Bail

Aboriginal People and Bail

The Purpose of Bail

When an accused is charged with an offence a decision is made whether he or she should be released in the community on bail or remanded in custody. This question can be determined, prior to the first appearance in court, by an authorised officer. Under the *Bail Act 1982* (WA), an authorised officer is a police officer, justice of the peace or, in the case of a child, an authorised community services officer.[1] If an accused is released on bail then he or she must enter into a bail undertaking which is a promise to appear in court at a particular time and place.[2]

The purpose of bail is to 'strike a balance' between the need to ensure that people who are charged with offences attend court and to guarantee, as far as possible, that accused people who are presumed innocent are not deprived of their liberty without good reason.[3] Another aim of bail is to protect the public from criminal behaviour. Therefore, where an accused is charged with a very serious offence, has a significant record of prior convictions, or is charged with an offence that allegedly occurred while subject to bail, it is more likely that they will be remanded in custody.[4]

Criteria for Determining Release on Bail in Western Australia

The law and procedure in relation to bail in Western Australia is contained in the *Bail Act 1982* (WA) ('the Act'). An adult has a right to have his or her application for bail considered as soon as practicable; however, there is no right for an adult to be released on bail.[5] Children, on the other hand, have a qualified right to be released on bail unless there is sufficient reason to withhold bail.[6] In determining whether an accused should be released on bail it is necessary to consider the various factors set out in the Act. The three most important are ensuring that:

- accused people attend court;
- the public are protected from offending behaviour; and
- there is no obstruction to the course of justice.[7]

When assessing these factors the following matters are to be taken into account:

- the nature and seriousness of the offence and the likely penalty if the accused is convicted;
- the character, previous convictions, antecedents, associations, home environment, background, place of residence and financial position of the accused;
- the history of any previous grants of bail to the accused; and
- the strength of the evidence against the accused.[8]

When deciding if an accused can be released on bail it is necessary to consider whether any conditions could be set that would alleviate concerns that the accused would not appear in court, would be likely to commit further offences, or would in some way interfere with the administration of justice.[9]

1. An authorised community services officer may be the Chief Executive Officer (Justice) or his or her delegate, a registrar of the Children's Court or the superintendent of a detention centre. See *Bail Act 1982* (WA) s 3 and Sch 1, Pt A, cl 1.
2. *Bail Act 1982* (WA) s 28.
3. Victorian Law Reform Commission (VLRC), *Failure to Appear in Court in Response to Bail* (2002) 29.
4. For example, *Bail Act 1982* (WA) Sch 1, Pt C, cl 3A provides that where an accused person has been charged with a serious offence that allegedly was committed while he or she was on bail for another serious offence, then exceptional circumstances must be demonstrated before bail will be considered.
5. *Bail Act 1982* (WA) s 5. The Commission is aware that a review of the *Bail Act 1982* (WA) in 2001 recommended that the legislation should state that adults have a right to bail subject to satisfying the relevant criteria. See Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth: Department of Justice Perth, August 2001) 5.
6. *Bail Act 1982* (WA) Sch 1, Pt C, cl 2(2).
7. *Bail Act 1982* (WA) Sch 1, Pt C, cl 1. It is also necessary to consider whether the accused needs to be held in custody for his or her own protection; whether the prosecutor has put forward grounds for opposing the grant of bail; and whether there are grounds for believing that, if the accused is not kept in custody, the proper conduct of the trial may be prejudiced. A review of the Act in 2001 recommended that the legislation should be simplified and restructured in order that it could be more easily understood. See Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth: Department of Justice, August 2001) 4.
8. *Bail Act 1982* (WA) Sch 1, Pt C, cl 3.
9. *Bail Act 1982* (WA) Sch 1, Pt C, cl 1.

The Problems in Relation to Bail for Aboriginal People

It has been recognised for some time that Aboriginal people encounter problems with respect to bail. In 1991 the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') recommended that governments consider amending bail legislation that unduly restricts the granting of bail to Aboriginal people.[10] Statistics indicate that Aboriginal people are more likely to be refused bail and if granted bail are more likely to be unable to meet the requirements or conditions that have been imposed.[11] In August 2005 approximately 35 per cent of adult remand prisoners were Aboriginal.[12] The position in relation to Aboriginal juveniles is of even greater concern. In August 2005, 78 per cent of juveniles in detention on remand were Aboriginal.[13] A review of the *Bail Act* in 2001, *Review of Best Practice and Innovative Approaches to Bail* (the 2001 Review), observed that the level of over-representation in custody on remand is similar to the level of over-representation of Aboriginal people who are sentenced to imprisonment.[14] The level of over-representation of Aboriginal people in prison, regardless of whether they are sentenced or on remand, is unacceptable. In relation to the high number of Aboriginal people who are in custody on remand it is necessary to consider alternative structures for release on bail for Aboriginal people. The Commission understands that the government is in the process of considering various procedural amendments to the Act.[15] The question whether the Act is generally in need of reform is beyond the terms of reference for this project. The Commission's focus is on issues that specifically affect Aboriginal people and the need for the Act to take into account relevant aspects of Aboriginal customary law.

Sureties

One condition that can be imposed in order to encourage attendance at court is a surety. A surety is a person who enters into an undertaking (promise) that he or she will forfeit a specified sum of money if the accused does not appear in court at the required time.[16] It has been widely acknowledged that many Aboriginal people are unable to obtain surety bail because family members and friends often do not have sufficient assets.[17] In August 2005, 37.5 per cent of all adult remand prisoners who were in custody because they were unable to fulfil bail conditions were Aboriginal.[18] The RCIADIC recommended that governments should closely monitor bail legislation to make sure that the 'entitlement to bail' is being observed in practice.[19] The disproportionate impact of surety conditions upon the ability of Aboriginal people to be released on bail needs to be addressed.

10. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [21.4.27] Recommendation 91(b).
11. In 2000 almost half of those that were detained in custody after being charged with an offence were Aboriginal. See Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Carlton: The Australian Institute of Judicial Administration, 2002) [6.2].
12. Information received by email from Adrian de Graaf, Senior Statistical Analyst Research and Statistics Unit Community and Juvenile Justice Department of Justice, 30 September 2005.
13. Ibid.
14. Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth: Department of Justice, August 2001) 46.
15. Some of these proposed amendments are contained in cl 4 and cl 7A of the Bail Amendment Bill 2000 (currently before the Legislative Assembly) and these amendments if implemented will allow bail to be dispensed with for some minor offences.
16. *Bail Act 1982* (WA) s 35. Section 38 provides that a person can only be approved to act as a surety if he or she is 18 years or over and if the value of his or her assets (after deducting liabilities and debts) is more than the amount that could be forfeited. Section 39 provides that when determining whether a person should be approved as a surety, the proximity or connection of the proposed surety to the accused can be taken into account.
17. Law Reform Commission of Western Australia (LRCWA), Project No 94, *Thematic Summaries of Consultations – Manguri,* 4 November 2002, 5; Auditor-General of Western Australia, *Waiting for Justice: Bail and Prisoners on Remand: Performance Examination,* Report No 6 (October 1997) 31; LRCWA, *Bail,* Final Report (March 1979) 5; Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth: Department of Justice, August 2001) 48. See also Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [16.16].
18. Information received by e-mail from Adrian de Graaf, Senior Statistical Analyst Research and Statistics Unit Community and Juvenile Justice Department of Justice, 30 September 2005. Approximately 66 per cent of juveniles who were in custody because they could not raise bail were Aboriginal. The Commission is unaware of the extent to which this was due to a requirement for a surety or for a responsible person.
19. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [21.4.27] Recommendation 89.

The 2001 Review recommended that legislation should provide that any financial condition on bail should only be imposed if other non-financial conditions would not be sufficient to ensure compliance with the bail undertaking.[20] The Commission supports this approach but also considers that, in order to achieve fairer access to bail for Aboriginal people, there must be a workable alternative to surety bail.

When assessing possible options it is important to consider the reasons why some Aboriginal people fail to attend court. It has been observed that the failure of Aboriginal people to attend court is not 'because they disregard the obligation to attend', but because they face obstacles to attendance.[21] Lack of transport is a common reason for failure to appear in court.[22] Another reason is that some Aboriginal people with poor literacy skills and those who have language barriers may not fully appreciate the obligation to attend court.[23] It has also been observed that socio-economic disadvantages experienced by many Aboriginal people may cause them to forget to attend court because their lives are in so much turmoil.[24] Aboriginal people may also fail to attend court because they experience a general sense of alienation from the criminal justice system.[25] Practices within the criminal justice system that encourage the involvement of Aboriginal communities have shown improvements in court attendance rates.[26]

In a submission to the 2001 Review, the ALS suggested a scheme where suitable Aboriginal people could act as mentors for other Aboriginal people who were on bail. It was proposed that these mentors could provide general support such as assistance in travelling to court.[27] Similarly the New South Wales Aboriginal Justice Advisory Council recommended that there should be a database of respected senior members of local Aboriginal communities who could act as 'guarantors' without the need for a monetary pledge.[28]

In its 1979 report, *Bail*, the Commission recommended that there should be a provision in the legislation that allows bail to be granted on the basis of an undertaking from a responsible person without the need for any financial security or surety.[29] The option for a responsible person to sign an undertaking promising that he or she would ensure that the accused person attends court is only currently available for children.[30] The benefit of this option for Aboriginal adults is that it would allow a respected member of the accused's community to provide an assurance to the court that he or she would support the accused while on bail and provide assistance in attending court.

The Commission acknowledged in its 1979 report that the most obvious argument against this approach is that there would be no sanction or penalty for a responsible person who failed in his or her obligation to ensure the attendance of the accused.[31] While the risk of losing money is supposed to motivate a surety to ensure that the accused complies with the bail undertaking, there would be no consequences for a responsible person if the accused did not attend court. It was concluded, however, that in the case of a respected member of an Aboriginal community, the incentive to guarantee that the accused attended court would be based upon social and cultural duty. If the responsible person failed in their duty they would lose respect from other members of the community.[32] The Commission is of the view that the effectiveness of this option could be strengthened by providing that

20. See Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth: Department of Justice, August 2001) 6.
21. VLRC, *Failure to Appear in Court in Response to Bail* (2002) 20–22. The Commission notes that during its own project on bail in 1977 it was told by the Aboriginal Legal Service of Western Australia (ALS) that despite the high incidence of cases where Aboriginal people fail to attend court, the ALS was not aware of any example where an Aboriginal person deliberately failed to attend in order to avoid his or her court appearance: see LRCWA, *Review of Bail Procedures,* Project No 64, Working Paper (November 1977) 158.
22. VLRC, ibid 22.
23. Ibid 22–23. The fact that some Aboriginal people may have difficulty understanding their bail obligations was recognised by the Commission in 1979. See LRCWA, *Bail,* Final Report (March 1979) 6. Widespread hearing loss in Aboriginal communities, in particular Aboriginal children, may also contribute to a lack of understanding about the criminal justice system including requirements relating to bail. See Howard D, Quinn S, Blokland J & Flynn M, 'Aboriginal Hearing Loss and the Criminal Justice System' (1993) 3(65) *Aboriginal Law Bulletin* 9.
24. Information received from the ALS by email dated 4 October 2005. In *Wassa v Norman* (1982) NTR 13, 16 (Forster CJ) the failure of the defendant to report to the police station as required by the bail conditions was a result of forgetfulness rather than any deliberate attempt to abscond. The court noted that the defendant was in fact found 150 meters from the police station. It was held that this should have reduced the amount of money that was forfeited.
25. See discussion under 'Alienation from the Criminal Justice System', above pp 99–100.
26. For example, Aboriginal courts in South Australia have shown a marked improvement in the appearance rate of Aboriginal people. For a further discussion see 'Aboriginal Courts – South Australia', above pp 148–49.
27. See Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth, Department of Justice, August 2001) Appendix E: ALSWA Submission Extract.
28. Schwartz M, 'The NSW *Bail Act* and Aboriginal Defendants' (2005) 6(9) *Indigenous Law Bulletin* 6.
29. LRCWA, *Bail,* Project No 64, Final Report (March 1979) 61. At the time of this report on bail the Commission noted that some magistrates imposed nominal sureties (for example $1) in order to overcome the problem.
30. *Bail Act 1982* (WA) Sch 1, Pt C, cl 2.
31. LRCWA, *Bail,* Project No 64, Final Report (March 1979) 61.
32. Ibid.

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the authorised officer or judicial officer should determine the suitability of the proposed responsible person. Therefore, the person deciding the suitability of the responsible person would need to be satisfied that the proposed person had sufficient connection with and influence over the accused.

In its examination of community justice mechanisms above, the Commission proposed the establishment of community justice groups.[33] One potential role for community justice groups is to supervise and support Aboriginal people while they are on bail. In some cases it may not be appropriate for an accused to return to a particular community. Members of community justice groups could act as the responsible person where appropriate. Other conditions could also be imposed that would allow an accused to undergo programs that have been developed by the community justice group including programs that aim to strengthen Aboriginal customary law such as cultural or bush trips or family healing centres.[34] Of course, bail supervision by community justice groups would be subject to the approval of the relevant community.

A responsible person who signs an undertaking should have the same powers and responsibilities as a surety. In particular, a responsible person should have the power to apprehend the accused or notify police when there are reasonable grounds for believing that the accused has breached a condition of bail or is unlikely to comply with bail.[35]

The Commission notes that the option of bail being granted to a responsible person for accused adults would apply for both Aboriginal people and non-Aboriginal people.[36] For example, it may be appropriate for young adults who still live with their parents or for intellectually disabled people who may not fully understand their obligations under bail.

Proposal 23

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

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

The rationale behind a surety undertaking is that when a surety is liable to lose a significant amount of money if the accused does not appear in court, then the surety will do everything possible to make certain that the accused attends court when required. The amount which a surety is liable to lose, relative to his or her financial means, is therefore relevant and should be taken into account. It has been suggested in New South Wales that the amount could be set as a proportion of the surety's income.[37] In Western Australia, a police officer, judicial officer or other authorised officer has discretion in setting an amount for a surety. The Commission considers that this discretion should be retained; however, it should be subject to a requirement to consider the financial means of the proposed surety.

Proposal 24

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

33. See discussion under 'The Commission's proposal for Community Justice Groups', above pp 133–41.
34. Under cl 2(1), Pt D, Sch 1 of the *Bail Act 1982* (WA) the authorised officer or judicial officer can impose conditions on the accused as to his or her conduct while on bail or in relation to where the accused lives in order to ensure that he or she attends court and does not commit any offence or endanger any person or property. In Geraldton the Commission was told that magistrates in the region used the *Bail Act 1982* (WA) to 'send Aboriginal people on bush programs for alcohol related problems': see LRCWA, Project No 94, *Thematic Summaries of Consultations – Geraldton,* 26–27 May 2003, 14.
35. *Bail Act 1982* (WA) s 46.
36. LRCWA, *Bail,* Project No 64, Final Report (March 1979) 62.
37. Aboriginal Justice Advisory Council, *Aboriginal People and Bail: Courts in NSW* (2001): see <http://www.lawlink.nsw.gov.au/ajac.nsf/pages/reports> 17. The Commission notes that during its consultations in Mirrabooka it was said that bail should be granted according to the means of the accused: see LRCWA, Project No 94, *Thematic Summaries of Consultations – Mirrabooka,* 18 November 2002, 14.

The requirement for a responsible person for juveniles

The RCIADIC observed that Aboriginal children face additional obstacles in being released on bail.[38] Although children have a greater right to bail than adults, in practice this is not always the case. The Act provides that a child under the age of 17 years can only be released on bail if a responsible person signs an undertaking.[39] In the 2001 Review of the Act, it was observed that this requirement can discriminate against children.[40] Because a child may not be able to meet this requirement he or she may be remanded in custody. This is inconsistent with international law standards[41] and with the principle contained in s 7(h) of the *Young Offenders Act 1994* (WA) that detention of children, both before and after conviction, should only be used as a last resort. In its submission to the 2001 Review, the ALS advised that it had represented numerous Aboriginal children who had spent two to three nights in custody for minor offences, such as disorderly conduct and possession of cannabis, because no responsible adult was available.[42] Aboriginal children may not be able to meet the requirement for a responsible person to sign bail when they are arrested some distance from their home and family or because of socio-economic problems such as lack of transport. The Commission supports the recommendation of the 2001 Review that police officers should make greater use of notices to attend court instead of arrest and the subsequent need to release on bail.[43]

In 1997 the ALRC commented on specific problems encountered by children from rural and remote communities.[44] In Western Australia any child who is detained in custody must be brought to Perth as there are currently no juvenile detention facilities outside the metropolitan area.[45] If bail is initially refused by a police officer, a justice of the peace or authorised community services officer, the child will be remanded to Perth until the next available Children's Court date. Adults from remote locations are also disadvantaged by a decision to refuse bail: they will be taken from their community to the nearest custodial facility. The 2001 Review recommended that when an accused is dissatisfied with a bail decision they should be entitled to apply by telephone to a magistrate.[46] The Commission supports this recommendation. It would benefit both Aboriginal adults and children from remote and rural locations.[47] It is particularly important to avoid, where possible, children being taken long distances to Perth in police custody.

Proposal 25

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

The supervised bail program run by the Department of Justice is designed to alleviate, where possible, injustice for those children who are unable to locate a responsible person. Where no responsible person can be located a supervised bail co-coordinator can act as the responsible person and the juvenile will reside at an approved location, usually a hostel.[48] In regional and remote

38. RCIADIC, *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia* (1991) [4.1.4.7].
39. *Bail Act 1982* (WA) Sch 1, Pt C, cl 2(2). It is possible for a 17-year-old to be released on his or her own personal undertaking provided that he or she is of sufficient maturity to live independently.
40. See Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth: Department of Justice, August 2001) 43.
41. Article 37(b) of the *Convention on the Rights of the Child*, which came into force in Australia in 1991, provides that the arrest, detention or imprisonment of children should only be used a measure of last resort.
42. See Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth: Department of Justice, August 2001) 42.
43. Ibid 43. The Commission separately considers the role of police: see 'Attending court without arrest', below p 243.
44. ALRC, *Seen and Heard: Priority for children in the legal process,* Project No 84, Final Report (1997) [18.166].
45. The Commission understands that the government has committed to building juvenile remand institutions at Geraldton and Kalgoorlie although, as observed by the Inspector of Custodial Services, there is a more pressing need in the Kimberly and Pilbara: see Office of the Inspector of Custodial Services, *Report of an Announced Inspection of Rangeview Juvenile Remand Centre*, Report No 29 (August 2005), viii.
46. See Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth: Department of Justice, August 2001) 32, 44. An example in South Australia was referred to where the entitlement to apply to a magistrate arises when the accused could not be bought before a court by 4pm the following day. The ability to apply to a magistrate for a review of a decision made by a police officer, justice of the peace or authorised community services officer would address the criticism that justices of the peace are unaccountable for their decisions in relation to bail. In particular, it has been suggested that when justices of the peace make a decision about the suitability of a proposed surety, unnecessary criteria are applied to the detriment of Aboriginal people. See LRCWA, *Review of the Criminal and Civil Justice System*, Project No 92 (1999) Submissions Summary, 147–48.
47. It would also be relevant for accused people who are refused bail or have had bail set with conditions that are unable to be met during the weekend.
48. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery,* Law Reform Commission of Western Australia, Project No 94, Background Paper No 7 (December 2004) 100.

locations the supervised bail program has operated in conjunction with Aboriginal communities. There have been three regional Department-run programs since 2000, although at the start of 2005 only the bail program at Yandeyarra community was in operation.[49] Initiatives such as these have the potential to prevent young Aboriginal people from cultural and community dislocation. It has been observed that when Aboriginal children are placed in these facilities they are taught important life skills including aspects of Aboriginal culture.[50] The Department of Justice indicates that there are ongoing discussions with Aboriginal communities to find other suitable locations.[51] The RCIADIC recommended that strategies should be introduced to reduce the rate that Aboriginal children are separated from their families by juvenile detention.[52] Aboriginal people consulted by the Commission for this project indicated support for community-based bail facilities for children.[53]

As discussed above the Commission's proposal for the establishment of community justice groups anticipates that they might provide culturally appropriate options for supervision while on bail.[54] The legislative requirement that a child must be bailed to a responsible person is broad enough to allow a member of a community justice group to act as a responsible person. In addition, the Commission supports the expansion of the Supervised Bail Program in rural and remote locations. The Commission acknowledges that the Department of Justice needs to be satisfied that there will be adequate and safe supervision of juveniles who are placed in community bail programs.[55] To this end, community justice groups will require sufficient resources and assistance from appropriate government departments to build capacity to provide programs for young people that address safety issues.

Proposal 26

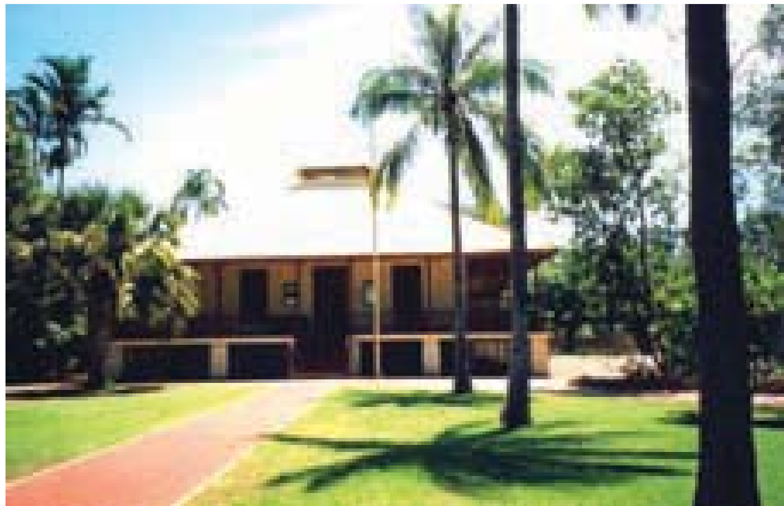
That the Department of Justice continue to develop, in partnership with Aboriginal communities, non-custodial bail facilities for Aboriginal children in remote and rural locations. In developing these facilities the Department of Justice should work in conjunction with any local community justice group.

Onerous conditions

Bail can be granted on various conditions that are designed to ensure that the accused attends court and refrains from criminal activity. Commonly imposed conditions include a requirement to regularly report to a police station or a curfew prohibiting the accused from leaving their place of residence during specified hours. During its consultations the Commission heard complaints by Aboriginal people that onerous and 'outrageous' conditions were sometimes imposed.[56] Research has shown that these types of conditions do little to improve the attendance rate when an accused is only subject to a personal bail undertaking.[57] The proposal for bail to be granted to a responsible person should be utilised in preference to conditions that are unduly restrictive and not necessarily effective. For example, if an accused person was released on bail subject to a condition that a responsible adult entered into an undertaking, this would allow an Aboriginal Elder from the accused's community to undertake to personally guarantee that the accused would attend court. If transport was an issue, a condition to report to a police station three times a week would make no difference to the ability of the accused to attend court. On the other hand, a promise by a respected member

49. See Department of Justice, *2005 Handbook* (2005) 40; Department of Justice, *Annual Report on Operations* (2003/2004) 99. The Banana Well program outside Broome and the Bell Springs program at Kununurra were withdrawn in 2004. In their background paper, Neil Morgan and Joanne Motteram state that the Bell Springs program was closed 'due to on-going concerns regarding the level of supervision': see Morgan & Motteram, ibid 100.
50. Polk K, Alder C, Muller D & Rechtman K, *Early Intervention: Diversion and Youth Conferencing: A national profile and review of current approaches to directing juveniles from the criminal justice system* (Canberra: Attorney-General's Department, December 2003) 64.
51. Department of Justice, *2005 Handbook* (2005) 40. It was acknowledged that the supervised bail program is difficult to arrange in regional and remote areas: see Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [11.44].
52. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [14.1] Recommendation 62.
53. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 6 & 10; *Pilbara*, 6–11 April 2003, 15; *Geraldton*, 26–27 May 2003, 14.
54. See discussion under 'The Commission's Proposal for Community Justice Groups', above pp 133–41.
55. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery,* Law LRCWA, Project No 94, Background Paper No 7 (December 2004) 101.
56. LRCWA, Project No 94, *Thematic Summaries of Consultations – Manguri*, 4 November 2002, 5 where it was noted that bail conditions can be too onerous; *Broome,* 17–19 August 2003, 25 where it was said that police impose curfews on young people and then come to the house in the middle of the night to check on them; *Wiluna,* 27 August 2003, 24 where it was stated that curfews are considered a punishment by some Aboriginal people.
57. Auditor-General of Western Australia, *Waiting for Justice: Bail and prisoners on remand: Performance examination,* Report No 6 (October 1997) 12. This research suggested that there was some improvement in the rate of attendance where the bail conditions were imposed in addition to a surety undertaking or a personal undertaking with an agreement that the accused forfeit a sum of money. However, where the accused signs an undertaking with no amount of money then additional conditions, such as reporting to a police station, did not significantly improve the rate of attendance.

of the accused's community to drive the accused to court would be far more effective.



Personal circumstances of the accused

The requirement to consider the 'character, previous convictions, antecedents, associations, home environment, background, place of residence, and financial position' of the accused has the potential to disadvantage some Aboriginal people applying for bail. Aboriginal people experience high rates of homelessness and overcrowding in public housing.[58] Similarly, Aboriginal people experience a higher incidence of unemployment than non-Aboriginal people.[59]

In 2001 the Aboriginal Justice Advisory Council argued that courts in New South Wales did not adequately take into account cultural ties to a community. Instead, the focus was on Western concepts such as employment, home ownership or long-term residence.[60] The *Bail Act 1978* (NSW) was amended in 2002 to provide that when assessing the background and community ties of Aboriginal and Torres Strait Islander people regard should be had to the person's connections to 'extended family and kinship and other traditional ties to place'.[61] The ALRC recommended, more broadly, that a court or other body deciding bail may take into account, as far as relevant, the 'customary laws of an Aboriginal community to which the defendant or a victim of the offence belongs'.[62]

The *Bail Act 1980* (Qld) provides that when considering bail the court or the police officer shall have regard to, if the defendant is an Aboriginal person or a Torres Strait Islander, any submissions made by a representative of the community justice group in the defendant's community including, for example:

(i) The defendant's relationship to the defendant's community; or

(ii) Any cultural consideration; or

(iii) Any considerations relating to programs and services for offenders in which the community justice group participates.[63]

The *Bail Act 1982* (WA) allows an authorised officer or judicial officer to take into account any matters which he or she considers are relevant when deciding if an accused person should be released on bail.[64] Although the Act is silent on Aboriginal customary law and other cultural issues, there is no reason why these matters could not be taken into account if relevant to the question of bail. The Commission is concerned, however, that unless authorised officers and judicial officers are directed to consider these issues practices will remain varied and likely to disadvantage many Aboriginal people. Injustice can occur if individual police, judicial officers or legal representatives are not fully aware of Aboriginal customary law and cultural issues. Therefore, it is proposed that the Act be amended to provide that any relevant matters of Aboriginal customary law or other cultural issues are to be taken into account when determining bail. The Commission

58. For a full discussion of the problems faced by Aboriginal people in relation to living conditions, see Part II 'Housing and Living Conditions', above pp 38–42. Overcrowding also makes it difficult for some Aboriginal people to be released on home detention bail because the proposed residence may not be considered suitable: see Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [6.2.2].
59. See discussion under Part II 'Employment', above pp 36–37.
60. Aboriginal Justice Advisory Council, *Aboriginal People and Bail: Courts in NSW* (2001) <http://www.lawlink.nsw.gov.au/ajac.nsf/pages/reports> 11.
61. *Bail Act 1978* (NSW) s 32(1)(a)(ia). In New South Wales it is also provided that a court or police officer is to take into account any special needs that arise because the accused is Aboriginal see s 32(1)(b)(v).
62. ALRC, *Draft Aboriginal Customary Laws (Recognition) Bill 1986*, cl 20.
63. *Bail Act 1980* (Qld) s 16(2)(e). This provision applies to both adults and juveniles. In Queensland a court has set bail on condition that the accused attend the community justice group as and when directed to do so by the co-ordinator of the community justice group: see *Clumpoint v Director of Public Prosecutions (Qld)* [2005] QCA 43 [2].
64. *Bail Act 1982* (WA) Sch 1, Pt C, cl 1.

Given the importance of Aboriginal customary law to many Aboriginal people, cultural and customary law obligations may take precedence for them over the requirement to attend court.

prefers the broader approach as suggested by the ALRC; limiting the relevance of customary law and cultural matters to an assessment of the accused's personal circumstances would be unduly restrictive. For example, Aboriginal customary law and other cultural issues may be relevant as an explanation for past failure to attend court. Further, innovative conditions designed to reduce the likelihood of failing to attend court and prevent further offending could be based upon methods for resolving disputes under Aboriginal customary law and the involvement of traditional authority structures such as Elders.[65]

Proposal 27

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

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

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

Aboriginal Customary Law and Bail

Funeral Attendance

In Western Australia it is an offence to fail to attend court, without reasonable cause, at the time and place specified. If an accused has been unable to attend court and fails to notify the court of the reason for non-attendance and subsequently attend court as soon as practicable, he or she will also commit an offence.[66] Given the importance of Aboriginal customary law to many Aboriginal people, cultural and customary law obligations may take precedence for them over the requirement to attend court. The RCIADIC noted that one factor, 'which in some areas can create a great dilemma for Aboriginal defendants, is a strongly felt obligation associated with the death of a family member'.[67] During its consultations the Commission received extensive comments from Aboriginal people about the importance of attending funerals.[68] In Carnarvon it was said that there was no choice:

> If your face is missing, it will be noticed. People's attitudes to you change if you do not attend.[69]

During the Pilbara consultations it was stated that:

> You will break Aboriginal law if you don't go to a funeral.[70]

While attendance at funerals is obviously important in all cultures, kinship and cultural obligations under

65. For example, an accused could be released on bail to comply with the lawful directions of a community justice group and required by the community justice group to attend a family healing centre or spend a period of time at an outstation. For detailed discussion of community justice groups, see 'The Commission's Proposal for Community Justice Groups', above pp 133–41.
66. *Bail Act 1982* (WA) ss 51(1)–(2). The penalty for this offence is a fine up to $10,000 or up to three years' imprisonment. It is also an offence to fail to comply with certain conditions of bail such as a condition not to contact a particular witness or the victim: see s 51(2a). In all jurisdictions except the Northern Territory it is an offence to fail to answer bail without a reasonable excuse. See VLRC, *Failure to Appear in Court in Response to Bail* (2002) 25. In the Northern Territory if a person fails to appear in court or otherwise fails to comply with the bail conditions he or she is liable to arrest and when he or she is brought before a court the issue of bail will be reconsidered. If the accused had agreed to forfeit an amount of money if he or she failed to attend court then this amount of money may be forfeited. See *Bail Act 1982* (NT) ss 38–40. The only case known to the Commission that has considered what constitutes a 'reasonable cause' is *Bradshaw v Moylan* (Unreported, Supreme Court of Western Australia, No 1178-80 of 1993, Nicholson J, 25 February 1994). In this case an Aboriginal accused failed to attend court on the required day because it was a public holiday. Nevertheless, because it was a regional location the court still sat on that day with one justice of the peace. Nicholson J held that there was an arguable defence to the charge of breach of bail.
67. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [21.4.27].
68. The importance of funerals in traditional Aboriginal societies is discussed under Part VI 'Funerary Practices', below pp 310–17.
69. LRCWA, Project No 94, *Thematic Summaries of Consultations – Carnarvon*, 30–31 July 2003, 5.
70. LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 13.

customary law may require Aboriginal people to attend funerals even where it is necessary to travel long distances and the deceased person would be considered a distant relative in a Western context.[71] The Commission is not aware how often Aboriginal people are charged with breaching bail if they have failed to appear in court because of their funerary customs. It is impossible to know the extent to which police officers exercise their discretion in this situation.[72]

The question whether attendance at a funeral should constitute a defence to a charge of breaching bail is complicated by the obligation under the Act that an accused who cannot attend court must notify the court and appear as soon as practicable. The ALS, in its submission to 2001 Review, stated that Aboriginal people may not advise courts when they are required to attend a funeral because of 'lack of access to phones, fear that they will not be allowed to attend the funeral and a lack of understanding of the need to advise the court in advance'.[73] According to the ALS, failure to appear in court due to funerary customs is common amongst Aboriginal people. While it appears that funeral attendance has not been argued as a defence for a charge, it is often accepted by magistrates when legal representatives advise the court prior to a warrant being issued for non-attendance. The ALS suggests that attendance at funerals has not been argued as a defence to a charge of breaching bail because in most cases the accused has not complied with the requirement to notify the court and appear as soon as practicable.[74] This is an issue that needs to be addressed through improved communication when Aboriginal people enter into their bail undertaking.[75] Although people are provided with formal notices under the Act these documents merely repeat legislative requirements.[76] The Commission is of the view that members of community justice groups could support Aboriginal people who are on bail by providing assistance in notifying the court or, alternatively, the ALS when an accused person is unable to attend court due to a funeral or other associated cultural ceremonies.

Proposal 28

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

That the rewording of these forms and notices should be undertaken with the assistance of Aboriginal communities.

There may be circumstances where the only reason that an accused has not notified the court or subsequently appeared in court is because he or she is grieving or involved in cultural obligations associated with a funeral. When an Aboriginal person has failed to attend court because he or she was attending a funeral, police officers and courts should take into account the person's customary law obligations associated with the funeral when deciding if there was a reasonable cause.

Traditional Punishment and Bail

The Commission's consultations indicated that many Aboriginal people were concerned that when an Aboriginal person was charged with an offence under Australian law (and had also breached Aboriginal customary law) the person was taken away by police before there was an opportunity for traditional punishment to take place:

> If someone contravenes our law and white law, and is not punished first by Aboriginal law, then the matter festers, with members of the offender's family being held responsible.[77]

71. See discussion under Part VI 'Funerary Practices', below pp 310–17.
72. The Commission accepts that there are probably cases that have come before a magistrate but as these transcripts are not publicly available it is difficult to know how often a charge of breach of bail has been successfully defended. One possible reason for that scarcity of case law in relation to breach of bail is that in 1997 it was found that over 50 per cent of people that failed to attend court were not in fact charged with breach of bail. One reason suggested for this is that police may have accepted the explanations given to them. See Auditor-General of Western Australia, *Waiting for Justice: Bail and prisoners on remand: Performance examination*, Report No 6 (October 1997) 14.
73. Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth: Department of Justice, August 2001) Appendix E: ALSWA Submission Extract.
74. Information received by email from the ALS, 4 October 2005. The Commission notes that cl 27 of the Bail Amendment Bill 2000, if passed, will remove the requirement to notify the registrar of the court of the reason for the failure to attend. However the obligation to subsequently appear as soon as practicable will remain.
75. The Commission acknowledges that individual staff at the ALS endeavour to advise their clients of their obligations under bail. However, not all Aboriginal accused are represented by the ALS and some are not represented at all. The Commission notes that the Mahoney Inquiry observed that many accused do not understand the bail system: see Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [16.23].
76. See *Bail Regulations 1988* (WA) Forms 6, 7, Sch 1.
77. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, 36.

Where a matter cannot be resolved according to Aboriginal customary law there is often disharmony in the community.[78] If the offender is not available to undergo traditional punishment, members of the offender's family may instead be liable to face punishment.[79] The preferable position according to many Aboriginal people is for the offender to face traditional punishment prior to being arrested and dealt with by Australian law.[80]

The central issue is whether an accused person's wish to undergo traditional punishment can be legitimately taken into account when considering bail. Whether police officers should allow traditional punishment to take place before the accused is arrested or taken into police custody is discussed below in the section on police.[81] At this stage the discussion is concerned with bail and therefore addresses the question whether an accused person can and should be released for the purpose of traditional punishment after arrest.

The relevant law in Western Australia

A relevant criterion in determining whether an accused person can be released on bail for the purpose of traditional punishment is whether the accused needs to be held in custody for his or her own protection.[82] (Of course, all other relevant factors under the Act must also be taken into account.) The Commission acknowledges that there may be many cases that have come before magistrates where an accused person has applied for bail for the purpose of undergoing traditional punishment, whether this purpose has been made known to the court or not. In Fitzroy Crossing it was said that the practice of magistrates is varied – sometimes the accused will be released on bail for the purpose of customary law punishment and other times not.[83]

Some Western Australian judicial precedent for this issue can be found in applications for bail that have come before the Supreme Court in cases of wilful murder or murder. When an Aboriginal person has been involved in the death of another Aboriginal person traditional punishment will usually follow. Applications for bail based upon traditional punishment have been made in cases of wilful murder or murder because for extremely serious offences it is necessary to show exceptional circumstances in order to be released on bail.[84] In cases where an accused would otherwise be likely to be granted bail it is unlikely that traditional punishment would be relied upon as the basis for the application.

In *Gable v The Queen*[85] the accused (who was charged with wilful murder) applied for bail in order that he could be speared. Elders testified that if the accused did not present himself for traditional punishment his brothers or sisters would face punishment instead. The evidence indicated that the accused would be speared in the thigh and it would be up to the family of the deceased as to whether the accused would be 'destroyed'. The Supreme Court considered that the spearing in this case would amount to grievous bodily harm and was therefore unlawful under Australian law. It was stated that a court may 'recognise tribal punishment as inevitable, but it cannot sanction or condone such punishment'.[86] The court also accepted the Crown's submission that if the accused was released on bail he might be speared in such a manner that could lead to his death and accordingly the court was required by the Act to keep the accused in custody for his own protection.[87]

In contrast, in *Unchango v The Queen*[88] the Supreme Court released the accused on bail for a charge of murder. In that case the court was satisfied that exceptional circumstances existed because the accused claimed that the deceased was stabbed in self-defence during the course of a sexual assault. When considering whether the accused needed to be kept in custody

78. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 3–4; *Pilbara*, 6–11 April 2003, 12; *Albany*, 18 November 2003, 16.
79. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003,4; *Cosmo Newbery*, 6 March 2003, 19; *Pilbara*, 6–11 April 2003, 8; *Geraldton*, 26–27 May 2003, 14; *Wiluna*, 27 August 2003, 22; *Wuggubun*, 9–10 September 2003, 36.
80. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 3–4; *Pilbara*, 6–11 April 2003, 8, 12; *Casuarina Prison*, 23 July 2003, 3; *Carnarvon*, 30–31 July 2003, 4; *Wuggubun*, 9–10 September 2003, 36 .
81. See 'The Police and Aboriginal Customary Law', below pp 236–39.
82. *Bail Act 1982* (WA) Sch 1, Pt C, cl 1(b). In New South Wales legislation expressly states that the court or authorised officer that is deciding whether to release an accused on bail should consider any special needs of an accused arising from his or her Aboriginality. On the face of it this could include the need to submit to traditional punishment. Because it is also necessary to consider whether the accused is in need of physical protection it would still be difficult for a court to release an Aboriginal person for the purpose of physical punishment. See *Bail Act 1978* (NSW) s 32(1)(b)(v).
83. LRCWA, Project No 94, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 42.
84. *Goldfinch v State of Western Australia* [2004] WASCA 218, [51] (Roberts-Smith J).
85. Unreported, Supreme Court of Western Australia, No MC S 47 of 1993, 3 September 1993.
86. Ibid 7 (Commissioner Yeats).
87. Ibid.
88. [1998] WASC 186.

for her own protection the court took into account assurances from staff at the cultural centre (where it was proposed that the accused would reside) that the accused would not be subject to any traditional punishment while she remained at the centre.[89]

Similar arguments based on traditional punishment have been raised in the Northern Territory. There the legislation states that in considering whether to release an accused on bail the court or police officer must decide whether the accused is 'in danger of physical injury or in need of physical protection'.[90] Although the Northern Territory Supreme Court has allowed the release of an Aboriginal person for the purpose of traditional punishment,[91] recent cases suggest that, where the proposed punishment would breach the criminal law, bail will either be refused or subject to conditions that are designed to prevent traditional punishment from taking place.[92] In 2004 in the case *In the Matter of an Application by Anthony*[93] the accused was charged with the manslaughter of his wife. The accused applied for bail on the basis that he wished to be released to undergo traditional punishment. It was submitted that the accused consented to the punishment and that he believed if he did not present himself he may be 'cursed by Aboriginal magic which might kill him while he was in gaol' and that his family may suffer punishment.[94] Martin CJ held that a court could not make an order that would facilitate the 'unlawful infliction of traditional punishment'.[95] He stated, however, that there could be circumstances where a court could grant bail to an accused on terms that would permit traditional punishment to take place:

> It is necessarily impossible to attempt to define the circumstances in which such a course would be permissible or appropriate, but I have in mind as an example minor physical punishment to which the offender is capable in law of consenting. If the court was satisfied that for cultural reasons such lawful punishment would be of benefit to the applicant, the victim, the victim's family and the particular community, in my view it would be permissible for a court to structure orders in a way that would allow for the opportunity for such punishment to be inflicted. If the applicant and all others involved sought such a course and it was clear that such a course would both recognise traditional law and benefit all concerned, the court should be reluctant to deny that course in a paternalistic approach based on moral values or views which are in conflict with the traditional law of the particular applicant and the applicant's community. [96]

The evidence indicated that the accused would be speared in each leg about four times and receive blows with a nulla nulla to his back. Martin CJ held that there was a significant risk that the punishment would result in grievous bodily harm (rather than bodily harm) and therefore the accused could not lawfully consent. This view was partly based on the fact that the people who were going to administer the punishment were inexperienced and there existed the risk that an artery could be severed.[97] After taking other factors into consideration the accused was released on bail. Martin CJ was of the view that it would not be appropriate to remand the accused in custody solely for the purpose of protecting him from voluntary participation in traditional punishment.[98] The court imposed as a condition of bail that the accused not attend the particular community where the traditional punishment would take place.[99] Within a couple of months the accused was arrested in hospital (where he was receiving treatment for leg injuries and a broken arm caused by the traditional punishment) for breaching his bail conditions by attending that community.[100]

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89. 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) 6.
90. *Bail Act 1982* (NT) ss 24 (1)(b)(iii)–(iv).
91. *R v Jungarai* (1981) 9 NTR 30. For a fuller 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) 6.
92. In *Barnes v The Queen* (1997) 96 A Crim R 593 (Mildren J) bail was refused to an Aboriginal man who wished to be released for traditional punishment. The court held that given the legislative provision, that requires a court to consider whether the defendant needs to be held in custody for his or her own protection, the defendant could not be released for punishment that would constitute a criminal offence in the Northern Territory. In *Ebatarinja v The Queen* [2000] NTSC 26 at [17] Mildren J confirmed that a court cannot release a defendant on bail if doing so would 'facilitate an unlawful act'. In this case the defendant was released on bail because the court held that there was no evidence presented to the court about the details of the proposed punishment and therefore there was no evidence that the traditional punishment would constitute an unlawful act.
93. [2004] NTSC 5 (Martin CJ).
94. Ibid [16].
95. Ibid [22].
96. Ibid [26].
97. Ibid [27]–[35].
98. Ibid [37]–[39].
99. Ibid [44].
100. 'Man Speared and Arrested in Tribal Punishment Case', *The Sydney Morning Herald*, 24 March 2005 <http://www.smh.com.au/articles/2004/03/24/1079939697533.html>. The Commission notes that legislation was introduced by a private member into Parliament in the Northern Territory with the aim of preventing a court from releasing an Aboriginal person where the court knows that he or she will be subject to traditional punishment. The legislation was defeated because it was not supported by the Northern Territory government. The Attorney-General, Dr Toyne, observed that the

The Commission's view

In his background paper for this project, Philip Vincent recommended that the Act should be amended to include, as a criterion for the granting of bail, that the Aboriginal community's wishes for the accused person to return to the community for the purpose of customary punishment be considered.[101] The Law Society of Western Australia in a submission for this project outlined a series of pre-conditions that should be met before an Aboriginal accused person could be released on bail for the purpose of undergoing traditional punishment.[102] These included that:

- the accused wishes to undergo traditional punishment;
- the court is satisfied that traditional punishment was sanctioned by the accused's community of origin;
- the court is satisfied that there is adequate medical treatment available for the accused and that there will be police present;
- the court is satisfied that the accused will face traditional punishment eventually upon release from custody; and
- the court is satisfied that if the accused is not released for traditional punishment members of the accused's family will be at risk of punishment.

The Law Society of Western Australia did acknowledge that the lawfulness or otherwise of traditional punishment must be addressed before any amendments could be made to the Act. The Commission agrees that whether a proposed punishment is lawful is central to the question whether an Aboriginal person can be released on bail for the purpose of traditional punishment or with knowledge that traditional punishment will take place. A detailed discussion of this complex issue can be found above in the section on consent.[103]

In its 1986 report on Aboriginal customary laws the ALRC concluded that:

> A court should not prevent a defendant from returning to his or her own community (with the possibility or even likelihood that the defendant will face some form of traditional punishment) if the defendant applies for bail, and if the other conditions for release on bail are met.[104]

When applying for bail, if an accused relies upon his or her desire to undergo traditional or customary law punishment, the outcome will be determined by the lawfulness of the proposed punishment. It is the Commission's view that if the punishment is unlawful, a court cannot release the offender for the purpose of undergoing that punishment. If in all other respects the accused should be granted bail, the court will be obliged to impose conditions to protect the accused from any physical injury. Where the proposed punishment under Aboriginal customary law is not unlawful and the accused wishes to be released for the punishment, the Commission does not consider that it is necessary to impose conditions upon the manner in which the punishment will take place. The proposal discussed above, that Aboriginal customary law and other cultural matters should generally be included in the Act as a relevant factor, will enable Aboriginal customary law punishments that are not unlawful, such as community shaming, compensation or symbolic spearing to be considered when determining bail.

current law in the Northern Territory did not allow a court to release a person for the purpose of traditional punishment and despite one case example (before a magistrate) where a person was so released, he did not consider that there was any need for reform. See Northern Territory, *Hansard*, Parliamentary Record No 16, 26 November 2003.

101. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 34. Hal Jackson has also suggested that despite the difficulties it may be appropriate to grant bail to a traditional Aboriginal person for the purpose on enabling customary punishment prior to being sentenced under Australian law: see Jackson HH, 'Can the Judiciary and Lawyers Properly Understand Aboriginal Concerns' (1997) 24(4) *Brief* 12, 15.
102. Law Society of Western Australia, Submissions in relation to Background Paper No 1, 9 December 2004, 6.
103. See discussion under 'Consent', above p 163–72.
104. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [506].