

Aboriginal Community Justice Mechanisms

The Commission's consultations with Aboriginal people across the state revealed a strong desire for greater participation in the operation of the criminal justice system and recognition of traditional forms of dispute resolution. While the precise nature of that involvement differed from community to community, in general the Commission found:

[T]hat many Aboriginal people, particularly those in remote areas of the state, want to see official recognition given to Aboriginal forms of adjudication and punishment. However, more attention has been devoted to identifying ways in which Aboriginal values and principles can be incorporated into the non-Aboriginal justice system.¹

Part X discusses the enhancement of governance structures in Western Australian Aboriginal communities. This section examines governance issues from a criminal justice perspective. Former Aboriginal and Torres Strait Islander Social Justice Commissioner, Bill Jonas, has argued that 'community justice mechanisms are an integral component of Indigenous governance' and in order to improve the situation faced by Indigenous people they must 'be accompanied by a return of control and decision making processes to Indigenous communities'.²

This section considers the developments in this area in Western Australia and other states of Australia and sets out proposals for the establishment of community justice groups in Western Australia. It is intended that these groups will deal with justice issues at the community level as well as having a direct role within the formal criminal justice system. Closely linked to community justice mechanisms is the establishment of Aboriginal courts in many parts of Australia. The different models for Aboriginal courts³ and the Commission's proposals in relation to Aboriginal courts

in Western Australia are discussed in the following section.

For the purposes of this Discussion Paper, an Aboriginal community justice mechanism refers to any structure which has been established by an Aboriginal community or its members, with or without government assistance, to deal with social and criminal justice issues affecting Aboriginal people. Aboriginal courts refer to the different models that operate throughout Australia which involve the active participation of Aboriginal community members, usually Elders, during the court proceedings. The exact nature of that involvement differs from place to place.

Harry Blagg observed in his background paper to this reference that there have been a number of developments in Western Australia both in relation to community justice mechanisms and Aboriginal courts; however, these developments have been informal and dependent on specific individuals and the government policy at the time.⁴ The Commission acknowledges that a number of successful community justice initiatives already exist in Western Australia. The proposals set out below do not attempt to take away from these initiatives but aim to empower Aboriginal communities to increase their ability to determine their own justice issues and solutions and to recognise Aboriginal customary law processes for dealing with justice matters.

Previous Inquiries

A number of other inquiries and reports have considered Aboriginal community justice mechanisms. While some of these have specifically considered Aboriginal customary law, others have been directed at the disturbing over-representation of Aboriginal people in

1. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance In Western Australia*, Law Reform Commission of Western Australia (LRCWA), Project No 94, Background Paper No 8 (January 2005) 3.
2. Jonas W, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Community Justice, Law and Governance: A rights perspective* (Paper delivered at the Indigenous Governance Conference, Canberra, 3–5 April 2002) 2–3: see <http://www.hreoc.gov.au/speeches/social_justice/community_justice.html>.
3. The term 'Aboriginal court' is used throughout this section to refer to all of the various models in Australia, such as the Nunga court, Koori Court, Murri Court and circle sentencing courts.
4. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance In Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 1.

the criminal justice system as both offenders and victims; the lack of understanding of the way in which the criminal justice system operates; and the inadequacy of mainstream services to deal with many of the underlying issues. Some of the more important and relevant findings are set out below. Unless otherwise noted, the Commission generally supports the material contained in these reports and has taken their recommendations into account when formulating its own proposals in this area.

In its 1986 report on *The Recognition of Aboriginal Customary Laws*, the ALRC revealed a strong preference for community justice mechanisms⁵ that do not provide for a separate court structure. It supported the establishment of community justice mechanisms that have the power to deal with matters in a non-judicial manner and for greater involvement of these structures within the Australian legal system:

Proposals for local justice mechanisms which do not involve the exercise of judicial power but focus on mediation and conciliation and a greater voice for Aborigines in the existing criminal justice system pose fewer problems of implementation than proposals for 'Aboriginal courts'.⁶

In its extensive recommendations, the RCIADIC recognised the importance of consultation and partnerships between Aboriginal people and governments in developing initiatives within the criminal justice system. In particular, it was recommended that guidelines should be developed to ensure that the principle of self-determination is 'applied in the design and implementation of any policy or program or the substantial modification of any policy or program which will particularly affect Aboriginal people'.⁷ Where possible such programs should be provided for by appropriate Aboriginal organisations and where not possible

Aboriginal people should be employed by the agency which delivers the program.⁸ The RCIADIC also supported the involvement by Aboriginal communities in community policing⁹ and adequate funding to support community policing and justice initiatives at the local level.¹⁰ Similarly, the New South Wales Law Reform Commission in its report, *Sentencing Aboriginal Offenders*, considered the role of Aboriginal communities in sentencing and found that:

Facilitating participation by people in the design and delivery of services and institutions that affect them is a fundamental principle of democracy and equality before the law.¹¹

In its 2003 inquiry into Aboriginal customary law in the Northern Territory, the Northern Territory Law Reform Committee (NTLRC) recommended that Aboriginal communities should be assisted by government to develop 'law and justice plans which appropriately incorporate or recognise Aboriginal customary law as a method of dealing with issues of concern to the community or to assist or enhance the application of Australian law within the community'.¹² It was proposed that a particular Aboriginal community could apply to the Attorney-General for legal recognition of such Aboriginal customs and traditions as the community wished as long as those customs and traditions did not breach the general laws of the Northern Territory or universal human rights.¹³ The report did not contain details as to how these 'law and justice plans' would be established other than a general acknowledgement that they should be carefully designed, developed and adequately resourced.¹⁴ It also recommended a model allowing for community input into the sentencing of offenders.¹⁵ As part this recommendation it was

5. The ALRC used the term 'local justice mechanisms' rather than community justice mechanisms and suggested that they should be provided with administrative support and legislative backing such as a provision which allows courts to adjourn a matter for consideration by the local justice mechanism: see ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [833].
6. Ibid. In this context the ALRC used the term 'Aboriginal courts' to refer to Aboriginal controlled community courts rather than the current models of Aboriginal courts that operated within the framework of the Australian criminal justice system.
7. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [27.1.4] Recommendation 188 and [27.4.31] Recommendation 192. For a fuller discussion of the concept of self-determination at international law and its application in the Western Australian context: see Part X, below pp 419–38.
8. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [27.1.4] Recommendation 188 and [27.4.31] Recommendation 192.
9. Ibid [29.2.4] Recommendation 214.
10. Ibid [29.3.21] Recommendations 220 and 221.
11. New South Wales Law Reform Commission (NSWLRC), *Sentencing: Aboriginal Offenders*, Report No 96 (2000) 108.
12. Northern Territory Law Reform Committee (NTLRC), *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 4. An earlier report of the NTLRC considered that alternative dispute resolution in Aboriginal communities could be enhanced through the development of community justice plans. As part of a community justice plan the community would be able to make by-laws covering both customary law offences and offences under Australian law; however, there were restrictions to the penalties that could be imposed. See NTLRC, *Report on Alternative Dispute Resolution in Aboriginal Communities*, Report No 17C (1997) 13–16. The Commission has considered the effectiveness of the existing Aboriginal community by-law scheme: see heading 'Review of the By-Law Scheme as it Relates to the Criminal Justice System', below pp 118–21.
13. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 20.
14. Ibid 21.
15. Ibid.

proposed that a Consultative Committee should be established on the following terms:

- An Aboriginal community could apply to the Attorney-General for approval of its Consultative Committee.
- The Consultative Committee would be entitled to appear in court whenever a member of that community is charged with an offence.
- In appropriate cases, the court may adjourn and refer the offender to the Consultative Committee for it to deal with the matter, as long as the offender had pleaded guilty and all relevant parties consented.
- No legal representation should be allowed when the person appears before the Consultative Committee; however, the offender would receive legal advice/representation before agreeing to be dealt with by the Consultative Committee.
- The Consultative Committee could use traditional punishments and procedures when dealing with the matter as long as they were not contrary to the general law.¹⁶

In his submission to the NTLRC inquiry into Aboriginal customary law, the Aboriginal and Torres Strait Islander Social Justice Commissioner considered a number of developments in relation to Indigenous community justice mechanisms and courts in Australia and internationally.¹⁷ The submission warned against the adoption of a 'one-size-fits-all' approach or 'the top-down application of a preconceived model' in formulating solutions to Aboriginal law and justice issues.¹⁸ Further, it was contended that any proposal should be developed with the 'full participation of Aboriginal people' and must have the ability to adapt to the needs of individual communities with a focus on capacity building, governance reform and service delivery.¹⁹

The Commission notes that its proposal for community justice groups may, at first glance, be conceived by some to be a 'top-down application' of a 'one-size-fits-all model'. However, the flexibility of the proposal described below²⁰ and the requirement for additional consultation with individual communities ensures that the practical implementation of the proposal will be based on the views of those communities who wish to establish a community justice group.

Community Justice Mechanisms: Western Australia

Although several examples of Aboriginal community justice mechanisms already exist in Western Australia, there is no formal recognition of their status and consequently no provision for them to operate within the criminal justice system. The state government's policy is clearly to work in partnership with Aboriginal people and to achieve local solutions with as much input from Aboriginal people as possible.²¹ This section of the Discussion Paper considers examples of initiatives in Western Australia and relevant government policy, plans and agreements for the purposes of illustrating the current position and for the better understanding of the need for reform.

Many communities consulted by the Commission showed support for Aboriginal community justice mechanisms.²² In Wiluna the benefits of existing community justice mechanisms such as the Social Justice Committee, Ganah Ganah Night Patrol and the Sobering-Up Shelter were acknowledged.²³ Similarly, in Wuggubun there was support for night patrols as a response to drunkenness as long as such initiatives were 'empowered and resourced' as well as support for programs such as training camps.²⁴ At Carnarvon there was support for community justice mechanisms

16. Ibid 30. The Northern Territory Government was supportive of this recommendation in principle; however, it stated that the proposal required detailed consideration, especially in relation to the types of offences that could be dealt with in this manner. See Northern Territory Government, *The Northern Territory Government Response to the Report of the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law: Towards Mutual Benefit* (November 2003) 4.

17. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (2003): see <http://www.hreoc.gov.au/social_justice/customary_law/nt_lawreform.html>.

18. Ibid 34.

19. Ibid 40.

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

21. Government of Western Australia, *Statement of Commitment to a New and Just Relationship Between the Government of Western Australia and Aboriginal Western Australians* (October 2001). The Indigenous Affairs Advisory Council (IAAC) is the mechanism for implementing the *Statement of Commitment to a New and Just Relationship*. It meets twice a year and has 11 members from a wide range of government agencies as well as four representatives from the Aboriginal and Torres Strait Islander Commission. The IAAC is described as the formal adviser to government on Indigenous affairs in Western Australia. See <<http://www.dia.wa.gov.au/Policies/StateStrategy/IAAC.aspx>>.

22. Note also that as part of its consultations with Aboriginal people for the Kimberley Regional Justice Project, the Department of Justice found that approximately 90 per cent of those questioned supported the greater use of 'safe houses and shelters' and there was similar support for more patrols and wardens for communities: see Colmar Brunton WA and Colmar Brunton Social Research, *Kimberley Regional Justice Project: Market Research* (Department of Justice, 2002) 22–23.

23. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, 24.

24. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, 37.

developed from within community structures and for Justice Reference Groups to be established with representatives from each region.²⁵ The Burringurrah community also indicated its desire to use an outstation to rehabilitate young people.²⁶ During other consultations the need for Aboriginal-controlled community-based options and local justice structures were discussed.²⁷

It is clear from the community consultations that substance abuse and associated violence and sexual abuse are considered to be some of the most serious problems facing Aboriginal communities. The background paper by Neil Morgan and Joanne Motteram reviewed services and programs provided by the Department of Justice. It is apparent that services and programs for Aboriginal people in these areas are deficient. For example, Morgan and Motteram note that there are no specific Department-run Aboriginal family and domestic violence programs for Aboriginal offenders available in Western Australia,²⁸ although the Department of Justice advised that a program to deal with substance abuse, family violence and sexual offending for Aboriginal offenders and their families is currently being developed. It is intended that delivery of these programs will involve local Aboriginal people.²⁹ The Commission is of the view that the development of Aboriginal community justice mechanisms— that are community-owned as distinct to community-based— to deal with these issues is essential.³⁰

Government Policy and Initiatives

Western Australian Aboriginal Justice Agreement

On 31 March 2004 the *Western Australian Aboriginal Justice Agreement* (AJA) was signed by the Department of Justice, the Department for Community Development, the Department of Indigenous Affairs, the Western Australia Police Service, the Aboriginal and

Torres Strait Islander Commission (ATSIC), the Aboriginal and Torres Strait Islander Services (ATSIS) and the Aboriginal Legal Service of Western Australia (ALS). The AJA sets out a number of aims and principles focused on improving justice related outcomes for Aboriginal people in Western Australia.

The AJA specifies three justice outcomes: to achieve 'safe and sustainable communities'; to reduce the number of victims of crime; and to reduce the over-representation of Aboriginal people in the criminal justice system.³¹ The agreement encourages partnerships between Aboriginal people and government agencies in achieving these outcomes and promotes the right of Aboriginal people to identify solutions to their problems.³² Reference is made to a number of key areas which relate to community justice mechanisms and to the increased involvement by Aboriginal people in the criminal justice system.³³ These include:

- communities making enforceable decisions on justice issues;
- establishment of restorative justice mechanisms;
- increased use of alternative dispute resolution methods;
- improved opportunities for input from Aboriginal people into sentencing options;
- local Aboriginal community justice mechanisms;
- participation of Aboriginal people in the administration of justice;
- Aboriginal customary law; and
- optimising opportunities and increasing the capacity for community delivered services.

The AJA (which is to operate for five years) involves the development of a Western Australian Aboriginal Justice Implementation Plan, Regional Aboriginal Justice Plans and Agreements, and Local Justice Plans.³⁴ Regional reference groups have been formed to develop regional and local justice plans based on the previous

25. LRCWA, Project No 94, *Thematic Summaries of Consultations – Carnarvon*, 30–31 July 2003, 5.

26. *Ibid.*

27. LRCWA, Project No 94, *Thematic Summaries of Consultations – Albany*, 18 November 2002, 17; *Mirrabooba*, 18 November 2002, 11; *Rockingham*, 9 December 2002, 35; *Manguri*, 4 November 2002, 4–6.

28. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 68. The Commission notes that there are successful Aboriginal-run community-based services dealing with family violence, such as the Derby Family Violence Prevention Project (see discussion in Part VII 'Addressing Family Violence and Child Abuse in Indigenous Communities', below pp 352–57) and the Yamatji Family Violence Prevention Unit (see above pp 28–29).

29. *Ibid.* 75.

30. In his background paper Blagg distinguishes between community-based initiatives, which are created by government and criminal justice agencies to operate in a community setting, and community-owned initiatives that empower communities to determine their own solutions. See Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 1–2.

31. *Western Australian Aboriginal Justice Agreement* (2004) 8–9.

32. *Ibid.* 3.

33. *Ibid.* 8–12.

34. *Ibid.* 14–15.

nine ATSIC regions and membership of these reference groups is drawn from government and non-government agencies and Aboriginal community representatives.³⁵ Planning and development for the statewide Aboriginal Justice Plan and local and regional justice plans are currently in progress.³⁶ While some of these plans aim for greater involvement of Aboriginal people in the justice system, in general the justice plans focus on improved service delivery.³⁷ The Commission supports the development of these plans and considers that the regional and local reference groups already in existence could provide assistance to Aboriginal communities who wish to establish a community justice group under the Commission's proposal. Although it is now over 18 months since the agreement was signed, it is difficult to find any evidence of direct action which empowers Aboriginal people to determine their own justice issues and solutions. It is this deficiency which the Commission aims to overcome with its proposal for community justice groups. While the Commission supports plans and agreements between government agencies, non-government agencies and Aboriginal people which aim to improve services to Aboriginal people, it considers that structures which empower Aboriginal people and enhance cultural authority are integral to the functional recognition of Aboriginal customary law and the improved quality of life for Aboriginal people in this state.³⁸

The Aboriginal Alternative Dispute Resolution Service

The Aboriginal Alternative Dispute Resolution Service (AADRS) commenced in 1995 under the auspices of the Aboriginal Policy and Services Division of the Department of Justice. It aims to reduce the level of over-representation of Aboriginal people in the criminal

justice system by providing an effective and culturally appropriate form of dispute resolution primarily for family feuding. All AADRS staff are Aboriginal and the service operates throughout the state.³⁹ This is an example of a government-controlled service which aims to be culturally appropriate and incorporate Aboriginal methods of resolving disputes. While the Commission supports these types of projects and considers that government services should be more culturally appropriate, the focus of the Commission is in supporting Aboriginal-controlled or Aboriginal-owned services.

Aboriginal Community Supervision Agreements

A scheme for Aboriginal Community Supervision Agreements commenced in 1993 between the Department of Justice and remote Aboriginal communities in the Kimberley, Pilbara and Goldfields. The voluntary scheme involves Aboriginal communities in the supervision of offenders in conjunction with the Department of Justice. The community council of a participating Aboriginal community nominates the supervising officer and undertakes to ensure that supervision and other obligations of the order are met as well as advising the Department of Justice community corrections officer of any non-compliance.⁴⁰

The plan, under this arrangement, to train as many potential community supervisors as possible takes into account Aboriginal customary law considerations by recognising that there needs to be a sufficient choice of supervisors to avoid the problems where a skin group relationship would make a supervisor inappropriate.⁴¹ On the other hand, the scheme does not provide for Aboriginal customary law ways of dealing with offenders

35. Department of Justice, *Aboriginal Justice Agreement Progress Report as at 30 June 2005* (2005) 1.

36. *Ibid.*

37. *Ibid.* Examples of plans that support the involvement of Aboriginal people in the justice system are Halls Creek (Priority 2 – Indigenous leaders groups to be involved in the court system) and Wiluna (Priority 4 – Aboriginal community participation in court processes).

38. In this regard the Commission notes the comments in Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 105 that the AJA had yet to result in any practical improvements for justice issues for Aboriginal people. Similar observations can be made about the *Kimberly Regional Justice Project* which commenced in 2000 and has so far undertaken extensive consultations with Aboriginal people from the Kimberly region and reported back to the Kimberly communities in relation to those consultations. The report indicated that in 2003 further consultations would take place. See Department of Justice, *Kimberly Regional Justice Project: Report Back to Kimberly Communities on the Research and Consultations So Far* (2003) 20. The Commission also notes the views expressed by respondents during consultations at Fitzroy Crossing, in particular that there were concerns that the AJA was a 'top down' initiative and that there was a need to 'build a justice strategy from the bottom up': see LRCWA, Project No 94, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 46. The Commission acknowledges and supports the recommendations of the Kimberley Aboriginal Reference Group in relation to the Kimberley Custodial Plan (October 2005).

39. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 19–20. The Department of Justice advised that the AADRS was formally evaluated in 2003; however, the results of that evaluation are not known.

40. Parriman F & Daley D, 'Aboriginal Community Supervision Agreements in Western Australia' (Paper presented at the Best Practice Interventions in Corrections for Indigenous People Conference convened by the Australian Institute of Criminology in conjunction with the Department for Correctional Services, Adelaide, 13–15 October 1999) 2–3.

41. *Ibid.* 4.

because the agreements expressly provide that it 'cannot be used to validate or enforce forms of behavioural control on community members other than those specified in the document itself'.⁴²

The Gordon Inquiry recommended that the use of Community Supervision Agreements in remote communities should be expanded as long as there are appropriate supports and training for the community members to manage offenders.⁴³ The scheme has recently been extended to include juvenile offenders⁴⁴ and is intended to provide a structure for the increased involvement of Aboriginal communities in juvenile justice diversionary processes.⁴⁵ These community supervision agreements have reportedly been effective in improving the supervision and performance of Aboriginal offenders subject to community-based orders in remote communities, as well as raising the credibility of this sanction with the judiciary. As a consequence there has been an apparent increase in the use of community supervision orders in remote areas.⁴⁶ What the scheme lacks is the ability for Aboriginal communities to incorporate their own way of 'doing things' through the use of both customary law and locally initiated justice mechanisms.

Cross Border Justice Project

The Department of Justice is leading a project between police and justice agencies in Western Australia, South Australia and the Northern Territory to address justice needs in their common border Ngaanyatjarra, Pitjantjatjara and Yankunytjatjara lands. The project will consider legislative changes to ensure the sharing of police, courts, community justice services and prison services.⁴⁷ The project anticipates that police from any of the three jurisdictions could charge, bail and prosecute an offender according to the applicable law, that the charges could be heard at the most convenient court location, and that any custodial

sentence could be served at the closest facility.⁴⁸ The Commission notes that the *Magistrates Court Act 2004* (WA) provides for the appointment of acting magistrates for the administration of justice in the lands which border Western Australia, South Australia and the Northern Territory and that this provision was considered necessary for the success of this project.⁴⁹ It has been acknowledged that this is one area where the reality of Aboriginal customary law can be recognised because Aboriginal customary law operates across state borders in these locations.⁵⁰ Any Western Australian Aboriginal community in this area that wishes to establish a community justice group should be able to liaise with, and make recommendations to, justice agencies in each jurisdiction about the operation of their community justice group within the criminal justice system.

Aboriginal Community Justice Mechanisms

The Commission supports the greater use of community justice mechanisms within Aboriginal communities, as well as the establishment of a scheme which allows these initiatives to play a significant role within the general criminal justice system. While a thorough review of all community justice mechanisms in Western Australia is beyond the scope of this Discussion Paper, the following section provides examples of some of the more common successful initiatives. The purpose is to show how these initiatives operate in order that the Commission's proposal in relation to community justice groups can be properly understood.

Patrols

Aboriginal community patrols have been formally supported and funded by the Department of Indigenous Affairs since 1995. There are currently 21

42. Ibid.

43. Gordan 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) 259.

44. *Young Offenders Act 1994* (WA) ss 17A–17D.

45. Recent amendments to the *Young Offenders Act 1994* (WA) allow for the chief executive officer to appoint a member of an approved Aboriginal community to be a Juvenile Justice Team Coordinator and where 'considerations of practicality, distance or cultural sensitivity make it appropriate' a warden, Elder or other member of an approved Aboriginal community can sit on the team instead of a police officer: see *Young Offenders Act 1994* (WA) ss 36(2), 37.

46. Parriman F & Daley D, 'Aboriginal Community Supervision Agreements in Western Australia' (Paper presented at the Best Practice Interventions in Corrections for Indigenous People Conference convened by the Australian Institute of Criminology in conjunction with the Department for Correctional Services, Adelaide 13–15 October 1999) 5–6.

47. Department of Justice, *Annual Report 2003/04* (2004) 34.

48. Remote Service Delivery Project Steering Committee, *Warburton Multi-Functional Police Facility Service Delivery Model: Final Report* (Government of Western Australia, September 2003) 23–24.

49. *Magistrates Court Act 2004* (WA) cl 10 sch 1. See also Magistrates Court Bill 2003, Explanatory Memorandum, 2.

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

community patrols operating in Western Australia.⁵¹ In theory, patrols focus on alcohol and substance abuse issues in addition to diverting Aboriginal people away from the criminal justice system; however, the precise role of a patrol is, in practice, determined by the needs of the community. Patrols often work closely with other community justice mechanisms (such as sobering-up shelters) and police⁵² and operate in a 'non coercive' manner with the aim of improving community wellbeing and safety.⁵³ Patrols have been successful in reducing the number of arrests of Aboriginal people for public order and related offences.⁵⁴



One such patrol, the Marrala Patrol in Fitzroy Crossing, had been operating successfully since the mid-1990s; however, in 2003 it lost its funding as a consequence of the failure by other agencies to take into account the Aboriginal customary law parameters under which it must operate. Marrala's primary role was to provide a safe method of transport from the Crossing Inn back to Aboriginal communities. Problems emerged when a sobering-up shelter was established in 1998 by the Western Australian Drug Abuse Strategy Office. The Marrala Patrol was not consulted about who would have the responsibility for taking people to the shelter, although the police and the shelter appeared to assume that the patrol would take on this function. In fact, the Marrala Patrol was only permitted under customary law to take an Aboriginal person to the shelter if that person consented. Without such consent, the members of the patrol would be held responsible under Aboriginal customary law for any death or injury that might occur at the shelter, rendering them subject to payback.⁵⁵ Because other agencies considered that the patrol should transport Aboriginal people to the shelter regardless of the circumstances it was denied funding. During its consultations the Commission was told that this situation caused the Aboriginal community to

conclude that their 'aspirations were of lesser importance'.⁵⁶

A similar problem has occurred with the Nyoongar Patrol in Perth. The Nyoongar patrol operates in the inner-city area, providing welfare and social assistance to Aboriginal people with the aim of reducing conflicts and interactions with police.⁵⁷ While the patrol members understand their role as providing a service to Aboriginal people, other interest groups—such as local businesses in Northbridge—believe that the patrol essentially consists of publicly funded security officers.⁵⁸ If the patrol members were to act solely as security officers then the service would lose the capacity to actively address the social and welfare issues of Aboriginal people at street-level or act to diffuse volatile situations with the police.⁵⁹ A recent newspaper article confirmed this ongoing problem when it was reported that the Nyoongar Patrol would lose some of its funding from the City of Perth as a consequence of this loss of support from Northbridge traders.⁶⁰ Fortunately, in July 2005 the Department of Indigenous Affairs announced a significant funding agreement to enable the continuing work of the patrol.⁶¹

The Commission considers that these two examples clearly support the conclusion of Blagg and Valuri, in their research on Aboriginal night patrols, that such

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51. Blagg H & Valuri G, *An Overview of Night Patrol Services in Australia* (Commonwealth Attorney-General's Department, 2003) 25.
 52. Policy and Coordination Directorate Department of Indigenous Affairs, *Building Stronger Communities* (2002) 22.
 53. Blagg H & Valuri G, *An Overview of Night Patrol Services in Australia* (Canberra: Commonwealth Attorney-General's Department, 2003) 25.
 54. Ibid; Cunneen C, *The Impact of Crime Prevention on Aboriginal Communities* (Sydney: New South Wales Aboriginal Justice Advisory Council, September 2001) 41.
 55. Blagg H & Valuri G, 'Self-Policing and Community Safety: The work of Aboriginal community patrols in Australia' (2004) 15 *Current Issues in Criminal Justice* 205, 213–14.
 56. LRCWA, Project No 94, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 43.
 57. Parliament of Victoria Drugs and Crime Prevention Committee, *Inquiry into Public Drunkenness: Final report* (Melbourne, 2001) 237.
 58. Blagg H & Valuri G, 'Self-Policing and Community Safety: The work of Aboriginal community patrols in Australia' (2004) 15 *Current Issues in Criminal Justice* 205, 212–13; Blagg H & Valuri G, *An Overview of Night Patrol Services in Australia* (Canberra: Commonwealth Attorney-General's Department, 2003) 27.
 59. Parliament of Victoria Drugs and Crime Prevention Committee, *Inquiry into Public Drunkenness: Final report* (Melbourne, 2001) 239.
 60. Parker G, '\$122,000 Funding Cut to Curb Nyoongar Patrol', *The West Australian*, 25 June 2005, 54.
 61. Department of Indigenous Affairs, *Tarwagin Newsletter*, 6 July 2005: see <<http://www.dia.wa.gov.au/newsletter/default.aspx>>.

patrols 'operate best when they remain culturally embedded in Indigenous communities, respect local cultural protocols and operate from within Aboriginal terms of reference'.⁶² As discussed earlier, the Ngooda-Gardy Patrol in South Hedland and the Yamatji Patrol in Geraldton are just two examples of successful patrols operating in Aboriginal communities.⁶³ In suggesting the establishment of Aboriginal community justice groups the Commission encourages justice groups to evolve from or work with existing successful community justice mechanisms.

Women's initiatives

In 2002 Aboriginal women Elders from Broome established the Peninsula Women's Group as a result of increasing concern about child sexual abuse in their communities. After an initial bush meeting the group organised activities such as educating women on how to recognise signs of child sexual abuse, designing literature for children and discussing options for offenders such as removal from the community.⁶⁴ In order to obtain funding from ATSIC the group was required to be incorporated, and, as Catherine Wohlan describes in her background paper, what began as a 'grass-roots initiative using Aboriginal authority structures' turned into a more bureaucratic, less flexible and slower organisation.⁶⁵

The Fitzroy Valley Action Group also emerged from the efforts of local women with the primary focus of addressing alcohol abuse. Following a successful community meeting with over 200 people attending, the group liaised with police and the local magistrate about alcohol issues and their actions led to the formation of a number of night patrols in the communities in the Fitzroy Valley.⁶⁶ As Wohlan concludes, Aboriginal women are developing successful mechanisms for dealing with social problems through the 'assertion of culture'.⁶⁷ The Commission considers that it is crucial that any proposal for community justice

mechanisms must incorporate the views of and initiatives developed by Aboriginal women.

Other initiatives

As set out in the discussion of the community consultations in Part II, many Aboriginal communities considered that a return to traditional cultural practices would solve the problems with Aboriginal youth.⁶⁸ Wohlan describes a successful initiative which involved bush trips for troubled teenagers in Fitzroy Valley and the use of Aboriginal culture to restore the cultural authority of Elders and to change inappropriate behaviour:

The Kurungal Yirraman track was walked by a group of teenagers, regarded as affected by 'drugs, alcohol and American movies', as a form of punishment. The teenagers were made to find and carry their own water and hunt for food. The walk educated the teenagers about resource use of country (eg, bush foods and medicines) and passed on knowledge of cultural sites. They were shown how to light fires, build windbreakers and serve meat properly. Within a couple of days their behaviour was described as changed. They started to bond with and show respect for the elders guiding the walk; they did as they were instructed and then did things without even being asked. They brought the experience of the walk back to the school and did a school project related to the walk. While on the track the teenagers forgot about the alcohol and drugs and understood more about their elders, their country and their cultural heritage.⁶⁹

In his background paper, Blagg outlines the work of the Derby Family Violence Prevention Project which was established in the late 1990s. The project, which was funded by the National Crime Prevention Program and managed by the local shire, has supported specific Aboriginal-controlled programs.⁷⁰ Blagg observes that this project takes into account Aboriginal cultural factors by having separate programs and separate spaces for young men and young women and that the project works closely with Elders.⁷¹ For example, the Mowanjum

62. Blagg H & Valuri G, 'Self-Policing and Community Safety: The work of Aboriginal community patrols in Australia' (2004) 15 *Current Issues in Criminal Justice* 205, 210. In a comprehensive evaluation of Indigenous alcohol and drug facilities and patrols in Australia it was concluded that the 'Indigenous perspective' is crucial to good practice for Indigenous substance misuse services: see Strempel P, Sagggers S, Gray D & Stearne A, *Indigenous Drug and Alcohol Projects: Elements of Best Practice*, Australian National Council on Drugs Research Paper No 8 (2003) ix.

63. See discussion in Part II 'Alcohol and other drug intervention projects', above pp 28–30.

64. Wohlan C, *Aboriginal Women's Interests in Customary Law Recognition*, LRCWA, Project No 94, Background Paper No 13 (April 2005) 43.

65. *Ibid.*

66. *Ibid* 44–45.

67. *Ibid* 47.

68. See Part II 'Children and Youth', above pp 20–23.

69. Wohlan C, *Aboriginal Women's Interests in Customary Law Recognition*, LRCWA, Project No 94, Background Paper No 13 (April 2005) 41.

70. Poelina A & Perdrisat I, *A Report of the Derby/West Kimberley Project: Working With Adolescents to Prevent Domestic Violence* (Canberra: Attorney-General's Department, January 2004) 9.

71. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance In Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 13.

The Commission considers that it is crucial that any proposal for community justice mechanisms must incorporate the views of and initiatives developed by Aboriginal women.

Aboriginal Community has both a men's centre and a women's centre. The men's centre, which also functions as a football club, has applied codes of behaviour to reduce alcohol and violence. The men were also involved in bush trips which reportedly 'strengthen cultural affirmation and social cohesion'.⁷²

Funding of Western Australian community justice initiatives

Aboriginal community justice mechanisms currently operating in Western Australia are principally funded by government. Community-operated patrols are funded by the Department of Indigenous Affairs.⁷³ In 2000 the responsibility for funding the Aboriginal wardens' scheme, discussed below, was transferred from the Aboriginal Affairs Department to the Western Australian Police Service.⁷⁴ The Indigenous Community Partnerships Fund is currently operated by the Department for Community Development and it provides one-off grants for up to \$15,000 for community initiatives to address issues identified by the Gordon Inquiry.⁷⁵ In order to obtain a grant an organisation must either be incorporated⁷⁶ or be a local government authority.

There is also evidence of funding for Aboriginal community justice mechanisms from the private sector. For example, a partnership between the state government and BHP Billiton Iron Ore to provide \$100,000 and \$300,000 respectively to the Ngooda Gardy Community Patrol in Port Hedland was recently announced.⁷⁷ The Munjurla Study, which was undertaken as part of the Western Australian COAG

trial in the Kadjungka/Tjurabalan region of the East Kimberly, sets out a 'new way of doing business with remote Aboriginal communities based on strong and enduring partnerships between the region, government and the private sector'.⁷⁸ The Commission supports this approach on the understanding that it will result in greater support for community initiatives from all sectors. However, regardless of the funding source, care is needed to ensure that accountability for a project is to the Aboriginal community which it is designed to serve and to ensure that the types of problems that occurred in respect of the Marrala Patrol and the Nyoongar Patrol are not repeated.

The Western Australian Aboriginal Community By-Law Scheme

The Aboriginal community by-law scheme aims to assist certain Aboriginal communities in the control and management of behaviour on their community lands. The scheme which operates under the *Aboriginal Communities Act 1979* (WA) ('the Act') was developed in the 1970s by Magistrate Terry Syddall out of concern that Aboriginal people lacked understanding of the general court system.⁷⁹ The original intention was that offences under the by-laws would be dealt with by Aboriginal justices of the peace in community courts. An early review of this aspect of the scheme found that, despite the original intention, these courts rarely sat without the non-Aboriginal magistrate being present.⁸⁰ It was highlighted in a review of the Act that the literacy requirement for justices of peace often

72. Poelina A & Perdrisat I, *A Report of the Derby/West Kimberley Project: Working With Adolescents to Prevent Domestic Violence* (Canberra: Attorney-General's Department, January 2004) 20–21.

73. Department of Indigenous Affairs: see <<http://www.dia.wa.gov.au/DIA/Funding/Patrols/default.aspx>>.

74. Western Australian Police Service, *Newsbeat*, 14 June 2002, 19.

75. Department for Community Development: see <<http://www.community.wa.gov.au/Resources/NotForProfitFundingAndGrants/Grants/CommunityPartnershipsFundGrants.html>>.

76. The organisation must be incorporated under the *Associations Incorporations Act 1987* (WA) or the *Aboriginal Council and Associations Act 1976* (Cth).

77. Department of Indigenous Affairs, 'New Look Street Patrol Boosts Port Hedland Community' (Media Statement, 21 June 2005): see <http://www.dia.wa.gov.au/news/news_187.aspx>. The partnership will provide job related training and qualifications to the patrol workers and one long-term worker has been appointed full-time supervisor of the patrol and he is now no longer paid through the CDEP scheme.

78. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance In Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 33.

79. RCIADIC, *Regional Report of Inquiry into Underlying Issues in Western Australia* (1991) [9.3].

80. Hoddinott A, *That's 'Gardia' Business: An evaluation of the Aboriginal Justice of the Peace Scheme in Western Australia* (1984) 34.

excluded Elders even though they were considered by many Aboriginal communities to be the most suitable candidates.⁸¹ Currently there are 25 Aboriginal communities that have by-laws in force. The Act was originally intended to provide a form of limited self-governance; however, the scheme has not generally been successful.⁸²

The Operation of the Aboriginal Communities Act 1979 (WA)

The Act allows certain Aboriginal communities to make by-laws in relation to controlling behaviour on their community lands. The by-laws cover a number of matters including:

- the admission of people, vehicles and animals onto community lands;
- the designation of places which are out of bounds;
- the prohibition of nuisance or any offensive, indecent or disorderly behaviour;
- the possession, use or supply of alcohol or deleterious substances;
- the possession of firearms;
- entering houses without permission; and
- property damage.⁸³

Some communities have included a by-law which provides that, where the person was acting under a custom of the community, it is a defence to a charge of breaching a by-law.⁸⁴ The ALRC was of the view that the circumstances in which this defence could be relied on were limited. It would have possible application to offences in relation to entry onto lands, causing disturbances and the interruption of meetings.⁸⁵ As proceedings are heard in the Magistrates Court and transcripts are not publicly available the Commission is not aware of any cases where this defence has been successfully relied upon.

Invitation to Submit 2

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.

An Aboriginal community can only make by-laws if it is a community that has been declared by the Governor to be a community to which the legislation applies. The by-laws themselves must also be approved by the Governor following recommendation by the Minister for Indigenous Affairs.⁸⁶ The Minister is required to consider, when recommending to the Governor that a community should be declared as a community to which the Act applies, that there are provisions in the constitution or rules of the community that require the council to adequately consult with members of the community (in relation to the nature of any by-laws).⁸⁷ The Governor is authorised to declare the boundaries of the community lands for a particular community. By-laws are limited in their application to those community lands, although they apply to *all people* who are on those lands, regardless of whether they are a member of the community.⁸⁸

Enforcement of by-laws and penalties for breach

Enforcement of community by-laws is the responsibility of the police⁸⁹ and if charged a person will be dealt with by the Magistrates Court. The potential ability for Aboriginal justices of the peace to deal with offences has been significantly affected by recent legislation which limits the jurisdiction of justices of the peace.⁹⁰ As mentioned in Part II, the current maximum penalty

81. McCallum A, *Review of the Aboriginal Communities Act 1979 (WA)* (Perth: Aboriginal Affairs Planning Authority, July 1992) 14.
82. The Lingjari Foundation, *The Munjurla Study: A scoping, profiling and planning process in respect of the WA COAG site trial for the purposes of informing the negotiation of a comprehensive regional agreement* (April 2004) 117.
83. *Aboriginal Communities Act 1979 (WA)* s 7.
84. See, for example, Wongatha Wonganarra Aboriginal Community By-Laws 2003, by-law 13 and Djarindjin Aboriginal Community By-Laws 1997, by-law 14. Note that the ALRC was informed by a magistrate that this defence had been rarely used and when so, with limited success: see ALRC *Aboriginal Customary Law and Local Justice Mechanisms: Principles, options and proposals*, Research Paper No 11/12 (1984) 69.
85. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [445]–[446].
86. *Aboriginal Communities Act 1979 (WA)* ss 4 & 8(3).
87. *Aboriginal Communities Act 1979 (WA)* s 4(2).
88. *Aboriginal Communities Act 1979 (WA)* ss 6 & 9.
89. *Aboriginal Communities Act 1979 (WA)* s 7(2).
90. Magistrates Court Regulations 2005, regs 8, 10, 11. These regulations limit the circumstances in which a Justice of the Peace can sit alone or with another Justice of the Peace. In particular in a country location, one Justice of the Peace can only deal with bail and adjournments and only if it is impractical for two Justices of the Peace to sit. Two justices of the peace (sitting together) can only deal with bail, adjournments and deal with a simple offence if the accused pleads guilty and both the prosecutor and the accused agree. The Commission notes that the RCIADIC recommended that jurisdictions that had not already done so should phase out the use of Justices of the Peace for the determination of charges and the imposition of penalties: see RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [22.4.27] Recommendation 98. The Commission understands that there must be an appropriate balance between the powers of justices of the peace and ensuring that people from remote areas are not disadvantaged by the lack of judicial officers available.

for an offence under community by-laws is a fine of \$5,000.⁹¹ In 2004 imprisonment was removed as an option. The Commission's consultations indicated that some communities sought its reinstatement as a penalty for breach of by-laws.⁹² In most cases the by-laws which are currently in force limit the penalty to a fine of \$100. However, some communities have included a by-law which states that the penalty may be a fine of up to the \$5,000 maximum provided for by the legislation.⁹³ If a person is fined by the Magistrates Court for breaching a by-law the fine is paid to the community council for the use of the community.⁹⁴ Failure to pay the fine is enforced in the same manner as any other monetary penalty and may eventually lead to imprisonment.⁹⁵

The by-laws do not affect general criminal liability under Australian law.⁹⁶ There are some matters which may be an offence against a by-law as well as an offence against a general criminal law statute. On the other hand, there are some matters (for example, possession of alcohol) that are not offences against the general



criminal law and will only be an offence on the relevant community lands. Therefore, a person may be charged with both an offence under the by-laws and an offence under the general criminal law. Indeed, the Commission heard examples of young Aboriginal people being charged with a by-law offence in relation to the possession of a volatile substance and, in addition, an offence of stealing as a consequence of taking the petrol without consent.

The role of wardens

In some Aboriginal communities operating a by-law scheme the police are supported by Aboriginal wardens⁹⁷ who are drawn from the particular community. Wardens were previously appointed as special constables under the *Police Act 1892* (WA); however, this practice ended in 1998.⁹⁸ Although they assist police in identifying breaches of by-laws, the wardens do not have the power to arrest offenders.⁹⁹ Indeed, the warden scheme is simply an administrative measure and has no enabling legislation. Nonetheless,

some communities have enacted by-laws that purport to empower wardens to investigate breaches and enforce the by-laws.¹⁰⁰ These types of provisions appear to be *ultra vires* and have led to some uncertainty about the respective roles of police and wardens in the enforcement of by-laws.

In a 1992 review of the *Aboriginal Communities Act 1979* (WA), Andrea McCallum emphasised that each of the 13 communities consulted for the review supported legislative recognition of the warden scheme.¹⁰¹ It has been noted elsewhere that the warden scheme was 'actively marketed' to Aboriginal communities by various government

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91. *Aboriginal Communities Act 1979* (WA) s 7(2). It is noted that in the 1992 review of the Act, many communities indicated that the previous maximum fine of \$100 was too low to have any significant deterrent effect. See the summaries of community consultations in McCallum A, *Review of the Aboriginal Communities Act 1979* (WA) (Vol. 2, July 1992).
92. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 8; *Cosmo Newbery*, 6 March 2003, 21. See also Ngaanyatjarra Community, *Law and Justice Submission to the Attorney General of Western Australia* (April 2002) 21–22.
93. For examples, see Ngaanyatjarra Council By-Laws 1989, by-law 14; Bidyadanga Community By-Laws 2004, by-law 14; Djarindjin Aboriginal Community By-Laws 1997, by-law 16; Kundat Djaru Community By-Laws 2005, by-law 15(3).
94. *Aboriginal Communities Act 1979* (WA) s 12 and note that a court can also order compensation up to \$250 to the community for any damage caused by the breach.
95. *Fines Penalties and Infringement Notices Enforcement Act 1994* (WA) ss 28, 53.
96. *Aboriginal Communities Act 1979* (WA) s 13.
97. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 43 and note that the provision for wardens does not generally appear in the actual By-Laws themselves except for a few cases: see Warmun Community (Turkey Creek) Inc By Laws 1991, by-law 22.
98. Galton-Fenzi AK, *Policing Remote/Discrete Communities in Western Australia* (Perth: Western Australia Police Service, June 2002) 15.
99. Western Australian Police Service *COP's Manual (Public Version)* (25 January 2005) AD-1.7.
100. Warmun Community (Turkey Creek) Inc By-Laws 1991, by-law 22; Kalumburu Aboriginal Corporation By-Laws 1991, by-law 18; Woolah Aboriginal Corporation By-Laws 1991, by-law 19.
101. McCallum A, *Review of the Aboriginal Communities Act 1979* (WA) (Aboriginal Affairs Planning Authority, July 1992) 42–44. The review recommended that wardens be appointed from each main family, language or skin group and that women, Elders and young people should be eligible to act as wardens. The Commission notes that although the communities consulted by McCallum generally supported increased powers for wardens, some communities were critical of aspects of the warden scheme. See for example, Bidyadanga, Djarindjin and Kalumburu communities in the summaries of consultations with 13 Kimberley communities accompanying the 1992 review of the scheme: McCallum A, *Review of the Aboriginal Communities Act 1979* (WA) (Vol. 2, July 1992) 4, 30 & 57.

agencies and that this 'marketing', coupled with the lack of police presence on many communities, has led to significant reliance on wardens and considerable support for the scheme.¹⁰²

Review of the By-Law Scheme as it Relates to the Criminal Justice System

Factors in support of the by-law scheme

Superficially the by-law scheme appears to give Aboriginal communities a degree of autonomy. Philip Vincent states that it is the only scheme under Australian law where 'Aboriginal communities can operate under their own laws'.¹⁰³ However, the government (through the Minister for Indigenous Affairs) retains the ultimate power over what matters can be included in the by-laws. The types of matters that are covered are generally a duplication of matters which already come under the umbrella of the criminal law rather than matters that reflect Aboriginal customary law.

The Commission acknowledges that some communities are in support of the by-law scheme; however, it has been suggested that this is probably only because there is no other choice.¹⁰⁴ Discussions with a representative of the Department of Indigenous Affairs indicated that, following a period of dysfunction, there has been some recent success with the scheme in Bidyadanga. In this community an informal system had been established for dealing with breaches of the community's by-laws. This involves a notice being given to the alleged offender by a warden, attendance by the alleged offender at a council meeting, the council determining whether a by-law has in fact been breached, and the voluntarily agreement by the offender to pay a fine. If the offender does not pay the fine or attend the council meeting, or if there have been a number of repeat offences, the matter is referred to the police.¹⁰⁵ There is nothing in the Bidyadanga Community By-Laws which authorises this process and in the Commission's

view, if such a scheme continued to be supported it could easily fit within the model for community justice groups proposed by the Commission below.¹⁰⁶

The Ngaanyatjarraku Shire Council has called for the re-introduction of imprisonment as a penalty for breaching by-laws. It was argued that when imprisonment was an option, volatile substance abusers were able to be sentenced to custody at a local substance abuse centre in Warburton.¹⁰⁷ The Commission is of the view that alternative options could be explored through the operation of community justice groups while at the same time avoiding the problems associated with introducing young people to the criminal justice system. In relation to most other offences that are commonly dealt with under the by-laws, offences available under Australian law have a wider range of penalty options available and, therefore, will be more effective for cases that are considered by the community to be the most serious or when the community wishes the matter to be dealt with under Australian law.

Factors against the by-law scheme

An additional set of laws

A review of the scheme in 1984 criticised the 'token acknowledgment of tribal custom' by providing for a defence based on the customs of the community and the failure of the scheme to allow Aboriginal people to practise their own customary law.¹⁰⁸ The review recommended that the Act should be amended to incorporate customary offences, sanctions and procedures.¹⁰⁹ Alternatively, the review suggested that the scheme could be abandoned altogether and that the participating communities return to Australian law.¹¹⁰ Of course, this last suggestion is somewhat misleading because communities remain subject to Australian law whether they have by-laws in place or not. Indeed, while it is often said that Aboriginal people face two laws (customary law and Australian law), those Aboriginal people living on communities with by-laws are in fact subject to three sets of laws.

102. Galton-Fenzi AK, *Policing Remote/Discrete Communities in Western Australia* (Perth: Western Australia Police Service, June 2002) 13–14.

103. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 44.

104. Kamien T, *Implementing Self-Government – An Examination of the Aboriginal Communities Act (WA) (1995) 2(1) E Law: Murdoch University Electronic Journal of Law* 6.

105. Interview with Carolyn Petroboni, Department of Indigenous Affairs (Perth, 27 September 2004) and note that during these discussions the Commission was told that the success of the scheme was dependant on support given to the community by outside agencies and the fact that at that time there was a strong community council with representatives from all skin groups.

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

107. Ngaanyatjarra Community, *Law and Justice Submission to the Attorney-General of Western Australia* (April 2002) 21–22.

108. Hoddinott A, *That's 'Gardia' Business: An evaluation of the Aboriginal Justice of the Peace Scheme in Western Australia* (1984) 34.

109. Ibid 2. The Commission notes that Phillip Vincent also supports the expansion of the scheme to incorporate customary law: see Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 44.

110. Hoddinott A, *That's 'Gardia' Business: An evaluation of the Aboriginal Justice of the Peace Scheme in Western Australia* (1984) 34.

As a result of the duplication of many offences under the general criminal law, the by-laws can have a net-widening effect¹¹¹ and add to the already high numbers of Aboriginal people being dealt with in the criminal justice system. Where an offence is contrary to both the by-laws and the general law there may be a conflict between the penalties that can be imposed.¹¹² The Commission is of the view that the criminal law is generally sufficient to deal with the types of matters that are covered by the by-law scheme. The main exceptions are in relation to alcohol and substance use and entry onto community lands. These matters are discussed in more detail below.

Enforcement problems

As Blagg comments, the by-law scheme has been 'sold as a panacea for a host of law and order and security issues on remote communities' and 'over-sold as a solution'.¹¹³ Because the scheme relies on police enforcement, it is ineffective for addressing law and order concerns on those communities that do not have a police presence.¹¹⁴ As a consequence of the lack of police presence and the absence of any enforcement mechanism, some community councils enforced breaches by imposing on-the-spot fines.¹¹⁵ One solution to this problem has been the suggestion that wardens be given enforcement powers; however, Aboriginal customary law considerations relating to skin obligations and avoidance issues can severely impinge upon a warden's ability to enforce by-laws.¹¹⁶ Since almost all communities consulted by the Commission expressed a desire for a full-time police presence, the Commission is of the view that legislation to give wardens powers of enforcement and arrest will be counter-productive. This does not prevent a community continuing to use wardens in an informal and flexible manner in the same way that patrols operate. In this regard it is noted

that patrols have been very effective throughout Australia without the necessity of enforcement powers.¹¹⁷ The Commission considers that Aboriginal wardens and patrols should not be required or expected to do the job of police and supports the improvement of remote policing services as recommended by the Gordon Inquiry.¹¹⁸

Limitation to community lands

A significant deficiency of the by-law scheme is that it only applies to community lands declared under the Act. In some communities, the community lands declared under the Act only cover the administrative and residential areas in the community while others include the entire reserve or pastoral lease.¹¹⁹ Community lands do not usually cover gazetted roads or government buildings, such as schools. The ability of by-laws to effectively control community behaviour is therefore limited and considerably undermined by the fact that a person could simply step outside a declared area to engage in prohibited activities, such as the consumption of alcohol.

In the 1992 review of the scheme it was recommended that the Act should be amended to provide that community lands be defined as the whole reserve or pastoral lease area and that this would avoid the need for the Governor to declare particular community lands.¹²⁰ While the Commission supports this recommendation it also allows, in its proposal for community justice groups, a more flexible scheme that relies on membership of the community and is not wholly dependant upon physical location. In other words, as a condition of residence, a member of a community may be required by the community justice group to comply with the community rules regardless of where they were physically located.

111. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance In Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 27.

112. The maximum fine that can be imposed for an offence against the by-laws is \$5,000. For the offence of disorderly conduct under s 74A of the *Criminal Code (WA)* the maximum penalty is \$6,000. The ALRC noted the conflict between the two sets of laws: see ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [750].

113. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance In Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 26.

114. *Ibid.* See also the discussion of enforcement issues, including lack of police presence, in the summaries of consultations with 13 Kimberley communities accompanying the 1992 review of the scheme: McCallum A, *Review of the Aboriginal Communities Act 1979 (WA)* (Vol. 2, July 1992).

115. See the summaries of consultations with 13 Kimberley communities accompanying the 1992 review of the scheme: McCallum, *ibid* 40-41, 48, 93. The councils that used on-the-spot fines were concerned that they may be acting illegally.

116. It has also been noted that it is 'unrealistic to expect that people can police their neighbours, family and friends': see The Lingjari Foundation, *The Munjurla Study: A scoping, profiling and planning process in respect of the WA COAG site trial for the purposes of informing the negotiation of a comprehensive regional agreement* (April 2004) 113.

117. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 30.

118. It is noted that the government has responded favourably to this recommendation: see Western Australian Government, *Second Progress Update On the Implementation of 'Putting People First': Addressing Family Violence and Child Abuse in Aboriginal Communities* (December 2003) 7. See also the discussion under 'Policing Aboriginal Communities', below pp 250-51.

119. McCallum A, *Review of the Aboriginal Communities Act 1979 (WA)* (Perth: Aboriginal Affairs Planning Authority, July 1992) 26.

120. *Ibid* 99.

Lack of cultural authority

An important reason for the general failure of the by-law scheme is that it is controlled by community councils which are not necessarily reflective of traditional authority structures and are sometimes significantly dysfunctional.¹²¹ Toohey observes that council members are not generally chosen 'because of their deep knowledge of traditional matters' but rather for their ability to deal with government agencies and service providers.¹²² Inevitably, the cultural authority of Elders has been weakened by the authority placed in council members under the by-law scheme and this has, in some instances, undermined customary law.¹²³ This was confirmed at the consultations in Broome where the Commission heard that a principal flaw of the by-law scheme is that it 'involves the choice of enforcers outside the skin group system of traditional law'.¹²⁴

Lack of autonomy

While some may see the by-law scheme as a way for Aboriginal people to make their own laws, the Commission is of the view that the by-law scheme is no more than an adjunct to the general criminal justice system and has done little to improve the justice-related outcomes for Aboriginal people or to allow Aboriginal people to practise customary law. The Commission notes the view expressed during the consultations in Broome that the scheme is another example of imposing white ways on Aboriginal communities in the name of 'empowerment'.¹²⁵ This point was underlined by Inspector Galton-Fenzi, in his review of policing in remote communities, when he stated:

It is important to note that what commenced as a consultation process with consideration to the application and process of traditional law within the communities, resulted in a process, application and interpretation of rules and regulations based entirely on our laws and legal systems.¹²⁶

During the 1992 review of the scheme, members of the Bidyadanga community advised that they felt 'no

ownership' of their by-laws and considered that the by-laws were 'alien to their needs'.¹²⁷ Toohey explains that the by-law scheme is based on Australian law because it incorporates western concepts such as councils, written laws and courts. Even if it could be argued that the scheme attempts to reconcile two systems of laws; it is 'Australian law which in the end prevails'.¹²⁸

The Commission's View

The Commission is aware that the Department of Indigenous Affairs is currently conducting a review of the Act and that the Minister for Indigenous Affairs has acknowledged that any legislative changes to the Act will require 'extensive consultation with all key stakeholders, particularly the Aboriginal communities to which the *Aboriginal Communities Act 1979* (WA) may apply'.¹²⁹ Taking the factors in support of and against the scheme into account, it is the Commission's view that the Act should be repealed. In making this proposal the Commission is particularly persuaded by the fact that the by-laws appear to simply create another layer of law applicable only to Aboriginal communities, but that have no cultural basis in the custom of those communities. At the conclusion of this section the Commission details a proposal that seeks to enhance the cultural authority of Elders and offer a culturally appropriate and community-owned process for control of behaviour currently addressed under the by-law scheme.

Proposal 11

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.

121. The by-law scheme has also been undermined by complaints in some communities that council members have themselves breached by-laws, in particular in relation to the consumption and supply of alcohol: *ibid* 22.

122. Toohey J, *Understanding Aboriginal Law* (1999) 28 in Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004).

123. The Munjurla study notes that a system of by-laws which attempts to override the traditional and higher authority of Elders is unlikely to succeed in the long-term. The Lingiari Foundation, *The Munjurla Study: A scoping, profiling and planning process in respect of the WA COAG site trial for the purposes of informing the negotiation of a comprehensive regional agreement* (April 2004) 115.

124. LRCWA, Project No 94, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, 26.

125. *Ibid*.

126. Galton-Fenzi AK, *Policing Remote/Discrete Communities in Western Australia* (Perth: Western Australia Police Service, June 2002) 13.

127. See the summaries of consultations with 13 Kimberley communities accompanying the 1992 review of the scheme: McCallum A, *Review of the Aboriginal Communities Act 1979* (WA) (Vol. 2, July 1992) 6–7.

128. Toohey J *Understanding Aboriginal Law* (1999) 29 in Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004) 41.

129. Minister for Indigenous Affairs, *Hansard*, Legislative Assembly, 17 August 2004, 5043 (The Hon JC Kobelke).

By-laws appear to simply create another layer of law applicable only to Aboriginal communities, but [they] have no cultural basis in the custom of those communities.

In recognition of the government's prerequisite that any legislative changes to the *Aboriginal Communities Act 1979* (WA) should not take place without full consultation with the Aboriginal communities to which the legislation applies, those communities should be consulted simultaneously in relation to whether they support this proposal and, if so, whether, and on what terms, they wish to establish a community justice group.

Consequential Amendments to General Criminal Law Offences

As discussed above, by-laws cover a number of areas that are also covered by the general criminal law such as damage, disorderly conduct, trespass, drink-driving, careless or dangerous driving and littering.¹³⁰ If the by-law scheme is abolished then certain offences under the general law must be amended to expressly apply to lands occupied by communities declared under the proposed 'Aboriginal Communities and Community Justice Groups Act'. Communities that are currently declared under the *Aboriginal Communities Act 1979* (WA) will be deemed to be declared under the new Act.

Having said this, the Commission is not suggesting that the focus of control on Aboriginal communities should be based upon these legislative provisions; rather, the Commission supports individual communities using their own methods of cultural and social control. The reference to these offences under the general law, along with the proposed amendments, is to ensure that when necessary or desired by an Aboriginal community, Australian law is available in the same way as it is to other Australians.

Disorderly Behaviour

The offence of disorderly behaviour under s 74A of the *Criminal Code* (WA) relates only to behaviour in a public place. Public place is defined in s 1 of the *Criminal Code* to include:

- (a) a place to which the public, or any section of the public, has or is permitted to have access, whether on payment or otherwise;
- (b) a privately owned place to which the public has access with the express or implied approval of, or without interference from the owner, occupier or person who has the control or management of the place; and
- (c) a school, university or other place of education, other than a part of it to which neither students nor the public usually have access.

Proposal 12

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.

Traffic Offences

Offences under the *Road Traffic Act 1974* (WA) which regulate the manner of driving, such as careless, dangerous and reckless driving and driving under the influence of alcohol, include a common definition as to what amounts to 'driving' or 'attempting to drive'. Section 73 of the *Road Traffic Act* provides that references to driving mean driving on a 'road or in any place to which the public is permitted, whether on payment of a fee or otherwise, to have access'. Whether a road or place is a 'place to which the public is permitted' to have access is a question of fact which turns on the actual usage of the place rather than its legal status.

In *Talbot v Lane*¹³¹ a private road on a mining lease was held to be a 'place to which the public is permitted'. In this case, boom gates were situated at the boundary of the lease together with a sign which indicated that

130. See *Criminal Code* (WA) s 70A Trespass; s 74A Disorderly Behaviour in Public; ss 444–445 Damage; *Litter Act 1979* (WA) s 23 Littering; *Road Traffic Act 1974* (WA) ss 59–72.

131. (1994) 14 WAR 120.

the use of the private road by members of the public was strictly prohibited. However, the decision turned on the fact that the boom gate was usually open and the fact that tourists and members of the public still freely accessed the road (despite the sign). Therefore, whether this definition would cover Aboriginal communities currently declared under the *Aboriginal Communities Act 1979 (WA)* may vary from community to community. The Commission considers that, in the circumstances, it would be desirable to amend s 73 to ensure that declared Aboriginal communities are brought within the terms of the *Road Traffic Act 1974 (WA)*.

Proposal 13

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'.

Trespass

Access into many Aboriginal communities is partly governed by the *Aboriginal Affairs Planning Authority Act 1972 (WA)*. Under this legislation the Aboriginal Lands Trust has responsibility for the management of Aboriginal Reserves. The *Aboriginal Affairs Planning Authority Act* provides for a permit system and the Minister approves permits for entry onto Aboriginal reserves.¹³² Without such a permit it is an offence to enter or remain on any land which has been reserved for the use of Aboriginal people unless the person is an Aboriginal person, Member of Parliament, police officer, public health officer, officer of a public authority or otherwise lawfully authorised.¹³³

The Aboriginal Lands Trust leases reserves to many Aboriginal organisations and where this is the case, unless the lease states otherwise, the Aboriginal organisation which holds the lease (usually the community council) has the power to restrict entry to the land covered by the lease.¹³⁴ In this situation the

offence of trespass under s 70A of the *Criminal Code* would be applicable. Section 70A provides that it is an offence to enter, be in or remain in any place without the consent or licence of the owner, occupier or person having control or management of the place. A person who trespasses without a lawful excuse is liable to a maximum of 12 months' imprisonment or a \$12,000 fine. Section 70A also provides that the police can ask someone to leave the place if requested to do so by the owner, occupier or person having control or management of the place. For those communities that have leases over reserved land, the community council (as lessee) would be considered to have the relevant control or management of the place and therefore may refuse entry or permission for someone to remain on their community. It should be noted that, since the offence of trespass provides for a defence of 'lawful excuse', anyone who has been granted a permit to enter the lands or otherwise has statutory authority to enter a community would not be guilty of an offence.¹³⁵

For those communities which occupy reserve lands without a lease, while the community council would be able to exclude outsiders, it is arguable whether the community council would be able to refuse entry to a member of the community itself. This situation was resolved in the *Aboriginal Communities Act 1979 (WA)* by the ability to make by-laws giving authority to the community council to decide who can enter and remain on the community lands including members of the community itself.¹³⁶ If, as the Commission has proposed, the ability of Aboriginal communities to make by-laws is abolished, there is a need to ensure that Aboriginal communities retain the ability to prohibit entry to the community, including members of the community. In this regard the Commission notes that, although exercised infrequently, the right to exclude is part of Aboriginal customary law. Under Aboriginal customary law the exact parameters of this right is complex; it is qualified by kinship rules and obligations and encompasses a requirement to seek permission from the appropriate people (either indirectly or directly) to enter specific areas of land.¹³⁷ While the Commission considers that it would be rare for an Aboriginal

132. See <http://www.dia.wa.gov.au/Land/Permits/About_Permits.aspx>.

133. *Aboriginal Affairs Planning Authority Act 1972 (WA)* s 31.

134. See <<http://www.dia.wa.gov.au/Land/Facts/Q09.aspx>>.

135. Note that by-laws which seek to give a community council the right to exclude persons from their community are also subject to the Australian law and any specific statutory authority for someone to enter the community. See *Aboriginal Communities Act 1979 (WA)* s 13.

136. See, for example, Wongatha Wonganarra Aboriginal Community By-Laws 2003, by-laws 4 and 9 which provide that the council can order a member of the community to leave if he or she is drunk; and the Bidyadanga Community By-laws 2004, by-law 4 which provides that a member of the community can be on the community lands at any time unless removed by a police officer for breaching the by-laws.

137. Sutton P, *Kind of Rights in Country: Recognising customary rights as incidents of native title*, National Native Title Tribunal, Occasional Paper Series No 2 (2001) 26–28.

community to exclude one of its members, discrete Aboriginal communities must be afforded the protection which this right entails.

Proposal 14

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.

There may be instances when an Aboriginal person has been asked to leave the community for a specified time and is subsequently obliged to return for a specific customary law purpose, such as participation in a ceremonial process. Therefore, the Commission considers that it may be necessary to recognise this by the inclusion of a defence which acknowledges that

entry onto particular lands may be justified under Aboriginal customary law. This takes into account the fact that many Aboriginal communities are made up of both traditional owners and of people who are historically the long-term residents of the community, and that the customary law obligations of traditional owners in particular need to be acknowledged.¹³⁸ It was noted above that a defence of custom has been incorporated into some community by-laws and the Commission has sought submissions to establish the effectiveness of that defence (see Invitation to Submit 2). The Commission therefore also seeks submissions as to whether there should be a customary law defence available to an offence of entering or remaining on community lands and, if so, on what terms.

Invitation to Submit 3

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'.

Addressing Alcohol and Substance Abuse in Aboriginal Communities in the Absence of By-Laws

Substance Abuse

The Commission's consultations with Aboriginal people revealed that substance abuse, in particular petrol-sniffing, was of serious concern to many Aboriginal communities, both in regional and metropolitan areas. As discussed in Part II, 11 communities have passed by-laws prohibiting the possession, sale and supply of deleterious substances.¹³⁹ Although the enactment of by-laws appear to assist discrete Aboriginal communities to control the use and supply of harmful substances on community lands, these methods are unlikely to be effective for communities that are close to major regional centres or within the metropolitan area. The high incidence of abuse of volatile substances in Perth (by both Aboriginal and non-Aboriginal users) is a significant problem that needs to be comprehensively addressed.

138 The Commission notes the observation that an important issue in terms of the relationship between traditional owners and residents is how the rights of Indigenous residents can be 'balanced and coordinated with the rights of traditional owners': see Sanders W, 'Thinking About Community Governance' (Canberra: Centre for Aboriginal Economic Policy Research, Australian National University, 2004) 15.

139. See Part II 'Inhalants', above pp 26–27.

The Commission notes that since these by-laws were enacted, a new offence has been created under s 206 of the *Criminal Code* (WA) which prohibits the supply of volatile substances or other intoxicants (excluding liquor) in circumstances where the person knows or where it is reasonable to suspect that someone will use the substance to become intoxicated. The maximum penalty for this offence is 12 months' imprisonment or a \$12,000 fine. It is therefore only the possession of these types of substances which is currently immune from general criminal liability. It is yet to be seen how effective this measure will be in addressing the problem in urban areas.

While the Commission acknowledges that some Aboriginal communities support the criminalisation of inhalant use, it is of the view that this is in conflict with the recognised need to divert Aboriginal people, especially young people, away from the criminal justice system.¹⁴⁰ Further, there is little evidence that these by-laws have been effective in addressing substance abuse. The Commission supports the provision of improved services for inhalant abusers¹⁴¹ as well as the supply of reduction initiatives such as the provision for alternative fuels.¹⁴² The Commission is of the view that its proposal in relation to community justice groups will provide alternative options for dealing with solvent abusers without the need for formal criminal charges.

The Commission observed during its consultations that some Aboriginal people expressed the view that police should have the power to confiscate volatile substances.¹⁴³ In fact the police already possess this power under the *Protective Custody Act 2000* (WA); however, its exercise is limited to public places. The power to seize an intoxicant (which includes alcohol, drugs and volatile substances) applies to children who are consuming (or about to consume) an intoxicant in a public place or to both adults and children who have been apprehended because they were already intoxicated. Apart from police, this power may be

exercised by authorised officers,¹⁴⁴ including public transport security officers and community officers.¹⁴⁵ A solution would be to extend the definition of 'public place' under the legislation to include discrete Aboriginal communities which have been declared under the proposed 'Aboriginal Communities and Community Justice Groups Act' and for the Commissioner of Police to appoint certain Aboriginal community members as authorised officers.

Members of a community justice group could be appointed to act in the capacity of community officers. Alternatively, a community may wish to select other members of their community for this function, such as patrol members or wardens. The *Protective Custody Act 2000* (WA) also gives authorised officers the power to apprehend people who are intoxicated (by alcohol or other substances) when it is considered necessary for their health and safety. If this occurs, the person should, where possible, be released into the care of another person or taken to an approved facility.¹⁴⁶ This course of action would give Aboriginal people in discrete communities the power to confiscate volatile substances from children and to make arrangements for their personal safety while recovering from the effects of the intoxicants.¹⁴⁷

Proposal 15

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 Groups 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).

140 See 'Police – Diversion', below pp 239–44.

141 See Part II 'Alcohol and Other Drug Intervention Projects', above pp 28–30.

142 Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report* (Canberra, 2005) 8.18 where the success of alternative fuels in Northern Territory was noted. The Commonwealth budget for 2005 has committed to increasing the number of Aboriginal communities accessing the Comgas Scheme from 37 to 60. See Indigenous Budget Measure 9: Combating Petrol Sniffing: <<http://www.atsia.gov.au/budget/budget05/index.asp>>.

143 LRCWA, Project No 94, *Thematic Summaries of Consultations – Armadale*, 2 December 2002, 27; *Midland*, 16 December 2002.

144 *Protective Custody Act 2000* (WA) ss 5, 6 & 9.

145 *Protective Custody Act 2000* (WA) ss 3 & 27. A public transport security officer can only seize intoxicants on property defined under the *Public Transport Act Authority Act 2003* (WA). Note that a community officer is a voluntary position appointed by the Commissioner of Police. The Gordon Inquiry noted that at the time of its report the Commissioner of Police had not yet appointed any community officers: see 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) 227.

146 *Protective Custody Act 2000* (WA) ss 11, 12. Note that there are a number of sobering-up shelters which have been approved in regional towns. See *Protective Custody (Approved Places) Notice 2000*, *Government Gazette* No 285, 29 December 2000, 7926–27.

147 The Northern Territory has recently passed the *Volatile Substance Abuse Prevention Act 2005* (NT) which deals with the early intervention, prevention and treatment of volatile substance abuse. This legislation allows for the appointment of authorised officers to exercise powers to seize

Alcohol

As discussed earlier in Part II of this Discussion Paper, alcohol abuse is considered a significant problem for most Aboriginal communities. Research suggests that there is 'strong association between alcohol and violence, crime and anti-social behaviour'.¹⁴⁸ A recent study has found that there is a higher proportion of Indigenous male offenders that had used alcohol prior to arrest or prior to the commission of an offence than for non-Indigenous male offenders.¹⁴⁹ Similar results may be found in respect of Indigenous homicides where 65 per cent of Indigenous homicides involved both the offender and the victim having consumed alcohol.¹⁵⁰

Many Aboriginal communities have enacted by-laws to prohibit or regulate the sale and consumption of alcohol. The McCallum review of the by-law scheme highlighted that the desire of communities to control alcohol was the principal reason that most communities joined the scheme.¹⁵¹ Of the 25 Aboriginal communities that have by-laws, only six have a by-law which completely prohibits any use or possession of alcohol in their community. Most have enacted by-laws which allow the community council to grant permission for the use of alcohol in their communities.¹⁵² Generally, the scheme does not appear to have been successful in preventing alcohol use¹⁵³ and, as discussed in Part II of this paper, it appears that the by-law scheme has been even less effective for communities located near towns where alcohol is freely available.¹⁵⁴ Solutions that do not involve the by-law scheme have been more promising. A recent report observed that the Ringer Soak community, which is not part of the by-law scheme, has been the most effective community in prohibiting

alcohol in the Tjurabalan-Kutjungka region in East Kimberley. It appears that this success is due to strong leadership, a good relationship with the police and a policy of docking people's CDEP wages if they bring alcohol into the community.¹⁵⁵ The Commission also notes that the strategy in use at Halls Creek (which involves restrictions to alcohol trading hours as well as education and training programs) appears to have resulted in a decrease in hospital presentations in relation to alcohol and family or domestic violence.¹⁵⁶

In view of the many problems associated with the by-law scheme the Commission does not support the continued reliance on by-laws as an effective method for controlling or reducing alcohol use and related harm in Aboriginal communities. It has been argued that it is 'unreasonable to expect communities to enforce restrictions unaided' and that a complementary model which encompasses both community control and statutory control is the preferable way to deal with alcohol restrictions in Aboriginal communities.¹⁵⁷ Other parts of Australia have implemented strategies which operate under general liquor licensing laws. In the Northern Territory, the liquor licensing authority has the power to declare a specific area of land to be a restricted area where alcohol is not permitted.¹⁵⁸ For some time in Queensland, several Aboriginal communities have had canteens which are permitted to sell alcohol. Legislation was enacted in 2002 to establish Community Liquor Licence Boards to control these canteens. The boards are generally required to take into account the recommendations of a community justice group in relation to the conditions of sale of alcohol in the community.¹⁵⁹ Community justice groups also have a pivotal role in relation to decisions

and destroy volatile substances and to take people to approved safe places. It is anticipated that authorised officers would include Elders, patrollers and other community members and that a safe place could be, for example, an outstation. The legislation provides that authorised officers would be permitted to exercise their powers in a specified area. See <http://www.nt.gov.au/justice/ocp/docs/forums/yj_forum/Volatile_Substance_Abuse_Factsheet_May05.pdf>. At the time of writing, this legislation had not yet commenced operation.

148. Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report* (Canberra, 2005) 8.10.
149. Putt J, Payne J & Milner L, 'Indigenous Male Offending and Substance Abuse' (2005) 293 *Trends and Issues in Criminal Justice* 4. In this study it was found that 69 per cent of Indigenous male prisoners and 43 per cent of Indigenous male police detainees had used alcohol at the time of arrest or at the time of the offence, compared with 27 per cent for non-Indigenous prisoners and 28 per cent for non-Indigenous detainees.
150. This is three times the rate for non-Indigenous homicides: see Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report* (Canberra, 2005) 8.11.
151. McCallum A, *Review of the Aboriginal Communities Act 1979 (WA)* (Perth: Aboriginal Affairs Planning Authority, July 1992) 17.
152. Apart from those communities which have strict prohibition and the Bindi Bindi Aboriginal Community By-Laws 2001, by-law 7 which provides for the use of alcohol on land used for private residential purposes, all of the remaining 19 communities have a by-law which provides that the community council has the discretion to grant permission to a person to use or possess alcohol on their community lands.
153. McCallum A, *Review of the Aboriginal Communities Act 1979 (WA)* (Perth: Aboriginal Affairs Planning Authority, July 1992) 18.
154. See Part II, above p 26.
155. The Lingiari Foundation, *The Munjurla Study: A scoping, profiling and planning process in respect of the WA COAG site trial for the purposes of informing the negotiation of a comprehensive regional agreement* (April 2004) 117.
156. Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key indicators 2005 report* (Canberra, 2005) 8.12.
157. D'Abbs P, 'Restricted Areas and Aboriginal Drinking' (Paper presented at the Australian Institute of Criminology Conference, 1990) 13: see <<http://www.aic.gov.au/Publications/proceedins/01/Dabbs.html>>.
158. *Liquor Act 1980* (NT) ss 74, 75. The process involves hearings and the requirement to consider the wishes of residents in the area concerned.
159. *Indigenous Communities Liquor Licences Act 2002* (Qld) ss 7 & 8.

to prohibit or restrict alcohol use in their communities. A community justice group can make recommendations to the Minister who oversees the *Liquor Act 1992* (Qld) in relation to restrictions and, if such restrictions are imposed, it is an offence to consume or possess alcohol in contravention of the restrictions. Enforcement is the responsibility of police and liquor licensing investigators. A restriction may involve a zero limit or a specified limit indicating the amount and type of alcohol allowed. Community justice groups also have the legislative power to declare a public area in their community to be a dry place and may also do so for a private area (such as houses or lands controlled by traditional owners) with the consent of the resident or private owner.¹⁶⁰

It is the Commission's view that any legislative prohibition or restriction of alcohol in Western Australian Aboriginal communities should be dealt with under the *Liquor Licensing Act 1988* (WA). The liquor licensing authority has already imposed restrictions on the availability of certain types of alcohol and the circumstances in which it is sold at a number of regional locations where social problems associated with the consumption of alcohol have dictated intervention.¹⁶¹ The Commission considers that the prohibition and restriction of alcohol within Aboriginal communities or in locations where a large number of Aboriginal people reside should be administered by the one authority that has the expertise to provide assistance.

A recent review of the *Liquor Licensing Act 1988* (WA) recommended that the Director-General of the Department of Indigenous Affairs should be able to apply to the licensing authority for regulations to support restrictions proposed¹⁶² by a community under the *Aboriginal Communities Act 1979* (WA). The regulations would create offences and provide penalties for breaching the provisions.¹⁶³ In other words, provisions similar to those that currently appear in

Aboriginal community by-laws could be included in the *Liquor Licensing Regulations 1989* (WA) with enforcement of breaches being the responsibility of police. An added bonus of this approach is that there can be no argument about the application of these laws to all people who may be present at an Aboriginal community. It does not matter whether the person is Aboriginal or non-Aboriginal or whether the person is a resident member of the community. The Commission supports this recommendation as long as there is a mechanism to ensure that any restriction has the support of the relevant Aboriginal community.

Proposal 16

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.

The Commission also supports the recommendations in the review of *Liquor Licensing Act 1988* (WA) that there should be an additional offence under the legislation in relation to the illegal sale of liquor to Aboriginal communities with strong deterrent penalties.¹⁶⁴ The Commission acknowledges a recommendation to an earlier review of the legislation in 1994, that transportation of alcohol into dry Aboriginal communities should be prohibited.¹⁶⁵ The Commission is of the view that it should be an offence for a person

160. See <<http://www.mcmc.qld.gov.au/community/restricted.php>>.

161. The licensing authority has the power to impose conditions under s 64 of the *Liquor Licensing Act 1988* (WA) and this power has been invoked in Halls Creek, Mount Magnet, Onslow, Nullagine, Derby, Newman, Port Hedland, South Hedland and Meekatharra: see Independent Review Committee, *Liquor Licensing Act 1988: Report of the Independent Review Committee* (Perth, May 2005) 76. Note also that this approach was supported by Aboriginal people during the consultation at Laverton: see LRCWA, Project No 94, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 17.

162. In this regard the Commission notes that it is vital that any prohibition or restriction to the use of alcohol is only imposed with the support of the community. If not, a prohibition may infringe the *Racial Discrimination Act 1975* (Cth): see Calma T, Acting Race Discrimination Commissioner and Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Implications of the Racial Discrimination Act 1975 with Reference to State and Territory Liquor Licensing Legislation' (Paper presented at the 34th Australasian Liquor Licensing Authorities' Conference, Hobart, 26–29 October 2004). See also the discussion in Part IV 'Recognition of Customary Law and the Principle of Equality', above p 72.

163. Independent Review Committee, *Liquor Licensing Act 1988: Report of the Independent Review Committee* (Perth, May 2005) 76–77.

164. *Ibid* 76. Note that s 109 of the *Liquor Licensing Act 1988* (WA) creates an offence for selling liquor without a licence or a permit and the maximum penalty is a \$10,000 fine.

165. Gray D, Drandich M, Moore L, Wilkes T, Riley R & Davies S, 'Aboriginal Wellbeing and Liquor Licensing Legislation in Western Australia' in Gray D & Saggars S (eds), *Indigenous Australian Alcohol and Other Drug Issues: Research From the National Drug Research Institute* (Perth: National Drug Research Institute, Curtin University, 2002) 5, 48. See also McCallum's comments that it was well-known that taxi drivers performed 'grog-runs' in the Kimberley and because they did not necessarily enter the community lands the by-laws were ineffective in dealing with this problem: McCallum A, *Review of the Aboriginal Communities Act 1979* (WA) (Perth: Aboriginal Affairs Planning Authority, July 1992) 22.

to sell or supply alcohol to a person in an Aboriginal community where that person knows that the community has prohibited the use of alcohol.

Proposal 17

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).

The Commission emphasises that an Aboriginal community would be able to implement their own initiatives to control alcohol use through the community justice groups proposed by the Commission. There is no reason why a community justice group could not declare their community or part of their community to be a dry place or otherwise impose restrictions upon the amount and type of alcohol permitted under their community rules. In time it may be appropriate for the liquor licensing legislation to empower community justice groups to establish dry areas as has occurred in Queensland; however, it should be noted that community justice groups in Queensland had been operating for a number of years prior to the enactment of those provisions. The focus in Western Australia at this stage should be on the establishment of, and capacity building for, community justice groups.

Community Justice Mechanisms in Other Australian Jurisdictions Queensland

Unlike Western Australia, Aboriginal community justice mechanisms in Queensland are formally recognised within the criminal justice system. Instead of individual government departments providing funding and support for a variety of local initiatives, the Department

of Aboriginal and Torres Strait Islander Policy and Development oversees the establishment and funding of community justice groups throughout Queensland and these, in turn, develop their own methods and structures to tackle local justice issues.

The Queensland Aboriginal and Torres Strait Islander Justice Agreement 2000 aims to reduce the over-representation of Aboriginal people in the criminal justice system and improve the standard of living for Aboriginal and Torres Strait Islander people. The agreement is a partnership between a number of government agencies and Aboriginal communities and organisations; community justice groups are just one aspect of the overall agreement.¹⁶⁶

Queensland community justice groups

The operation of community justice groups

The first community justice group was established in 1994 after extensive consultations with the Kowanyama community and was, at that time, funded by the Queensland Corrective Services Commission. The Kowanyama Community Justice Group (KCJG) commenced with 18 members comprising three men and three women from each of the local family groups.¹⁶⁷ Currently there are over 30 community justice groups in remote, rural and urban communities in Queensland funded through the Local Justice Initiatives Program under the control of Department of Aboriginal and Torres Strait Islander Policy and Development.

An interim assessment found that community justice groups were 'developing innovative and successful strategies for tackling community justice issues by working within the formal justice system and within the community itself'.¹⁶⁸ An evaluation of the KCJG found that there had been a significant reduction in juvenile crime which was in part attributable to activities of the group such as their 'kids and cops' program. This program involved local police recruiting young people as honorary police to assist in evening patrols. The reduction in juvenile crime was also the result of the group working with the community council to

166. See *Queensland and Torres Strait Islander Justice Agreement* (July 2001) 16–17 Summary.

167. Chantrill P, *The Kowanyama Justice Group: A study of the achievements and constraints on local justice administration in a remote Aboriginal community* (Australian Institute of Criminology Occasional Seminars, 1997) 7: see <<http://www.aic.gov.au/conferences/occasional/chantrill.html>>.

168. Cunneen C, *The Impact of Crime Prevention on Aboriginal Communities* (Sydney: New South Wales Aboriginal Justice Advisory Council, September 2001) 46–47: see <<http://www.lawlink.nsw.gov.au/ajac.nsf/pages/reports/>>. In their background paper Chris Cunneen and Melanie Schwartz note that the evaluations of community justice groups in Queensland have shown that they reduce juvenile crime and truancy; reduce family and community disputes and violence; lead to more effective use of police and judicial discretion; increase the self-esteem and empowerment of communities; provide better support for offenders in the community; and result in cost savings in the area of criminal justice: see Cunneen C & Schwartz M, *Customary Law, Human Rights and International Law: Some Conceptual Issues*, LRCWA, Project No 94, Background Paper No 11 (March 2005) 34–35.

establish sport and recreational activities.¹⁶⁹ Some of the successful strategies used by community justice groups in Queensland are:

- encouraging police to divert matters to the community justice group;
- assisting with supervision and support of offenders while on bail or subject to community-based orders or parole;
- developing diversionary alternatives such as outstations and cultural programs;
- visiting prisons;
- conducting night patrols;
- organising recreational and cultural activities for young people;
- counselling and mediation; and
- use of shaming by Elders.¹⁷⁰

The interim assessment also found that community justice groups empowered their local community and that 'a strong theme in the activities of community justice groups is a desire to strengthen language, culture and customary law in their communities in order to restore a sense of cultural identity and high self esteem'.¹⁷¹ For example, the KCJG Elders used forms of control such as:

- avoiding people or not making them welcome at particular homes;
- forbidding access to the community canteen;
- asking people to leave the community for varying periods of time;
- promoting reconciliation by bringing problems out into the open and holding meetings; and
- growling and shaming to promote socially acceptable behaviour.¹⁷²

The success of various community justice groups in Queensland is largely attributable to the cultural authority which the groups exert based on representation from all local family groups.¹⁷³ In relation to the Coen Local Justice Group it has been stated that:

The composition of the Justice Group is a reflection of the traditional Indigenous authority structure within the area and is a genuine attempt at reinvigorating past methods of social control within the clan groups for the benefit of the community.¹⁷⁴

The one problem area that had been identified in relation to the KCJG, as well as community justice groups in Queensland generally, concerns the abuse of alcohol and related violence. In many communities the sale of alcohol is controlled by a community canteen. Conflict of interest problems arose because profits of the community canteen went to the community council (and some members of the council were also members of the justice group).¹⁷⁵ More recently, the Queensland government has endeavoured to address this issue through separate legislation dealing with the sale and management of alcohol in Aboriginal communities as well as providing for statutory recognition of the activities of community justice groups in relation to the management of alcohol and their involvement within the formal justice system.¹⁷⁶

Legislative basis of Queensland community justice groups

Community justice groups are established under the *Aboriginal Communities (Justice and Land Matters) Act 1984* (Qld) which provides that the functions of a community justice group include the regulation of the possession and consumption of alcohol, carrying out local strategies to address justice issues affecting

169. Cunneen C, *The Impact of Crime Prevention on Aboriginal Communities* (Sydney: New South Wales Aboriginal Justice Advisory Council, September 2001) 46–47: see <<http://www.lawlink.nsw.gov.au/ajac.nsf/pages/reports/>> 15. See also Chantrill P, *Community Justice in Indigenous Communities in Queensland: Prospects for keeping young people out of detention* [1998] *Australian Indigenous Law Reporter* 18, 2–3, where similar observations were made in relation to the Palm Island Community Justice Group.

170. Cunneen C, *The Impact of Crime Prevention on Aboriginal Communities* (Sydney: New South Wales Aboriginal Justice Advisory Council, September 2001) 44–48: see <<http://www.lawlink.nsw.gov.au/ajac.nsf/pages/reports/>>.

171. *Ibid* 48.

172. Chantrill P, *The Kowanyama Justice Group: A study of the achievements and constraints on local justice administration in a remote Aboriginal community* (Australian Institute of Criminology Occasional Seminars, 1997) 14: see <<http://www.aic.gov.au/conferences/occasional/chantrill.html>>.

173. Wright H, 'Hand in Hand to a Safer Future: Indigenous family violence and community justice groups' (2004) 6(1) *Indigenous Law Bulletin* 17.

174. Kristiansen KMS & Irving M, *The Coen Local Justice Group – A Community Response to Family Violence in Queensland through the Local Justice Initiatives Program* (2001) 5(13) *Indigenous Law Bulletin* 12.

175. Chantrill P, *The Kowanyama Justice Group: A study of the achievements and constraints on local justice administration in a remote Aboriginal community*, Australian Institute of Criminology, Occasional Paper (1997) 19: see <<http://www.aic.gov.au/conferences/occasional/chantrill.html>> . See also Cunneen C, *The Impact of Crime Prevention on Aboriginal Communities* (Sydney: New South Wales Aboriginal Justice Advisory Council, September 2001) 48: see <<http://www.lawlink.nsw.gov.au/ajac.nsf/pages/reports/>> .

176. *The Indigenous Communities Liquor Licences Act 2002* (Qld) provides for the establishment of Community Liquor Licence Boards to manage canteens and members of this board cannot also be members of the community council. The Community Liquor Licence Board is required to implement any recommendations about the sale and management of alcohol which are made by the Community Justice Group unless it considers that the recommendations are not in the interests of the community.

members of the community, and making recommendations to the Community Liquor Licence Board.¹⁷⁷ The composition and rules of individual community justice groups are established through regulations; however, there is a legislative requirement that the membership of a community justice group must include at least one representative of each of the main indigenous social groupings in the area and each community justice group must appoint a coordinator.¹⁷⁸

Importantly, in terms of the involvement of community justice groups within the general criminal justice system, statutory requirements to take into account the views of community justice groups were introduced in 2000. Section 9(2) of the *Penalties and Sentences Act 1992* (Qld) provides that when sentencing an offender that is an Aboriginal or Torres Strait Islander person the court *must* have regard to any submissions made by a representative of the community justice group that are relevant to sentencing.¹⁷⁹

Northern Territory

Aboriginal Law and Justice Strategy

The Northern Territory's Aboriginal Law and Justice Strategy commenced in 1995 and is designed to provide a 'whole-of-government' approach to Aboriginal law and justice issues at the Territory, regional and community levels. A primary focus of the strategy is the development of community law and justice plans.¹⁸⁰ The objectives of community law and justice plans include increasing 'Aboriginal participation in the law and justice process through an appropriate local structure using local organisations'.¹⁸¹ Law and justice plans have already been developed in some

communities¹⁸² and the NTLRC has recommended further development of law and justice plans and for these plans to incorporate Aboriginal customary law as a method of dealing with issues within the community.¹⁸³ A typical Law and Justice Committee has a 'dual role': a formal role within the criminal justice system and an informal role in community dispute resolution.¹⁸⁴

Example of a Northern Territory law and justice plan

The Lajamanu Community Law and Justice Plan ('the Plan') which commenced in November 2000 is an agreement entered into between a number of community groups¹⁸⁵ and government departments. It was developed after a series of community meetings and workshops with community members and organisations. One of the main community groups involved in the Plan is the Lajamanu Tribal Council. There are approximately 35 members drawn from the four male and four female skin groupings in the area.¹⁸⁶

The Tribal Council is not a formally organised Council with clearly defined functions. It draws its authority from the status and seniority of its individual skin group leaders. The Tribal Council or more accurately members with a vested interest in specific issues will come together to resolve certain issues. Membership is therefore not static and different groups of people are called on to address different matters.¹⁸⁷

The Plan anticipates that when an offence or dispute occurs the matter will initially be resolved by the community (for example, through the Tribal Council or the Law and Order Committee). The matter will only be referred to the police when: the victim wishes it to; the police consider that the welfare or safety of the victim is at risk; or the matter requires mandatory reporting. The Plan clearly requires support from the

177. *Aboriginal Communities (Justice and Land Matters) Act 1984* (Qld) s 87.

178. *Aboriginal Communities (Justice and Land Matters) Act 1984* (Qld) ss 88 & 90; and see *Aboriginal Communities (Justice and Land Matters) Regulations 1998*.

179. Note also that s 109(1)(g) of the *Juvenile Justice Act 1992* (Qld) has a similar provision. Similarly, s 15 of the *Bail Act 1980* (Qld) provides that the views of a community justice group may be considered during an application for bail.

180. Department of Community Development, Sport and Cultural Affairs, Northern Territory Government, *A Model for Social Change: The Northern Territory's Aboriginal Law and Justice Strategy (1995–2001)* 7.

181. *Ibid.*

182. For example, the Ali Curung, Lajamanu and Yuendumu communities have established their own Law and Justice Committees and the Kurduju Committee comprises representatives from each of these communities to provide a 'forum for the proper documentation and recording of remote community initiatives'. See Ali Curung, Lajamanu and Yuendumu Law and Justice Committees, *The Kurduju Committee Report* (Vol. 1, December 2001) 7.

183. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 22.

184. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance In Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 18.

185. Examples of the community organisations which are involved in the law and justice plan are Women's Safe House Management Committee, the Wulain Outstation Resource Centre, the Lajamanu Night Patrol and the Lajamanu Community Government Council. See Department of Community Development, Sport and Cultural Affairs, Northern Territory Government, *A Model for Social Change: The Northern Territory's Aboriginal Law and Justice Strategy (1995–2001)* 52–53.

186. Department of Community Development, *ibid* 52.

187. *Ibid.*

police as it is proposed that when an incident occurs the police will meet with representatives from the Tribal Council and other groups. Subject to the above constraints, this meeting will determine whether the matter is dealt with by the police, the Tribal Council or another group, or is referred to a community diversionary program.¹⁸⁸ The advantages of this model, and of the community justice groups in Queensland, is the empowerment of communities to be involved in decision-making processes, to make use of customary methods for dealing with disputes and offences, and to divert Aboriginal people away from the formal criminal justice system. What the Northern Territory scheme lacks is the statutory recognition of the local justice structures and the requirement for courts to consider the views of these groups when dealing with matters concerning sentencing or bail.

New South Wales

New South Wales Aboriginal Justice Agreement

The New South Wales Aboriginal Justice Agreement entered into in 2002 is a partnership between the New South Wales Attorney-General and the Aboriginal Justice Advisory Council. Like its counterparts in other states it aims to reduce the level of contact between Aboriginal people and the criminal justice system and improve community safety for Aboriginal people in New South Wales. Specifically the agreement was designed to implement an Aboriginal Justice Plan.¹⁸⁹ The Aboriginal Justice Plan was entered into in 2004 and is to operate for 10 years.¹⁹⁰

New South Wales community justice groups

One important initiative that has been supported by the New South Wales Aboriginal Justice Agreement and the Aboriginal Justice Plan is the establishment of community justice groups. Community justice groups in New South Wales are described as 'local groups of Aboriginal people who come together to develop ways

to solve local law and justice problems' and work in cooperation with justice agencies as well as developing local crime prevention programs.¹⁹¹ In addition to the expansion of community justice groups, the Aboriginal Justice Plan supports a number of other community justice mechanisms such as Aboriginal community patrols and diversionary programs, including conferencing and community-managed outstation facilities.¹⁹² The only legislative recognition of community justice groups in New South Wales is in relation to circle sentencing. The Minister may appoint a community justice group for each court which participates in circle sentencing and the main function of the community justice group is to assess offenders for inclusion in the circle sentencing program.¹⁹³

Victoria

Victorian Aboriginal Justice Agreement

The Victorian Aboriginal Justice Agreement was entered into in 2000 and aims to improve justice outcomes for Aboriginal people in Victoria by developing a statewide action plan and then developing regional Aboriginal justice plans.¹⁹⁴ The Agreement recognises that the best practice interventions since the RCIADIC involve 'the Aboriginal community's participation in their development, ownership and implementation'.¹⁹⁵ The agreement also recommended a review of Aboriginal community justice panels which were already operating throughout Victoria.¹⁹⁶

Aboriginal Community Justice Panel Program

Community Justice Panels commenced in Victoria in 1988 as a result of the recommendations of the RCIADIC. They were initially administered by the Victorian Aboriginal Legal Service; however, they are now under the umbrella of the Victorian Police Service.¹⁹⁷ The main role of community justice panels is to ensure the safety of Aboriginal people in police custody and to assist Aboriginal people after they leave custody.¹⁹⁸ However,

188. Ibid 54–55, and note that a community diversionary program may include a fine, banishment, restitution, removal of the offender to an outstation or ceremony camp, community service or such other punishment as is determined by the Tribal Council or other groups.

189. *New South Wales Aboriginal Justice Agreement* (2002).

190. New South Wales Aboriginal Justice Advisory Council, *New South Wales Aboriginal Justice Plan: Beyond justice* (2004–2014).

191. See <<http://www.lawlink.nsw.gov.au/cpd.nsf/pages/communityjustice>>.

192. Cunneen C, *NSW Aboriginal Justice Plan: Discussion paper* (Sydney: Aboriginal Justice Advisory Council, August 2002) 42–48.

193. *Criminal Procedure Regulation 2000* (NSW) sch 3. For a more detailed discussion of circle sentencing in New South Wales, see 'Aboriginal Courts', below pp 142–57.

194. *Victorian Aboriginal Justice Agreement* (2000) 23.

195. Ibid 16.

196. Ibid 42.

197. Aboriginal Community Justice Panel Review Team, *Review of the Aboriginal Community Justice Panel: Final report* (2001) 16.

198. See <http://www.police.vic.gov.au/files/documents/424_Aboriginal_Community_Justice_Panels.pdf>.

in practice, these panels have become involved in emergency and welfare services.¹⁹⁹ The review of the panels pursuant to the Aboriginal Justice Agreement recommended that community justice panels should be adequately resourced to become more involved in crime prevention and diversionary strategies.

South Australia

Consistent with the current nationwide experience of governments entering into partnerships with Aboriginal communities, the South Australian government developed the 'Doing it Right' policy in 2003 and established a high level Indigenous Advisory Council to oversee its implementation. Apart from the Minister for Aboriginal Affairs the membership of this council is entirely Indigenous.²⁰⁰ Specifically in relation to justice issues, the Aboriginal Justice Vision Statement aims, amongst other things, to establish regional Aboriginal justice plans. The Aboriginal Justice Consultative Committee which was set up in January 2002 is comprised of both Aboriginal stakeholders and government agencies and it will be involved in this process.²⁰¹ Specific Aboriginal community justice mechanisms such as family violence programs and patrols have been operating successfully in South Australia for some.²⁰²

Key Principles for Effective Community Justice Mechanisms

After examining the current situation with respect to Aboriginal community justice mechanisms throughout Australia, as well as government policies related to the participation of Aboriginal people in the criminal justice system, the Commission considers that the following key principles are essential components to any proposal in this area.

Partnerships

From the above overview of Aboriginal community justice mechanisms, coupled with the acknowledgment that the general criminal justice system has systematically failed Aboriginal people, it is clear that the key to success is for Aboriginal people to determine their own ways of dealing with justice issues in their communities. This is consistent with the current government policy of entering into partnerships with Aboriginal people and communities because:

The notion of partnership is a critical one for furthering community involvement in justice administration. Self-determination does not imply that communities must undertake all tasks alone.²⁰³

As Blagg has stated, it is necessary to allow Aboriginal communities to 'define the issues for themselves and then work in partnership with government agencies to implement strategies'.²⁰⁴ This directly relates to the need to assist Aboriginal communities in developing their capacity to deal with justice issues on their own terms.

Capacity Building

In general capacity building refers to the strengthening of resources, skills, values and relationships in order to achieve desired outcomes.²⁰⁵ The Commission considers that in the area of criminal justice the issue of capacity building is twofold. First, a particular Aboriginal community must be supported by a whole-of-government approach by ensuring that the appropriate structures and services are in place to allow that community to deal with justice and social issues in a meaningful and sustainable way.²⁰⁶ (For example, Blagg makes reference in his background paper to the Jigalong community which had wanted to establish an outstation program for some time; however, government agencies saw this option as too costly and did not support the

199. Victorian Aboriginal Justice Agreement (2000) 42.

200. South Australian Department for Aboriginal Affairs and Reconciliation, *Doing it Right* (May 2003) 16.

201. See <<http://www.justice.sa.gov.au/aboriginal.htm>>.

202. Blagg H & Valuri G, *An Overview of Night Patrol Services in Australia* (Commonwealth Attorney-General's Department, 2003) 72–76; and see generally Cunneen C, *The Impact of Crime Prevention on Aboriginal Communities* (Sydney: New South Wales Aboriginal Justice Advisory Council, September 2001): see <<http://www.lawlink.nsw.gov.au/ajac.nsf/pages/reports/>> for a discussion of various programs.

203. Chantrell P, *Community Justice in Indigenous Communities in Queensland: Prospects for keeping young people out of detention* (1998) 3 *Australian Indigenous Law Reporter* 163, 176.

204. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 13–14.

205. See discussion in Part X 'Capacity Building and Governance', below p 426.

206. The Lingjari Foundation, *The Munjurla Study: A scoping, profiling and planning process in respect of the WA COAG site trial for the purposes of informing the negotiation of a comprehensive regional agreement* (April 2004) 9. See the Commission's Proposal 1, above p 44, dealing with a whole-of-government approach to service delivery for Indigenous communities.

community's proposal.)²⁰⁷ Considerations of cost need to be viewed against the saving in other areas such as the cost of imprisoning or detaining a person in custody. The second way that capacity building is enhanced is through the establishment and development of community justice mechanisms. The Commission believes that community justice groups have the strong potential to enhance the capacity of communities to self-govern: as has been noted by Blagg, law and justice structures are 'prerequisites for the development of healthy communities'.²⁰⁸

Consultation and Planning

In order for any community justice mechanism to be successful, community consultation is imperative. Inadequate consultation and 'poor establishment practices' lead to what had been described as a 'cycle of failure'.²⁰⁹ In particular, it is vital for relevant agencies to ensure that the consultation is designed to determine what the particular community wants rather than to illicit consent for a proposal that has already been planned.²¹⁰ At the same time the Commission notes that there is a danger in continued consultation with Aboriginal communities which does not result in any meaningful changes.²¹¹

In formulating its proposal for community justice groups in Western Australia the Commission has aimed to achieve a balance between taking into account the views expressed to it during its consultations with Aboriginal communities and proposing a model which guarantees the need for further consultation to ensure that local views are taken into account. In other words, the Commission's proposal is designed to achieve real and practical improvements to justice outcomes for Aboriginal people but, at the same time it has sufficient flexibility to allow its application to individual communities based upon their specific views and requirements.

Cultural Authority

The Commission's consultations showed that many Aboriginal communities support the vital role of Elders

and experience suggests that the most successful strategies (such as the community justice groups in Queensland) hinge on the cultural authority of Elders in their respective communities. As stated in the *Munjurla Study*:

We would do well to remember that the kinship system and the system of customary law succeeded in maintaining social order in this region for thousands of years until very recent times.²¹²

It is the Commission's view that its proposal for community justice groups not only recognises the cultural authority of Elders in Aboriginal communities, but also will assist in the restoration of that authority where it may have broken down.

Formal Recognition within the Criminal Justice System

The Commission supports the formal recognition of community justice groups within the criminal justice system in a similar way to the method of recognition in Queensland. Many of the issues discussed in this Part regarding the way in which courts should be informed of and take into account Aboriginal customary law and culture, can be overcome by a provision which requires a court to consider information about such matters from a community justice group.²¹³ The statutory recognition of community justice groups will enable courts and police to divert Aboriginal people away from the criminal justice system and allow them, when appropriate, to be dealt with by their own community and pursuant to Aboriginal customary law.

Recognition of Aboriginal Customary Law

It is clear that the criminal justice system to date has been ineffective in dealing with offences committed by Aboriginal people, especially where those offences occur in an Aboriginal community.

Aboriginal customary law may provide a more effective way of dealing with Aboriginal offenders, solving victim

207. Ibid 22.

208. Ibid 40.

209. Ibid 16.

210. Ibid 40.

211. In this regard the Commission notes comments by the team which reviewed the Victorian Community Justice Panel scheme that 'over-consultation' can be problematic when the 'consultation process does not appear to achieve any particular outcome for the community consulted': see Aboriginal Community Justice Panel Review Team, *Review of the Aboriginal Community Justice Panel: Final report* (2001) 22.

212. The Lingiari Foundation, *The Munjurla Study: A scoping, profiling and planning process in respect of the WA COAG site trial for the purposes of informing the negotiation of a comprehensive regional agreement* (April 2004) 114.

213. See discussion under 'Evidence of Aboriginal Customary Law in Sentencing', below pp 221–24, where the Commission emphasises problems, such as false claims, that arise when information about customary law is presented without adequate corroboration from Aboriginal people. Another problem is that without direct information from relevant Aboriginal people, customary law issues run the risk of being overlooked.

issues and providing a means for resolving any disputes within the community that may have arisen as a result of the offence or that may be an underlying cause of the offence.²¹⁴

The Commission considers that the proposal for community justice groups provides a space for the functional recognition of Aboriginal customary law.²¹⁵ The proposal avoids the problems associated with any attempt to codify or write down aspects of Aboriginal customary law.²¹⁶ Most Aboriginal people consulted for this reference did not support the codification of customary law because of the fear that 'Aboriginal law would inevitably be appropriated by the white man's law if written down, classified and codified (these being essentially non-Aboriginal practices).²¹⁷

The Commission's Proposal for Community Justice Groups

Establishment of Community Justice Groups

The Commission is of the view that the *Aboriginal Communities Act 1979* (WA) should be repealed and new legislation (the 'Aboriginal Communities and Community Justice Groups Act') should be enacted to provide for the establishment of community justice groups. Aboriginal communities that are currently declared under *Aboriginal Communities Act* should be deemed to be declared under the proposed 'Aboriginal Communities and Community Justice Groups Act'. The Commission considers that this new legislation should distinguish between discrete Aboriginal communities (in other words, the type of communities which the *Aboriginal Communities Act* currently covers) and other Aboriginal communities that are not discrete, such as those in metropolitan areas or in close proximity to regional centres. Discrete Aboriginal communities are those communities which have identifiable physical

boundaries. Discrete Aboriginal communities would be able to set their own community rules and community sanctions (in addition to performing a number of functions within the general criminal justice system). Non-discrete Aboriginal communities would be able to undertake the same roles within the criminal justice system as discrete Aboriginal communities but would not have the facility to create community rules and sanctions.

An Aboriginal Justice Advisory Council (AJAC) with members from both the Aboriginal community and government departments should be established to advise and support communities in relation to the option of establishing a community justice group. The Commission notes that some Indigenous advisory bodies are entirely constituted by Indigenous people. However, in line with the need to assist Aboriginal communities to build their capacity to manage their own affairs with limited external interference, the Commission is of the view that an AJAC in Western Australia should have the benefit of the expertise of relevant government departments. Where possible the government representatives on the AJAC should be Aboriginal and have longstanding experience in Aboriginal issues that affect their portfolio. The AJAC would then assist any community who wished to set up a community justice group by holding community consultations; assisting with the identification of the relevant family, social or skin groups within the community; and providing advice on preparation of the application to the Minister. The current Indigenous Affairs Advisory Council is not considered to be the appropriate advisory body as it is described as the primary adviser *to government*. The proposed AJAC should be focused on justice issues and should act as an adviser *to Aboriginal communities*.

The Commission acknowledges the work that is currently being undertaken with respect to the Aboriginal Justice Agreement and the development of regional and local justice plans and is of the view that

214. Aboriginal Justice Advisory Council *Strengthening Community Justice: Some Issues in the Recognition of Aboriginal Customary Law in New South Wales* (undated) 7: see <http://www.lawlink.nsw.gov.au/ajac.nsf/pages/discussion_papers>.

215. Chris Cunneen and Melanie Schwartz argue that Aboriginal justice mechanisms are not primarily about the recognition of customary law but rather allow Aboriginal communities to apply their own laws within a 'negotiated relationship to state institutions'. In this discussion Cunneen and Schwartz considered Aboriginal courts, circle sentencing, community justice groups and patrols. See Cunneen C & Schwartz M, *Customary Law, Human Rights and International Law: Some conceptual issues*, LRCWA, Project No 94, Background Paper No 11 (March 2005) 32. The Commission has separated the discussion of Aboriginal courts (including circle sentencing) from the discussion about Aboriginal community justice mechanisms because it considers that the former are not specifically about the recognition of Aboriginal customary law while the latter—in particular the Commission's proposal for community justice groups—provide an appropriate space for recognising Aboriginal customary law. This does not mean that community justice groups will be restricted to only applying Aboriginal customary law. The Commission's proposal envisages that community justice groups can determine community rules and sanctions on their own terms. Of course this must be subject to Australian law – a matter that the terms of reference for this project clearly require.

216. For further discussion of the reasons why the Commission does not support codification of Aboriginal customary law, see Part III 'Codification', above p 62.

217. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 13–14.

this proposal can operate in tandem with the current arrangements. Groups and government agencies that are working towards these local plans should be involved with the consultations in the communities and providing support for a community who wishes to establish a community justice group. The AJAC would be able to coordinate all relevant groups for this purpose.

The Commission considers that it is necessary for community justice groups to be formally established because of the proposed roles that the groups would have within the justice system. The success of the state's recognition of Aboriginal customary law in the criminal justice system will depend heavily on the ability of courts to access the expertise, community and customary law knowledge and proposed functions of the community justice groups.

Discrete Aboriginal communities

For discrete Aboriginal communities which are not currently covered by the *Aboriginal Communities Act*, those who wish to establish a community justice group will need to be declared under the proposed 'Aboriginal Communities and Community Justice Groups Act'. In order to ensure that this proposal can be implemented as quickly as possible the Commission recommends that the Minister for Indigenous Affairs have the power to declare a community to be a community to which the 'Aboriginal Communities and Community Justice Groups Act' applies. The legislation should provide that the Minister is to declare a discrete community if he or she is satisfied that there is provision for adequate consultation between the community members and a community justice group, especially in relation to the determination of community rules and sanctions. Once declared under the 'Aboriginal Communities and Community Justice Groups Act', a discrete Aboriginal community would be able to apply to the Minister for Indigenous Affairs for approval of their community justice group.

Most discrete communities occupy land pursuant to a crown lease or a pastoral lease. For these communities, the Commission is proposing that there should be a general definition to the effect that in these cases the community lands are the entire reserve area or pastoral

lease, whichever is applicable. This will be relevant not only for the establishment of community justice groups, but also for other legislation (discussed above) which refers to Aboriginal communities which have been declared under the proposed 'Aboriginal Communities and Community Justice Groups Act'.²¹⁸ The Commission anticipates that there may be some discrete Aboriginal communities that occupy land without any formal agreement specifying the boundaries of the community and that these communities may wish to apply for approval of a community justice group. In this situation the 'Aboriginal Communities and Community Justice Groups Act' should provide for the Minister to declare the boundaries of the particular community by giving notice in the Gazette.

Non-discrete Aboriginal communities

The Commission proposes that non-discrete Aboriginal communities may also establish a community justice group under the new legislation to undertake a formal role within the criminal justice system. However, the functions of community justice groups in non-discrete communities cannot formally include the establishment of community rules and sanctions. The concept of community rules and sanctions envisages that members of the community will voluntarily abide by the sanctions that are agreed upon and, if sanctions are not followed, the community has the option to request that a member of the community leave for a specified time.²¹⁹ For non-discrete Aboriginal communities, where there are no defined boundaries, this would not be possible.

Membership

The nature of the membership of a community justice group is fundamental to the success of the scheme. In Queensland the legislation requires that there must be at least one representative from each of the main Indigenous social groupings in the area and the members must be of a good standing in the community.²²⁰ Indigenous social grouping is defined as:

A group of Indigenous persons sharing a common basis of social affiliation, including family relationship, language, traditional land ownership and historical association.²²¹

218. See Proposal 12 in relation to disorderly behaviour; Proposal 13 in relation to the definition of driving; Proposal 15 in relation to the *Protective Custody Act 2000* (WA), and Proposal 16 in relation to the *Liquor Licensing Act 1988* (WA).

219. See discussion under 'Trespass', above pp 122–23.

220. *Aboriginal Communities (Justice and Land Matters) Act 1984* (Qld) s 88.

221. *Aboriginal Communities (Justice and Land Matters) Act 1984* (Qld) s 88(5).



Although in a different context, the success of Aboriginal working groups, which currently operate in Western Australia with respect to native title and land administration issues, has been attributed to their legitimate representative structure.²²² There are currently about 30 working groups in the Murchison/Gascoyne and Pilbara regions and each group has between 12 and 16 members.²²³ Members are 'nominated and authorised by traditional societies at native title community meetings' and, once formed, the working group is empowered to make decisions in relation to native title and land administration on behalf of the traditional community.²²⁴ The authority of the group is limited to specific areas and places pursuant to the boundaries of the native title community. Importantly, these working groups apply traditional decision-making procedures that are applicable to their respective communities.²²⁵ The working groups have been operating successfully for between four and eight years; they are a testament to the viability of Aboriginal community groups provided that any such group is truly representative of the community that it serves.

To secure similar legitimacy, the Commission is of the view that membership of a community justice group must be representative of the different family, social or skin groups within the relevant community. Each

family, social or skin group should be able to nominate an equal number of male and female members.²²⁶ It is expected that members of community justice groups would be Elders or respected members of family, social or skin groups and a process allowing each group to nominate the appropriate people ensures that the representatives have the support of their community. The Commission also considers that in order to safeguard the rights of Aboriginal women and children and to make sure, as stated by Wohlan, that there are 'proper mechanisms where Aboriginal women have a say in what is culturally sanctioned and acceptable behaviour within their communities',²²⁷ the membership of a community justice group must be comprised of an equal number of men and women.²²⁸ This will ensure that the community justice group has the cultural authority to be effective in dealing with justice issues at the community level and to support its role within the criminal justice system.

Criteria for approval

In making this proposal the Commission is concerned to avoid external interference in the establishment and operation of community justice groups. The intention is that each community can develop its own structures and processes to deal with social and justice issues in the community. The Commission emphasises that this

222. Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, 'Submission to the Aboriginal Customary Laws Reference' (18 August 2005) 2.

223. Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, Yamatji Land and Sea Council, Pilbara Native Title Service, 'Working Group Service Delivery Model: A policy paper' (18 May 2005) 1.

224. Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, 'Submission to the Aboriginal Customary Laws Reference' (18 August 2005) 2.

225. Ibid.

226. In this regard the Commission notes the comment during the Regional Prisons Consultations that 'white man cannot elect Elders ... each person from each area knows who the Elders are': see <<http://www.lrc.justice.wa.gov.au/Aboriginal/Consultation%20summaries/Prisons.htm>>; LRCWA, Project No 94, *Thematic Summaries of Consultations – Midland*, 16 December 2002, 40 where it was stated that Elders must be appointed by the Aboriginal community itself; LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 6 where it was stated that white man cannot elect Elders; LRCWA, Project No 94, *Thematic Summaries of Consultations – Bunbury*, 28–29 October 2003, 7 where it was mentioned that there are some difficulties in identifying Elders and that family groups need to be identified and the families will identify the Elders; LRCWA, Project No 94, *Thematic Summaries of Consultations – Armadale*, 2 December 2002, 18 where it was stated that 'rightful leaders' are defined/nominated/elected by their own families.

227. Wohlan C, *Aboriginal Women's Interests in Customary Law Recognition*, LRCWA, Project No 94, Background Paper No 13 (April 2005) 47.

228. In this regard the Commission notes that in Queensland membership has included both men and women but that for the most part there have been more women members of community justice groups than men: see Fitzgerald T, *Cape York Justice Study* (Brisbane: Department of the Premier and Cabinet, 2001) 15.

is a proposal only and that its success hinges upon community initiative and acceptance. For this reason, the only legislative criteria for approval of a community justice group are:

- That the rules in relation to the membership of the group provide for equal representation of all relevant family, social or skin groups in the community and equal representation of both men and women.
- That there has been adequate consultation with the members of the community and that a majority of the community members support the establishment of a community justice group.

The Commission considers that these criteria are necessary in order to ensure that Aboriginal women are protected and to reduce the chances of one dominant group within a community determining the outcome.

Roles of the Community Justice Group

Community rules and sanctions

A community justice group in a discrete Aboriginal community (that is, a community that has been declared under the proposed 'Aboriginal Communities and Community Justice Groups Act') would be able to set community rules and community sanctions. Consistent with the aim of facilitating the highest degree of autonomy possible, there should be no limit on the types of matters that are considered, other than the constraints of Australian law. In other words, a community would not be able to have a sanction that involved inflicting physical punishment which amounted to an offence under the criminal law. Nor would it be able to impose a sanction which involved the unlawful detention of a person. The Commission considers that the success of any particular group will depend primarily on the cultural authority it exerts and the support for

the establishment of community rules and sanctions within the community itself. Therefore, consent to undergo a particular sanction is necessarily implied in the model. If an Aboriginal person does not agree to comply with both the community rules and the community sanctions then the community has the power through its community council to refuse to allow that person to remain in the community for a specified period of time.²²⁹

To specify in the legislation exactly what sanctions a community justice group could impose would in the Commission's opinion unnecessarily restrict a community's ability to determine its own sanctions and might well involve the codification of Aboriginal customary law. As mentioned earlier, the Commission is mindful of the disempowerment of Aboriginal people that may result from such codification.²³⁰ The advantages of a flexible approach are that it allows each community to decide for themselves the rules and sanctions and allows the incorporation of matters that are offences against Australian law and offences against Aboriginal customary law. Of course, the rules could include matters which are neither general criminal offences nor offences against customary law, such as the consumption of alcohol and intoxicants.²³¹ Importantly it allows for community sanctions which take into account Aboriginal customary law punishment and processes. It has been observed in relation to Aboriginal community justice groups in Queensland that:

[C]ustomary law is as much about a process of governing social relations as it is about the content of rules and customs that might be considered to make up a body of law. Understood in this way, the challenge of recognising customary law can be seen as the challenge of empowering customary processes or mechanisms by which indigenous communities can maintain social order.²³²

For the purposes of illustration, *community rules* could include rules that prohibit violence, alcohol and volatile substances and culturally offensive behaviour.²³³

229. See Proposal 14, above p 123. The Commission notes that at the time of the McCallum Review in 1992 some communities were using banishment as a sanction for breaching by-law offences. See the summaries of consultations with 13 Kimberley communities accompanying the 1992 review of the scheme: McCallum A, *Review of the Aboriginal Communities Act 1979 (WA)* (Vol. 2, July 1992).

230. For a fuller discussion of these issues see Part III 'Codification', above p 62.

231. In this regard the Commission acknowledges the view expressed by the ALRC that acceptance of Aboriginal controlled methods of dealing with issues should not necessarily be dependent upon whether it is perceived as a customary or traditional method: see ALRC, *Aboriginal Customary Law and Local Justice Mechanisms: Principles, Options and Proposals*, Research Paper No 11/12 (1984) 136. The Commission notes that during the McCallum Review the Beagle Bay community described itself as a European-style community and its members no longer followed traditional law. There is nothing in this proposal that would prevent this community from establishing a community justice group. See the summaries of consultations with 13 Kimberley communities accompanying the 1992 review of the scheme: McCallum A, *Review of the Aboriginal Communities Act 1979 (WA)* (Vol. 2, July 1992) 18.

232. Limerick M, 'Indigenous Community Justice Groups: the Queensland Experience' (2002) 80 *Reform* 15.

233. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 8 where there was a detailed discussion about the concern over culturally offensive behaviour that was 'deliberately disrespectful, insulting or offensive on matters of law, initiation or family' rather than 'white-fella type swearing'.

To specify in the legislation exactly what sanctions a community justice group could impose would in the Commission's opinion unnecessarily restrict a community's [autonomy].

Community rules may also be established to regulate traffic, to control domestic animals, to assist in the elimination of health risks (such as rules about waste disposal and litter), or to provide for off-limits areas pursuant to customary law. *Community sanctions* could include community work, compensation, shaming, community meetings, banishment, referral to outstations and referral to other local justice mechanisms such as healing centres, youth camps and bush trips. The difference between this approach and the current by-law scheme is that there is more flexibility and freedom to decide what matters can be included; that the rules which apply to all members of the community do not have to be restricted to community lands; and that Aboriginal customary law matters which are subject to secrecy can be included without the need for anything to be written down. It also allows each community to incorporate its own dispute resolution processes.²³⁴

Where a matter is both a breach of community rules and a breach of the general criminal law the alleged offender, the victim and the community justice group would choose whether the community justice group would deal with the matter or whether it would be referred to the police. Of course, the police would always have the power to charge someone if they saw fit.

Who is bound by community rules and sanctions?

As discussed in Part III, it is the Commission's view that the question who is bound (and who should be bound) by Aboriginal customary law is a matter for Aboriginal people themselves.²³⁵ In the context of community rules and sanctions established by community justice groups (some of which may reflect Aboriginal customary law) it is likely that membership of the community will

require adherence to these rules and that the community will be empowered to exclude members that refuse to comply with community rules. This may be acceptable for people who have chosen to live as part of the community and to abide by the community rules and sanctions set by the community justice group, but what of service providers (such as healthcare staff, teachers or law enforcement officers) who are required to reside at the community as part of their employment?

For matters that fall within Australian law (which includes under the Commission's proposal the regulation of alcohol within a community) those persons will of course be subject to that law.²³⁶ For matters that are not covered by Australian law, the Commission considers that it is an issue which should best be left for negotiation between service providers and the specific Aboriginal community. Some communities may choose to exempt service providers from certain community rules and sanctions, especially those that reflect aspects of Aboriginal customary law. Others may not, and it should be the right of a particular Aboriginal community to exclude a person who shows no respect for their customary law. The Commission acknowledges that there are some matters that, from an Aboriginal perspective, may be non-negotiable. For example, in Wuggubun it was stated that:

If we walk into a white person's paddock, we commit trespass. But when they walk on our sacred sites, they contravene nothing. Ours is the law of the land for us. They must obey our law, as we obey theirs.²³⁷

If communities wish for non-Aboriginal residents to abide by community rules and sanctions then it may be necessary that these rules and sanctions are explained. In some cases it may be appropriate that signs are displayed in the community.

234. Under traditional law the maintenance of law and order was restricted locally. Sanctions used by a 'clan, a tribe or a linguistic group' would rarely operate outside the group except where there were shared ceremonial and cultural practices or trading relationship: see Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 359.

235. See Part III 'Evidence and Parameters of Customary Law in Western Australia: Who is Bound (and Who Should be Bound) by Customary Law?', above, pp 53–54.

236. See discussion under 'Alcohol', above pp 125–27.

237. LRCWA, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, 35.

An underlying principle of the Commission's proposal is that no person can be forced to submit to sanctions imposed by a community – to do so would amount to a breach of Australian law. If a service provider (whether Aboriginal or non-Aboriginal) resident in an Aboriginal community did not follow the community rules and sanctions that they know to apply to them, then the community would have the right to decide whether they wish that person to remain.

Roles within the criminal justice system

Any community justice group would have a number of important roles within the criminal justice system. This section discusses these roles generally; further discussion and proposals can be found below in sections on sentencing, bail, police and prisons, as well as in Part IX 'Aboriginal Customary Law in the Courtroom: Evidence and Procedure'.

Provision of information to courts

It is proposed that there should be a legislative provision which requires a court, when sentencing an Aboriginal person or when considering bail for an Aboriginal person, to take into account matters put before it by a community justice group in a similar form to s 9(2)(o) of the *Penalties and Sentences Act 1992* (Qld).²³⁸ Such a provision should include, as it does in Queensland, that a court could consider information from a respected Elder of the community (which would be especially relevant where there was no community justice group in existence). A court could hear from a community justice group either on the application of the defence, prosecution, community justice group or on its own initiative. The advantage of this approach is that it provides a means by which a court can be informed of cultural matters, customary law and the community's views in relation to sentencing and bail in a manner which reduces the likelihood of false claims being made to the court (something which was brought to the attention of the Commission during the consultations). It also allows for the proper representation of the views of Aboriginal women because of the representative nature of the community justice group.

Diversion and supervision of offenders

The Commission is of the view that a court should be able to refer or divert an offender to a community justice group to be dealt with by them.²³⁹ In these circumstances the court could adjourn sentencing for the offender to attend the community justice group. Upon receiving a report or information from the community justice group, and if satisfied that the matter has been resolved, the court could impose a lesser (or in some cases no) additional penalty. This should assist to some degree in preventing the double punishment which many Aboriginal people face and invoke the process of community healing at an early stage. In appropriate cases this should result in diverting Aboriginal people away from imprisonment. Police should also be empowered to exercise their discretion to refer a matter to the community justice group without charging the person. The Commission has proposed that a pilot diversionary scheme involving community justice groups should be established.²⁴⁰

The Commission notes that a community justice group might also play a role in the supervision of people on community-based orders, parole or while subject to bail.²⁴¹ The role of community justice groups in the supervision of offenders is discussed in detail below.²⁴²

Aboriginal courts

In the case of an Aboriginal court, such as the Koori court model or circle sentencing (discussed in detail below),²⁴³ a community justice group might have a pivotal role in both establishing the court as well as selecting some of its members to sit with the magistrate or, if that was not appropriate, to advise on the most suitable person. This should assist in alleviating problems currently experienced by courts in relation to the choice of Elders to sit with a magistrate. During the consultations at Wiluna it was stated that sometimes the court breaks Aboriginal law because the Elder sitting with the magistrate is not appropriate in the circumstances. It was suggested that there should be two women and two men available to sit with the magistrate.²⁴⁴ The existence of a community justice

238. See discussion under 'Evidence of Aboriginal Customary Law in Sentencing', below pp 221–24.

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

240. See 'Police – Diversion', below p 239–42.

241. During the Commission's consultation in Warburton, community involvement in the administration of sentences was suggested, in particular, that magistrates should structure sentences so that offenders could be taken to the bush under the responsibility of Elders: see LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 4 & 6.

242. See 'Sentencing Options', below pp 224–30.

243. See 'Aboriginal Courts', below pp 142–57.

244. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, 24.

A community justice group should be accountable to the community that it serves.

group would provide a suitable panel from which to choose representatives to constitute the bench.

Other Matters

Accountability

A community justice group should be accountable to the community that it serves. One example of how this could be achieved is for the constitution or rules of a community justice group to provide for the nomination and the withdrawal of that nomination by each relevant family or skin group in the community. Therefore, if for any reason a member is no longer able to undertake his or her role the family could withdraw that nomination and nominate someone else in his or her place. The method by which a community justice group is to be held accountable should be determined by the community itself.

Remuneration

A difficult question arises in relation to the payment for services by Aboriginal members of community justice mechanisms.²⁴⁵ The Commission is of the view that where members of an Aboriginal community provide services (such as patrols), operate diversionary programs, supervise offenders and provide evidence or information to courts, those members should be appropriately reimbursed. This reflects the views expressed during consultations in relation to Elders not being paid²⁴⁶ and the recommendation of the RCIADIC that Aboriginal people who are involved in community and police-initiated schemes should receive adequate

remuneration in recognition of their contribution to the administration of justice.²⁴⁷ In this regard it has been said that:

There seems to be a presumption that Aboriginal people will take on voluntary and onerous community work and unpaid overtime to an extent that is not expected of non-Aboriginals.²⁴⁸

Civil liability of community justice group members

The view has been expressed that there should be legislative protection for members of a community justice group so that they are indemnified for their activities.²⁴⁹ In Queensland there is legislative protection from civil liability for members of a community justice group provided that their actions were honest and they were not negligent. If this provision prevents civil liability from attaching to a member of the community justice group then the liability instead attaches to the state.²⁵⁰ For illustrative purposes, Western Australian legislation that covers the indemnity of justices of the peace provides that civil liability does not attach for matters connected with the performance of the functions of a justice of the peace, unless done so 'corruptly or maliciously'.²⁵¹ In addition, unlike Queensland, the state is relieved of liability.²⁵² The question of the state's liability for the actions of community justice group's members is a matter for the state; however, the Commission considers that a provision which protects community justice group members while undertaking their roles within the criminal justice system is necessary.

245. See Aboriginal Community Justice Panel Review Team, *Review of the Aboriginal Community Justice Panel: Final Report* (2001) 25 which stated that the review committee supported the continued voluntary status of the panel workers; and note the Victorian Aboriginal Legal Service Discussion Paper in relation to the Aboriginal Community Justice Panel Review which criticised the review's findings that panel workers should remain voluntary: see <<http://www.vals.org.au/faqs/cjp/>> 4–6.

246. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, 24; *Wuggubun* 9–10 September 2003, 33 where concerns were raised that Elders were not paid when they were involved in the criminal justice system. The Commission notes that the remuneration of Aboriginal people involved in these types of activities is supported by the New South Wales Aboriginal Justice Plan: see New South Wales Aboriginal Justice Advisory Council, *New South Wales Aboriginal Justice Plan: Beyond Justice* (2004–2014) 19.

247. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [29.3.21] Recommendation 221.

248. Sex Discrimination Commissioner of the Human Rights and Equal Opportunity Commission, 'Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory' (May 2003) 'Principle Four': see <http://www.hreoc.gov.au/sex_discrimination/customary_law/submission.html>

249. Fitzgerald T, *Cape York Justice Study* (Department of the Premier and Cabinet Queensland, 2001) 120.

250. *Aboriginal Communities (Justice and Land Matters) Act 1984* (Qld) s 92.

251. *Justices of the Peace Act 2004* (WA) s 19.

252. *Ibid.*

Proposal 18

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.

The potential benefits of the Commission's proposal for community justice groups are that it will:

- assist Aboriginal people to develop their own processes for dealing with justice issues within their community;
- recognise aspects of Aboriginal customary law in a practical way with as little interference as possible by the Australian legal system;
- enhance the cultural authority of Elders;
- reduce offending;
- improve the potential for Aboriginal people to be diverted away from the criminal justice system;
- reduce the rate of Aboriginal imprisonment and detention;
- provide more effective sentencing and bail options for courts;

- enable Aboriginal people to be actively involved in the criminal justice system;
- assist in improving the level of understanding of the criminal justice system in Aboriginal communities; and
- assist in improving the broader governing capacity of Aboriginal communities.

Community Justice Groups in Action

In order to illustrate how a community justice group could operate in practice, two hypothetical case studies are set out below. These examples are not intended to be prescriptive, but rather seek to demonstrate the potential for community justice groups to deal with justice issues in their own communities.

Case Study 1

A young Aboriginal male resides in a community where the community rules prohibit the use of alcohol. This man has been repeatedly caught drinking alcohol at the community as well as at a nearby town. The community justice group has previously warned the man to stop drinking, including during a community meeting. The man is again caught drinking alcohol but this time he has assaulted his partner by pushing her hard enough that she fell to the ground. He does not have any history of violence.

The community justice group holds a meeting with the offender and the victim. All agree that because this is the offender's first episode of violent behaviour it would not be appropriate to refer him to the police. During the meeting it was agreed by all parties that the offender must spend three months at the community's outstation and abstain from drinking alcohol. During the time at the outstation he would be supported by Elders who considered that he should engage in traditional activities that would enhance his respect for his culture, community and family.

If all goes well then the offender is diverted from the criminal justice system but at the same time the underlying causes of his offending behaviour are being addressed. On the other hand, if the offender does not abide by the agreement the community justice group could consider other options such as referring the matter to the police or asking the offender to leave the community.

Case Study 2

An Aboriginal boy from a discrete community is caught by the police in a nearby town for burglary. He and four other juveniles broke into the local liquor store and stole alcohol and cigarettes. The boy had left his community to meet up with his friends in town. He had been drinking alcohol prior to committing the burglary. This boy does have a criminal record, but this is his first serious offence.

The police arrest the boy in the town at night and because they cannot find a responsible adult he spends the night in custody. The next day he appears before the local magistrate. The magistrate requests to hear from a member of the community justice group who is due to give evidence in court that day for another matter. This person explains that he is surprised about the boy's behaviour and suggests that he has been spending too much time with his friends in the town. At the community no alcohol is allowed. The member of the community justice group also explains to the court that the boy would be a suitable candidate for a bush trip program that is being run by Elders in the community.

The magistrate adjourns sentencing for three months and places the boy on bail to a responsible adult. The member of the community justice group agrees to take on this supervisory role.

After three months the boy and member of the community justice group reappear in court and inform the magistrate that the boy completed the program and appears to be settled. The magistrate then decides to dismiss the charge under s 67 of the *Young Offenders Act 1994 (WA)*. Alternatively, if the boy had not attended the program the magistrate would be able to sentence the boy in the usual manner.