordinary drivers licence. In all cases there is a time period that must expire before the person can make an application. The amount of time depends upon the nature of the offence that led to the disqualification.¹⁴¹ If granted, an extraordinary drivers licence will allow

128. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 22, 106.

129. See discussion under 'Aboriginal Courts', below pp 142–57.

130. Blagg H, Morgan N, Cunneen C & Ferrante A, 'Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System' (in press) 59. There are about 19 Indigenous bail justices in Victoria.

131. See discussion under 'The Commission's Proposal for Community Justice Groups', below pp 133–41.

132. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2003* (Perth: Crime Research Centre, 2004) 141. This was also referred to in Mahoney Inquiry: see Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) [9.31]

133. Ferrante A, *The Disqualified Driver Study: A study of factors relevant to the use of licence disqualification as an effective legal sanction in Western Australia* (Perth: Crime Research Centre, 2005) 70.

134. *Ibid.*

135. See discussion under 'Sentencing Options', below pp 224–30.

136. LRCWA, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 14.

137. *Ibid.* 13.

138. *Ibid.*

139. Siegel N, 'Is White Justice Delivery in Black Communities by "Bush Court" a Factor in Aboriginal Over-representation Within our Legal System?' (2002) 28 *Monash University Law Review* 268, 289.

140. Kimberley Aboriginal Reference Group, 'Kimberley Aboriginal Reference Group's Initial Recommendations Toward the Kimberley Custodial Plan' (October 2005) 10.

141. *Road Traffic Act 1976* (WA) s 76(1)(a).



the person to drive subject to specific conditions imposed by the court. Conditions may relate to the purpose of driving, the hours that the person is permitted to drive and the place or road on which the person is entitled to drive.¹⁴²

When deciding whether to grant an extraordinary licence the court is required to consider the safety of the public, the character of the applicant, the nature of the offences which led to the disqualification and the applicant's conduct since the licence was disqualified. In addition the court must take into account the 'degree of hardship and inconvenience which would otherwise result to the applicant and his family'¹⁴³ if an extraordinary licence was not granted.

In the case of a special application (made within one to two months of a disqualification for certain offences related to drink driving or refusing to comply with the requirements of a breath-test) the court can only grant an extraordinary licence if satisfied that the applicant will suffer extreme hardship.¹⁴⁴ Extreme hardship is limited to medical treatment for the applicant or his or her family or for the purposes of employment.¹⁴⁵ The Commission is of the view that the relevant criteria for deciding whether to grant an extraordinary drivers licence should be extended to take into account Aboriginal kinship and cultural and customary law obligations. This would allow a respected member of an Aboriginal community (or a member of a community justice group) to apply for an extraordinary drivers licence for the purpose of transporting community members to court or to funerals, or when someone is in need of urgent medical treatment.

Proposal 9

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.

Under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) a person is not entitled to apply for an extraordinary drivers licence if his or her licence is suspended for unpaid fines.¹⁴⁶ Alternatively an application must be made to the registrar of the Fines Enforcement Registry for the licence suspension order to be cancelled. The grounds of the application are that the applicant requires a drivers licence for employment or needs urgent medical treatment (or a family member needs urgent medical treatment).¹⁴⁷ If the registrar grants the application the offender is required to pay the outstanding fine by instalments. The same criteria as outlined in the above proposal should also be included in the grounds upon which a person can apply to have their licence suspension cancelled.

Proposal 10

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.

142. *Road Traffic Act 1976* (WA) s 76(5).

143. *Road Traffic Act 1976* (WA) s 76 (3) (f).

144. *Road Traffic Act 1976* (WA) s 76(3)(a).

145. *Road Traffic Act 1976* (WA) s 76(3)(b).

146. *Road Traffic Act 1976* (WA) s 76(1)(aa).

147. *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) ss 27A, 55A.