

# Criminal Responsibility

Under Australian law criminal responsibility, which means that a person is liable to punishment for an offence, is determined by assessing three possible elements:

- the act or omission that constitutes the offence;
- any mental element such as intention or wilfulness; and
- any defence that may be applicable in the circumstances.<sup>1</sup>

As discussed earlier in this Part, there may be some aspects of Aboriginal customary law that are considered unlawful under Australian law.<sup>2</sup> For example, the traditional punishment of spearing may, in some cases, constitute an offence of unlawful wounding or grievous bodily harm. Therefore, the question arises whether there is any scope to recognise Aboriginal customary law when determining the criminal responsibility for an offence under Australian law.

While aspects of Aboriginal customary law have been considered in the past by Australian courts in the context of criminal responsibility, judicial consideration of Aboriginal customary law has been far more prevalent in respect of sentencing.<sup>3</sup> There is currently no defence of general application that absolves a person of criminal responsibility because the conduct was done in

accordance with Aboriginal customary law.<sup>4</sup> In order for Aboriginal customary law to be taken into account in deciding criminal responsibility it must 'somehow fit into one of the mainstream defences'.<sup>5</sup>

## Defences Based on Aboriginal Customary Law

### General Defence

Traditional physical punishments that have the potential to breach Australian law continue today.<sup>6</sup> As a result, those Aboriginal people who are required under Aboriginal customary law to order or carry out the punishment face the dilemma of following their obligations under Aboriginal customary law or complying with Australian law.<sup>7</sup> Failure to obey either law may result in punishment. In its 1986 report on recognition of Aboriginal customary law, the ALRC considered whether there should be a general defence that would excuse liability under Australian law for any offence that resulted from conduct required by Aboriginal customary law. Bearing in mind that such a defence would inevitably apply to homicide, it did not support that approach.<sup>8</sup> It was suggested in submissions to the ALRC that a Aboriginal customary law defence for particular

1. The term 'defence' is commonly used; however, it is somewhat misleading. For general defences such as self-defence, provocation and honest claim of right the obligation is on the prosecution to prove beyond a reasonable doubt that it does not apply. For others, in particular specific defences set out in the legislative provision which creates the offence, the defendant is required to prove (on the balance of probabilities) that the defence has been made out.
2. See discussion under 'Conflict with Australian Law', above pp 92–93.
3. Geoffrey Eames has highlighted that arguments based on Aboriginal customary law that have been put forward to support a defence have rarely been successful compared to similar arguments put forward during the sentencing process. See Eames G, 'Aboriginal Homicide: Customary Law Defences or Customary Lawyers' Defences?' In Strang H & Gerull S (eds), *Homicide: Patterns, Prevention and Control*, Conference Proceedings No 17, 12–14 May 1992 (Canberra: Australian Institute of Criminology, 1993) 153.
4. In *R v Warren, Coombes and Tucker* (1996) 88 A Crim R 78, 80 (Doyle CJ; Cox and Debelle JJ concurring) it was held that on the basis of the decision in *Walker v The State of New South Wales* (1994) 126 ALR 321 it was not possible for the defendants to argue that their conduct was lawful because it was done in accordance with Aboriginal customary law. Instead, it would be necessary for the defendants to argue that as a consequence of Aboriginal customary law they were acting under duress – a defence that is generally available.
5. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 15.
6. See discussion under 'Consent', below pp 163–72.
7. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [448]. In his background paper to the current reference, Philip Vincent recommended that there should be a defence in the *Criminal Code* (WA) available to all offences (other than homicide, grievous bodily harm and sexual assault) to the effect that those persons who act 'in execution of Aboriginal customary law, and those who act in obedience to orders from those in authority under and in accordance with Aboriginal customary law, are protected from criminal responsibility'. See Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 22. Similarly, Greg McIntyre suggested a defence for people administering traditional punishments provided that the punishment was voluntarily accepted; that it was carried out in accordance with Aboriginal customary law; and that it did not breach international law standards. See McIntyre G, *Aboriginal Customary Law: Can It Be Recognised?* LRCWA, Project 94, Background Paper No 9 (February 2005) 46.
8. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [447]. The Commission notes that the ALRC also rejected the option for a general cultural defence (applicable to all cultures) on the basis that it would 'violate the principles of equality before the law and equal protection of the law'. See ALRC, *Multiculturalism and the Law*, Final Report No 57 (1992) 171.

offences, including offences that arose as a consequence of traditional punishments such as spearing, would be more appropriate. It was argued that without a defence which acknowledged the obligation under Aboriginal customary law to impose traditional punishment, the recognition of Aboriginal customary law would be uncertain. This is because it would be reliant upon whether the existing defences under Australian law permitted consideration of Aboriginal customary law.<sup>9</sup> The ALRC did not support a general customary law defence (either applicable to all offences or only to some offences) because:

- in practice such cases rarely come before the court;
- it would be difficult to formulate a legislative defence that would adequately reflect the many dimensions of Aboriginal customary law and the interpretation of such a defence by the courts would remove customary law from the control of Aboriginal people;<sup>10</sup> and
- it would deprive people, including Aboriginal victims of assault and violence, of the protection of Australian law.<sup>11</sup>

The ALRC concluded that any injustice could be adequately dealt with either by judicial discretion at the time of sentencing or, in the case of homicide, by the introduction of a legislative provision creating a partial defence of Aboriginal customary law.<sup>12</sup>

There was no indication from the Commission's consultations that Aboriginal people generally supported any separate system of criminal responsibility. Indeed, it was pointed out that 'two laws may be divisive'.<sup>13</sup> A defence exonerating Aboriginal people for a wide range of offences (including offences of violence) because

the conduct was required under Aboriginal customary law would create different notions of criminal responsibility. Non-Aboriginal people would be liable to punishment under Australian law for certain behaviour and Aboriginal people would not. Further, such a defence would not provide equal protection under Australian law. Aboriginal people are entitled to the same level of protection (from violence and other criminal behaviour) as other Australians. Even if certain serious offences (such as murder, grievous bodily harm and sexual assault) were excluded, such a defence could potentially be relied upon for other offences of violence.

Some aspects of traditional customary law have evolved as a result of the interaction with Australian law. Generally, death is no longer imposed as a form of traditional punishment. In some instances the punishment of spearing has been modified and in some cases has stopped altogether.<sup>14</sup> Megan Davis and Hannah McGlade have observed, in the context of recognition of Aboriginal customary law, that international human rights standards can operate as a 'vehicle for the evolution of culture'.<sup>15</sup> Just as the influence of Australian law has resulted in the modification of some traditional punishments, awareness of international human rights standards may also result in changes to the nature of some traditional punishments. It is arguable that a defence that permits certain behaviour (such as spearing) may operate to stifle the continuing evolution of Aboriginal customary law in contemporary society. The Commission does not support or encourage violent traditional punishments, as to do so may infringe human rights and therefore any defence based on Aboriginal customary law that authorises such practices regardless of the circumstances is unacceptable.<sup>16</sup>

9. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [448].

10. This is similar to what was said by the Northern Territory Law Reform Committee in its 2003 inquiry into Aboriginal customary law. It did not recommend any changes to the *Criminal Code* because it considered that this would result in a 'synthetic law that is neither Australian law nor Aboriginal law' and would be incomprehensible by both Aboriginal and non-Aboriginal people. See Northern Territory Law Reform Committee (NTLRC), *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 4–5; NTLRC, *The Legal Recognition of Aboriginal Customary Law*, Background Paper No 3 (2003) 30.

11. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [449]. In its 1992 report, *Multiculturalism and the Law*, the ALRC affirmed this position when considering the question whether there should be a general cultural defence to absolve criminal liability when a person acting in good faith committed an offence against Australian law on the basis that the act or omission was required by culture or custom. See ALRC, *Multiculturalism and the Law*, Final Report No 57 (1992) 171.

12. ALRC, *The Recognition of Aboriginal Customary Laws*, Final Report No 31 (1986) [450].

13. LRCWA, *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, 21. The Commission notes the observation by the ALRC that the rule that there should be 'one law for all' is not unqualified and that where differential treatment can be justified, special laws may be appropriate. See ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [168].

14. In some cases spearing (which would usually result in an injury) has been replaced with symbolic spearing where only the ceremonial aspects of the spearing punishment are performed. See discussion under 'Traditional Punishments', above pp 88–92.

15. Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA Australia, Project No 94, Background Paper No 10 (March 2005) 76–77.

16. The Commission discusses, in the context of spearing and other physical punishments, the relevance of consent to offences against the person: see 'Consent', below pp 163–72. In circumstances where a person genuinely consents to physical traditional punishment the arguments discussed in this section on separate defences do not necessarily apply.

## Partial Defence to Homicide

A difficult issue arises in relation to offences of homicide. Under Western Australian law if a person unlawfully kills another with the intention to kill, that person will be guilty of wilful murder.<sup>17</sup> If a person kills with an intention to cause grievous bodily harm then he or she will be guilty of murder.<sup>18</sup> In both cases there is a mandatory punishment of life imprisonment. Although the court has discretion to determine, within a prescribed range, the minimum amount of time the person must spend in jail before he or she can be considered for release, a sentence of life imprisonment must be imposed regardless of the circumstances of the case.<sup>19</sup>

The conflict for Aboriginal people is that if someone dies as a consequence of a punishment imposed pursuant to Aboriginal customary law there is little scope (other than when deciding what should be the minimum term) for taking Aboriginal customary law into account. As discussed earlier in 'Traditional Law and Punishment', intentional death is not a customary law punishment that is widely used or threatened today.<sup>20</sup> The main area of conflict is where an Aboriginal person inflicts traditional punishment with the intention to cause grievous bodily harm and death results: in these circumstances the person administering the traditional punishment would be guilty of murder. The Commission notes that the traditional punishment of spearing may or may not involve an intention to cause grievous bodily harm.<sup>21</sup> The Commission accepts that it is possible that some Aboriginal people could be charged and convicted of wilful murder or murder as a consequence of carrying out a traditional punishment under Aboriginal customary law.

Although it concluded that there should be no general defence, the ALRC supported a partial defence to homicide that would operate to reduce a charge of wilful murder or murder to manslaughter. The ALRC concluded that the main criticisms of a general and absolute defence did not apply to a partial defence.<sup>22</sup> Because there would still be a conviction (of manslaughter) the defence would not operate to deprive other people of the protection of the law. A partial defence would recognise that the moral culpability of Aboriginal people who are obliged to impose traditional punishment (that results in a death) is more akin to manslaughter.<sup>23</sup> This is particularly important in those jurisdictions that require a mandatory sentence of life imprisonment for the offence of wilful murder or murder, because without a partial defence there is little scope to take into account customary law issues in mitigation of sentence.<sup>24</sup> The ALRC recommended a partial defence in the following terms:

It should be provided that, where the accused is found to have done an act that caused the death of the victim in the well-founded belief that the customary laws of an Aboriginal community to which the accused belonged required that he do the act, the accused should be liable to be convicted for manslaughter rather than murder.<sup>25</sup>

It is the Commission's view that the potential cases that may fall within the parameters of such a partial defence to wilful murder (and murder) would be rare. One option would be to introduce a partial defence in similar terms to that recommended by the ALRC. The alternative would be to amend the penalties applicable to offences of wilful murder and murder to a maximum of life imprisonment, thus allowing courts to take into account circumstances which significantly reduce the

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17. *Criminal Code* (WA) s 278.

18. *Criminal Code* (WA) s 279. For other ways in which a person may be convicted of murder, see full section.

19. Section 90 of the *Sentencing Act 1995* (WA) provides that for a sentence of life imprisonment for murder the minimum term must now be between 7–14 years and for wilful murder it must be between 15–19 years. Section 91 provides that if the sentence (for wilful murder) is strict security life imprisonment, the minimum term is to be between 20–30 years. What this means is that after the offender has served the minimum term he or she is eligible to be considered for release. The parole board must first recommend to the Attorney General that he or she is suitable for release. If the Attorney General recommends to the Governor that the offender should be released then the Governor has the final word. See *Sentencing Administration Act 2003* (WA) ss 25, 26. In some other states the punishment for murder is a maximum term of life imprisonment, and therefore in those states the courts can take into account the circumstances of the offence and in particular whether the person was acting in pursuance of Aboriginal customary law: see, for example, *Crimes Act 1958* (Vic) s 3.

20. See discussion under 'Traditional Punishments – Examples of Traditional Punishments', above pp 89–92.

21. See discussion of spearing under 'Consent', below pp 163–72.

22. However, the ALRC accepted that some of the arguments against a general defence (in particular, that it would be difficult to prove and may result in unwanted examination by courts into aspects of Aboriginal customary law) would still apply to a partial defence. See ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [452].

23. *Ibid* [451].

24. *Ibid*.

25. *Ibid* [453]. This defence incorporates a subjective element: that the accused must genuinely have believed that his or her actions were required under customary law. It also includes an objective element: that the belief was well-founded in the customary laws of the community. The ALRC also recommended that Aboriginal customary law should be considered where relevant as mitigation for offences which would otherwise result in mandatory sentence (in particular life imprisonment): *ibid* [522].

culpability of the offender.<sup>26</sup> A benefit of this approach is that its scope would go beyond just the issue of Aboriginal customary law and would apply to all Western Australian people. The Commission is concurrently working on a dedicated reference dealing with the law of homicide, which specifically examines defences and partial defences to wilful murder and murder; the distinction between wilful murder and murder; and the sentencing regime for homicide offences. Given the complexity of these issues and the fact that the law relating to homicide is being separately examined, the Commission invites submissions about the need for a partial defence of Aboriginal customary law to the offences of murder or wilful murder.

#### Invitation to Submit 4

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

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

## Specific Defences

While the Commission does not support a defence based on Aboriginal customary law that applies to a wide range of offences, a specific defence (or exemption)<sup>27</sup> that applies to a particular offence may be appropriate.<sup>28</sup> In its 1992 report *Multiculturalism and the Law*, the ALRC recommended that specific



exemptions or defences that take into account cultural or religious issues should only be introduced where the significance of the cultural or religious matter 'outweighs the harm the law seeks to prevent and where the recognition of that freedom by the law poses no direct threat to the person or property of others'.<sup>29</sup> In other words, a specific defence may be justifiable if its operation does not significantly interfere with the rights of other people or result in the inadequate protection of other members of society. Taking into account this principle, and in the context of this reference, the Commission considers that there are two areas where specific defences or exemptions may be justified.

- In the area of customary harvesting, the exemption of Aboriginal people from the application of general laws dealing with the regulation of harvesting flora, fauna or fish is entirely appropriate. The need to strengthen the existing exemptions, subject to legitimate conservation interests, is discussed in Part VIII below.<sup>30</sup>
- In its discussion of community justice mechanisms, the Commission has comprehensively examined the

26. In its recent report on defences to homicide the Victorian Law Reform Commission (VLRC) stated that there should be compelling reasons for the introduction or continuation of partial defences rather than allowing issues of culpability to be taken into account during sentencing. See VLRC, *Defences to Homicide*, Final Report (October 2004) 232.

27. An exemption is a legislative provision that provides that a particular law regulating conduct does not apply to a specified class of person or activity. For example, s 23 of the *Wildlife Conservation Act 1950* (WA) provides that an Aboriginal person is permitted to engage in hunting and foraging (of flora and fauna) on land that is not a nature reserve or wildlife sanctuary for sustenance purposes. This provision is an exception to the general prohibition of taking protected fauna or flora without a licence.

28. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [446]. The ALRC provided examples including that, under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), it is a defence to a charge of entering upon a sacred site or Aboriginal land that the entry was 'in accordance with Aboriginal tradition'. Similarly, s 17 of the *Aboriginal Heritage Act 1972* (WA) provides that it is an offence to damage, destroy, alter, remove, conceal or deal with any Aboriginal site in a manner that is not sanctioned by relevant custom.

29. The ALRC considered that the best way to achieve this was through exemptions set out in the relevant legislation rather than defences that are reliant upon concepts of reasonableness: see ALRC, *Multiculturalism and the Law*, Final Report No 57 (1992) 177.

30. See Part VIII 'Improving Recognition of Aboriginal Harvesting Rights in Western Australia', below pp 374–82.

current Aboriginal community by-law scheme. Pursuant to this scheme Aboriginal communities are empowered to make by-laws that prohibit certain conduct on their community lands. Some communities have provided that it is a defence to a breach of a by-law that the person was acting in accordance with a custom of the community. The Commission has sought submissions to determine the effectiveness of this defence and how it might be applied to the Commission's proposed offence of trespass.<sup>31</sup>

## Intention

Many criminal offences in Western Australia require proof of an intention to cause a specific result.<sup>32</sup> For example, a conviction of wilful murder requires proof that the accused intended to cause the death of the victim.<sup>33</sup> Intention is a subjective element; it is what the accused person was thinking at the time of committing the offence. In the absence of direct evidence (in the form of an admission), the intention of the accused will be inferred from the circumstances of the offence.<sup>34</sup> In coming to a conclusion about the accused's intention the judge or jury will apply their own 'common sense understanding of human behaviour'.<sup>35</sup> The potential danger for Aboriginal people (and for that matter, other cultural minorities) is that the judge or jury may make 'wrong inferences from behaviour unless they have evidence of the customs, practices and beliefs prevalent in the accused's community'.<sup>36</sup>

Where Aboriginal customary law is considered to be outside the experience of 'ordinary people' evidence of it is admissible if it is relevant to the accused's state of mind or intent.<sup>37</sup> As stated by Dowsett J in *R v Watson*<sup>38</sup> 'evidence of the peculiarities of a particular

community or a particular person' may be admissible to prove or disprove intention. To justify expert evidence, the characteristics of a particular community or person must depart significantly from what is considered the 'norm'.<sup>39</sup> In *R v Watson* the appellant had been convicted of murder after stabbing a woman in the abdomen. The appellant claimed that he did not intend to kill her or to do her grievous bodily harm. Instead he explained that he only meant to cut her as a form of discipline. The Queensland Court of Criminal Appeal held that evidence from a sociologist revealing that Indigenous men in Palm Island regularly 'cut' their wives for the purpose of discipline was not admissible to prove intention. The court held that the issue of whether the accused intended to kill or cause grievous bodily harm was a matter within the range of common experience. The fact that one person may inflict an injury with an intention to kill or cause grievous bodily harm while another only intends to cause minor harm, was not considered unique to Indigenous people of Palm Island.<sup>40</sup>

In its 1992 report on *Multiculturalism and the Law*, the ALRC found that Australian law adequately provides for courts to consider evidence of cultural matters that may be relevant to the question of the accused's state of mind. The difficulty lies in the need to ensure that there is relevant evidence before the court. The ALRC emphasised that because intention is an element that must be proved by the prosecution, it would be unlikely that the prosecution would call evidence that would support the defence. The obligation then falls on the accused to present the evidence either by giving evidence directly or by calling an expert witness.<sup>41</sup> The difficulties posed by the rules of evidence for the reception of information about Aboriginal customary law are discussed in detail below; recommendations

31. See Invitation to Submit 2 (above p 116) and Invitation to Submit 3 (above p 123).

32. For example s 317A(b) of the *Criminal Code (WA)* creates an offence for an assault with an intent to do grievous bodily harm; s 294 (1) creates an offence for doing grievous bodily harm with an intent to do grievous bodily harm; and s 409 (1) creates the offence of fraud which requires an intention to defraud. Section 6(1)(a) of the *Misuse of Drugs Act 1981 (WA)* provides that it is an offence to be in possession of prohibited drugs with an intention to sell or supply those drugs to another person. However, s 23 of the Code provides that unless expressly declared to be an element of the offence, intention is irrelevant.

33. *Criminal Code (WA)* s 278.

34. *R v Willmot (No 2)* [1985] 2 Qd R 413, 418–19 (Connolly J). The Commission notes that s 28 of the *Criminal Code (WA)* provides that intoxication can be taken into account when determining whether an accused person had a specific intent. The ALRC did not consider that if an accused was intoxicated this should preclude customary law issues from being taken into account. See ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [438]. While the Commission acknowledges that generally Aboriginal people do not consider alcohol (and other forms of intoxication) to be part of Aboriginal customary law, the fact that an accused person was intoxicated at the time of an offence should still be able to be taken into account when assessing intention. If the accused person's intention was affected by both alcohol and customary law issues the law is currently flexible enough for a court to give each factor the appropriate weight.

35. Tasmanian Law Reform Institute, *Intoxication and Criminal Responsibility*, Issues Paper No 7 (March 2005) 13.

36. ALRC, *Multiculturalism and the Law*, Report No 57 (1992) 183.

37. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [416].

38. (1986) 69 ALR 145.

39. *Ibid* 166.

40. *Ibid* 152 (McPherson J), 161 (Derrington J), 166 (Dowsett J).

41. ALRC, *Multiculturalism and the Law*, Final Report No 57 (1992) 183.

are made for legislative reform to remove some of the existing impediments to the admissibility of relevant information.<sup>42</sup>

## Consent

Aboriginal people who inflict physical traditional punishment may be guilty of an offence under Western Australian law. Depending upon the nature of the punishment and the degree of physical injury, the person may be charged with assault, assault occasioning bodily harm, unlawful wounding, grievous bodily harm or homicide. For violent offences that require proof of an assault, the consent of the 'victim' may mean that the accused is not held to be criminally responsible. For these offences *lack of consent* must be proved by the prosecution beyond a reasonable doubt. However, consent is irrelevant for the offences of unlawful wounding and grievous bodily harm. The distinction between those offences in which lack of consent is an element and those in which it is not has significant implications for Aboriginal people who inflict physical traditional punishments such as spearing.

In order to properly examine this very complex and controversial issue, it is necessary to consider, from a general perspective, the relationship between consent and violence. Important legal and moral principles are at the heart of this topic. In dealing with this issue in a comprehensive manner the Commission does not want to suggest that physical traditional punishments are the most important aspect of Aboriginal customary law. The Commission does not advocate the use of violence and emphasises that there are many forms of non-violent customary law punishments.<sup>43</sup> Nevertheless, the practice of spearing continues today and is an important part of tradition to many Aboriginal people in this state.

The following discussion shows that the current status of our law with respect to consent does not solely affect Aboriginal people: the arbitrary distinctions between assault occasioning bodily harm and unlawful wounding have the potential to affect any Western Australian.

## Consent and Violence

Most jurisdictions accept that consent to violent conduct in certain circumstances precludes criminal responsibility. But this is not absolute: 'inevitably lines must be drawn beyond which consent will be deemed ineffective'.<sup>44</sup> Whether a person can 'legally consent' to violence and if so, to what level of violence or harm, is a complex question and subject to conflicting opinions. The issue requires a balance between the state's right to prevent harm and the individual's right to freedom of choice.<sup>45</sup> Because of these conflicting principles it has been suggested that a compromise is required.<sup>46</sup> The dilemma is where to draw the line.

### Background

The law in Western Australia in relation to consent to violence is quite different to the position at common law. At common law a person can only consent to common assault. Anything more serious (such as bodily harm, wounding or grievous bodily harm) is unlawful, irrespective of whether or not the 'victim' consented.<sup>47</sup> However, there are a number of exceptions at common law—such as ritual male circumcision, tattooing, ear-piercing and violent sports including boxing<sup>48</sup>—which are considered justifiable in the public interest. It has been argued that the exceptions are based upon the 'public acceptability' of certain types of activities or behaviour.<sup>49</sup> The public interest or 'social utility' of some of these activities could be questioned.<sup>50</sup>

The English case *R v Brown*<sup>51</sup> dealt with sado-masochistic acts (which caused bodily harm and wounding) between consenting male adults performed in private for the purpose of sexual gratification. A majority of the House of Lords held that consent was irrelevant because sado-masochistic violence did not fit within any of the existing exceptions and, because of the inherent dangers involved, it could not be said that the behaviour was justifiable in the public interest.

The majority decision has been the subject of much criticism. It has been argued that the requirement that the relevant behaviour must have a 'social utility' is

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

43. See discussion under 'Traditional Punishments', above pp 88–91.

44. Kell D, 'Consent to Harmful Assaults Under the Queensland Criminal Code: Time for a Reappraisal' (1994) 68 *Australian Law Journal* 363.

45. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code* (May 1999) ch 5, 119.

46. Giles M, '*R v Brown*: Consensual Harm and the Public Interest' (1994) 57 *Modern Law Review* 101, 110.

47. Kell D, 'Consent to Harmful Assaults Under the Queensland Criminal Code: Time for a reappraisal' (1994) 68 *Australian Law Journal* 363.

48. *R v Brown* [1993] 2 All ER 75, 79 (Lord Templeman).

49. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code* (May 1999) ch 5, 123.

50. Kell D, 'Consent to Harmful Assaults Under the Queensland Criminal Code: Time for a reappraisal' (1994) 68 *Australian Law Journal* 363, 376.

51. [1993] 2 All ER 75.

wrong. Instead, it is suggested that there should be a presumption that consensual behaviour is lawful unless there are public policy reasons for making it unlawful.<sup>52</sup> Others have disapproved of the decision because it undermines 'individual autonomy' and infringes 'the right to privacy'.<sup>53</sup> The appellants in *R v Brown* appealed to the European Court of Human Rights, on the basis that their criminal convictions amounted to an unlawful and unjustifiable interference with their right to privacy under the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. The court held that there was no violation of this convention and that the state is entitled to regulate through the criminal law 'activities which involve the infliction of physical harm' regardless of whether the activities take place in the context of sexual conduct or otherwise.<sup>54</sup> Further, it was held that:

The determination of the level of harm that should be tolerated by the law in situations where the victim consents is in the first instance a matter for the State concerned since what is at stake is related, on the one hand, to public health considerations and to the general deterrent effect of the criminal law, and, on the other hand, to the personal autonomy of the individual.<sup>55</sup>

In Australia the *Human Rights (Sexual Conduct) Act 1994* (Cth) provides that:

Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.<sup>56</sup>

It is not permissible for a state or territory to arbitrarily interfere with private sexual conduct between consenting adults. Therefore, if sexual conduct is interpreted to include the infliction of physical harm (such as may occur during sado-masochistic activities), then government cannot arbitrarily interfere.<sup>57</sup>

In *R v Brown*, although the decision of the House of Lords was based on the assumption that all of the 'victims' were willing participants, Lord Templeman stated that in some cases alcohol and drugs were used to obtain consent and that it was not surprising that the 'victims' did not complain to the police given the nature of the activities. Lord Templeman observed that the consent of some of the participants was therefore 'dubious or worthless'.<sup>58</sup> One commentator, who noted that the genuineness of the consent in this case was questioned by at least two members of the House of Lords, emphasised that the key issue is what constitutes 'full, free and informed consent'.<sup>59</sup>

The meaning of consent in this context is not easy to determine. Writers emphasise that the reason behind the violence, coupled with underlying social inequalities, may mean that 'consent' is not freely given. For example, Chris Kendall has argued that while 'some gay men may "choose" to be the objects of eroticized violence, degradation, beating and verbal abuse not everyone has or wants this "choice"'.<sup>60</sup> Kendall's main concern is that if there is no choice, consent is meaningless. Referring to *R v Brown*, he argues that many gay men are socialised to believe that they are worthy of abuse and ridicule, and that true consent cannot exist where abuse is normalised and the participants do not believe that there are any other life options available.

Similarly, Catharine MacKinnon maintains that consent assumes a level playing field where one may not exist.<sup>61</sup> This has been recognised with the widespread criminalisation of female genital mutilation irrespective of whether the female child or her parents have given consent.<sup>62</sup> And while 'consent' in this context might be 'given', many young women feel that they have little choice but to consent for fear of offending tradition and for fear of being ostracised from their community.

52. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General *Model Criminal Code* (May 1999) ch 5, 125; see also Kell D, 'Consent to Harmful Assaults Under the Queensland Criminal Code: Time for a Reappraisal' (1994) 68 *Australian Law Journal* 363.  
 53. Bronitt S, 'Protecting Sexual Privacy Under the Criminal Law: *Human Rights (Sexual Conduct) Act 1994* (Cth)' (1995) 19 *Criminal Law Journal* 222, 227.  
 54. *Laskey, Jaggard and Brown v The United Kingdom* [1997] ECHR 4 [44] & [51].  
 55. *Ibid* [45].  
 56. *Human Rights (Sexual Conduct) Act 1994* (Cth) s 4. This statute was enacted as a consequence of a decision of the United Nations Human Rights Committee condemning Tasmanian laws which criminalised homosexual activity, between consenting adults in private.  
 57. However, it is arguable that the state may impose legal restrictions in order to protect individuals who are 'vulnerable because of youth, inexperience or emotional dependency': Bronitt S, 'Protecting Sexual Privacy under the Criminal Law: *Human Rights (Sexual Conduct) Act 1994* (Cth)' (1995) 19 *Criminal Law Journal* 222, 227–28.  
 58. [1993] 2 All ER 75, 82–83.  
 59. Giles M, '*R v Brown*: Consensual harm and the public interest' (1994) 57 *The Modern Law Review* 101, 107.  
 60. Kendall C, *Gay Male Pornography: An issue of sex discrimination* (Vancouver: UBC Press, 2003) 121.  
 61. MacKinnon C, *Toward a Feminist Theory of the State* (Harvard: Harvard University Press, 1989). See also Patemen C, *The Sexual Contract* (Cambridge: Polity, 1988); Jeffreys S, 'Consent and the Politics of Sexuality' (1993) 5 *Current Issues in Criminal Justice* 201.  
 62. Section 306 of the *Criminal Code* (WA) prohibits female genital mutilation and expressly states that consent is not a defence.

## The Criminal Code (WA)

### *Assault and assault occasioning bodily harm*

The definition of assault in s 222 of the *Criminal Code* (WA) provides that:

A person who strikes, touches, or moves, or otherwise applies force of any kind to the person of another, either directly or indirectly, without his consent, or with his consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without his consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect his purpose, is said to assault that other person, and the act is called an assault.

For any offence where assault is an element, the prosecution must prove beyond a reasonable doubt that the application of force was without the consent of the victim. The most relevant example for this discussion is the offence of assault occasioning bodily harm. In order to be convicted of this offence there must have been an assault (as defined above) and bodily harm.<sup>63</sup> Bodily harm is defined as any bodily injury which interferes with health or comfort.<sup>64</sup>

### *Unlawful wounding*

Section 301 of the *Criminal Code* (WA) provides that any person who unlawfully wounds another is guilty of a crime.<sup>65</sup> Because 'assault' is not an element of the offence of unlawful wounding the issue of consent is irrelevant. A wound is not defined in the *Criminal Code* (WA) but has been judicially interpreted as requiring the breaking of the skin and penetration below the epidermis (the outer layer of the skin).<sup>66</sup> Usually a wound will be caused by an instrument but it may also be caused by a fist – a split lip could be categorised as a wound.<sup>67</sup>

### *Grievous bodily harm*

Any person who unlawfully inflicts grievous bodily harm is guilty of an offence under s 297 of the *Criminal Code* (WA). Grievous bodily harm is defined in s 1 of the *Criminal Code* (WA) as:

any bodily injury of such a nature as to endanger, or be likely to endanger life, or to cause, or be likely to cause, permanent injury to health.

Similarly, because the term assault does not appear in s 297 consent is not an element of grievous bodily harm. In contrast, s 317A provides an offence for assaulting a person with intent to cause grievous bodily harm and therefore because assault is an element of this offence consent would appear to be applicable.

### *The relevance of consent*

Although it has been suggested that a person cannot legally consent to an assault occasioning bodily harm, the Commission is of the view that under the *Criminal Code* consent is relevant to bodily harm but not to unlawful wounding.<sup>68</sup> Section 223 of the Code provides that:

The application of force by one person to the person of another may be unlawful, although it is done with the consent of that other person.

In *Lergesner v Carroll*<sup>69</sup> it was stated that the equivalent section under the Code in Queensland

reflects the policy and structure of the Criminal Code to divide offences against the person into two categories. Those which involve as an element an assault where the presence or absence of consent is determinative of the criminality of the application of force and those where consent is immaterial to the criminality of the conduct.<sup>70</sup>

It is necessary for the prosecution to prove that the victim did not consent to the actual degree of force used.<sup>71</sup> In other words, it is for the jury to decide whether the 'degree of violence used in the assault

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

64. *Criminal Code* (WA) s 1.

65. The Commission notes that there are other offences that involve wounding but also include additional elements such as an intention to maim or disfigure or cause grievous bodily harm. The discussion which follows about the arbitrary distinction between unlawful wounding and assault occasioning bodily harm does not extend to these other offences.

66. *Halsbury's Laws of Australia* (Sydney: Butterworths, 1991) [130-1055].

67. *R v Shepard* [2003] NSWCCA 351.

68. In his background paper to this reference, Greg McIntyre argued that an act which resulted in a wounding or bodily harm would constitute an offence under the *Criminal Code* (WA) even if the victim had consented to the application of force. In support of his argument McIntyre relied on *R v Watson* (1986) 69 ALR 145. However, this case was distinguished in *Lergesner v Carroll* [1991] 1 Qd R 206 which held that lack of consent is an element of a charge of assault occasioning bodily harm. See McIntyre G, 'Aboriginal Customary Law: Can it be recognised', LRCWA, Project No 94, Background Paper No 9 (February 2005) 44.

69. [1991] 1 Qd R 206.

70. *Ibid.*

71. *Ibid* 217–18 (Cooper J).

exceeded that to which the consent had been given'.<sup>72</sup> Each case must consider the relevant facts 'existing at the time the consent is expressly given or is to be inferred from the circumstances'.<sup>73</sup> For example, in violent sporting activities the consent of the participants to the normal rules and practices of the game is implied.<sup>74</sup> If violent conduct goes beyond that which is expected and impliedly consented to, then the perpetrator would be criminally responsible. In addition, an accused may rely on the defence of honest and reasonable mistake to argue that he or she honestly and reasonably believed that the 'victim' consented to the relevant harm.

### *The distinction between unlawful wounding and assault occasioning bodily harm*

The offence of unlawful wounding is found in a section of the *Criminal Code* headed 'Offences Endangering Life or Health'. At first glance this suggests that the reason for the distinction between the two offences is that unlawful wounding is considered to be more serious. The maximum penalties for assault occasioning bodily harm and unlawful wounding are the same.<sup>75</sup> This indicates that Parliament, when setting the maximum penalties, considered the offences to be equally serious. The legislative penalties for both offences have been amended as recently as 2004.<sup>76</sup> Parliament has continued to treat the offences in exactly the same manner.

In each case, the facts must determine whether a specific example of unlawful wounding is more or less serious than an assault occasioning bodily harm. For example, a small cut would amount to a wound while a broken nose would be categorised as bodily harm. In a review of the *Criminal Code* in 1983 the anomaly between assault occasioning bodily harm and wounding was acknowledged.<sup>77</sup> It was argued that unlawful wounding covers a wide range of harm from serious to trivial and that it is an

unsatisfactory concept because it involves any full thickness penetration of the skin, whether that be by a pin prick or a shot gun blast.<sup>78</sup>

It has also been noted that a wound may involve a minor injury that may not even amount to bodily harm because there may be no interference with health or comfort.<sup>79</sup> The Model Criminal Code Officers Standing Committee observed that:

There is no reason in logic for making the use of the word 'assault' the key criterion. Consent [is not] a defence to any charge of wounding, but wounding is established by the most trivial nicking of the skin, not amounting to bodily harm. Further, consent may provide a defence to a charge of assault occasioning bodily harm or assault with intent to cause grievous bodily harm. Under the Code, therefore, one could consent to a quite high level of violence.<sup>80</sup>

The discrepancy is further evidenced in relation to ear-piercing and, possibly, tattooing. A person who pierces the ear or any other body part of another with consent would, under the present law, be guilty of unlawful wounding. Nonetheless, the *Health (Skin Penetration Procedure) Regulations 1998* (WA) establish controls over 'skin penetration procedures', which include procedures where the skin is cut, punctured or torn. The regulation of these activities demonstrates that there are some circumstances where Parliament considers that consent to wounding is acceptable.

Not only does the *Criminal Code* distinguish between unlawful wounding and assault occasioning bodily harm in terms of consent, but it also treats the offences differently in regard to the availability of the defence of provocation.<sup>81</sup> A person may be excused for assault occasioning bodily harm if there was provocation for the assault, but provocation cannot constitute a defence to unlawful wounding. The Commission has strong reservations about the applicability of a complete defence of provocation to any non-fatal offence against the person<sup>82</sup> and questions its relevance, even as a

72. Ibid 212 (Shepherdson J).

73. Ibid 218 (Cooper J). In *Horan v Ferguson* [1995] 2 Qd R 490, 495, McPherson JA stated that consent includes consent that is tacit or implied: 'Just as the absence of consent may be inferred from the circumstances, so too equally its presence may be inferred'.

74. *Abbott v The Queen* (Unreported, Supreme Court of Western Australia, CCA No 98/1995).

75. The maximum penalty for assault occasioning bodily harm and unlawful wounding is five years' imprisonment. If the victim of either of these offences is of or over the age of 60 years the maximum penalty is seven years' imprisonment: see *Criminal Code* (WA) ss 317, 310 respectively.

76. The maximum penalties for both offences committed in circumstances of aggravation and the maximum fine that can be imposed by a summary court were both increased. See for example, *Criminal Law Amendment Act 2001*(WA) and *Acts Amendment (Family and Domestic Violence) Act 2004* (WA).

77. Murray M, *The Criminal Code: A General Review* (1983) 202.

78. Ibid.

79. Kell D, 'Consent to Harmful Assaults Under the Queensland Criminal Code: Time for a Reappraisal' (1994) 68 *Australian Law Journal* 363, 372.

80. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code* (May 1999) ch 5, 123.

81. Sections 245 and 246 of the *Criminal Code* (WA) provide that the defence of provocation is only available (other than the defence of provocation for homicide in s 281) for an offence of which assault is an element.

82. The Commission notes that in the Murray Report it was observed that apart from Western Australia and Queensland, every other jurisdiction in Australia as well as New Zealand and the United Kingdom only allowed provocation as a partial defence to murder. It was recommended that

partial defence to murder.<sup>83</sup> In the present context, the Commission's opinion is that there is no justification for distinguishing between assault occasioning bodily harm and unlawful wounding in relation to the availability of the defence of provocation.

The difference between the offences may also have a bearing on which offence the police decide to charge. In some cases an injury may constitute both unlawful wounding and bodily harm. For example, a two centimetre deep cut would constitute a wound under the *Criminal Code* and would also constitute bodily harm. It would be naïve to believe that the relevance of consent and the availability of the defence of provocation would not, in some instances, impact upon the decision by police or prosecutors as to what offence a person is charged with.

## Traditional Aboriginal Punishments

Traditional punishments may involve spearing, beatings, and sometimes both.<sup>84</sup> The Commission's consultations with Aboriginal people indicated that spearing is still practised by, and considered important in, many Aboriginal communities. In Warburton it was emphasised that spearing is not the only punishment available but it does have 'major symbolic and cultural significance'.<sup>85</sup> The fact that spearing still regularly occurs is evidenced by the number of cases which come before the courts where the issue of spearing is raised in mitigation of sentence.<sup>86</sup> However, it is not practised in all communities<sup>87</sup> and is not used in every possible situation.<sup>88</sup> Nevertheless, in Warburton it was emphasised that in some cases there is no alternative under customary law to spearing.<sup>89</sup>

The circumstances in which spearings occur today differ from the past. Because of diabetes, high blood pressure

and other medical complaints it is recognised by Aboriginal people that some members of their community cannot be given the same level of punishment as others.<sup>90</sup>

There were numerous comments to the Commission indicating that traditional punishment must be undertaken in the absence of alcohol: 'payback should not be confused with alcohol related violence'.<sup>91</sup> In Kalgoorlie it was stressed that traditional punishment is not 'wanton destruction of property, nor is it done drunk, and it does not produce feuds. It is ritualised, measured, final and relentless, without limitation periods'.<sup>92</sup> In the Pilbara it was stated that:

Traditional punishment in fact must be done while sober, and administered properly, using appropriate tools, and in the appropriate places.<sup>93</sup>

As Aboriginal community members in Laverton explained, when determining whether violence was legitimately inflicted under customary law or was merely alcohol-related the following should be considered: whether the Elders were present; whether the offender has gone back to the community; and whether there 'was a clear mind'.<sup>94</sup> When undertaken in accordance with customary law, traditional punishment is a 'formal and regulated process'.<sup>95</sup>

## The nature of physical traditional punishments

Depending upon the type of traditional punishment an offence of common assault, assault occasioning bodily harm, unlawful wounding or grievous bodily harm may be committed. Some traditional punishments could potentially cause death. In the case of *The Police v Z*,<sup>96</sup> the court heard evidence from members of an Aboriginal community that spearing was no longer used because it may cripple the person. In *R v Rictor*<sup>97</sup> the

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provocation should be abolished as a defence for non-fatal offences against the person. See Murray M, *The Criminal Code: A General Review* (1983) 153–54.

83. See discussion under 'Provocation', below pp 183–87.

84. See discussion under 'Traditional Punishments', above pp 88–91. See also Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 17–18.

85. LRCWA, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 5.

86. See discussion under 'Sentencing – Traditional Punishment as Mitigation', below pp 212–15.

87. LRCWA, *Thematic Summaries of Consultations – Meekatharra*, 28 August 2003, 29.

88. LRCWA, *Thematic Summaries of Consultations – Mowanjun*, 4 March 2004, 49.

89. LRCWA, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 5.

90. LRCWA, *Thematic Summaries of Consultations – Cosmo Newbery*, 6 March 2003, 19; Pilbara, 6–11 April 2003, 8.

91. LRCWA, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 12; see also *Warburton*, 3–4 March 2003, 5.

92. LRCWA, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, 22.

93. LRCWA, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 8.

94. LRCWA, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 14.

95. LRCWA, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 5; *Broome*, 17–19 August 2003, 23. During consultation the Aboriginal Legal Service expressed the view that traditional punishment has to be 'properly administered, in the fleshy part of the thigh, under medical supervision and with an independent non-Aboriginal witness': LRCWA, *Thematic Summaries of Consultations – Aboriginal Legal Service*, 29 July 2003, 3.

96. (Unreported, Children's Court of Western Australia, No 3698/2001, O'Brien J, 24 April 2002).

97. (Unreported, Supreme Court of Western Australia, No 34/2002, McClure J, 30 April 2002).

court was told that one of the purposes of spearing is to disable the person to the point that he or she cannot get off the ground or walk. During the Commission's consultations it was observed that traditional punishment may involve grievous bodily harm.<sup>98</sup>

In the Western Australian case *R v Judson*<sup>99</sup> a number of accused were charged with assault occasioning bodily harm as a result of the victim being hit with sticks and a crowbar (in administering traditional punishment), and one accused was charged with unlawful wounding as a result of a spearing. All accused were acquitted. For the charges of assault occasioning bodily harm the defence relied upon consent and argued that, if the victim had not consented, the accused nevertheless held an honest and reasonable but mistaken belief that the 'victim' had consented. Because consent is not relevant to unlawful wounding, the only legal basis that the accused on that charge could have been acquitted, was that the jury was not satisfied beyond a reasonable doubt that he was the person who actually did the spearing.

The court accepted the medical evidence that the spearing had caused a wound (two centimetres deep) that had penetrated through all layers of the skin.<sup>100</sup> This case demonstrates that a spearing will not necessarily amount to grievous bodily harm.<sup>101</sup> Each offence will depend upon where the spear penetrates, how deep the wound is and how many times the person was speared.

In practice, traditional punishment that consists of beating with sticks or other instruments would probably result in a charge of assault occasioning bodily harm. On the other hand, spearing would probably result in a charge of unlawful wounding. Even if the person punished in the first case was bruised and swollen all over, consent would remove criminal responsibility. In the second case, even if the wound was minor, the consent of the person punished would be irrelevant. Not only does the distinction between assault occasioning bodily harm and unlawful wounding appear arbitrary in the context of traditional punishment, it is also illogical when other forms of violence are considered.

In a submission to the NTLRC a compelling point was made:

The proposition that spearing is intrinsically dangerous is certainly tenable. Grievous harm and death are a possible consequence. It is questionable whether either is an intended outcome. Grievous harm or death may occur in boxing matches. In such contests the inflicting of grievous harm is an objective of the contest i.e. knocking unconscious or injuring the opponent to the point they are unable to continue – an outcome clearly intended. Payback is conducted to restore order as between families. Boxing contests involve two persons in a consensual assault seeking to inflict bodily and possibly grievous harm on each other for money.<sup>102</sup>

A similar point was made by the ALRC:

It is difficult to avoid the conclusion that the common law has shown a measure of ethnocentricity in accepting the validity of consent to quite extreme forms of deliberate physical violence in some sports, while (probably) rejecting consent to the infliction of force in the course of indigenous traditional punishments.<sup>103</sup>

While it appears to be uncommon for an Aboriginal person to be charged with a criminal offence for inflicting traditional punishment, this is not because physical traditional punishments do not occur. The scarcity of cases where an Aboriginal person has been charged may evidence an 'unofficial policy' by the police to acquiesce in such punishments where the person receiving the punishment consents.<sup>104</sup> Therefore, the decision to prosecute an Aboriginal person in these circumstances is at the discretion of the police: a situation which does not provide Aboriginal people with any certainty of their legal position. Another explanation may be that many spearings are inflicted in secret, which may in fact be more dangerous as there will be no police or medical presence. Further, incidents of traditional punishment may not come to the attention of police because the person who receives the punishment consents and makes no complaint about the matter.

### Consent and traditional punishments

Perhaps the most difficult issue in this discussion is how to determine whether an Aboriginal person consents

98. LRCWA, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 13–14.

99. (Unreported, District Court of Western Australia, No POR 26/1995, O'Sullivan J and Jury, 26 April 1996).

100. *Ibid* 6.

101. In *R v Minor* (1992) 2 NTLR 183, 195–96, Mildren J also expressed the view that spearing in the thigh would not necessarily amount to grievous bodily harm.

102. Superintendent Svikart, Submission to the NTLRC, 25 October 2002, 2.

103. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) 363.

104. See discussion under 'Police and Aboriginal Customary Law', below pp 236–39.

to the infliction of physical traditional punishment. The *Criminal Code* does not contain a definition of consent for offences of violence.<sup>105</sup> For sexual offences the definition states that consent is not freely and voluntarily given if it is obtained by force, threats, intimidation, deceit or any fraudulent means. Nevertheless, this definition has been adopted by courts in consideration of consent to an assault. In *R v Judson*<sup>106</sup> the trial judge directed the jury that consent must be voluntary and not the result of fear, intimidation or threats.<sup>107</sup>

It is questionable whether Aboriginal people living in communities that still practise traditional punishments such as spearing have a free and voluntarily choice to participate. One view is that because of the possibility that family members will be punished if the offender fails to accept traditional punishment there can be no true consent because the offender is 'forced' to agree to the punishment. The Commission is mindful of the numerous recounts by Aboriginal people that if a person who had offended Aboriginal customary law was not available for punishment then members of his or her family would be punished instead.<sup>108</sup> On the other hand, the ALRC concluded that traditional Aboriginal people follow their laws not just because of fear of punishment but because of a 'belief in their legitimacy' and there will be situations where Aboriginal people follow their customary law without any external pressure.<sup>109</sup>

During the Commission's consultations in Warburton senior Aboriginal men stated that when properly done spearing was something to which offenders agreed by 'offering a leg'.<sup>110</sup> It was observed that although traditional punishment is still a fact of life in many communities, 'sometimes families [will] say no to "tribal punishment way"'.<sup>111</sup> In Geraldton an Elder suggested that only those who choose to live under traditional law would be liable to punishment.<sup>112</sup>

However, in Broome it was stated that 'leaving traditional law is not in fact a choice. That is because such law is a part of who you are'.<sup>113</sup> Similarly, in Geraldton it was said that '[u]ndergoing traditional punishment is not a matter of choice. If it is not undergone, the families affected by the offence will be after you or after your family'.<sup>114</sup>

The issue is further complicated by the concepts of Aboriginal mutual obligations and collective responsibilities and rights. It has been stated that:

Indigenous people have a greater sense of community in terms of both rights and responsibilities and thus place greater importance on collective rights over individual rights.<sup>115</sup>

In contrast, underlying the Western law concept of consent is individual freedom of choice. It is difficult to transpose this concept to Indigenous peoples where participation in physical punishment may be consented to because of mutual obligations under customary law. The consequences of not consenting to punishment may extend to being ostracised from community and culture.

It is also important to recognise that for non-Aboriginal people it is difficult to accept or understand that a person may willingly undergo violent punishment. In discussing the sado-masochistic activities in *R v Brown*, it was observed that because an outsider feels repulsion he or she may question how anyone could possibly consent to that level of harm.<sup>116</sup> It was said that:

[Because] many could not and most certainly do not consent does not mean that no one in fact can and does.<sup>117</sup>

The age at which a person can legally consent to violence is also a complicated issue. A child under the age of 13 years cannot consent to offences of a sexual nature,<sup>118</sup> but there is nothing in the *Criminal Code* to

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105. In the 1983 Review of the *Criminal Code (WA)* it was recommended that consent should be defined for all relevant sections to mean 'a consent freely and voluntarily given and, without otherwise affecting or limiting the meaning of the word, a consent is not freely and voluntarily given if it is obtained by force, threats or intimidation, or by any deception or fraudulent means': see Murray M, *The Criminal Code: A General Review* (1983) 528.

106. (Unreported, District Court of Western Australia, No POR 26/1995, O'Sullivan J and Jury, 26 April 1996).

107. *Ibid.*

108. See LRCWA, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 41–42; *Pilbara*, 6–11 April 2003, 8; *Geraldton*, 26–27 May 2003, 11; *Wiluna*, 27 August 2003, 22.

109. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) 308

110. LRCWA, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 5

111. LRCWA, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 9.

112. LRCWA, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 13–14.

113. LRCWA, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, 23.

114. LRCWA, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 14.

115. Gerber P, 'Black Rights/White Curriculum: Human rights education for Indigenous peoples' [2004] *Deakin Law Review* 3, 85.

116. Archard D, *Sexual Consent* (Oxford: Westview Press, 1998) 112.

117. *Ibid.*

118. *Criminal Code (WA)* s 319(2).

prevent a child consenting to an application of force. In *R v Judson*<sup>119</sup> the victim was 14 years old and all the accused were acquitted of assault occasioning bodily harm, because the prosecution could not prove beyond a reasonable doubt that the 'victim' had not consented. There are situations where consent to the application of force is appropriate for children, such as in some sports. However, for other situations, such as traditional punishment, it is arguable that children should be protected because they are not necessarily in an equal position to be able to refuse.

Due to the diversity of Aboriginal people in Western Australia and the difficulty of determining the exact nature of customary law in any particular community, the Commission believes that in some cases Aboriginal people may consent to being speared because they fear that someone close will be punished instead. In other cases, they may agree to undergo punishment because they do not wish to be rejected by their community or because they truly wish to undergo the traditional punishment process.

## Traditional Aboriginal Punishments and Fundamental Human Rights

It has been suggested that spearing or other forms of physical traditional punishment may contravene the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, and the *International Covenant of Civil and Political Rights*, both of which prohibit torture and other acts of cruel, inhuman or degrading treatment or punishment. Neither of these international conventions defines cruel, inhuman or degrading treatment or punishment. The Human Rights Committee has commented that it is unnecessary to list prohibited acts and the distinctions between 'cruel', 'unusual' and 'degrading' depends upon the 'nature, purpose and severity of the treatment applied'.<sup>120</sup> The stated aim is to 'protect both the dignity and the physical and mental integrity of the individual'.<sup>121</sup>

In the context of its inquiry into Aboriginal customary law in the Northern Territory, the NTLRC observed that:

[C]ruel, inhuman or degrading treatment or punishment is determined solely by cultural perspective. With respect to people bound by traditional law, the punishment is not regarded as such.<sup>122</sup>

Further, it was stated that 'an action alleged to breach the prohibition of torture and cruel, inhuman and degrading treatment must be intended to inflict a degree of cruelty and humiliation on the victim'.<sup>123</sup> It has also been noted that the question whether traditional punishments breach these standards will depend upon the individual circumstances.<sup>124</sup> The Aboriginal and Torres Strait Islander Social Justice Commissioner argued in a submission to the NTLRC that 'rather than imposing a uniform ban or refuse to recognise certain practices, the Commission notes that it is preferable for judicial organs to be required to balance Aboriginal Customary law issues with human rights standards'.<sup>125</sup>

Sam Garkawe has observed that the words 'cruel' and 'degrading' are culturally relative and that from an Aboriginal perspective, an 'unusual' punishment:

may be placing someone in jail for long periods of time, away from their family and community. Thus, to some Aboriginal people, a one-off spearing would be less cruel or degrading than a lengthy jail term.<sup>126</sup>

Similarly, during the Commission's consultations in Wuggubun it was argued that international standards must be viewed from the point of view of Aboriginal people:

The matter of Australia's international obligations in relation to physical punishment needs to be understood from our point of view. Ours goes back much further. These international law norms strike many of us as disrespectful and ridiculous. For us, prison is cruel and inhumane.<sup>127</sup>

Davis and McGlade contend that, like non-Indigenous Australians, Indigenous people have differing views on

119. (Unreported, District Court of Western Australia, No POR 26/1995, O'Sullivan J and Jury, 26 April 1996).

120. General Comment No 20, which replaces General Comment No 7 concerning the prohibition of torture and cruel treatment or punishment: *International Covenant of Civil and Political Rights*, Article 7, 44th Session, 10 March 1992.

121. *Ibid.*

122. NTLRC, *International Law, Human Rights and Aboriginal Customary Law*, Background Paper No 4 (2003) 34.

123. *Ibid.* 23.

124. Joseph S, Schultz J & Castan M (eds), *The International Covenant on Civil and Political Rights: Cases, commentary and materials* (Oxford: Oxford University Press, 2000) 140–44, as quoted in NTLRC, *ibid.*

125. *Ibid.*

126. Garkawe S, 'The Impact of the Doctrine of Cultural Relativism on the Australian Legal System' (1995) 2(1) *Murdoch University Electronic Journal of Law* 11. This was also observed by the ALRC: see *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [184].

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

these issues.<sup>128</sup> They argue that when considering whether a particular cultural practice breaches an international law instrument it is necessary to understand the cultural context in which the practice was committed. They also advocate a case-by-case approach and argue that a 'whole-scale prohibition' would breach other international standards that require the protection of culture and the obligation to consult.<sup>129</sup>

## Options for Reform

The ALRC did not advocate reform of the law in this area. It concluded that considerations in relation to consent and traditional punishment could appropriately be left to discretionary decisions in sentencing, bail and prosecution policy.<sup>130</sup>

The NTLRC recognised that spearing may amount to grievous bodily harm and if so would be unlawful under their Criminal Code. It recommended that the Northern Territory government establish an inquiry to consider the extent that payback is still practised and to develop policy options to respond to the issue.<sup>131</sup>

In considering the need for reforming the law of consent as it applies to violent offences, the Commission notes the observation that:

Laws should reflect social need, not moral repugnance. Unless there are pressing reasons to do so, it is futile to try and stop activities which are bound to continue and upon which the community is divided ... Where the moral issue is one upon which there is room for seriously divergent opinions, the legislature should interfere only to the extent necessary to protect the community, or any individuals with special needs. Generally those who take part voluntarily in activities some consider morally repugnant should not be the concern of the legislature unless they are so young and defenceless that their involvement is not truly voluntary.<sup>132</sup>

The Commission does not support any blanket legalisation of physical traditional punishments. To do so regardless of the individual circumstances (such as whether the person being punished consents, the age of the person being punished and the nature of the

punishment) would breach international human rights standards. It would also be contrary to the state's obligation to protect individuals from harm. Any reform must, at the very least, ensure that each case can be determined depending upon the individual circumstances: a court would have to decide based upon the evidence before it, whether the person punished did in fact consent.

Due to the difficult and complex issues involved some may consider that it is preferable to do nothing. Any accommodation of physical punishment may be seen to encourage violence. But to ignore this issue fails to address the inconsistencies between the offences of assault occasioning bodily harm and unlawful wounding. These inconsistencies not only affect Aboriginal people but all Western Australians.

## Legislative change

There are three possible options for legislative change. The first is to amend the *Criminal Code* to introduce an element of consent into the offence of unlawful wounding. This option would remove the anomaly that currently exists in relation to the relevance of consent to unlawful wounding and assault occasioning bodily harm.

The second option is to repeal the offence of unlawful wounding. As discussed earlier, it has been suggested that unlawful wounding is conceptually difficult. The 1983 Murray report recommended that the offence of unlawful wounding should be abolished.<sup>133</sup> Murray was of the view that it was preferable to rely upon the distinction between bodily harm and grievous bodily harm.<sup>134</sup>

The third approach would be to reconsider the current classification of harms resulting from violence. The manner in which the draft Model Criminal Code distinguishes between harm and serious harm is instructive. Harm includes both physical and mental harm. Serious harm is defined as any harm that 'endangers, or is likely to endanger a person's life' or that 'is likely to be significant and longstanding'.<sup>135</sup> A person will not be guilty of the offence of intentionally

128. Davis M & McGlade H, 'International Human Rights Law and the Recognition of Aboriginal Customary Law' LRCWA, Project 94, Background Paper No 10 (March 2005) 27.

129. *Ibid* 63.

130. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [503].

131. Northern Territory Law Reform Committee (NTLRC), *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 27.

132. Queensland Commission of Inquiry, *Report into Possible Illegal Activities and Associated Police Misconduct*, (1989), as quoted in Morgan N, 'Legislation Comment: Law Reform (Decriminalisation of Sodomy) Act 1989 (WA)' (1990) 14 *Criminal Law Journal* 180, 181.

133. Murray M, *The Criminal Code: A General Review* (1983) 202.

134. *Ibid*.

135. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code* (May 1999) ch 5, [5.1.2].

causing harm if the victim consents. However, for conduct that causes serious harm or conduct that gives rise to a danger of death or serious harm the person will not be criminally responsible if it is conducted for the purpose of benefiting the other person or in pursuance of a socially acceptable function or activity.<sup>136</sup>

The potential benefits of reforming the law in this area include:

- Properly sanctioned and consensual spearing that is not likely to cause permanent injury to health or death could take place without the person who inflicted the punishment being liable to a criminal sanction.
- It may provide more guidance to assist police officers in their approach to traditional punishment. As discussed separately, police officers are faced with a dilemma of whether to facilitate traditional punishment because it potentially breaches the criminal law. If police officers are satisfied that the person to be punished genuinely consents then they can, with the agreement of the community, be present during the punishment.
- It may provide more flexibility for courts when dealing with bail applications and in sentencing decisions. Evidence might be led to satisfy the court that an accused genuinely consents to a spearing and that the proposed punishment falls within the level of harm that can legally be consented to. A court would not then be precluded from releasing a person from custody for the purpose of traditional punishment.
- It would remove the unnecessary distinction between assault occasioning bodily harm and unlawful wounding. This has other implications, for example for people involved in ear or body piercing or tattooing.

The Commission has identified what it considers to be the relevant issues in this area. These are not easily resolved. In the absence of specific submissions about the possible options for reform from Aboriginal people and from the wider community, the Commission has been unable to reach a conclusion. Therefore, the Commission strongly encourages submissions in relation to this issue.

### Invitation to Submit 5

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

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

## Ignorance of the Law

### Basis of the Rule

The law in Western Australia reflects the common law position that ignorance of the law does not generally provide an excuse for criminal behaviour.<sup>137</sup> The criminal law incorporates concepts such as blameworthiness and fault. Therefore, the rule in respect of ignorance of the law has the potential to cause injustice when an accused person has no knowledge that what he or she did was wrong. As Brennan J observed in *Walden v Hensler*,<sup>138</sup> this rule does not generally operate unfairly in relation to laws that prohibit wrong or immoral conduct. However, it may do so in circumstances where the law prohibits conduct that an ordinary person, without any special knowledge of the law, may engage in believing that they are entitled to do so. One justification for the rule that ignorance of the law is no excuse for criminal behaviour is to educate the community about conduct that is prohibited by the criminal law. If ignorance of the law excused criminal conduct there would be little incentive for members of the community to ensure that they are aware of their responsibilities under Australian law.<sup>139</sup> It has also been suggested that another justification for the rule is expediency: if ignorance of the law could be relied upon to excuse a person from criminal responsibility

136. *Ibid* [5.1.17].

137. *Criminal Code* (WA) s 22.

138. (1987) 75 ALR 173.

139. Amirthalingam K, 'Mistake of Law: A Criminal offence or a reasonable defence?' (1994) 18 *Criminal Law Journal* 271, 272.

then there would be no limit to the cases where such a defence would be raised.<sup>140</sup>

Although Western Australia is a code state, not all criminal offences are contained in the *Criminal Code*, or even in legislation that deals with a particular subject matter.<sup>141</sup> In addition, regulatory offences are often contained in complex legislation and may only be known to those people who are directly involved in the activities or industry that is subject to the regulation. The fact that ignorance of the law does not provide an excuse has the potential to operate unjustly in circumstances where a person honestly believed that their conduct was lawful and the nature of the legal prohibition was not one that the person should be expected, in all the circumstances, to know.<sup>142</sup>

## The Potential Injustice for Aboriginal People

The difficulty of knowing all matters that are proscribed by the criminal law is more pronounced for people who have cultural or language barriers.<sup>143</sup> People who do not fully understand English would be unlikely to understand any written publication of the law. Some people may come from a cultural background where certain conduct (that is prohibited in Australia) is considered acceptable or even required in their own community or country of origin.<sup>144</sup> For those Aboriginal people whose lives are primarily controlled by Aboriginal customary law the potential for injustice equally exists. Aboriginal people may engage in conduct that is acceptable or required by Aboriginal customary law without knowing that this conduct is unlawful under Australian law. For example, Aboriginal people may take rare flora for the purposes of customary harvesting without realising that they may be committing an offence.<sup>145</sup> For traditional Aboriginal people, the need to consider and understand Australian written law may

not be readily apparent given that Aboriginal customary law is based on oral tradition. The Commission's consultations indicated that many Aboriginal Western Australians were concerned about their lack of knowledge of Australian law and sought improved education about Australian law and the legal system.<sup>146</sup>

## Options for Reform

### A defence based on ignorance of the law

One option, suggested by Philip Vincent, to overcome the potential injustice for Aboriginal people would be to provide that ignorance of the law is an excuse for offences committed by Aboriginal people.<sup>147</sup> In other words, if an Aboriginal person was unaware of the relevant Australian law he or she would not be criminally responsible for an offence if there was an honest belief that the conduct was authorised by Aboriginal customary law. To allow criminal behaviour to be excused because of an honest (but not necessarily correct) belief that the behaviour was permitted under Aboriginal customary law may contribute to an increase in false claims being made that certain behaviour is legitimate under Aboriginal customary law.<sup>148</sup> For example, false claims have been made in the context of family violence: despite the belief of some Aboriginal men to the contrary, there is no legitimate basis for family violence under Aboriginal customary law.<sup>149</sup>

A strong argument against a separate defence of ignorance of the law for Aboriginal people is that it would not provide adequate protection for other Aboriginal people. For example, recently in the Northern Territory, a traditional Aboriginal man was sentenced for having sexual relations with a child. The sentencing judge took into account as mitigation the fact that the defendant did not know that he was committing an offence and that he believed that his actions were

140. *Iannella v French* (1968) 119 CLR 84 (Taylor J). It has also been stated that the common law rule that ignorance of the law is not a defence is 'one of convenience not one of justice nor one of principle'. See Bronitt S & Amirthalingam K, 'Cultural Blindness: Criminal law in multicultural Australia' (1996) *Alternative Law Journal*: see <<http://www.law.anu.edu.au/criminet/tart2.html>> 5.

141. For example, *Misuse of Drugs Act 1981* (WA) and *Road Traffic Act 1974* (WA).

142. The Commission discusses the recent case *Ostrowski v Palmer* (2004) 206 ALR 422; [2004] HCA 30, in Part VIII below pp 375–76. The High Court held that although a fisherman had been given erroneous advice by a fisheries office about the areas where fishing was prohibited did not provide a defence because the fisherman had been acting in ignorance of the law.

143. ALRC, *Multiculturalism and the Law*, Final Report No 57 (1992) 179.

144. *Ibid* 169.

145. This issue is explored in detail under 'Honest Claim of Right', below pp 175–78. It is also discussed in detail in the broader context of Aboriginal customary harvesting rights in Part VIII 'Customary Hunting, Fishing and Gathering Rights', below pp 365–82.

146. LRCWA, *Thematic Summaries of Consultations – Cosmo Newbery*, 6 March 2003, 20; *Kalgoorlie*, 25 March 2003, 25; *Pilbara*, 6–11 April 2003, 11; *Wiluna*, 27 August 2003, 22; *Albany*, 18 November 2003, 14; *Wuggubun* 9–10 September 2003, 35.

147. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 15–16. Vincent suggestion was that offences of murder, grievous bodily harm and sexual assault should be excluded from the operation of this proposed defence.

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

149. See Part VII 'Family Violence, Child Abuse and Customary Law', below pp 357–62.

justified under customary law.<sup>150</sup> If ignorance of the law was an excuse this defendant would probably have been acquitted. For Aboriginal people to be protected by Australian law it is necessary that they also be bound by it.

In order to overcome the potential difficulty in ascertaining the law for some members of the community, the ALRC considered the option of a limited defence where ignorance of the law was the result of 'inadequate provision of information in an accessible form'.<sup>151</sup> In some jurisdictions it is a defence that the relevant statutory provision has not been adequately published.<sup>152</sup> In Western Australia statutory provisions and subordinate legislation are required to be published in the government gazette.<sup>153</sup> Publication or notification in a government gazette may not be an effective way of ensuring public knowledge of the law.<sup>154</sup> The gazette can be accessed via the internet or by subscription or individual purchase. Without appropriate resources or some knowledge of the existence of a particular law, publication in the gazette is unlikely to adequately inform Aboriginal people of relevant changes to Australian law.

The ALRC did not support the establishment of a defence based on the inaccessibility of information because it considered that the responsibility of all members of the community to know what is permitted under Australian law should remain. Bearing in mind that ignorance of the law is a matter that can be taken into account in mitigation of sentence; the ALRC considered that the appropriate way to alleviate any injustice was to introduce strategies to improve communication of the law.<sup>155</sup>

## Justifiable ignorance of the law to be taken into account in sentencing

Although the Commission is of the opinion that ignorance of the law cannot be asserted as defence, it is a factor that should be taken into account during sentencing. In *Walden v Hensler*<sup>156</sup> an Aboriginal man was convicted of an offence that involved taking protected fauna in circumstances where he believed he was entitled under both Aboriginal customary law and the law in Queensland. The majority of the High Court accepted the appellant's 'moral innocence' and took this into account by discharging him without conviction and without imposing any penalty.<sup>157</sup> In 1992 the ALRC recommended that ignorance of the law should be included, in the *Crimes Act 1914* (Cth), as a mitigating factor for the purposes of sentencing.<sup>158</sup> The *Sentencing Act 1995* (WA) provides that a court is to take into account in mitigation of sentence anything that decreases the offender's culpability or the extent to which he or she should be punished.<sup>159</sup> Although ignorance of the law is not expressly included in the *Sentencing Act 1995* (WA) as a mitigating factor, it clearly falls within the definition and can legitimately be taken into account by a sentencing court.

## Improve communication about the law

In order to overcome any injustice caused by the rule that ignorance of law is not an excuse for an offence, the ALRC recommended that government agencies improve the communication of legislative provisions that restrict behaviour to those groups of people who would most likely be affected by them.<sup>160</sup> The Commission

150. *R v CJ* (Unreported, Supreme Court of Northern Territory, SCC 20418849, Martin CJ, 11 August 2005) 6.

151. ALRC, *Multiculturalism and the Law*, Final Report No 57 (1992) 179.

152. For example, *Criminal Code* (Qld) s22(3) provides a defence where the person was not aware of the relevant statutory instrument and the statutory instrument had not been published or otherwise made reasonably available or known to the public or to those people who are most likely to be affected by it. Note that the effect of s 22(4) is that statutes are required to be published in the Gazette and subordinate legislation (eg, regulations, orders and notices) are required to be either published in full or notice given of their existence in the Gazette. See also *Criminal Code 1983* (NT) s 30. A similar defence is contained in the model Criminal Code in relation to subordinate legislation only: see Criminal Law Officers Committee of the Standing Committee of Attorney Generals, *Model Criminal Code: Chapters 1 and 3, General Principles of Criminal Responsibility* (December 1992) s 9.4.

153. *Interpretation Act 1984* (WA) s 41.

154. Criminal Law Officers Committee of the Standing Committee of Attorney Generals, *Model Criminal Code: Chapter 1 and 3, General Principles of Criminal Responsibility* (December 1992) 57.

155. ALRC, *Multiculturalism and the Law*, Final Report No 57 (1992) 179.

156. (1987) 75 ALR 173.

157. *Ibid* 175 (Brennan J; Deane & Dawson JJ concurring). The magistrate had originally imposed a fine and ordered the defendant to pay costs, which together amounted to \$919.50. Brennan J specifically noted that the appellant was not engaged in an activity or business in which he would be expected to make specific enquires.

158. The ALRC recommended that the fact that the accused did not know that he or she had committed an offence and he or she could not reasonably be expected to know the relevant criminal law should be a mitigating factor: see ALRC, *Multiculturalism and the Law*, Final Report No 57 (1992) 180. Although this recommendation has not been acted upon by the Commonwealth Government, s 16A of the *Crimes Act 1914* (Cth) does contain a provision that when sentencing a court is to take into account the cultural background of the offender. It could be argued that if an offender was unaware that he or she had committed an offence due to cultural or language barriers then this could be legitimately considered in sentencing under this provision.

159. *Sentencing Act 1995* (WA) ss 6 & 8.

160. ALRC, *Multiculturalism and the Law*, Final Report No 57 (1992) 179.

agrees and considers that the educative role of the criminal law would be undermined if people could escape criminal liability because they were not able to easily find out about the law. The Northern Territory case referred to above provides a useful example. As stated, if ignorance of the law was a defence then that particular accused may well have been excused because he did not know that it was an offence to have sexual relations with a 14 year old child.<sup>161</sup> If this was the result the criminal law would fail to educate other Aboriginal men (who may consider that such behaviour is acceptable under customary law) that they may be committing an offence under Australian law.

In this Discussion Paper the Commission has considered specific areas where educative measures can be taken to assist Aboriginal people in understanding their rights and responsibilities under Australian law. For example, the Commission has made a proposal in relation to more effective communication of Australian laws that regulate hunting and foraging (of flora and fauna) and the law in relation to the discipline of children.<sup>162</sup> For some Aboriginal people (as well as the members of the wider community) the publication of changes to the law in the Government Gazette may not be effective. Therefore, the Commission suggests that there should be more effective and culturally appropriate information about criminal laws that may significantly affect Aboriginal people.

#### Proposal 20

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

## Honest Claim of Right and Native Title Defence

### Honest Claim of Right

#### The requirements of the defence

There is a limitation to the general rule that ignorance of the law does not provide an excuse for a criminal offence. Section 22 of the *Criminal Code (WA)* provides that:

[A] person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by him with respect to any property in the exercise of an honest claim of right and without intention to defraud.<sup>163</sup>

In order to rely on the defence of honest claim of right it is necessary that:

- the offence is one relating to property;
- the accused had an honest belief that he or she was entitled to do the act or make the omission; and
- the belief must be of such a nature that if true the accused would have been entitled to do the act or make the omission with respect to any property and, therefore, would be exonerated from criminal responsibility.

#### *The offence must relate to property*

In order to rely on the defence of honest claim of right the offence must be one that relates to property.<sup>164</sup> Originally, the defence had been judicially interpreted as applying only to offences under the heading 'Offences Relating to Property and Contracts' in Part VI of the *Criminal Code (WA)*.<sup>165</sup> However, this interpretation was challenged before the High Court in *Walden v Hensler*<sup>166</sup> which considered the equivalent defence in s 22 of the Queensland *Criminal Code*. In *Walden* the appellant, an Aboriginal man, had taken turkeys from Crown land, honestly believing that he was entitled to do so pursuant to the customs of Aboriginal people and believing that this right had not

161. The accused in this case believed that he was entitled to do what he did because it was acceptable under the Aboriginal customary law of his community. It was also accepted by the court that he was not aware that it was an offence under Australian law. See *R v CJ* (Unreported, Supreme Court of Northern Territory, SCC 20418849, Martin CJ, 11 August 2005) 6.

162. See discussion under Part VIII 'The Need for Clarity in the Legislative Recognition of Customary Harvesting', below pp 375–76 and discussion under 'Discipline of Children', below pp 187–89.

163. *Criminal Code (WA)* s 22.

164. In *DPP Reference No 1 of 1999* [2000] NTCA 6 the Court of Appeal of Northern Territory Supreme Court held that the similar defence under the *Criminal Code (NT)* could not apply to an offence of assault as it was not an offence relating to property.

165. See *Pearce v Paskov* [1968] WAR 66 (Virtue J).

166. (1987) 75 ALR 173.

been removed by Australian law. He was charged with an offence of keeping protected fauna in contravention of s 54 of the *Fauna Conservation Act 1974–1979* (Qld). Although the defence ultimately failed, three judges of the High Court held that the defence of honest claim of right has a broad application and can apply to offences other than those described as offences relating to property and contracts in the *Criminal Code*.<sup>167</sup>

This finding was confirmed in *Molina v Zaknich*<sup>168</sup> where the Full Court of the Supreme Court of Western Australia agreed that offences relating to property for the purposes of the defence of honest claim of right are not restricted to offences classified as property offences in Part VI of the *Criminal Code*.<sup>169</sup> Therefore, the defence of honest claim of right can be available, if all of the other requirements are met, for any offence which relates to property.

### *There must be an honest belief*

The accused must have had an *honest* belief or claim that they were entitled to do the act or make the omission giving rise to the offence. In other words, if the accused knew that their actions constituted a breach of Australian law then the defence would fail because the belief could not be said to be honest. In *Margarula v Rose*<sup>170</sup> the accused was charged with trespassing. She believed that she was entitled under Aboriginal customary law to protect specific land but the defence of honest claim of right failed because the accused knew that she would be arrested for her conduct.<sup>171</sup>

### *The belief must be of such a nature that if true it would exonerate the accused*

Ignorance of the criminal law is not an excuse for a criminal charge.<sup>172</sup> In order to rely on the defence of honest claim of right the belief must be in relation to a

legal right under civil law and must be of such a nature that if the belief were true, it would exonerate the accused from any criminal charge. For example, a person taking another person's property honestly believing it to be their own would be acting under an honest claim of right.<sup>173</sup> The belief is in relation to the person's entitlement under civil law (in this example that they in fact owned the item) which if true would exonerate the person from a charge of stealing. In *Basso-Brusa v City of Wanneroo* Pullin J stated that:

Plainly, the fact that a person can honestly say that he thought he was entitled to do the relevant act because he was unaware that it was proscribed by the criminal law, does not provide him with a defence of honest claim of right under s 22 of the *Criminal Code*.<sup>174</sup>

In *Walden v Hensler* Deane and Dawson JJ held that the appellant's belief that he was entitled to take the turkeys amounted to no more than ignorance of the criminal law – he was not aware that his actions were prohibited by the legislation. Their Honours were of the view that the offence created by s 54 of the *Fauna Conservation Act 1974–1979* (Qld) prohibited the taking or keeping of fauna regardless of any ownership or other rights to the property. Therefore, even if Australian law recognised his Aboriginal customary law right to take the turkeys, the appellant would still be guilty of the offence.<sup>175</sup>

### *Aboriginal customary law and the defence of honest claim of right*

Because the defence of honest claim of right is based upon a mistake, a claim of right does not have to be one that is recognised by Australian law. A belief by an accused person that he or she is entitled to do something in relation to property pursuant to Aboriginal customary law is valid and sufficient but only if there is also a belief that this right is recognised by Australian

167. Ibid 187 (Deane J), 201–02 (Toohey J), 208 (Gaudron J). The majority of the High Court (Brennan, Deane and Dawson JJ) held, for different reasons that the defence of honest claim of right did not apply. Brennan J held that the defence of honest claim of right only applies to offences in which the 'causing of another to part with property or the infringing of another's rights over or in respect of property is an element' (at 183). Deane and Dawson JJ based their reasons on the fact that there must be a belief of a right which if true would have exonerated the accused.

168. [2001] WASCA 337.

169. Ibid [97] (McKechnie J; Malcolm CJ and Templeman J concurring). In this case the court held that s 22 was applicable to a charge of being on premises without lawful authority pursuant to s 82B(1) of the *Police Act 1892* (WA). Also in *Basso-Brusa v City of Wanneroo* [2003] WASCA 103, [16] it was held that s 22 may apply to an offence under the *Town Planning and Development Act 1928* (WA).

170. [1999] NTSC 22.

171. For a detailed discussion of this case, see Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 67. The decision was confirmed on appeal to Northern Territory Court of Appeal in *Margarula v Rose* [2000] NTCA 12, [39].

172. Levy R, 'Native Title and the Criminal Law: the Defence of Galarrwuy Yunupingu' (1998) 4(13) *Indigenous Law Bulletin* 10. The general proposition that mere ignorance of the criminal law is not sufficient to found a honest claim of right under s 22 was referred to in *Walden v Hensler* (1987) 75 ALR 173, 187–88 (Deane J), 196 (Dawson J), 204 (Toohey J); 206 (Gaudron J).

173. *Basso-Brusa v City of Wanneroo* [2003] WASCA 103 [18] (per Pullin J).

174. Ibid [20].

175. *Walden v Hensler* (1987) 75 ALR 173, 187–88 (Deane J), 196 (Dawson J).

law.<sup>176</sup> The defence was successfully relied upon by Aboriginal defendants in *R v Craigie and Pattern*.<sup>177</sup> The defendants were charged with breaking and entering into an art gallery and stealing Aboriginal paintings. They were acquitted because the court found that they held an honest belief that the law of New South Wales recognised their right under Aboriginal customary law to claim possession of the paintings.<sup>178</sup>

In *R v Waine*,<sup>179</sup> an Aboriginal woman was successful in an appeal against her conviction of six charges of wilful damage. The appellant argued that the trial judge had been wrong in refusing to allow the defence of honest claim of right to be left to the jury. It was alleged that she had spray-painted the words 'Aboriginal University of Australia' on buildings that were owned by the Queensland Department of Environment. In her defence, the appellant relied on her honest belief that she had been given permission by the traditional Aboriginal land owner to paint the buildings. The appellant believed that this person's native title rights had been recognised by Australian law. The trial judge had refused to allow the jury to consider the defence because the defendant was not claiming a right that was personal to her. It was held that the defence of honest claim of right was available to the appellant because the defence is not limited to a claim of ownership or possession: it can be an honest belief of an entitlement to do an act in respect of property. Thus the appellant's belief that she had the consent of the owner was considered sufficient to give rise to an honest claim.<sup>180</sup>

### *Availability of the defence of honest claim of right to offences relating to customary harvesting*

For the purpose of considering whether the defence of honest claim of right could be available for an Aboriginal person exercising customary harvesting rights it is useful to classify offences in this area into two categories. The first category is offences which prohibit an activity without any exemption for Aboriginal people.

For example, the offence that was relevant in *Walden v Hensler*, under s 54 of the *Fauna Conservation Act 1974–1979* (Qld), created an offence of taking protected fauna without a licence. There was no exemption for Aboriginal people. The accused Aboriginal person in that case believed that he was entitled to take the fauna under Aboriginal customary law and that the law of Queensland recognised that right. Two of the judges held that honest claim of right did not apply because even if a customary law right to take fauna had been recognised by the law of Queensland the accused would still be guilty of the offence. This was because all people were prohibited from taking protected fauna without a licence regardless of whether they owned the fauna or had some other entitlement to it.<sup>181</sup>

The second category relates to offences that are contained in legislation which also includes an exemption for Aboriginal people. For example, under s 16 of the *Wildlife Conservation Act 1950* (WA) it is an offence to take protected fauna (from any land) without a licence. Aboriginal people are exempted from the operation of this provision because s 23 of the *Wildlife Conservation Act* permits Aboriginal people to engage in hunting and foraging (of flora and fauna) on Crown land or private land (other than a nature reserve or wildlife sanctuary) for subsistence purposes. If the land is private, the consent of the owner or occupier is required. As discussed in more detail in Part VIII below, problems arise because this exemption is subject to restriction at any time by the Governor. Any such restriction is declared in the Government Gazette.<sup>182</sup> The availability of the defence of honest claim of right is significant given the likelihood that some Aboriginal people may be aware that they are exempted from the prohibition of taking protected fauna without a licence, but may not be aware of a subsequent restriction being imposed.

The possibility of relying on an honest claim of right in this second category can be illustrated by the following hypothetical example. Assume that, for conservation

176. Ibid 179 (Brennan J); 202 (Toohey J); 208 (Gaudron J).

177. (Unreported, District Court of New South Wales, 1980).

178. The right under Aboriginal customary law entitled them to take possession of the paintings in order to prevent them from being removed from the Aboriginal community to which they belonged: see ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [435]. The Commission notes that the defence was relied on unsuccessfully for an offence of trespass in *Margarula v Rose* [1999] NTSC 22. The defence failed because it was held that the defendant did not have an honest belief that her customary law right to protect the area of land that she had entered was recognised by the law of Northern Territory. The defendant knew that she would be arrested for placing herself on the top of a container at the Jabiluka mine site and therefore her belief was not genuine.

179. [2005] QCA 312.

180. Ibid [25] (Keane JA; McMurdo P and Wilson J concurring). Although the appeal was successful a new trial was ordered.

181. *Walden v Hensler* (1987) 75 ALR 173, 187–88 (Deane J); 196 (Dawson J). The Commission notes that the two dissenting judges Toohey and Gaudron JJ held that the defence of honest claim of right was available therefore there is not a majority view in relation to the availability of the defence of honest claim of right to these types of offences once it accepted that the offence is an offence relating to property.

182. See discussion under Part VIII 'The Need for Clarity in the Legislative Recognition of Customary Harvesting Rights', below pp 375–76.

purposes, the Governor has restricted the right of Aboriginal people to hunt Western Grey Kangaroo under s 23 of the *Wildlife Conservation Act 1950 (WA)*. Prior to this restriction, an Aboriginal person who had taken Western Grey Kangaroo from Crown land for subsistence purposes would have been exempted from the offence of taking kangaroo without a licence under s 16 of the *Wildlife Conservation Act*. If an Aboriginal person continued to take kangaroo unaware that their right has been restricted by the Governor they could be charged with an offence. With reference to these facts and the requirements of the defence of honest claim of right it could be argued that:

- the offence under s 16 of the *Wildlife Conservation Act* is an offence relating to property;<sup>183</sup>
- the Aboriginal person had an honest belief that they were entitled to take kangaroo; and
- this belief would be of such a nature that if true it would exonerate the accused. This is because the belief relates to their civil right to take kangaroo as a consequence of the exemption.<sup>184</sup> Because of the restriction to that right imposed by the Governor the Aboriginal person is now mistaken about the extent of this right. If they had not been mistaken then they would have a valid defence to the charge.<sup>185</sup> As stated by Deane J in *Walden v Hensler*, a defence of honest claim of right will be available if what 'was claimed or believed would, if it were a fact, have negated an element of the actual offence or provided a good defence to it'.<sup>186</sup>

The Commission is unaware of any case in Western Australia where honest claim of right has been successfully argued for an offence that relates to customary harvesting.<sup>187</sup> The availability of the defence appears to depend upon the precise nature of the offence and is untested in Western Australia. The

Commission considers that it is arguable that an Aboriginal person who has been engaging in an activity that was permitted under an exemption without knowing that this exemption had since been restricted or removed, could have a defence to a charge. However, it is noted that successful reliance on this defence could undermine conservation objectives by excusing Aboriginal people from engaging in conduct that has been prohibited in order to protect specific species of fauna (or flora). In Part VIII below, the Commission discusses the priorities of recognition and concludes that conservation must take priority over all other interests in land, including the interests of Indigenous peoples.<sup>188</sup> To clarify the legislative rights accorded to Aboriginal people in relation to customary harvesting, the Commission has therefore made proposals for more effective communication of the relevant legislative provisions and restrictions so that Aboriginal people are aware of their responsibilities under the law. This proposal is discussed in detail in Part VIII.<sup>189</sup>

## Native Title Defence

Although native title is expressly excluded from this reference, its relevance as a defence to a criminal charge is important. While the defence of honest claim of right is based upon a mistaken belief that Australian law recognises customary harvesting rights, a native title defence claims that Australian law does recognise those rights. Following the recognition of native title at common law in the High Court's decision in *Mabo v Queensland [No2]*<sup>190</sup> there have been a number of cases where a defendant, who has been charged with a criminal offence relating to taking or otherwise dealing with flora, fauna or fish contrary to Australian law, has relied on a defence of native title.<sup>191</sup> While it would appear that the common law recognition of native title would have made these types of offences easier to

183. Note that s 1 of the *Criminal Code (WA)* defines property to include anything capable of ownership. Section 22 of the *Wildlife Conservation Act 1950 (WA)* states that fauna is, until lawfully taken, the property of the Crown.

184. It has been held that the fact that a right arises under statute law rather than under common law is immaterial. See *Molina v Zaknich* [2001] WASCA 337, [103] (McKechnie J; Malcolm CJ and Templeman J concurring).

185. Pursuant to s 27C of the *Wildlife Conservation Act 1950 (WA)* if an Aboriginal accused person pleads the exemption under s 23 in answer to a charge of taking protected fauna under s 16 then the accused bears the onus of proving the exemption. Therefore if the accused claimed that he or she held an honest (but mistaken) belief that he or she was exempted from the prohibition the accused would probably first have to prove that the conduct fell within the terms of the exemption.

186. *Walden v Hensler* (1987) 75 ALR 173, 188 (Deane J). Similarly, it was stated in *R v Waine* [2005] QCA 312 at [30] (Keane JA; McMurdo P and Wilson J concurring) that in order to establish an honest claim of right it is necessary to show that the right claimed if true would 'preclude what was done from constituting a breach of the relevant criminal law'.

187. Although the Commission acknowledges that honest claim of right may have been argued at a lower court level for which transcripts are not publicly available.

188. See discussion under Part VIII 'The Need for Clarity in the Legislative Recognition of Customary Harvesting Rights', below pp 375–76.

189. See below Proposal 73.

190. (1992) 175 CLR 1, 94 where Deane J and Gaudron JJ stated that native title rights could be 'asserted by way of defence in criminal and civil proceedings'.

191. See *Williams V, The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 72–77 for a discussion of these cases.

defend, the strict evidential requirements of native title have proved difficult to meet in practice.<sup>192</sup>

Further, proof of native title does not necessarily mean that a native title holder is immune from all legislative provisions that regulate fishing, and the taking of flora and fauna.<sup>193</sup> The answer is found by an examination of the complex legislative provisions in this area, in particular the effect of s 211 of the *Native Title Act 1993* (Cth). If state legislation allows people to engage in conduct that would otherwise be contrary to the law (by the issuing of a licence, permit or other instrument), under s 211 native title holders will not be guilty of an offence on the basis that they did not have such a licence or permit. Therefore s 211 may override state legislation which would otherwise have the effect of regulating hunting and foraging activities for all people (including native title holders). For example, in *Wilkes v Johnsen*<sup>194</sup> the appellant had been charged with possessing protected fish (undersized marron) contrary to s 46(b) of the *Fish Resources Management Act 1994* (WA). The appellant claimed that he had a native title right to fish undersized marron. The majority of the Supreme Court upheld the appeal against the conviction finding that s 211 applied and therefore a native title holder was not required to comply with s 46(b) of the *Fish Resources Management Act*.<sup>195</sup> On the other hand s 211 will not operate to override state legislation that prohibits a specific activity for all persons.

As a consequence of the difficulty in relying on a native title as a defence, the Commission considers that the appropriate way to provide greater protection from criminal prosecution for Aboriginal people is for specific legislative recognition of customary harvesting rights. Due to the Commission's view that conservation must be the first priority and therefore any legislative recognition cannot be absolute, there will continue to be circumstances where Aboriginal people are exercising

their customary harvesting rights under a mistaken belief that they are entitled to do so. As discussed there are limited circumstances where a defence of honest claim of right may be available. The Commission's proposal in Part VIII for more effective communication to Aboriginal people of the complex legislative restrictions in this area should alleviate the potential for injustice.<sup>196</sup>

## Compulsion

### The Different Categories of the Defence of Compulsion

When an accused is compelled to engage in prohibited conduct, Australian law recognises the lack of moral blameworthiness through the defence of compulsion. The defence reflects that the behaviour of the accused is not truly voluntary and therefore he or she should not be held criminally responsible. Section 31 of the *Criminal Code* (WA) includes different categories of the defence of compulsion; the most relevant of which for the purposes of this reference is the defence of duress (s 31(4)), which is discussed in detail below.

One of the defences of compulsion is that the offence was committed in execution of the law (Australian law).<sup>197</sup> This defence operates to excuse people, who by virtue of their official position, are required to engage in conduct that would otherwise break the law.<sup>198</sup> On this basis, Phillip Vincent suggested that Aboriginal people who are required under Aboriginal customary law to order and carry out traditional punishment should be permitted to do so.<sup>199</sup> This approach does not allow consideration of important issues, such as the age or consent of the person who receives the punishment. Accordingly, the Commission believes that a defence that applies irrespective of the particular circumstances does not provide adequate protection to those people who may receive traditional punishment.<sup>200</sup>

192. *Mason v Tritton* (1994) 34 NSWLR 572, 584 (Kirby P). See Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 16. See also Part VIII 'Proof of traditional harvesting rights at common law,' below pp 371–72.

193. Jeffery P, 'Escaping the Net: Native Title as a Defence to Breaching of Fishing Laws' (1997) 20 *University of NSW Law Journal* 352. In this article Peter Jeffery argues that general fisheries management laws should be construed as applying to native title holders. As stated by Kirby P in *Mason v Tritton* (1994) 34 NSWLR 572, 593 the decision in *Mabo (No 2)* did not imply that native title holders 'should be able to remove themselves from the ordinary regulatory mechanisms of Australian society'.

194. [1999] WASCA 74.

195. Wheeler and Kennedy JJ allowed the appeal and ordered that the matter be remitted back to the magistrate to be dealt with again. Originally the magistrate had not allowed any evidence of native title to be presented to the court and it is not known whether the appellant was able to meet the strict evidential burden when the case was reheard. Similarly, in *Yanner v Eaton* [1999] HCA 53 the majority of the High Court held that s 211 of the *Native Title Act 1993* (Cth) applied so that the appellant was not guilty of an offence of taking prohibited fauna without a licence.

196. See discussion under Part VIII 'The Need for Clarity in the Legislative Recognition of Customary Harvesting Rights,' below pp 375–76.

197. *Criminal Code* (WA) s 31 (1).

198. In *Mackinlay v Wiley* [1971] WAR 3, 10 (Virtue S.P.J) it was said that s 31(1) operated to excuse people such as prison officers and bailiffs who are required to engage in conduct that may otherwise constitute an offence. The difference between conduct that is required and conduct that is voluntary assumed was considered in *R v Slade* [1995] 1 Qd R 390. In this case a police officer, who had supplied cannabis to an informant in order to penetrate a criminal gang, was unable to rely on the defence because he had not been required to break the law as part of his job as a police officer.

199. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 20. Philip Vincent qualifies this recommendation by excluding certain serious offences from its application.

200. See discussion under 'Defences Based on Aboriginal Customary Law: General Defence,' above pp 158–60.

## Duress

### The requirements of the defence of duress

The defence of duress relieves a person from criminal responsibility where the offence was compelled by threats. The specific requirements of the defence differ substantially between jurisdictions.<sup>201</sup> The rationale for the defence is to excuse criminal liability where a person has been faced with a choice between two evils: a choice of either committing the offence or suffering the harm that has been threatened.<sup>202</sup>

In Western Australia the defence is contained in s 31(4) of the *Criminal Code*.<sup>203</sup> To satisfy the requirements of the defence:

- the accused must have done the act or made the omission in order to save himself or herself from immediate death or grievous bodily harm;
- death or grievous bodily harm must have been threatened by someone actually present and in a position to execute the threats; and
- the accused must have believed that he or she was otherwise unable to escape death or grievous bodily harm.

The defence in Western Australia is more restrictive than in many other Australian jurisdictions.<sup>204</sup> The requirement that the threat must be of *immediate* death or grievous bodily harm has been interpreted to mean a 'very short time after doing the relevant act'.<sup>205</sup> In common law jurisdictions it has been held that the threat must be present, continuing and imminent,<sup>206</sup> although not necessarily immediate.<sup>207</sup> Similarly, there is no requirement for the threat to be of immediate harm in Queensland,<sup>208</sup> the Northern Territory<sup>209</sup> or the Australian Capital Territory,<sup>210</sup> or under Commonwealth legislation.<sup>211</sup>



In most other Australian jurisdictions there must be a threat and the conduct giving rise to the offence must be a reasonable response to that threat.<sup>212</sup> The nature of the threat is also more restrictive in Western Australia as there must be a threat to cause death or grievous bodily harm. The incorporation of an objective test of reasonableness (which is not contained in the Western Australian legislation) balances the broader scope of the defences in other jurisdictions. In Western Australia the threat must be directed to the accused and no other, whereas in most other jurisdictions a threat to harm another person may suffice.<sup>213</sup>

### Aboriginal customary law and the defence of duress

The principal behaviour under Aboriginal customary law that may involve a breach of Australian law is the infliction of traditional physical punishments. When relying on a defence of duress it is necessary to consider the reason why Aboriginal people may impose traditional punishment on others. In some circumstances it may be because they fear being subject to traditional punishment themselves.<sup>214</sup> The Commission's

201. For a discussion of the different requirements, see ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [428].

202. *R v Howe* [1987] AC 417, 433 (Hailsham LJ).

203. The defence is not available for wilful murder, murder, grievous bodily harm or an offence that includes an intention to do grievous bodily harm. It is also not available when the accused has made himself or herself liable to such threats because of an unlawful association or conspiracy.

204. The defence in Tasmania is similar to Western Australia as it requires a threat of immediate death or grievous bodily harm: see *Criminal Code* (Tas) s 20.

205. *R v Pickard* [1959] QdR 457, 476 (Stanley J; Townley and Stable JJ concurring) as cited in *P (A Child) v The Queen* (Unreported, Supreme Court of Western Australia; Library No 950469S, No 222/1994, Kennedy J, 7 September 1995).

206. *R v Hurley* [1967] VR 526, 543 (Smith J).

207. A threat to cause harm at some future time was alluded to in *R v Abusafiah* (1991) 24 NSWLR 531, 538 (Hunt J). See also Leader-Elliot I, 'Warren, Coombes and Tucker' (1997) 21 *Criminal Law Journal* 359, 360 where it was stated that in South Australia there does not have to be a threat of immediate harm.

208. *Criminal Code* (Qld) s 31(d) which provides that there must be a threat by some person in a position to carry out the threat.

209. *Criminal Code* (NT) s 40 which requires that the accused believe that the person making the threat was in a position to execute the threat.

210. *Criminal Code 2002* (ACT) s 40 which provides that there must be a threat that will be carried out unless the offence is committed; that there is no reasonable way to make the threat ineffective; and that the conduct is a reasonable response to the threat.

211. *Criminal Code 1995* (Cth) s 10.2. The defence under the Commonwealth legislation is the same as in Australian Capital Territory.

212. *Criminal Code* (NT) s 40 only refers to a threat; *Criminal Code* (Qld) s 31(d) refers to a threat to cause serious harm or detriment to a person or property; *Criminal Code 2002* (ACT) s 40 and *Criminal Code 1995* (Cth) s 10.2 refer only to a threat.

213. *Criminal Code* (Qld) s 31(d); *Criminal Code 2002* (ACT) s 40; *Criminal Code 1995* (Cth) s 10.2; *Criminal Code* (NT) s 40.

214. For example, the ALRC referred to *R v Isobel Phillips* (Unreported, Northern Territory Court of Summary Jurisdiction, 19 September 1983). In this case the accused was required by customary law to fight any woman who was involved with her husband. Failure to do so would result in death

consultations revealed mixed views as to whether compliance with Aboriginal customary law is the result of the exercise of choice, is achieved because of the fear of repercussions, or is a consequence of a belief in the validity of the law.<sup>215</sup>

Elizabeth Eggleston argued that the defence of duress might be appropriate in some cases if an Aboriginal person was forced through fear of traditional punishment to commit an offence against Australian law.<sup>216</sup> In this regard she distinguished conduct that was obligatory under Aboriginal customary law from conduct that is viewed as justifiable.<sup>217</sup> Based on this analysis, only obligatory conduct could potentially provide the source for duress. Anthropological accounts indicate that kinship obligations may require an Aboriginal person to punish another regardless of his or her personal feelings and therefore in some cases there is a duty to inflict traditional punishment.<sup>218</sup> The ALRC found that traditionally orientated Aboriginal people generally follow their customary laws 'not just because of fear of punishment, but because of belief in their legitimacy'.<sup>219</sup> However, the ALRC concluded that in some situations Aboriginal people follow customary law voluntarily while in other cases they may do so under duress.

In *R v Warren, Coombes and Tucker*<sup>220</sup> the defence of duress was argued by three Aboriginal men who had been charged with serious offences of violence. They claimed that they were required to inflict the injuries on the victim as traditional punishment for the victim's breach of customary law. The defendants stated that if they had not imposed the traditional punishment they would have received the same punishment themselves. The trial judge held that the defence of duress was not available; however, on appeal it was

accepted by the majority that an obligation under Aboriginal customary law could provide a basis for the defence of duress. In this case the court held that duress was not applicable because the explanation given by the defendants was not believed. The trial judge had found that the motivation for the assault was for a 'show of strength'.<sup>221</sup>

## Problems with the Defence of Duress in Western Australia for Aboriginal People

### *Requirement of a threat to harm the accused*

In Western Australia, for the defence of duress to be available a threat must have been made, by a person actually present, against the accused. The defence would have no application unless a particular person threatened the accused with traditional punishment amounting to death or grievous bodily harm if he or she failed to comply with Aboriginal customary law.<sup>222</sup> An Aboriginal person may commit an offence not because a specific individual made a threat but because of knowledge of the repercussions that would flow from a failure to comply with Aboriginal customary law.<sup>223</sup> The Commission does not consider that it is appropriate to remove the requirement that there must actually be a threat. The removal of this requirement would unjustifiably extend the scope of the defence. It would allow people to be excused from criminal conduct merely because they feared that they would be harmed, even if this fear was unfounded.

In the context of the present discussion it should be noted that s 31(4) of the *Criminal Code* (WA) is not available if the threat was to harm another person. Therefore, an Aboriginal person would not be able to rely on a threat to harm a member of his or her family.

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or serious injury and while she remained in her community she would be unable to avoid these consequences. The magistrate acquitted the accused on the basis of the defence of duress. See ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [430].

215. LRCWA, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, 23 where it was stated that traditional law is not a choice because it is a 'part of who you are'. Some communities expressed the view that there was no choice to comply because of repercussions that may follow to family members. This was in the context of the failure of a person who was liable for traditional punishment presenting himself or herself for that punishment: see LRCWA, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 41–42; *Pilbara*, 6–11 April 2003, 8–9; *Geraldton*, 26–27 May 2003, 13–14; *Wiluna*, 27 August 2003, 22. Other Aboriginal people said that there was a choice as to whether a person would be subject to Aboriginal customary law: see LRCWA, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 22–23; *Geraldton*, 26–27 May 2003, 14.
216. Eggleston E, *Fear, Favour or Affection: Aborigines and the criminal law in Victoria, South Australia and Western Australia* (Canberra: Australian National University Press, 1976) 297–98.
217. *Ibid* 279.
218. See ALRC, 'Traditional Aboriginal Society and Its Law' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 217; 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).
219. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [430]. See also Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 19.
220. (1996) 88 A Crim R 78.
221. *Ibid* 81 (Doyle CJ; Cox J concurring).
222. In *R v Warren, Coombes and Tucker* (1996) 88 A Crim R 78, 81–82 Doyle CJ was not convinced that at common law there had to be a requirement for a threat from an 'external source'; however, it was not necessary for him to decide the issue.
223. Leader-Elliott I, 'Warren, Coombes and Tucker' (1997) 21 *Criminal Law Journal* 359, 361.

## Requirement for immediate threat

The necessity for a threat of immediate death or grievous bodily harm would appear to preclude any reliance upon duress where the actions were taken in carrying out Aboriginal customary law. The Commission is unaware of any example where traditional punishment has followed immediately after an Aboriginal person has refused to comply with an obligation under customary law. Traditional punishment usually occurs some time after a violation of customary law and therefore it would be difficult for an Aboriginal person to argue that he or she feared immediate harm.<sup>224</sup>

## The Commission's view

The Commission considers that the reasons an Aboriginal person would comply with Aboriginal customary law would depend upon the individual circumstances of the case. In some situations it may be a genuine fear of the consequences that might follow; in other circumstances it may be because of a belief in the legitimacy of customary law. For this reason the ALRC did not support any extension of the defence of duress to better accommodate issues that may arise under Aboriginal customary law.<sup>225</sup> While the Commission accepts that there are different reasons why Aboriginal people comply with their customary laws, it does not agree with this conclusion. An extension of the defence of duress does not imply that all Aboriginal people follow their customary law because of the fear of repercussions. Instead, it recognises that some Aboriginal people may be forced to inflict traditional punishment because they were compelled by threats. The Commission stresses that amending the defence of duress, by removing unnecessary restrictions, does not mean that all Aboriginal people will be able to rely on the defence whenever they breach Australian law.

In reaching the conclusion that the defence of duress is unduly restrictive in Western Australia, the Commission had also taken into account the fact that the defence is potentially gender biased. For example, women who are the victims of serious domestic or family violence may be compelled to commit an offence under a threat of being harmed in the future. The requirement for a threat of immediate harm would preclude reliance on the defence. Importantly, any amendments to the defence of duress will apply equally to Aboriginal people and non-Aboriginal people. The Commission has reviewed the defence of duress in other jurisdictions and considers that the defence as it exists in the Australian Capital Territory and the Commonwealth provides a useful model.<sup>226</sup> In these jurisdictions, in order to rely on the defence, it is necessary that:

- a threat has been made that will be carried out unless the offence is committed;<sup>227</sup>
- there is no reasonable way to make the threat ineffective;<sup>228</sup> and
- the conduct is a reasonable response to the threat.

The defence in these jurisdictions can apply to any offence including murder and grievous bodily harm.<sup>229</sup> The question of whether the defence of duress should be available for murder and in what form, will be considered in the Commission's reference on homicide.<sup>230</sup> At this stage, the Commission proposes that the restrictions on the nature of the threat be removed. The defence should be available if an Aboriginal person is forced to break the law as a consequence of a threat of a future punishment under Aboriginal customary law. A requirement that the conduct giving rise to the offence must be a reasonable response to the threat provides a safeguard against any abuse of this defence.<sup>231</sup>

224. For example, it is stated by Berndt and Berndt that 'settlement by duel' was not held immediately following an offence at customary law, but after there was time for anger to cool: see Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 350.

225. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [430].

226. See *Criminal Code* 1995 (Cth) s 10.2 and *Criminal Code* 2002 (ACT) s 40 and note that both provisions restrict the operation of the defence to persons who voluntarily associate with others who engage in criminal conduct thereby making themselves liable to such threats.

227. Therefore the threat can be made to harm the accused or some other person.

228. This element incorporates the requirement to escape contained in s 31(4) of the *Criminal Code* (WA) as well as under the common law. It has been held that the defence of duress at common law was available for a woman who committed social security fraud because of her fear of violence by her abusive husband. The fact that she had not sought help from the police was not fatal to her defence as it was held that she was not expected to leave her marital relationship: see Leader-Elliot I, 'Warren, Coombes and Tucker' (1997) 21 *Criminal Law Journal* 359, 362. This reasoning could also apply to an Aboriginal person who, due to his or her strong ties to the community, should not necessarily be expected to leave.

229. Under the Western Australian Criminal Code a person who has been threatened with death will not be excused for killing or even for causing grievous bodily harm to save them from death. The requirement in the ACT and Commonwealth that the response must be reasonable would be considered in this context.

230. LRCWA, Project No 97.

231. Criminal Law Officers Committee of the Standing Committee of Attorney Generals, *Model Criminal Code: Chapters 1 and 3, General Principles of Criminal Responsibility* (December 1992) 65.

### Proposal 21

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

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

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

## Provocation

### The Basis for the Defence of Provocation

The defence of provocation has been described as a 'concession to human frailty'.<sup>232</sup> Provocation recognises that a person may not be morally blameworthy if he or she commits a crime as a consequence of a sudden loss of self-control, usually as a result of anger.<sup>233</sup> The historical basis for the defence can be traced back to 16th century England. It developed following altercations arising from 'breaches of honour', such as fights between men and violent reactions to adultery committed by a man's wife.<sup>234</sup> The relevance of the defence in contemporary society has been questioned.<sup>235</sup> The Commission notes that this issue is currently being considered in its review of the law of homicide.<sup>236</sup> The discussion that follows is therefore limited to an examination of whether the defence

adequately allows cultural and customary law issues to be taken into account.

In Western Australia the defence of provocation is available as a partial defence to wilful murder and murder. If accepted, provocation will reduce a charge of wilful murder or murder to manslaughter. It is also a complete defence for offences that require proof of an assault.<sup>237</sup> For example, the defence can operate to excuse criminal liability for an offence of assault occasioning bodily harm but not for an offence of unlawful wounding.<sup>238</sup> While the precise elements of the partial defence for wilful murder (and murder) and the defence for offences of assault are different, the essential characteristics are the same:

- The provocation (wrongful act or insult) must be of such a nature that an ordinary person could have been provoked to react in a similar way to the accused.
- The accused must have been deprived of the power of self-control.
- The accused must have acted suddenly and before there was time for his or her passion to cool.<sup>239</sup>

While the exact requirements of the defence of provocation differ between jurisdictions,<sup>240</sup> there is general uniformity in the underlying principles.<sup>241</sup>

The defence of provocation has been the subject of extensive debate and criticism.<sup>242</sup> Over the past decade a number of law reform agencies have examined the defence of provocation and some have recommended its abolition.<sup>243</sup> The primary rationale for abolition of

232. Leader-Elliott I, 'Sex, Race and Provocation: In defence of *Stingel*' (1996) 20 *Criminal Law Journal* 72, 84.

233. It has been observed that 'anger is primarily a feature of provocation and fear a feature of self-defence'; however, loss of self-control may be a result of both anger and fear. See *Masciantonio v The Queen* (1995) 129 ALR 575, 582 (Brennan, Deane, Dawson and Gaudron JJ).

234. VLRC, *Defences to Homicide*, Final Report (October 2004) 21–23. In particular note that the defence originated at a time when the death penalty was a mandatory penalty to offences of homicide.

235. *Ibid* 21–58.

236. LRCWA, Project No 97.

237. Sections 245 and 246 of the *Criminal Code* (WA) set out the requirements of the defence for offences of assault. The partial defence of provocation is contained in s 281 of the *Criminal Code* (WA). At common law provocation is only available as a partial defence to murder. The position in Queensland is the same as Western Australian: see *Criminal Code* (Qld) ss 268, 269 & 304. In the Northern Territory the defence is available as both a partial defence to murder and as a complete defence to all offences other than those causing death or grievous bodily harm: see *Criminal Code* (NT) s 34.

238. See *Kapronovski v The Queen* (1975) 133 CLR 209. Pursuant to s 318 of the *Criminal Code* (WA) the elements of an offence of assault occasioning bodily harm are that the accused unlawfully assaulted the victim and caused bodily harm. The elements of unlawful wounding in s 301 of the *Criminal Code* (WA) are that the accused unlawfully wounded the victim and therefore, the prosecution is not required to prove an assault as defined in s 222 of the Code. The anomaly with respect to the availability of defences for these two offences is discussed under 'Consent', above p 163.

239. See *Criminal Code* (WA) ss 245, 246 & 281.

240. For the requirements of the defence in other jurisdictions, see *Crimes Act 1900* (ACT) s 13; *Crimes Act 1900* (NSW) s 23; *Criminal Code* (NT) s 34; *Criminal Code* (Qld) ss 268, 269 & 304.

241. *Stingel v The Queen* (1990) 97 ALR 1, 6; *Hart v The Queen* [2003] WASCA 213, [34] (Steytler J).

242. For a full discussion of the criticisms, see VLRC, *Defences to Homicide*, Final Report (October 2004); NSWLRC, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) [2.7].

243. Model Criminal Code Officers Committee of the Standing Committee of Attorney-Generals, *Model Criminal Code Chapter Five: Fatal offences against the person*, Discussion Paper (June 1998) 83; VLRC, *Defences to Homicide*, Final Report (October 2004) 58. The VLRC considered a number of criticisms of the defence and recommended that it should be abolished as a partial defence to murder. The defence has been abolished in Tasmania. The Commission notes that arguments in support of abolishing the partial defence of provocation recognise that in most jurisdictions mitigatory issues associated with any provocation and loss of self-control can be taken into account in discretionary sentencing decisions. See NSWLRC, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) [2.7]. However, in Western Australia there is still a mandatory sentence of life imprisonment for wilful murder and murder.

the defence is that extreme anger—while possibly providing an explanation for an offence—should not provide an excuse. One of the major criticisms is that the defence of provocation is gender biased: the requirement that the accused must have responded suddenly to the provocation before there was time for passions to cool, may not accommodate the experiences of women who may respond to serious and persistent physical abuse at a time when there is a lull in the violence.<sup>244</sup> Another pertinent criticism is that the objective test, on which the defence relies, is complex and potentially unfair to minorities. This is considered in more detail below.

## Aboriginal Customary Law and the Defence of Provocation

In the context of its application to Aboriginal people the question arises whether the defence of provocation sufficiently allows cultural matters, in particular conduct that infringes Aboriginal customary law, to be taken into account. The objective test, whether the provocation is of such a nature that an ordinary person could have been provoked to react in a similar way to the accused, is split into two distinct stages.<sup>245</sup> The first stage is the assessment of the gravity of the provocation. Australian law permits cultural issues (as well as other factors personal to the accused) to be taken into account when assessing the seriousness of the provocation.<sup>246</sup> However, once the second stage has been reached (whether an ordinary person would have been deprived of the power of self-control) the only personal characteristic of the accused that may be attributed to the ordinary person is age.<sup>247</sup> A useful statement of the test, as set out by the High Court in *Stingel*<sup>248</sup> and which has been held to apply to provocation in Western Australia, is:

In the first stage, the gravity of the provocation is assessed by reference to particular characteristics of the accused which may be relevant. Such characteristics may include age, race, sex, personal history and other factors. The result of that assessment is a characterisation of the provocation somewhere of a scale of gravity, ranging from minor and trivial to extreme. The next question involves an assessment of how an ordinary person could have responded to provocation of that particular degree of gravity. It would appear that the second limb is a relatively simple filter designed to ensure that the law does not excuse an extreme response to minor provocation.<sup>249</sup>

### The objective test

#### *Assessing the gravity of the provocation*

The personal characteristics of an accused should be considered when assessing the nature and seriousness of the provocation because conduct that may not be 'insulting or hurtful to one person might be extremely so to another because of that person's age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history'.<sup>250</sup> This is clearly the case with matters that would constitute a breach of Aboriginal customary law. For example, the utterance of a deceased person's name would not cause difficulty for a non-Aboriginal person, but such conduct could be extremely offensive and upsetting for an Aboriginal person.

Case law has established that issues relating to Aboriginal culture and background may provide grounds for a defence of provocation. For example, in *Verhoeven v Ninnette*<sup>251</sup> racial taunts directed to an Aboriginal woman were taken into account as provocation for an assault. Importantly, the court emphasised that it was not enough to simply describe the provocation as a 'racial taunt'. Because of the negative connotations

244. VLRC, *Defences to Homicide*, Report (October 2004) 27. See also NTLRC, *Self Defence and Provocation* (October 2000) 41; ALRC, *Equality Before the Law: Justice for women*, Report No 69 (1994) [12.6]–[12.7]. Courts have received evidence in relation to 'battered women's syndrome' to overcome some of the difficulties with the defence of provocation (as well as self defence and duress). The syndrome presumes that women who have been the victims of repeated violence suffer from 'learned helplessness' and as a consequence are unable to leave the violent relationship. The Commission is aware that the reliance on battered woman's syndrome may be ineffective for Aboriginal women because some Aboriginal women fight back against family violence and therefore do not fit neatly within the definition. Also as the syndrome focuses on the psychology of the accused it may be ineffective in taking into account cultural issues that prevent Aboriginal women from leaving their partner and community. See Stubbs J & Tolmie J, 'Race, Gender and the Battered Woman Syndrome: An Australian case study' (1995) 8 *Canadian Journal of Women and the Law* 122, 123–42.

245. Leader-Elliott I, 'Sex, Race and Provocation: In defence of *Stingel*' (1996) 20 *Criminal Law Journal* 72, 74.

246. See *Hart v The Queen* [2003] WASCA 213, [49] (Steytler J; McClure and Pullin JJ concurring) approving the test as set out in *Stingel v The Queen* (1990) 97 ALR 1, 9.

247. In *Stingel v The Queen* (1990) 97 ALR 1, 12–13 it was stated by the High Court that the age of the accused can be attributed because the 'process of development from childhood to maturity is something which, being common to us all, is an aspect of ordinariness'. The reason for the concession for age is that generally young people are less capable of self-control than more mature adults. See Leader-Elliott I, 'Sex, Race and Provocation: In defence of *Stingel*' (1996) 20 *Criminal Law Journal* 72, 88.

248. (1990) 97 ALR 1.

249. *Verhoeven v Ninnette* [1998] WASCA 73 (Unreported, Supreme Court of Western Australia, Library No 980162, Wheeler J, 23 October 1997) 8.

250. *Masciantonio v The Queen* (1995) 129 ALR 575, 581 (Brennan, Deane, Dawson and Gaudron JJ).

251. [1998] WASCA 73 (Unreported, Supreme Court of Western Australia, Library No 980162, Wheeler J, 23 October 1997).

that can be implied by racial abuse directed towards Aboriginal people, it is necessary to assess the provocation from the point of view of the accused.<sup>252</sup> Aboriginal customary law was specifically taken into account in *Lofty v The Queen*.<sup>253</sup> In this case the appellant was convicted of the murder of his wife. The killing occurred after the appellant discovered that his wife was planning to leave him for another man. A relationship with this other man was prohibited under Aboriginal customary law. The court approved the trial judge's direction that a breach of Aboriginal customary law can be taken into account when assessing the gravity of the provocation.<sup>254</sup>

### *Assessing the ordinary person's capacity for self-control*

Once the gravity of the provocation has been established, it is then necessary to assess how an ordinary person would have reacted to provocation of that degree of seriousness.<sup>255</sup> The law in Western Australia does not permit characteristics of the accused (such as Aboriginality or particular cultural beliefs) to be attributed to the ordinary person:<sup>256</sup> the ordinary person has been referred to as a 'truly hypothetical ordinary person'.<sup>257</sup> The continuing debate in relation to the defence of provocation is usually centred on the test for the ordinary person's capacity for self-control.

### *Arguments against the ordinary person test*

It has been observed that the two-stage process of the objective test requiring a jury 'to distinguish between questions relating to the gravity of the provocation and questions relating to the capacity for self-control'<sup>258</sup> is too complex to understand. A jury is

entitled to take into account all of the accused's characteristics and background when considering the seriousness of the provocation. It is then expected to disregard all of these factors (except age) when assessing whether an ordinary person could have lost self-control.

It has also been argued that the ordinary person test does not logically reflect the rationale behind the defence of provocation; that is, that a person is less culpable when there is a loss of self-control compared to someone who acts with premeditation. In these circumstances perhaps the focus should be on the accused person's state of mind, rather than on some hypothetical ordinary person. Reflecting this, it has been suggested that the test should be purely subjective, such that the question becomes not whether the ordinary person would lose self-control but whether the accused did in fact lose self-control.<sup>259</sup>

The most relevant argument against the ordinary person test, for the purposes of the current discussion, is that it is potentially discriminatory and unfair to members of ethnic groups. There is widespread support for the view that the ordinary person test is inappropriate because of the diverse nature of multicultural society today.<sup>260</sup> It is argued that a jury, when deciding whether an ordinary person could have lost self-control, will generally impose the standards of the dominant group. Thus ethnic minorities, that may have different values and standards, will be required to conform to the standards of Caucasian people.<sup>261</sup>

In his background paper, Philip Vincent argued that the ordinary person test should refer to an ordinary person of the same culture and environment as the accused.<sup>262</sup> In support of this argument Vincent refers

252. Ibid 11–12 (Wheeler J) Thus referring to an Aboriginal person as a 'black' would be viewed as more serious provocation than a reference to a Caucasian person as a 'white ...'. This is because in Australian society there have never been any negative connotations associated with being white. For a detailed consideration of the extent of racism towards Aboriginal people in Western Australia, see discussion under Part II 'Racism and Reconciliation', above pp 31–34.

253. [1999] NTSC 73.

254. Ibid [39] (Martin CJ; Mildren and Riley JJ concurring).

255. *Lewis v Dickinson* [2001] WASCA 95, [9] (Scott J).

256. There have been some cases in the Northern Territory that have allowed the individual characteristics of the accused to be taken into account. For example in *Jabarula v Poore* (1989) 68 NTR 26, 33 it was held that an ordinary person should be an ordinary Aboriginal person from the same community as the accused. In *Mungatopi v R* (1991) 2 NTLR 1 where it was decided that the decision of the High Court in *Stingel v R* did not apply to the defence of provocation under the *Criminal Code* (NT). Note that s 34(1)(d) requires that an ordinary person *similarly circumstanced* would have acted in the same or a similar way. Stanley Yeo comments that these cases are 'objectionable because they regard Aboriginal people as possessing lesser capacity for self-control than other ethnic groups': see Yeo S, 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited' (1996) 18 *Sydney Law Review* 304, 316.

257. *Stingel v The Queen* (1990) 97 ALR 1, 11.

258. Model Criminal Code Officers Committee of the Standing Committee of Attorney-Generals, *Model Criminal Code Chapter Five: Fatal offences against the person*, Discussion Paper (June 1998) 75. See NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No 83 (1997) [2.56]; Weinberg M, 'Moral Blameworthiness – The 'Objective Test' Dilemma' (2003) 24 *Australian Bar Review* 1, 19.

259. See NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No 83 (1997) [2.19]–[2.20].

260. Model Criminal Code Officers Committee of the Standing Committee of Attorney-Generals, *Model Criminal Code Chapter Five: Fatal offences against the person*, Discussion Paper (June 1998) 80.

261. See NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No 83 (1997) [2.55]; *Masciantonio v The Queen* (1995) 129 ALR 575, 586 (McHugh J).

262. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 21. This argument was also referred to in Weinberg M, 'Moral Blameworthiness – The "Objective Test" Dilemma' (2003) 24 *Australian Bar Review* 1, 18.

to the comments of McHugh J in *Masciantonio v The Queen*<sup>263</sup> that where the ordinary person test fails to accommodate the cultural background of an accused the law of provocation is 'likely to result in discrimination and injustice'.<sup>264</sup> McHugh J argued that in order to achieve true equality before the law in a multicultural society it is necessary that the law of provocation for one group of people be different to the law of provocation for another.<sup>265</sup>

### Arguments in support of the ordinary person test

The rationale for the ordinary person test is to ensure that all people are held to the same standard regardless of individual traits and capacities.<sup>266</sup> Accordingly, the ordinary person test provides a minimum standard that is necessary for the protection of the public. In *Stingel v The Queen*<sup>267</sup> the High Court stated that:

No doubt, there are classes or groups within the community whose average powers of self-control may be higher or lower than the community average. Indeed, it may be that the average power of self-control of the members of one sex is higher or lower than the average power of self-control of members of the other sex. The principle of equality before the law requires, however, that the differences between different classes or groups be reflected only in the limits within which a particular level of self-control can be characterised as ordinary.<sup>268</sup>

If the test was purely subjective (that is, whether the accused lost self-control), then it has been suggested that any killing that occurred as a consequence of loss of self-control would be partially excused.<sup>269</sup> In its report

on *Multiculturalism and the Law*, the ALRC concluded that there is a need for a 'uniform standard to be observed by all where necessary for the protection of individuals and society'.<sup>270</sup>

While cultural differences are taken into account when assessing the gravity of the provocation it has been suggested that there is no justification for taking cultural differences into account when considering the capacity to lose self-control.<sup>271</sup> In support of this, it is maintained that any suggestion that one cultural group has a greater or lesser capacity for self-control is mere speculation.<sup>272</sup> In particular, it has been asserted that any suggestion that Aboriginal people have a lesser capacity for self-control is offensive.<sup>273</sup>

If cultural differences were able to be attributed to the ordinary person, it has been asserted the test would be open to abuse.<sup>274</sup> For example, expert evidence might be led to infer that a particular cultural group has a lesser capacity for self-control because members of the group are more prone to violence. This argument of course would be flawed because prevalence of violence does not equate to a different capacity for self-control.<sup>275</sup> If an ordinary person, for the purpose of assessing capacity for self-control, was considered to be an ordinary Aboriginal man from the same background as a particular accused, the prevalence of violence by some Aboriginal men against Aboriginal women might be used to argue that Aboriginal men have a lesser standard of self-control. If this approach was accepted by the courts the law might not provide Aboriginal women with adequate protection.<sup>276</sup>

263. (1995) 129 ALR 575.

264. *Ibid* 586.

265. *Ibid* (McHugh J). McHugh J was part of the majority in *Stingel v The Queen* and then dissented in *Masciantonio v The Queen*. This change of heart was based on the arguments of Stanley Yeo, who subsequently changed his mind and agreed with Ian Leader-Elliott that there is no justification for assuming that different cultures have different capacities for self-control. Yeo now argues that the test of whether an ordinary person could have lost self-control and reacted in the way that the accused did should be separated into two stages. The capacity for self-control should be based upon an ordinary person of the same age. However, he maintains that the response or type of reaction of an ordinary person should be based on an ordinary person of the same age, sex and cultural background as the accused. See Yeo S, 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited' (1996) 18 *Sydney Law Review* 304, 305.

266. *Stingel v The Queen* (1990) 97 ALR 1, 9.

267. (1990) 97 ALR 1.

268. *Ibid* 12. It has been noted that if the ordinary person was an ordinary person of the same gender it may be argued that men have a lower capacity for self-control in order to excuse some men for violence against women. See NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No 83 (1997) [2.68].

269. See NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No 83 (1997) [2.60].

270. ALRC, *Multiculturalism and the Law*, Final Report No 57 (1992) 187. The ALRC noted that standards of reasonableness are not static and can evolve to take into account the cultural diversity of Australian society. As stated in *Stingel v The Queen* (1990) 97 ALR, 11 the ordinary person test will be 'affected by contemporary conditions and attitudes'. The ordinary person today would be viewed differently than the ordinary person 200 years ago.

271. See NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No 83 (1997) [2.61]. See also Law Society of Western Australia, Written Submission, 19 October 2005.

272. See NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No 83 (1997) [2.61] and Leader-Elliott I, 'Sex, Race and Provocation: In Defence of *Stingel*' (1996) 20 *Criminal Law Journal* 72, 89–90.

273. Yeo S, 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited' (1996) 18 *Sydney Law Review* 304, 316.

274. Leader-Elliott I, 'Sex, Race and Provocation: In defence of *Stingel*' (1996) 20 *Criminal Law Journal* 72, 90.

275. *Ibid*.

276. *Verhoeven v Nynette* [1998] WASCA 73 (Unreported, Supreme Court of Western Australia, Library No 980162, Wheeler J, 23 October 1997) 20–21.

## The Commission's View

The Commission considers that there are compelling arguments both in support of and against the ordinary person test. Bearing in mind that the Commission is currently examining defences to homicide in another reference, it believes that it is premature at this stage to propose any changes to the ordinary person test or to the law of provocation in general. The Commission therefore seeks submissions as to whether the ordinary person test when assessing capacity for self-control should be amended to allow cultural matters to be taken into account. The Commission stresses that issues under Aboriginal customary law can currently be taken into account when assessing the gravity of the provocation. In this regard it is vital that relevant and reliable evidence of Aboriginal customary law can be presented to the court. Proposals to improve the presentation and consideration of evidence of Aboriginal customary law are discussed below.<sup>277</sup>

### Invitation to Submit 6

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

## Discipline of Children

The Commission's consultations indicated that many Aboriginal people were concerned about the discipline of their children. Many Aboriginal people believe that welfare agencies have interfered with their right to discipline their children.<sup>278</sup> For example, some Aboriginal people were concerned when young people threatened families with 'white man's law' if they attempted to impose any type of physical discipline.<sup>279</sup>

In Geraldton, it was alleged that Australian law had undermined traditional authority and did not recognise Aboriginal child-rearing practices that involved physical discipline.<sup>280</sup>

## The Position under Traditional Law

In traditional Aboriginal societies disciplining children was the responsibility of the immediate family, including older siblings who were expected to protect and discipline younger children.<sup>281</sup> Anthropological studies have found, that while physical chastisement such as slapping did occur at times, punishment that was severe or drawn out was rare.<sup>282</sup> Childhood, which ended at puberty or initiation, was characterised by instruction about kinship rules and general freedom with few restrictions imposed.<sup>283</sup> At the time of puberty or initiation discipline shifted from the immediate family to the 'tribal group'.<sup>284</sup> According to Robert Tonkinson, children were rarely punished or chastised. In fact, when children were physically punished by missionaries, parents would vent their disapproval.<sup>285</sup> Tonkinson explained that physical discipline such as slapping would be used only where a child was threatening violence to a younger sibling or a parent who was unwell. In other situations, especially those that involved breaches of kinship obligations (which children were not required to strictly observe) the child may be scolded or ridiculed.<sup>286</sup> On the other hand there is limited evidence that strong physical discipline of children occurred in some traditional Aboriginal societies.<sup>287</sup>

## The Contemporary Position

In this discussion the Commission distinguishes the issue of physical discipline from child abuse. Reasonable physical discipline is permitted under Australian law provided that it is for the purpose of correction and not retribution.<sup>288</sup> Any physical violence to a child that is not for the purpose of correction is unacceptable. Catherine Wohlan observes in her background paper, that in Aboriginal communities, family members who

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

278. Wohlan C, *Aboriginal Women's Interests in Customary Law Recognition*, LRCWA, Project No 94, Background Paper No 13 (April 2005) 40.

279. See Part II 'Children and Youth', above pp 20–22. The Commission notes, however, that during the consultations in Derby it was said that the image of a young person armed with legislation is a myth: see LRCWA, *Thematic Summaries of Consultations – Derby*, 4 March 2004, 52.

280. LRCWA, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 12.

281. Tonkinson R, 'MarduJarra Kinship' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 152.

282. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 339.

283. Tonkinson R, 'MarduJarra Kinship' in Edwards WH (ed) *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 151.

284. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal Traditional Life Past and Present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 339–40.

285. Tonkinson R, *The Jigalong Mob: Aboriginal victors of the desert crusade* (California: Cummings, 1974) 49, 130.

286. Tonkinson R, *The Mardudjara Aborigines: Living the dream in Australia's desert* (New York: Holt, Rhinehart and Winston, 1978) 64–67.

287. Gilbert K, 'Living Blacks: Blacks Talk to Kevin Gilbert' (Melbourne: Penguin, 1977) 33–34.

288. The nature of the discipline of children defence is discussed immediately below.

take out their stress on children are met with disapproval. Grandmothers in particular will intervene if they consider that a child is being 'senselessly beaten'.<sup>289</sup> The issue here is whether there is any conflict between physical discipline of children that is legitimate under Aboriginal customary law and that which is permitted under Australian law.

From a contemporary perspective, Wohlan describes the 'ritual' punishment of two teenage girls in Balgo who received a public hiding from their parents (in the presence of police officers) for engaging in the conduct of sniffing petrol (and committing offences under Australian law).<sup>290</sup> Katherine Trees describes the breakdown of some aspects of traditional law concerning the discipline of children in Roebourne. One Aboriginal woman described that in the past other adult family members would smack a child; however, today the parents may sometimes object to other people disciplining their children.<sup>291</sup> Another Aboriginal woman said that when her children were young and did something wrong she would hit them or throw a stone at them.<sup>292</sup>

## Discipline of Children under the *Criminal Code*

Section 257 of the *Criminal Code* (WA) provides that:

It is lawful for a parent or a person in the place of a parent, or for a schoolmaster, to use, by way of correction, towards a child or pupil under his care, such force as is reasonable under the circumstances.

There are limits on the right to discipline a child. The punishment must be moderate and reasonable; it must be appropriate taking into account the child's age,

physique and mental development; and it must be carried out with a reasonable instrument.<sup>293</sup> The punishment must be for the purpose of correction and not for retribution.<sup>294</sup> When considering what is reasonable it is necessary to take into account current community standards:<sup>295</sup> what was acceptable many years ago in mainstream Australian would no longer be considered acceptable today. The Tasmanian Law Reform Institute considered the defence of reasonable correction in detail. Its 2003 report showed that the interpretation by courts of similar defences in other jurisdictions does not provide any clear guidance as to what is acceptable and what is not.<sup>296</sup> Amendment to the law in some jurisdictions has reflected changes in the community's attitude to what is acceptable, particularly in relation to the extent of physical punishment that is allowed in schools.<sup>297</sup> In Western Australia corporal punishment is prohibited as a matter of education policy; however, s 257 of the *Criminal Code* is still applicable to the issue of criminal responsibility if corporal punishment takes place in an education setting.<sup>298</sup> While research has shown that the majority of Australian parents smack their children and consider that physical punishment of children is acceptable, there is a growing trend of opinion that physical punishment is ineffective and undesirable.<sup>299</sup> While physical correction such as smacking may be lawful in Western Australia more serious instances where a child receives injuries or is punished with an instrument may be viewed differently in the current climate.

## Resolving the Issue for Aboriginal People

In June 2005 it was reported that the Federal Health Minister, Tony Abbot, was told by Aboriginal Elders in

289. Wohlan C, *Aboriginal Women's Interests in Customary Law Recognition*, LRCWA, Project No 94, Background Paper No 13 (April 2005) 40.

290. *Ibid.* In addition to the physical punishment the girls were 'mentored'.

291. Trees K, *Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – A Case Study*, LRCWA, Project No 94, Background Paper No 6 (November 2004) 25.

292. *Ibid.* 26.

293. *R v Terry* [1955] VLR 114, 116–17 (Scholl J).

294. *Higgs v Booth* (Unreported, Supreme Court of Western Australia, Library No 6420, 29 August 1986) as cited in *Cramer v R* (Unreported, Supreme Court of Western Australia, Court of Criminal Appeal, Library No 980620, White J, 28 October 1998) 4.

295. *Ibid.*

296. Tasmanian Law Reform Institute, *Physical Punishment of Children*, Final Report No 4 (2003) 8.

297. In Tasmania and New South Wales it is illegal to use corporal punishment in all schools. In Australian Capital Territory, South Australia and Victoria it is illegal to use corporal punishment in public schools (including smacking): see Royal Australian College of Physicians, *Paediatric Policy: Physical punishment and discipline* at <<http://www.racp.edu.au/hpu/paed/punishment/index.htm>>.

298. See National Committee of Violence, *Violence: Directions for Australia* (Canberra: Australian Institute of Criminology, 1990): see <<http://www.aic.gov.au/publications/vda/vda-sec23.html>> and see also <<http://www.endcorporalpunishment.org/pages/frame.html>>. For example, Sweden has abolished the defence and in New South Wales the *Crimes Act 1900* (NSW) s 61AA provides that it is illegal to use any force to the head or neck area of a child or to use any force that causes harm lasting for more than a short period. See Tasmanian Law Reform Institute, *Physical Punishment of Children*, Final Report No 4 (2003) 16–17. Other countries such as Finland, Denmark and Norway also prohibit any physical punishment of children: see National Committee of Violence, *Violence: Directions for Australia* (Canberra: Australian Institute of Criminology, 1990) <<http://www.aic.gov.au/publications/vda/vda-sec23.html>> 6.

299. The Tasmanian Law Reform Institute's primary recommendation was to abolish the defence of reasonable correction: see Tasmanian Law Reform Institute, *Physical Punishment of Children*, Final Report No 4 (2003) 26 & 47. Information available on the website for the Department of Community Development refers to the potential dangers and general ineffectiveness of physical punishments: see 'Keeping Our Kids Safe' <<http://www.community.wa.gov.au>>.

Alice Springs that they were unable to do anything in response to uncontrollable behaviour by some young people because if they were to smack them the authorities would intervene. Mr Abbot assured this group that parents who acted with 'caution and restraint' would not have a problem with Australian law and indicated with surprise the 'cultural confusion' that existed about this issue.<sup>300</sup> This misapprehension is familiar to the Commission. As stated above, the Commission was told by numerous Aboriginal people that Australian law prevented them from using physical punishment on their children. While the Commission does not wish to specifically promote the use of physical discipline, it considers that Aboriginal people in Western Australia should be made aware that they currently have the same right as any other Australian to discipline their children in a reasonable way bearing in mind the child's individual characteristics. While it remains lawful to discipline a child physically, it is vital that Aboriginal families (as well as other Australians) are informed about what are the appropriate limits.<sup>301</sup>

The anthropological evidence referred to above suggests that for children in traditional Aboriginal societies, physical discipline was rare and when used it was generally of a reasonable nature. The difficulty arises with older Aboriginal children who have reached puberty or undergone initiation. Because they may be considered adults in Aboriginal society they may be subject to traditional physical punishments such as spearing. The question of whether a child (as defined under Australian law) should be able to consent to traditional punishments is discussed earlier.<sup>302</sup> Australian law concerning childhood discipline does not appear to conflict with Aboriginal customary law practices. Further, as Wohlan alludes, there are other mechanisms currently being employed by Aboriginal people to control the behaviour of young people that do not involve physical punishments but rather focus on reconnecting young people to their culture.<sup>303</sup> The Commission supports

non-violent strategies developed by Aboriginal people to deal with youth issues as well as appropriate programs, as discussed in Part II, developed by government agencies to assist Aboriginal people with parenting skills.<sup>304</sup>

### Proposal 22

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

The Commission understands that some Aboriginal people may be reluctant to participate in programs organised by the Department of Community Development because of the history of its involvement in the removal of Aboriginal children from their families. Therefore, the Commission invites submissions as to which agency would be the most appropriate to conduct parenting programs in conjunction with Aboriginal people.

### Invitation to Submit 7

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

300. Price M, 'Abbott Dances Around a Punishing Question', *The Australian*, 30 June 2005, 1.

301. The National Committee of Violence noted in 1990 that there is much controversy as to whether physical discipline such as spanking is appropriate and whether it should be prohibited by the law. It recommended that the long term aim should be to prohibit physical discipline and in the meantime the focus should be on parent education. See National Committee of Violence, *Violence: Directions for Australia* (Canberra: Australian Institute of Criminology, 1990) <<http://www.aic.gov.au/publications/vda/vda-sec23.html>> 6.

302. See discussion under 'Consent', above p 163.

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

304. Katherine Trees mentions the need for the white system to help Aboriginal parents learn to successfully discipline their children. See Trees K, *Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – A Case Study*, LRCWA, Project No 94, Background Paper No 6 (November 2004) 25–26. See Part II 'Children and Youth', above pp 20–22 where there is a more detailed discussion of the concerns of Aboriginal people in relation to children and youth. The Commission is aware that the Department of Community Development has developed the 'Best Start' program for Aboriginal families. The program is available in metropolitan, regional and remote locations and deals with issues of health, safety, activities parenting and support for families of children up to five years old. As this program is not available in all locations and not for children over five years the Commission has made a more general proposal. For information on the 'Best Start' program, see <<http://www.community.wa.gov.au>>.