Sentencing

Aboriginality and Sentencing

General Sentencing Principles

Sentencing is the stage of the criminal justice process where a court determines the appropriate penalty for an offence. In Australia sentences are determined by a judicial officer (as distinct from a jury). A judicial officer is required by law to take into account all relevant factors when sentencing. Each case is decided on an individual basis because the circumstances of each offence and each offender are different. When determining the appropriate sentence a court must weigh up all relevant factors as well as various sentencing objectives. The main objectives are punishment, deterrence, incapacitation, denouncement and rehabilitation.

Punishment encompasses the idea that offenders should receive their 'just deserts'.[1] Deterrence is aimed at discouraging the offender as well as other potential offenders from committing offences in the future.[2] When necessary, courts will impose a sentence with the purpose of incapacitating an offender (generally only for a limited period of time) so that he or she is incapable of committing further offences.[3] Denouncement reflects the educative role of the criminal law by indicating to the offender and others, through the imposition of a penalty, that certain behaviour is unacceptable.[4] Rehabilitation aims to reform an offender in order that he or she no longer poses a risk to the community.[5]

Underlying these objectives are the overall aims to reduce crime and protect the community.[6] Sentencing principles require that any penalty should be proportionate to the seriousness of the offence, which is determined by taking into account the harm caused and the culpability of the offender.[7] It has been observed that the general community usually favours punishment and deterrence over rehabilitation.[8] The purpose of rehabilitation is often misunderstood. It has been said that:

> It is fallacious to regard the rehabilitation of an individual offender as a consideration separate and apart from, and somehow inimical to, the protection of the public. The two things are intrinsically connected. The criminal justice system aims to rehabilitate offenders (particularly young offenders) because rehabilitation removes the danger to the public from one of its (previously) errant members.[9]

In Western Australia a number of sentencing principles are contained in the *Sentencing Act 1995* (WA) ('the Act'). For children relevant principles are contained in the *Young Offenders Act 1994* (WA). The principle that punishment must be proportionate is reflected in s 6(1) of the Act:

> A sentence imposed on an offender must be commensurate with the seriousness of the offence.

Section 6(2) of the Act provides that the seriousness of an offence is to be determined by taking into account

> (a) the statutory penalty for the offence;
> (b) the circumstances of the commission of the offence, including the vulnerability of the any victim of the offence;
> (c) any aggravating factors; and
> (d) any mitigating factors.[10]

1. Clarkson C & Keating H, *Criminal Law: Text and materials* (London: Sweet and Maxwell, 1994) 24.
2. Von Hirsh A & Ashworth A, *Principled Sentencing: Readings on theory and policy* (Oxford: Hart Publishing, 1998) 44.
3. Clarkson C & Keating H, *Criminal Law: Text and materials* (London: Sweet and Maxwell, 1994) 45. Imprisonment incapacitates an offender for the duration of the prison term.
4. Ibid 32.
5. Von Hirsh A & Ashworth A, *Principled Sentencing: Readings on theory and policy* (Oxford: Hart Publishing, 1998) 1.
6. New South Wales Law Reform Commission (NSWLRC), *Sentencing: Aboriginal Offenders*, Report No 96 (2000) 29.
7. Ibid 29–30.
8. Ibid 52.
9. *B (A Child) v The Queen* (1995) 82 A Crim R 234, 244.
10. Aggravating factors are defined in s 7 of the *Sentencing Act 1995* (WA) as factors which 'increase the culpability of the offender' but do not include the fact that the offender has pleaded not guilty, has a criminal record or a previous sentence has not achieved the purpose for which it was imposed. Mitigating factors are defined in s 8 as factors which 'decrease the culpability of the offender or decrease the extent to which the offender should be punished'.

In comparison to Western Australia, sentencing legislation in most other Australian jurisdictions includes comprehensive sentencing principles and a full list of relevant sentencing factors.[11] In 2000 the New South Wales Law Reform Commission observed that there had been a recent trend to include, for the purpose of guidance, the factors that should be taken into account in sentencing. Western Australia was noted as an exception to this general trend.[12] Unlike other jurisdictions Western Australia does not include as a general sentencing principle the purposes of deterrence, denouncement or rehabilitation. Specific factors—such as those relating to the offence, the response to the offence by the offender, the offender's personal circumstances and facts relating to the victim—are not set out in the Western Australian legislation.

The Relevance of Aboriginality to Sentencing

Sentencing principles apply equally irrespective of the cultural background of the offender. In other words an Aboriginal person cannot be sentenced more leniently or more harshly just because he or she is Aboriginal.[13] This general proposition does not mean that the individual characteristics of a particular offender (including matters associated with his or her cultural background) cannot be taken into account by a court when determining the appropriate sentence for an offence. Sentencing requires the personal circumstances of the accused to be considered because they may impact upon his or her moral blameworthiness. In *Neal v The Queen*[14] Brennan J commented that:

> The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group.[15]

Martin Flynn observed that this principle is an illustration of the 'substantive equality principle';[16] that is, in order for courts to treat Aboriginal people equally it is necessary to take into account any relevant differences.

These sentencing principles have been developed by the common law; however, in some jurisdictions there is also legislative authority for taking into account cultural issues during sentencing. In relation to adults the Western Australia legislation is silent on the relevance of cultural factors. In comparison, s 46(2)(c) of the *Young Offenders Act 1994* (WA) provides that when sentencing a young person the court is to take into account the cultural background of the offender.[17] Other jurisdictions include, as a relevant sentencing factor, the cultural background of the offender (both for adults and children).[18] In Queensland sentencing courts are required to consider any submissions from an Aboriginal community justice group that are relevant to sentencing, including submissions in relation to the offender's relationship with his or her community, cultural considerations and any programs or services that are available in the offender's community.[19]

One of the most important cases that has dealt with the sentencing of Aboriginal people is *R v Fernando.*[20] This case outlined a number of important principles, including:

- A sentencing court can take into account facts which exist only by reason of the offender's membership of an ethnic or other group.
- The Aboriginality of an offender may not necessarily mitigate punishment but may explain the offence and the circumstances of the offender.
- Imprisonment may not necessarily be effective at addressing the problems of alcohol abuse and violence within Aboriginal communities.
- Despite the ineffectiveness of imprisonment,

11. See *Crimes Act 1914* (Cth) s 16 A; *Crimes Act 1900* (ACT) ss 341, 342; *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 3A & 5; *Sentencing Act 1995* (NT) s 5; *Criminal Law (Sentencing) Act 1988* (SA) ss 10, 11; *Sentencing Act 1991* (Vic) s 5; *Penalties and Sentences Act 1992* (Qld) s 9.
12. NSWLRC, *Sentencing: Aboriginal Offenders*, Report No 96 (2000) 35.
13. If an Aboriginal person was sentenced more leniently than a non-Aboriginal person merely because he or she was Aboriginal then this could arguably contravene the *Racial Discrimination Act 1975* (Cth). See *Rogers v Murray* (1989) 44 A Crim R 301. The NSWLRC stated that 'Aboriginality does not of itself mean that an offender will automatically receive special of lenient treatment, since it may have no bearing on the commission of the offence': see NSWLRC, *Sentencing: Aboriginal Offenders*, Report No 96 (2000) 28.
14. (1982) 42 ALR 609.
15. Ibid 626.
16. Flynn M, 'Not "Aboriginal Enough" for Particular Consideration When Sentencing' (2005) 6(9) *Indigenous Law Bulletin* 15.
17. See also ss 6(f) and 7(l) of the *Young Offenders Act 1994* (WA) which provide that courts are to ensure young people are dealt with in a manner that is culturally appropriate and that courts are to generally take into account the cultural background of a young person.
18. *Crimes Act 1914* (Cth) s 16(2)(m); *Crimes Act 1900* (ACT) s 342(i). In New Zealand s 8(i) of the *Sentencing Act 1992* (NZ) provides that a court must take into account the cultural background of the offender.
19. *Penalties and Sentences Act 1992* (Qld) s 9(2)(o). This provision is included in an extensive list of other relevant sentencing factors.
20. (1992) 76 A Crim R 58.

sentencing courts must still ensure that Aboriginal people are protected by the law from violence.

- Although drunkenness is not generally a mitigating factor, 'where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor'.[21] It was said that this involves a 'realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self image, absence of education and work opportunity and other demoralising factors have placed heavy stress on them, reinforcing their resort to alcohol and compounding its worst effects'.[22]
- Imprisonment may be particularly harsh for an Aboriginal person who has had little experience with non-Aboriginal ways of life.
- While it is necessary to ensure that the punishment in any case fits the crime, it is also important to consider rehabilitation in order to prevent the offender from committing further offences.

In her background paper for this reference Victoria Williams provides numerous case examples where these principles have been taken into account.[23] These cases reveal that a number of different factors associated with an offender's Aboriginality have been considered as mitigation during sentencing proceedings.

Relevant factors

Socio-economic disadvantages

Courts have recognised socio-economic disadvantages suffered by many Aboriginal people. In doing so, courts have distinguished between Aboriginal people with a background of poverty, lack of education and employment, poor health, alcohol and substance abuse, and other people (Aboriginal or non-Aboriginal) who

have led a stable or relatively advantaged life.[24] Recently, in *Newcombe v Police*,[25] the South Australian Supreme Court took a much broader view of the relevance of socio-economic factors. In this case a 19-year-old Aboriginal male was convicted of an offence of damage which was his first offence. The court was referred to the low level of employment of Indigenous people compared with non-Indigenous people. It was argued that if a conviction was recorded for the offence the offender would be placed at an even greater disadvantage in respect of his prospects of future employment. The offender was fined, but released without a conviction.

Although many of the cases have dealt with problems faced by Aboriginal people in remote locations there is authority to suggest that relevant socio-economic factors can be taken into account for Aboriginal people living in urban areas.[26] In *Harradine v The Queen* [27] the majority of the South Australian Court of Criminal Appeal took into account the adjustment difficulties that the accused had faced when he moved to the city from a remote Aboriginal community.[28]

However, two recent cases in New South Wales have taken a more limited view of the application of the principles defined in *R v Fernando*. The New South

21. Ibid 62.
22. Ibid.
23. Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, Law Reform Commission of Western Australia (LRCWA), Project No 94, Background Paper No 1 (December 2003) 103–18. See also for a detailed discussion of some relevant cases, Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) ch 8.
24. *Rogers and Murray* (1989) 44 A Crim R 310, 307 (Malcolm CJ). See also Williams, ibid.
25. [2004] SASC 26 (Gray J).
26. *R v Fuller-Cust* [2002] VSCA 168, [91] (Eames JA).
27. (1991) 61 A Crim R 201.
28. Ibid 210 (Mulligan J), 205 (White J).

Wales Court of Criminal Appeal emphasised in *R v Newman; R v Simpson* [29] that the offenders were not from a remote community for whom imprisonment would be particularly harsh and the offences did not occur in a local or rural setting.[30] In *R v Walter and Thompson*[31] the two accused persons were convicted of aggravated robbery. They had assaulted the victim after demanding that he remove and hand over his jeans. Prior to the incident both accused persons had been refused entry to a nightclub supposedly because one of them had been wearing tracksuit pants. The bouncer, who refused their entry, told police that when he saw them walking towards the nightclub he decided to refuse entry irrespective of the clothes they were wearing because they 'didn't look like our normal clientele'.[32] The court held that the principles in *R v Fernando* did not apply to one of the accused because he did not come from a dysfunctional or deprived background.[33] It appears that in this case the impact of racism was not taken into account.[34] In the past, provocative racist behaviour has been taken into account as mitigation.[35]

Alcohol and substance abuse

Intoxication does not usually amount to an excuse or provide any mitigation. However, where alcohol or substance abuse reflects the socio-economic environment in which the offender has grown up, this can be used in mitigating a sentence.[36] It is a requirement to show a link between the alcohol or substance abuse and the offender's background. It is not sufficient to merely rely on the fact that an offender is Aboriginal and happened to be affected by alcohol at the time of the offence.[37]

Hardship of imprisonment

Imprisonment is a sanction foreign to Aboriginal customary law. Although the traditional punishment of banishment involved removal of an Aboriginal person from their community, it did not involve incarceration. In some instances banishment has been to another community or to an outstation where there would still be a sense of connection to land and community.[38] With reference to international human rights standards that prohibit punishment that is cruel and inhumane, it was said during the Commission's consultations that:

> For us, prison is cruel and inhumane.[39]

Sentencing courts have recognised that imprisonment will be harder for Aboriginal people who face the loss of connection to land, culture, family and community.[40] In his background paper for this reference, Philip Vincent referred to the problems faced by Aboriginal people, especially children, in Western Australia because custodial facilities may be a long distance from their families and communities. As a result some Aboriginal prisoners are unable to maintain contact with their families.[41] It has been observed that to imprison Aboriginal people is to 'take them from their group, their culture and too often their land; and to repeat to that group and to them the dislocation that has been going on for two centuries'.[42] In one Western Australian case it was acknowledged that serving a sentence in a prison a long way from an Aboriginal

29. [2004] NSWCCA 102.
30. Ibid [30]. The main reason that Aboriginality was not taken into account in this case was because nothing had been presented to the court to show why issues connected with the offender's Aboriginality were relevant.
31. [2004] NSWCCA 304.
32. Ibid [18].
33. Ibid [58].
34. Flynn M, 'Not "Aboriginal Enough" for Particular Consideration When Sentencing' (2005) 6(9) *Indigenous Law Bulletin* 15, 16.
35. *Pearce v The Queen* (1983) 9 A Crim R 146, where the accused and his friends were asked in an offensive manner to leave a party because they were Aboriginal.
36. *Juli v The Queen* (1990) 50 A Crim R 31, 36 (Malcolm CJ); *R v Fernando* (1992) 76 A Crim R 58, 62–63. The need to consider the subjective circumstances of the offender was referred to in *R v Tjami* [2000] SASC 311, 22 (Nyland J) when it was stated that 'not all Aboriginal persons or communities have problems with alcohol abuse, and it would be offensive to suggest otherwise'.
37. *R v Carr* [1999] NSWCCA 200, [31] (Studdert J, Simpson J concurring).
38. *R v Miyatatawuy* (1996) 135 FLR 173; *Atkinson v Walkely* (1984) 27 NTR 34; see also discussion under 'Traditional Punishments – Banishment or Exile', above p 90.
39. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, 36.
40. 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) 101.
41. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 23.
42. Nicholson J, 'The Sentencing of Aboriginal Offenders' (1999) 23 *Criminal Law Journal* 85, 89. A similar observation has been made in relation to Aboriginal peoples in Canada. It was stated that although 'Aboriginal peoples did not traditionally have the institution of imprisonment in their conceptual or architectural landscapes, they have, more than any other group in Canada, experienced its impact': see Jackson M, *Justice Behind the Walls: Human Rights in Canadian Prisons* (Vancouver: Douglas & McIntyre, 2002) 103.

person's country is almost akin to being imprisoned in a foreign country.[43]

Hearing loss

It has been recognised that a high proportion of Aboriginal people, in particular children, suffer from hearing loss and that social problems resulting from hearing loss may impact upon offending behaviour.[44] For some Aboriginal people hearing loss may compound other communication difficulties (such as language barriers) experienced within the criminal justice system.[45] Further, a sentence of imprisonment may be even more difficult for an offender who suffers from hearing loss.[46]

Separation or removal from family

The effects of removing an Aboriginal offender from her family were taken into account in *R v Churchill*.[47] In this case the accused had been removed from her family by government agencies and placed on a mission. By the time the accused was free to return to her community, her family were fringe dwellers who regularly abused alcohol. The accused was convicted of the manslaughter of her partner and the offence was committed while she was under the influence of alcohol. The court took into account her long-standing alcohol problem, that it was linked to her family background and was a cause of her offending behaviour.

In *R v Fuller-Cust*[48] the accused was sentenced to 20 years' imprisonment for a number of serious offences including five charges of sexual assault. On appeal the majority of the Victorian Court of Criminal Appeal reduced the sentence to 17 years' imprisonment. Eames JA, who dissented, was of the view that factors associated with the accused's Aboriginality—the removal from his family, unsuccessful attempts to regain contact with his mother (who was Aboriginal) and the anxiety that he suffered because he was unable to embrace his Aboriginality—should have been given more weight. There was psychological evidence to suggest that the offences were caused in part by this stress and his fear of rejection.[49] It has been commented that the judgment of Eames JA went further than the usual factors associated with socio-economic disadvantage of Aboriginal people and considered matters relating to the 'cultural harm that has been inflicted upon Indigenous communities'.[50]

Violence

It has been suggested that in the past courts have imposed more lenient penalties on Aboriginal people who commit violent offences against other Aboriginal people, especially women and children.[51] As a result some Aboriginal women perceive that courts do not consider the matter to be as serious when they are the victims of violent offences.[52] However, more recently in cases of violence by Aboriginal men against Aboriginal women and children, courts have been less inclined to reduce the sentence as a result of factors associated with an offender's Aboriginality.[53] In Western Australia the Court of Criminal Appeal has acknowledged the need to protect Aboriginal women and that this will often mean that mitigatory circumstances such as socio-economic disadvantage will have less weight.[54] In *R v Daniel*[55] it was stated that Aboriginal people who commit violent offences against other members of their communities should not 'be accorded special treatment by the imposition of lighter sentences'.[56]

In relation to the belief by some Aboriginal men that violence against Aboriginal women is acceptable under customary law, Kearney J in the Northern Territory Supreme Court stated that courts must endeavour to dispel the widespread belief that such violence is

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43. *The State of Western Australia v Sturt* (Unreported, Supreme Court of Western Australia, No 5/2004, Murray J, 1 September 2004) Transcript of Proceedings 44. Also in *R v Turner* (Unreported, Supreme Court of Western Australia, No 211 of 2002, Anderson J, 19 August 2003), Transcript of Proceedings 51–52, the effect of imprisonment on an Aboriginal person who had never been away from his traditional area for more than a few weeks at a time was taken into account by the court when deciding to impose a sentence of life imprisonment rather than strict security life imprisonment for an offence of wilful murder.
44. Howard D, Quinn S, Blokland J & Flynn M, 'Aboriginal Hearing Loss and the Criminal Justice System' (1993) 3(65) *Aboriginal Law Bulletin* 9.
45. For a discussion of the communication problems faced by Aboriginal witnesses, see Part IX 'Difficulties Faced by Aboriginal Witnesses', below pp 396–401.
46. *Russell v The Queen* (1995) 84 A Crim R 386, 393 (Kirby ACJ).
47. (Unreported, Supreme Court of Western Australia, No 160/1998, Owen J, 6 October 1998).
48. [2002] VSCA 168.
49. Ibid [89]–[92]. O'Bryan AJA agreed that the issues in relation to the accused's Aboriginality were relevant. He did not consider that the sentence should be reduced below 17 years' imprisonment: see [154].
50. Edney R, 'The Stolen Generation and the Sentencing of Indigenous Offenders' (2003) 5(23) *Indigenous Law Bulletin* 10, 12 (emphasis omitted).
51. *R v Friday* (1985) 14 A Crim R 471, 472 (Campbell CJ).
52. NSWLRC, *Sentencing: Aboriginal Offenders*, Report No 96 (2000) 45.
53. *R v Friday* (1985) 14 A Crim R 471, 473 (Connolly J).
54. *R v Woodley, Boonga and Charles* (1994) 76 A Crim R 302, 318.
55. [1998] 1 Qd R 499, 530–31 (Fitzgerald P).
56. Ibid 530–31 (Fitzgerald P).

acceptable.[57] The justification of violence and sexual abuse on the basis of Aboriginal customary law is considered in detail below.[58]

Problems within the criminal justice system

Most of the cases that have taken into account factors associated with Aboriginality have focused on historical and socio-economic factors with far less emphasis on disadvantages within the criminal justice system. There are, however, some important cases that draw attention to deficiencies within the justice system in relation to Aboriginal people. In *Russell v The Queen* [59] Kirby ACJ acknowledged the high imprisonment rate of Aboriginal people and commented that:

> [The] usefulness of long sentences for Aboriginal offenders must increasingly be called into question in light of the Royal Commission and the other reports, produced in recent years. Judges with the responsibility of sentencing must generally be familiar with these considerations.[60]

In *R v Scobie* [61] the court took into account the failure of government authorities to address the recommendations of the RCIADIC and that there had been no effective measures to address the accused's offending behaviour. In May 2005 the Western Australian Court of Criminal Appeal in *WO (A Child) v The State of Western Australia* [62] made important observations about the inadequacy of programs and services for Aboriginal children in regional areas, as well as taking into account systemic bias within the system. In this case the President of the Children's Court had sentenced two young Aboriginal children to six months' detention. Both had been convicted of relatively serious offences and had breached a conditional release order previously imposed by the court. The court considered the question whether 'all reasonable steps towards the rehabilitation of these children had been taken' and in this regard noted that there were fewer programs and services available for this purpose in regional areas. The court also took into account that the rate of referral to diversionary juvenile justice options is far less for Aboriginal children and as a result Aboriginal children come into contact with the formal criminal justice system at a much faster rate. Therefore, when making decisions based in part upon the offender's criminal record it was held that the court must be careful to ensure that the cumulative effect of previous decisions is taken into account and that details of any past offending are closely examined.[63]

The view of the offender's community

As discussed earlier in this Part, Aboriginal communities are actively involved in the resolution of disputes under Aboriginal customary law and the purpose of customary law punishment is often to restore peace within the relevant community.[64] In cases where an Aboriginal offender has committed an offence against Australian law, as well as violating customary law, courts have taken into account the views of an offender's community. It has been held that the views of the offender's Aboriginal community can be taken into account in sentencing as long as giving effect to those views does not lead to a penalty that is inappropriate for the offence.[65]

In the Northern Territory case, *R v Miyatatawuy,*[66] the offender was convicted of an assault against her partner. The victim informed the court that he did not wish for the offender to be imprisoned. In a written statement to the court the victim also outlined that the offender had been punished under Aboriginal customary law. After spending two years at a dry outstation the offender was now welcome back with her partner to the community. The views or wishes of a victim about the appropriate sentence are generally not relevant.[67] In *Miyatatawuy* the court held that it was entitled to take into account the wishes of the offender's community. The victim just happened to also be a member of that community.[68]

Aboriginal courts throughout Australia (such as the Nunga Court, the Koori Court and circle sentencing courts) provide a direct mechanism for the views of

57. *Amagula v White* (Unreported, Supreme Court of Northern Territory, No JA 92/1997, Kearney J, 7 January 1998).
58. See discussion under 'Aboriginal Customary Law as the Reason or Explanation for the Offence', below pp 215–20.
59. (1995) 84 A Crim R 386.
60. Ibid 392.
61. [2003] SASC 85.
62. [2005] WASCA 94.
63. Ibid [65].
64. See discussion under 'Traditional Dispute Resolution', above pp 85–88.
65. See *R v Minor* (1992) 59 A Crim R 227; *Robertson v Flood* (1992) 111 FLR 177; *R v Miyatatawuy* (1996) 135 FLR 173.
66. (1996) 135 FLR 173.
67. *Coulthard v Kennedy* (1992) 60 A Crim R 415, 417. Section 25(2) of the *Sentencing Act 1995* (WA) provides that a victim impact statement is not to address the way in which or the extent to which an offender should be punished.
68. See discussion of this case in 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) 38.

the offender's community to be taken into account. Again, these views cannot override what is considered to be the appropriate sentence by the relevant judicial officer.[69] It should not be assumed that an Aboriginal offender's community will necessarily seek more lenient penalties. In relation to circle sentencing in New South Wales, it has been observed that sentences suggested by the Aboriginal Elders were at the 'heavier end of the scale'.[70]

Aboriginal customary law

As a consequence of the principle that relevant factors associated with an offender's Aboriginality can be taken into account in sentencing, there is extensive judicial authority for the consideration of Aboriginal customary law when sentencing. The issue of Aboriginal customary law and sentencing is separately discussed below.[71]

The Commission's view

While there is ample case law authority to allow matters associated with an offender's Aboriginality to be taken into account during sentencing, the cases are not consistent in approach. The spotlight is generally on socio-economic disadvantage. Although there are some more recent cases (discussed above) that have taken a broader view of the types of factors that relate to an offender's Aboriginality,[72] there is no way of knowing whether this approach will be adopted by all courts, especially the lower courts that deal with Aboriginal people on a daily basis. For the purposes of consistency and to ensure that important issues associated with the Aboriginality of an offender are not overlooked, the Commission is of the view that there should be a legislative direction to have regard to the cultural background of the offender. There is no reason to limit this provision only to Aboriginal people because matters associated with the cultural background of other groups in the community may also be relevant to sentencing.[73]

Given the current structure of the Act such a provision may appear out of place. Where a similar provision appears in legislation in other jurisdictions it is contained in a list of other relevant sentencing factors. The Commission suggests that the Act should be amended to include a list of factors that are generally considered relevant to sentencing. This list should be for the purpose of guidance for the judiciary as well as the defence and prosecution, but it should not constitute an exhaustive list because flexibility is required in sentencing.

Proposal 29

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

Imprisonment as a Sentence of Last Resort

Over-representation of Aboriginal people in custody

Despite the practice of sentencing courts throughout Australia taking into account relevant factors associated with the Aboriginality of an offender, and the numerous reports and inquiries that have recommended changes to the criminal justice system, the rate of imprisonment of Aboriginal people continues to rise and remains disproportionate to the rate of imprisonment of non-Aboriginal people. Western Australia has a 'long-established and continuing tradition of high rates of imprisonment'.[74] In 2003 the rate of imprisonment for all people in Western Australia was higher than anywhere else in Australia except for the Northern Territory.[75] What is more disturbing is that Western Australia has by far the highest rate of imprisonment of Aboriginal people in the nation.[76] As stated by Morgan and Motteram, 'Aboriginal Western Australians are

69. For a detailed discussion, see 'Aboriginal Courts', above pp 142–57.
70. Holmes J, 'Inside the Circle', *Four Corners*, 10 October 2005.
71. See discussion under 'Aboriginal Customary Law and Sentencing', below pp 212–24.
72. See, in particular, the approach taken by the Western Australian Court of Criminal Appeal in *WO (A Child) v The State of Western Australia* [2005] WASCA 94. For further discussion, see Proposal 30 under 'Imprisonment as a Sentence of Last Resort', below p 212.
73. The Commission notes that the Law Society of Western Australia in a submission for this project supported a statutory requirement for all offenders that in sentencing a court must take into account the offender's cultural background: see Law Society of Western Australia, Written Submission, 19 October 2005.
74. Harding R, 'The Excessive Scale of Imprisonment in Western Australia: The systemic causes and some proposed solutions' (1992) 22 *The University of Western Australia Law Review* 72, 73. The Department of Justice has stated that Western Australia 'has a justice system characterised by over use of imprisonment': see Department of Justice, *Reform of Adult Justice in Western Australia* (2002) 6.
75. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery,* LRCWA, Project No 94, Background Paper No 7 (December 2004) 15.
76. Ibid 16; and see discussion under 'Over-representation in the Criminal Justice System', above p 95.

Part of the reason for the high levels of over-representation of Aboriginal people in custody is the cumulative effect of discriminatory practices within the justice system.

amongst the most imprisoned people in the world and their position has deteriorated rapidly over the last two years'.[77]

Aboriginal people who were consulted by the Commission acknowledged that imprisonment is required for some offenders; however, many considered 'the current levels of mass incarceration as destructive of Aboriginal culture and law'.[78] For example, in Laverton it was stated that:

> Too many people get picked up for minor stuff – causes cultural dislocation and disharmony: they never get jobs or back on track.[79]

The issue of over-representation must be addressed both for the welfare of Aboriginal people generally and to ensure that the criminal justice system does not further contribute to the destruction of Aboriginal customary law.

Earlier in this Part the Commission considered some of the reasons for the high level of over-representation of Aboriginal people in custody.[80] Generally, the causes can be categorised as historical factors, factors resulting from socio-economic disadvantages, and problems within the criminal justice system. In 1986 the ALRC concluded that the main causes of the level of over-representation of Aboriginal people in custody were related to problems outside the criminal justice system. The ALRC acknowledged that if steps were taken at all levels of the criminal justice system (police, courts and prisons) there may be some limited improvement.[81] However, since that time the RCIADIC published its extensive recommendations dealing with Aboriginal people and the criminal justice system. It is now widely acknowledged that part of the reason for the high levels of over-representation of Aboriginal people in custody is the cumulative effect of discriminatory practices within the justice system.

Possible solutions to reduce the level of over-representation of Aboriginal people in custody

Imprisonment as a sentence of last resort

In response to the disproportionate rate of imprisonment of Aboriginal people, the RCIADIC recommended that 'governments which have not already done so should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort'.[82] This principle is reflected in s 6(5) of the Act which provides that imprisonment must not be imposed unless a court decides that the seriousness of the offence justifies imprisonment or the protection of the community requires it.[83] Further, s 39 sets out the different sentencing options that are available in Western Australia and requires that the option of imprisonment cannot be imposed unless the court is satisfied that all other options are inappropriate.[84] In relation to juveniles s 7(h) of the *Young Offenders Act 1994* (WA) provides that detention should only be used as a last resort.

Most jurisdictions within Australia contain legislative provisions to the effect that imprisonment must not be imposed by a court unless all other sentencing options are considered inappropriate.[85] However,

77. Ibid 7.
78. Ibid. See for example LRCWA, Project No 94, *Thematic Summaries of Consultations – Midland*, 16 December 2002, 37; *Warburton*, 3–4 March 2003, 5. In a study of traditional Aboriginal prisoners in 1982 it was found that imprisonment disrupted traditional law ceremonies: see Duckworth A, Foley-Jones C, Lowe P and Maller M, 'Imprisonment of Aborigines in North Western Australia' (1982) 15 *Australian and New Zealand Criminal Law Journal* 26, 37 & 40.
79. LRCWA, Project No 94, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 15
80. See discussion under 'Over-representation in the Criminal Justice System', above p 95.
81. ALRC, *The Recognition of Aboriginal Customary Laws*, Final Report No 31 (1986) [538].
82. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) Recommendation 92.
83. Morgan N, 'Business as Usual or a "New Utopia"? Non-Custodial Sentences Under Western Australia's New Sentencing Laws' (1996) 26 *The University of Western Australia Law Review* 364, 369–70.
84. The principle is also reflected in s 35(1) of the *Sentencing Act 1995* (WA) which requires a court that has imposed a sentence of 12 months' imprisonment or less to provide written reasons as to why no other sentencing option was available.
85. See *Crimes Act 1914* (Cth) s 17A; *Crimes Act 1900* (ACT) s 345; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5; *Criminal Law (Sentencing) Act 1988* (SA) s 11; *Sentencing Act 1991* (Vic) s 5(4); *Sentencing Act 1997* (Tas) s 12.

Queensland is the only jurisdiction when dealing with adult offenders to directly use the phrase: 'imprisonment should only be imposed as a sentence of last resort'.[86]

Bearing in mind the level of over-representation of Aboriginal people in custody it has been said that the principle that imprisonment should only be used as a last resort has particular reference to Aboriginal people.[87] However, endorsement of this principle in Australian legislation has not yet resulted in any significant reduction in the rate of Aboriginal imprisonment.[88]

Individual causes of over-representation

One approach to deal with the disproportionate rate of imprisonment of Aboriginal people is to respond to the individual causes of over-representation. This is not new: government agencies have attempted in the past and continue to attempt to address individual factors that cause over-representation. As observed by Morgan and Motteram:

> There has been a plethora of reports aimed at addressing Aboriginal justice issues over the past four years and they have all agreed, explicitly or implicitly, that imprisonment is not the answer.[89]

In this Discussion Paper the Commission has made proposals aimed at recognising Aboriginal customary law as well as reducing the level of imprisonment of Aboriginal people in Western Australia. However, these reforms will take time to implement and longer to have any significant effect on the imprisonment rates. For example, the Commission considers that its proposal for community justice groups has the potential to reduce imprisonment rates in the long-term through the use of diversionary options and support for Aboriginal-controlled crime prevention and justice mechanisms.[90] In the meantime, it is unacceptable for Aboriginal people to continue to be imprisoned at such excessive rates.

Legislative change: The Canadian model

Over-representation of Indigenous people within the criminal justice system is not unique to Australia. As a response to the level of over-representation in Canada the *Criminal Code 1985* (Canada) was amended in 1996 to include the following principle:

> All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, *with particular attention to the circumstances of aboriginal offenders*.[91]

The Canadian Supreme Court considered this principle in *R v Glaude* [92] and held that it was introduced for the purpose of reducing the tragic over-representation of Aboriginal people in Canadian prisons. The court held that the section directs sentencing courts to undertake the sentencing process for Aboriginal offenders differently, 'in order to endeavour to achieve a truly fit and proper sentence in the particular case'.[93] Further, it was stated the phrase 'particular attention' to the circumstances of Aboriginal offenders does not mean that judges are to pay 'more' attention when sentencing Aboriginal offenders.[94] Rather, the court held that judges should 'pay particular attention to the circumstances' of Aboriginal offenders 'because those circumstances are unique, and different' from those of non-Aboriginal offenders.[95] The court also observed that imprisonment may be less appropriate or a less useful sanction for Aboriginal offenders.[96] Importantly, the court observed that the Canadian government's objective when enacting the section was directed at reducing the use of prison, increasing the use of restorative justice principles in sentencing and utilising where possible Aboriginal community justice initiatives when sentencing Aboriginal offenders.[97]

The Supreme Court of Canada emphasised that this approach did not mean that Aboriginal people would escape prison for serious or violent offences. Sentencing requires a case-by-case approach and the question

86. Section 9(2) of the *Penalties and Sentences Act 1992* (Qld) provides that a court must have regard to, amongst other things, the principles that a 'sentence of imprisonment should only be imposed as a last resort' and a 'sentence that allows the offender to stay in the community is preferable'.
87. NSWLRC, *Sentencing: Aboriginal Offenders*, Report No 96 (2000) 31.
88. See discussion under 'Over-representation in the Criminal Justice System', above p 95.
89. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 18.
90. See discussion under 'The Commission's Proposal for Community Justice Groups', above pp 133–41.
91. *Criminal Code 1985* (Canada) s 718.2(e).
92. [1999] 171 DLR (4th) 385.
93. Ibid [33] (Cory & Iacobucci JJ).
94. Ibid [37].
95. Ibid.
96. Ibid.
97. Ibid [47]. At the same time as the introduction of s 718.2(e), other principles were included in the *Criminal Code* such as the objective to 'provide reparations for harm done to victims or to the community and 'to promote a sense of responsibility in offenders': see *Criminal Code 1985* (Canada) ss 718 (e)–(f).

should be: 'for this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the *Criminal Code*?'[98]

A legislative provision for Western Australia

Bearing in mind that the principle that imprisonment should only be used as a last resort is already reflected in the Act; that the common law sentencing principles allow for issues connected with an offender's Aboriginality to be taken into account; and that the Commission has considered individual problems within the criminal justice system that contribute to the level of over-representation, is it necessary to introduce a legislative provision in similar terms to the Canadian model?

It has been argued that current common law sentencing principles in Australia suggest that Aboriginality only becomes relevant if the offender 'suffers from economic or social disadvantage'.[99] As discussed above in relation to the approach taken by courts when sentencing Aboriginal offenders, historical and socio-economic factors have received most attention. Apart from a handful of cases there has been limited recognition by courts of discriminatory practices within the criminal justice system itself.[100] For example, the discussion earlier in this Part refers to statistics that indicate that Aboriginal children have been referred to diversionary juvenile justice options, such as the juvenile justice teams, far less often than non-Aboriginal children.[101] Therefore, as a result of being charged more readily, Aboriginal children generally accumulate a criminal record faster and reach the stage of custody sooner than non-Aboriginal children.[102]

As observed in *R v Carberry*,[103] the sentencing principles which have been developed by the courts for dealing with Aboriginal people have not avoided the high level of over-representation of Aboriginal people in custody.[104] Martin Flynn argued that sentencing principles should 'respond to both the fact that, nationally, an Indigenous person is 16 times more likely than a non-Indigenous person to be in prison and the reasons for that fact'.[105] Legislative reform similar to the Canadian provision would have the effect of directing judicial officers to 'exhaust in practice all sentencing options other than imprisonment'.[106] One aspect to this approach is for a sentencing court to consider 'culturally relevant' non-custodial sentencing options.[107]

One argument against a legislative direction to courts to pay particular attention to the circumstances of Aboriginal offenders when considering whether to impose imprisonment is that it would be discriminatory. However, the Commission considers that such a provision would fall within the meaning of a special measure under s 8 of the *Racial Discrimination Act 1975* (Cth). As discussed in Part IV on international law, affirmative action or special measures are permitted in order to achieve substantive equality.[108] The former Aboriginal and Torres Strait Islander Social Justice Commissioner has argued that:

> The view that everyone should be treated the same overlooks the simple fact that throughout Australian history Indigenous peoples never have been…The failure to provide us with the same opportunities as the rest of society in the past means that to now insist on identical treatment will simply confirm the position of Indigenous people at the lowest rungs of Australian society.[109]

The provision would not have the effect of automatically reducing the sentence for any Aboriginal person who

98. Ibid [80].
99. Edney R, 'Imprisonment as a Last Resort for Indigenous Offenders: Some lessons from Canada?' (2005) 6(12) *Indigenous Law Bulletin* 23, 25.
100. See discussion under 'The Relevance of Aboriginality to Sentencing – Problems within the Criminal Justice System', above pp 206–207.
101. See discussion under 'Over-representation in the Criminal Justice System', above p 95.
102. For example, a case study in the report *Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth* revealed that a 14-year-old Aboriginal boy from a regional area received a conditional release order for his first offence. This order is the most serious sanction available in the Children's Court other than a custodial sentence. This young boy had never been referred to the juvenile justice team either by police or by the courts. See Morgan N, Blagg H & Williams V, 'Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth' (Perth: Aboriginal Justice Council, December 2001) 64.
103. [2000] ACTSC 60.
104. Ibid [8] (Miles CJ).
105. Flynn M, 'Not "Aboriginal Enough" for Particular Consideration When Sentencing' (2005) 6(9) *Indigenous Law Bulletin* 15.
106. Edney R, 'Imprisonment as a Last Resort for Indigenous Offenders: Some lessons from Canada?' (2005) 6(12) *Indigenous Law Bulletin* 23, 25. Richard Edney has also suggested that courts should be provided with a prison impact statement for Aboriginal offenders addressing any previous terms of imprisonment, previous programs made available to the offender, assessment of the impact of a term of imprisonment on the offender and his family, and possible treatment options available for the offender including resources available in the offender's community. He then argues that courts should not impose a term of imprisonment unless it would be 'likely to be of more benefit than not for the offender'. See Edney R 'The Need for a Higher Custody Threshold for Indigenous Offenders in Victoria' (2004) 6(6) *Indigenous Law Bulletin* 17, 19. The Commission considers that the decisive issue should be the likely benefit to the entire community.
107. Flynn M, 'Not "Aboriginal Enough" for Particular Consideration When Sentencing' (2005) 6(9) *Indigenous Law Bulletin* 15, 17.
108. See discussion under Part IV 'Recognition of Customary Law and the Principle of Equality', above pp 72–73.
109. Human Rights and Equal Opportunity Commission, *Social Justice Report*, Report No 2 (2001) as quoted in Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 35.

came before the courts for sentencing. General sentencing principles would still apply and where an offence was particularly serious imprisonment would be required. It would also be necessary for a sentencing court to consider the particular circumstances of the offender and whether that offender's antecedents indicated that he or she may have suffered the negative effects of a system that generally discriminates (whether indirectly or directly) against Aboriginal people.

In considering whether the use of imprisonment as a punishment for Aboriginal people should be legislatively discouraged it is important to bear in mind that there is 'no evidence to suggest that penal policy and practice has done anything to make Western Australia, on the one hand, safer or, on the other hand, more dangerous'.[110] Apart from punishing an offender, imprisonment is assumed to deter the offender (as well as other potential offenders) from breaking the law. The ALRC noted that for Aboriginal people it is a 'widely held view that no stigma attaches to going to gaol'.[111] John Nicholson has observed that some Aboriginal men consider prison as a 'rite of passage' and therefore it may be pointless to continue to impose penalties that neither deter nor rehabilitate Aboriginal offenders.[112]

The Commission's view

The lack of judicial decisions that acknowledge the detrimental effect of practices within the criminal justice system upon the rate of imprisonment of Aboriginal people, justifies the introduction of a legislative provision which directs courts to consider the circumstances of Aboriginal people when deciding whether to impose a custodial sentence. The Commission has proposed that the cultural background of an offender should be included in the Act as a relevant sentencing factor. This does not directly deal with factors that contribute to the disproportionate rate of imprisonment. The Commission is of the view that there should be a separate provision, applicable to both adults and juveniles, directing courts to have regard to the circumstances of Aboriginal people in deciding whether imprisonment is appropriate.

Proposal 30

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

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

Aboriginal Customary Law and Sentencing

There is a long history of judicial recognition of Aboriginal customary law when sentencing Aboriginal offenders. Most commonly this has occurred when an offender is liable to traditional punishment under Aboriginal customary law. Courts have also, although far less often, considered aspects of Aboriginal customary law when considering the reason or explanation for an offence.[113] To determine whether there is any need for reform it is necessary to examine the common law principles that have developed in relation to Aboriginal customary law and sentencing.

Traditional Punishment as Mitigation

If an Aboriginal person commits an offence against Australian law and the conduct giving rise to the offence also violates Aboriginal customary law the person may be liable to face two punishments. In her background paper, Williams examined numerous Australian cases where sentencing courts have taken into account as mitigation the fact that the offender has been or will be subject to traditional punishment.[114] Traditional punishment is a factor to be considered because the offender is Aboriginal and therefore falls within the principle as set out above in *R v Neal*.[115] In addition, traditional punishment may result in a less

110. Harding R, 'The Excessive Scale of Imprisonment in Western Australia: The Systemic Causes and Some Proposed Solutions' (1992) 22 *The University of Western Australia Law Review* 72, 75. See also Department of Justice, *Reform of Adult Justice in Western Australia* (2002) 10.
111. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [535].
112. Nicholson J, 'The Sentencing of Aboriginal Offenders' (1999) 23 *Criminal Law Journal* 85, 88. This was alluded to during the consultations at Albany where it was stated that some 'boys see prison as a rite of passage, although they are still scared when they arrive': see LRCWA, *Thematic Summaries of Consultations – Albany,* 18 November 2003, 19. See also LRCWA, *Thematic Summaries of Consultations – Geraldton,* 26–27 May 2003, 12; *Carnarvon,* 30–31 July 2003, 2, 6.
113. Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, Law Reform Commission of Western Australia, Project No 94, Background Paper No 1 (December 2003) 101.
114. Ibid 16–46. This background paper dealt with cases from approximately 1980 onwards. For a case digest of earlier cases, see Crawford J & Hennessy P, *Cases on Traditional Punishments and Sentencing* (Sydney: ALRC, 1982).
115. (1982) 42 ALR 609.

If an Aboriginal person commits an offence against Australian law and the conduct giving rise to the offence also violates Aboriginal customary law the person may be liable to face two punishments.

severe sentence because of the principle that a person should not be punished twice for the same offence.[116]

The legality of traditional punishments under Australian law

Some physical traditional punishments may constitute an offence against Australian law. When taking such punishments into account courts have stated that they are not condoning or sanctioning the infliction of unlawful violence.[117] While recognising that traditional punishment has or will take place courts have generally avoided incorporating the punishment into a sentencing order. In *R v Sydney Williams*[118] the sentencing judge imposed a suspended sentence of imprisonment on condition that the offender (who was convicted of manslaughter) return to his community and follow the lawful orders and directions of the Tribal Elders. Although there was no mention of the traditional punishment in the sentencing remarks, the ALRC noted that traditional punishment had been referred to by counsel. Subsequent to his release and while he was at the community as required by the court order, Sydney Williams was speared in the leg.[119] This case illustrates the dilemma for sentencing courts: the need to balance the potential conflict between the requirement to treat Aboriginal people fairly and the constraints of Australian law. The ALRC concluded that where a traditional punishment would be unlawful it could not be included in a sentencing order.[120] Despite this in *R v Wilson Jagamara Walker*[121] the court imposed a suspended sentence of imprisonment with a condition that the offender return to the community where it was proposed spearing would take place.

On the other hand, where the proposed form of traditional punishment is not unlawful there is nothing to prevent that punishment from being incorporated into a sentencing order. For example, in *Munugurr v The Queen*[122] the court imposed as a condition upon release from prison (to be subject to a suspended sentence) that the offender attend a meeting in his community.

Another issue that arises because of the unlawfulness of some traditional punishments is whether sentences can be imposed to protect the offender from traditional punishment. The ALRC observed that imprisonment should not to be used as a 'device for a paternalistic form of preventive detention'[123] and concluded that an offender:

> [S]hould not be sentenced to a longer term of imprisonment than would otherwise apply, merely to 'protect' the defendant from the application of customary laws including 'traditional punishment' (even if that punishment would or may be unlawful under the general law).[124]

Past and future traditional punishment

In some cases courts have reduced the sentence because the offender has already undergone traditional punishment. In other cases courts have taken into account the fact that an offender will be liable to traditional punishment in the future.[125] The ALRC observed that in cases where the punishment has not yet taken place, despite the uncertainty as to the exact nature of the punishment, courts have still been willing to reduce the sentence.[126] This latter category is more

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116. *R v Minor* (1992) 59 A Crim R 227, 238 (Mildren J). See also ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [508].
117. 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) 16. In *The State of Western Australia v Sturt* (Unreported, Supreme Court of Western Australia, No 5/ 2004, Murray J, 1 September 2004) acknowledged the probability that the accused would be traditionally punished upon her release from custody, but at the same time made it clear that the court was not condoning the punishment: see Transcript of Proceedings 46–47.
118. (Unreported, Supreme Court of South Australia, Wells J, 14 May 1976).
119. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [492].
120. Ibid [512].
121. (1994) 68(3) *Aboriginal Law Bulletin* 26.
122. (1994) 4 NTLR 63, [39].
123. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [505].
124. Ibid [505].
125. 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.
126. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [507].

controversial especially if the information provided to the sentencing court is unreliable or the offender does not attend for traditional punishment as originally proposed.

Double punishment

Many Aboriginal people consulted by the Commission expressed concern at the issue of double punishment.[127] In some cases when an Aboriginal person is sentenced to a term of imprisonment under Australian law—in addition to the problems that arise from being removed from his or her culture, land, community and family—the term of imprisonment is served with the knowledge that upon release the accused will still be liable to traditional punishment and that because of his or her absence family members may also suffer punishment.

One view expressed during the Commission's consultations was that Aboriginal people should not have to face two punishments: there should only be one.[128] However, generally the consultations revealed that Aboriginal people desire an appropriate balance between Australian law and Aboriginal customary law; in particular, a balance between the two punishments imposed.[129] In Warburton it was argued that there should be more weight placed on traditional punishments in mitigation of sentence.[130] During the Commission's consultations in Casuarina Prison it was said that 'going through Aboriginal punishment should mean a reduced sentence'.[131]

In Western Australia the principle that a person should not be punished twice for the same offence is recognised in s 11 of the Act which provides that, if the evidence that establishes one offence also establishes another offence, the offender can only be sentenced for one of the offences.[132] Currently this provision cannot be relied upon to argue that if a person has been punished under Aboriginal customary law he or she cannot be punished under Australian law. This is because customary law offences are not recognised by Australian law. If offences under Aboriginal customary law were to be recognised for the purposes of s 11 of the Act then in cases where an Aboriginal person had been punished under customary law no punishment could be imposed under Australian law.

In order for Aboriginal people to be protected by Australian law it is necessary that they are bound by Australian law. The Commission is of the view that it would not be appropriate to legislate that punishment under Aboriginal customary law precludes punishment under Australian law. The Commission recognises the need for courts to consider Aboriginal customary law consequences so that Aboriginal people do not face excessive punishment.

Traditional punishments which have been considered by courts

Although the most well-known and controversial forms of traditional punishment are physical punishments such as spearing or beatings;[133] various other forms of traditional punishment, such as banishment, community meetings and reprimands by Elders have been taken into account as mitigation.[134] For example, in *R v Miyatatawuy*[135] the Northern Territory Supreme Court took into account the fact that the offender and her husband (the victim) had been banished to a dry community for two years and as a result both the offender and the victim had successfully overcome their alcohol addiction.[136]

127. LRCWA, Project No 94, *Thematic Summaries of Consultations – Geraldton,* 26–27 May 2003, 13 & 16; *Bandyup Prison,* 17 July 2003, 2; *Albany,* 18 November 2003, 16.
128. LRCWA, Project No 94, *Thematic Summaries of Consultations – Geraldton,* 26–27 May 2003, 13.
129. LRCWA, Project No 94, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 42; *Warburton*, 3–4 March 2003, 6; *Cosmo Newbery*, 6 March 2003, 19; *Pilbara,* 6–11 April 2003, 9, 12.
130. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton,* 3, 4 March 2003, 6.
131. LRCWA, Project No 94, *Thematic Summaries of Consultations – Casuarina Prison,* 23 July 2003, 4. But note that in Wuggubun it was said that double punishment may be a good thing in terms of deterrence (provided that traditional punishment took place first): see LRCWA, Project No 94, *Thematic Summaries of Consultations – Wuggubun,* 9–10 September 2003, 37
132. *Sentencing Act 1995* (WA) s11(1). Section 11(3) provides that it is an exception if the act or omission of an offender causes the death of another. In this situation the offender may be sentenced for the offence of which he or she is guilty by reason of causing the death despite the fact that he or she has already been sentenced for some other offence constituted by that act or omission.
133. For case examples, 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) 18.
134. Ibid 17–20.
135. (1996) 135 FLR 173.
136. Banishment was also taken into account in *Atkinson v Walkely* (1984) 27 NTR 34 and *Ogle v Mahoney* (Unreported, Supreme Court of Queensland, Court of Appeal, CA No 132/1997, 5 August 1997). In *R v Njana* (Unreported, Supreme Court of Western Australia, No 162/1997, Scott J, 13 March 1998) the offender who was physically punished was apparently also subject to permanent banishment from his community. Scott J questioned this aspect because the purpose of traditional punishment is usually described as healing and the restoration of peace. It was submitted by defence counsel that the banishment was part of the punishment in this case.

Williams observed that all of the Western Australian cases examined in her background paper involved physical punishment of some kind.[137] One explanation for the reluctance of courts and legal representatives to consider other forms of punishment or methods of resolving disputes under customary law may be a lack of awareness of the powerful and important nature of various non-physical sanctions. Aboriginal courts such as the Nunga Court, Koori Court and circle sentencing have led to a greater awareness of the benefits of culturally appropriate shaming. The Commission's proposal for the greater use of Aboriginal courts in Western Australia, as well as the proposal for community justice groups, should encourage the recognition of non-violent Aboriginal customary law sanctions.[138]

Courts to be satisfied that punishment was undertaken in accordance with Aboriginal customary law

During the consultations the Commission was made aware of the need to consider whether traditional punishment was undertaken in accordance with Aboriginal customary law. In Laverton it was expressed that 'payback should not be confused with alcohol-related violence' and in order to distinguish between the two it was suggested that 'courts should consider whether Elders were there; whether the person had gone back to the community or family; and whether there was a clear mind'.[139] Similarly, during the Pilbara consultations it was stated that 'traditional punishment in fact must be done while sober, and administered properly, using the appropriate tools, and in the appropriate places'.[140] In Warburton it was explained that, 'properly done, it was a formal and regulated process (and that it is quite different from alcohol-related violence)'.[141]

In *R v Minor* [142] Asche CJ stated that if payback is no more than a revenge attack it could not be taken into account during sentencing.[143] In *Mamarika v The Queen* [144] the court found that the punishment had not been undertaken in accordance with customary law because there had been no community meeting of Elders and those who inflicted the punishment were under the influence of alcohol. Nevertheless the court still took into consideration the fact that the offender had suffered as a result of committing the offence.[145] Although there are conflicting views as to whether private violent revenge can be taken into account as mitigation;[146] physical punishment inflicted upon an Aboriginal offender should only be categorised as traditional punishment if it has been undertaken in accordance with the requirements of Aboriginal customary law.

In the Northern Territory, courts have been informed that the purpose of the traditional punishment is to restore peace and heal the community. It is not common in Western Australian for this type of information to be presented to the court.[147] In order to prevent any distortion of Aboriginal customary law, courts should be satisfied that the punishment was properly done in accordance with Aboriginal customary law. If an Aboriginal person suffers violence as a result of committing an offence and this cannot properly be categorised as Aboriginal customary law then general sentencing principles should determine the weight (if any) to be given in mitigation.

Aboriginal Customary Law as the Reason or Explanation for an Offence

General principles

Sentencing courts have also taken Aboriginal customary law into account when assessing the reason why the offender committed an offence. Consideration of an

137. The Commission notes that the cases considered by Victoria Williams are those that are publicly available or were otherwise known to the author. There may be instances, in particular in the Magistrates Courts, where other non-physical punishments have been considered.
138. See discussion under 'The Commission's Proposal for Community Justice Groups', above pp 133–41 and 'Aboriginal Courts', above pp 142–57.
139. LRCWA, Project No 94, *Thematic Summaries of Consultations – Laverton,* 6 March 2003, 14.
140. LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara,* 6–11 April 2003, 8.
141. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton,* 3–4 March 2003, 5.
142. (1992) 59 A Crim R 227.
143. Ibid 228.
144. (1982) 42 ALR 94.
145. Ibid 97.
146. In *R v Gooley* (1996) 66 SASR 380, 383 (Doyle J) it was held that private revenge cannot be considered in mitigation. However, in *R v Daetz; R v Wilson* [2003] NSWCCA 216 [16] (James J, Tobias JA and Hulme J concurring) it was held that private revenge in the form of a serious assault on the offender by others who were connected to the victim could properly be taken into account in mitigation because otherwise the court would not be able to ensure that the offender did not suffer excessive punishment.
147. 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) 21. A recent example in the Northern Territory is *R v Jones* (Unreported, Supreme Court of Northern Territory, SCC No 20309047, Angel J, 27 February 2004). In this case the offender had been convicted of the manslaughter of his brother. The court was told that payback had been affected and the matter had been 'settled according to customary law' and the family wished for the matter to be at an end.

offender's reasons or motives is a legitimate sentencing factor. For example, a person who steals money to feed his or her family would, all things being equal, receive a more lenient penalty than someone who steals money for greed.

Williams has observed that generally courts have been less reluctant to take into account Aboriginal customary law as the reason for the offending behaviour.[148] In some cases this may have been due to the manner in which the information was presented to the court. For example, in *R v Owen Bara*[149] it was submitted to the court that the young Aboriginal offender had committed a number of offences as a result of cultural peer pressure. The Supreme Court of the Northern Territory rejected this argument. No information had been presented to the court about the nature of the cultural pressure. In *R v Brand*[150] two Aboriginal women were convicted of assault occasioning bodily harm. The court was told that there was a long-standing dispute between the offenders and the victim (also an Aboriginal woman). One of the causes of this dispute was that the victim had apparently had a sexual relationship with the traditional husband of one of the offenders. Malcolm CJ noted in his judgment that it had not been argued that the assault on the victim was justified under Aboriginal customary law. It is impossible to know whether Aboriginal customary law did play a part in either of these cases or if the lack of information simply reflected that customary law was not in fact relevant. What these cases (as well as others)[151] show is that courts, quite correctly, do not infer or assume that customary law played a part in the offence without clear evidence.

In other cases, despite arguments to the contrary, the court has rejected the contention that the offence was committed because of Aboriginal customary law. In *Ashley v Materna*[152] the accused was convicted of assaulting his sister. It was argued that because the victim's husband had sworn at her in the presence of the accused there was a breach of customary law and the accused was allowed to punish her. This explanation was rejected by the court. There was no evidence that the assault was obligatory under customary law or that the offender would face any consequences if he had not 'punished' his sister. In addition, the offender was affected by alcohol at the time of the offence. Therefore, the court held that the conduct could not be properly categorised as Aboriginal customary law.[153]

In some instances, even though an offender has engaged in conduct that is either obligatory or acceptable under Aboriginal customary law, courts have taken the view that the offence is considered too serious under Australian law for there to be any significant reduction in penalty. This has usually arisen in cases of violence or sexual abuse against Aboriginal women and children.

Violent and sexual offences

In the past there have been instances where courts have treated Aboriginal men who commit violent or sexual offences against women and children more leniently than non-Aboriginal offenders. In 1975 in relation to an offence of carnal knowledge of a 10-year-old child, it was stated that:

> [T]his is a serious offence and young girls like this one must be protected against themselves. Nevertheless, I do not regard this offence as seriously as I would if both participants were white. This is of course not to say that the virtue of Aboriginal girls is of any less value than that of white girls, but simply that social customs appear to be different.[154]

The justification of violence or sexual offending against Aboriginal women and children by reference to Aboriginal customary law has been met with strong disapproval by numerous commentators.[155] Megan Davis

148. 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) 22. In two South Australian cases Aboriginal customary law was used to explain offences of arson. In *R v Goldsmith* (1995) 65 SASR 373 the Aboriginal offender set fire to the house where his friend had died. The court took into account the offender's cultural belief that the lighting of the fire would allow the spirit of his friend to rest in peace. In *R v Shannon* (1991) 57 SASR 14 the court took into account as mitigation the fact that the offender lit the fire to protect himself from his father who had threatened the offender with the 'kadaitcha' men.
149. (Unreported, Supreme Court of the Northern Territory, SCC 20016855/20020942, Bailey J, 30 July 2001).
150. [1998] WASCA 279.
151. See also *R v Herbert* (1983) 23 NTR 22; *Janima v Edgington* (Unreported, Supreme Court of the Northern Territory, No 36/1995, Mildren J, 6 September 1995).
152. (Unreported, Supreme Court of the Northern Territory, No JA1/1997, Bailey J, 21 August 1997).
153. Ibid 9.
154. *R v Mangukala* (Unreported, Supreme Court of the Northern Territory, SCC No 313/1974, Forster J, 18 April 1975).
155. See for example Lloyd J & Rogers N, 'Crossing the Last Frontier: Problems Facing Aboriginal Women Victims of Rape in Central Australia' in Easteal P (ed.), *Without Consent: Confronting Adult Sexual Violence* (Canberra: Australian Institute of Criminology, 1993) 149; Payne S, 'Aboriginal Women and the Law' in Easteal P & McKillop S (eds), *Women and the Law* (Canberra, Australian Institute of Criminology, 1993) 65; Eames G, 'Aboriginal Homicide: Customary Law Defences or Customary Lawyers' Defences?' in Strang H & Gerull S (eds), *Homicide: Patterns, prevention and control* (Canberra: Australian Institute of Criminology 1993) 149. See also the discussion under Part VII 'Customary Law is No Excuse for Family Violence', below pp 357–59.

and Hannah McGlade argue in their background paper for this reference:

> Any suggestion from the judiciary that Indigenous women may be afforded lesser standards of protection on the basis of custom is a tacit sanction to the continuing problems of family violence and treatment of Aboriginal women.[156]

More recently arguments that family or domestic violence is generally acceptable within Aboriginal communities or permitted under Aboriginal customary law have been firmly rejected by courts.[157] There is continuing debate about cases of sexual offending against 'promised brides' under traditional law.

Promised brides

In the much published case *Hales v Jamilmira* [158] the Northern Territory Supreme Court of Criminal Appeal considered the issue of promised brides. In this case the 49-year-old Aboriginal accused was sentenced for an offence of carnal knowledge against his 15-year-old promised bride. A Supreme Court judge reduced the offender's sentence from 13 months' imprisonment (to be suspended after serving four months) to a sentence of 24 hours' imprisonment. The Court of Criminal Appeal increased the sentence to 12 months' imprisonment with the offender to be released after serving one month in prison.[159] Although it was accepted that the conduct of the accused was based upon practices considered by some Aboriginal people to be acceptable under Aboriginal customary law, the need to protect children was considered paramount.[160] It was also observed by Riley J that the behaviour in this case was more serious because the offender had a choice: although there may have been a degree of 'cultural pressure' there was no suggestion that the offender was required to have sexual relations with his promised wife.[161]

In *R v GJ* [162] the court was presented with an argument that the accused had sexual relations with a girl aged 14 years because the victim was his promised wife. The accused pleaded guilty to an offence of having sexual intercourse with the child and an offence of aggravated assault. Upon hearing accusations that his promised wife had engaged in sexual conduct with a young boy, both the accused and the victim's grandmother assaulted the victim as a form of punishment. The victim was forced to go with the accused and was again assaulted prior to the sexual conduct. Martin CJ accepted that the accused believed that he was entitled to have intercourse with the victim because she was his promised wife and had reached puberty. He also accepted (as did the Crown) that the accused believed that the victim had consented to sexual intercourse. In addition Martin CJ took into account that the accused did not know that he was committing an offence against the law of the Northern Territory.

Although the accused believed that his conduct was permissible under Aboriginal customary law, Martin CJ noted that it was not a case where customary law required that he have sexual intercourse or strike the child: in both cases the accused had a choice. Further, the sentencing judge made it clear that young Aboriginal girls are entitled to the protection of Australian law and he indicated his concern that some senior male members of the community believed they were entitled to force a promised wife to engage in sexual relations. The court sat at the Aboriginal community hoping to 'get the message through to all members of the community' that what the accused had done was wrong.[163] The accused was sentenced to two years' imprisonment to be suspended after serving one month in prison.

The public's concern for young Aboriginal girls is justified. The prosecution in each of these cases conceded that the sexual offence was consensual.[164] The sentencing courts were therefore required to proceed on that basis. While there are divergent views as to whether the actual sentences imposed were appropriate, the courts rightly considered aspects of Aboriginal customary law that indicated less moral blameworthiness. In particular, in *R v GJ* significant weight was placed by

156. Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 41.
157. See for example *Jardurin v The Queen* (1982) 44 ALR 424; *R v Bulmer* (1986) 25 A Crim R 155; *Ashley v Materna* (Unreported, Supreme Court of the Northern Territory, No JA1/1997, Bailey J, 21 August 1997). For further discussion on this point see Part VII 'Customary Law is No Excuse for Family Violence', below pp 357–59.
158. [2003] NTCA 9.
159. The offender appealed, against the severity of the sentence imposed by the Court of Criminal Appeal, to the High Court of Australia. Special leave to appeal was refused. See *Jamilmira v Hales* [2004] HCATrans 18 (13 February 2004).
160. *Hales v Jamilmira* [2003] NTCA 9 [26] (Martin CJ).
161. Ibid [32] (Riley J).
162. (Unreported, Supreme Court of the Northern Territory, SCC 20418849, Martin CJ, 11 August 2005).
163. See *R v GJ* (Unreported, Supreme Court of the Northern Territory (Yarralin), SCC 20418849, Martin CJ, 11 August 2005) Transcript of Proceedings 5.
164. In both cases the prosecution charged the offender with an offence that did not allege that sexual relations had taken place without consent.

Martin CJ on the fact that the offender did not realise that he was committing an offence against the law of the Northern Territory. This is perhaps understandable given that the Northern Territory parliament previously allowed a defence to a charge of carnal knowledge if the accused and the alleged victim were traditionally married – this defence was only removed in early 2004.[165] As Martin CJ has subsequently stated, in the future when Aboriginal men who follow this aspect of traditional law become aware that this behaviour is contrary to the law of the Northern Territory, more severe penalties will be imposed.[166]

In November 2005 the Crown appealed against the leniency of the sentence imposed in *R v GJ*. The Northern Territory Court of Criminal Appeal allowed the appeal on the basis that the sentence imposed on the accused was manifestly inadequate. The appeal court emphasised that the offences were objectively serious and that the conduct of the accused (although permissible under Aboriginal customary law) was not obligatory and the accused had not been under any pressure to commit the offences. Nonetheless, the court confirmed that when Aboriginal people commit an offence because they are acting in accordance with traditional Aboriginal law they may be less morally culpable. In this case the court noted that the traditional beliefs of the accused had already been taken into account by the decision not to charge him with an offence of sexual assault without consent. The court also took into account that in 2004 the maximum penalty for the offence of carnal knowledge was increased from seven years' imprisonment to 16 years' imprisonment.[167] The Court of Criminal Appeal substituted a sentence of 3 years 11 months' imprisonment to be suspended after serving 18 months in prison.

The Commission received no evidence to suggest that the practice of promised brides in Aboriginal communities in Western Australia is common.[168] In addition Western Australia has never recognised traditional marriage as a defence to an offence of having sexual relations with a child under the age of 16 years.[169] Any arguments to a sentencing court suggesting that an Aboriginal offender did not know that sexual relations with an under-aged child is against the law of Western Australia would be unlikely to succeed.

The Commission's view

Although many of the cases discussed above refer to violence against women, it should be recognised that both Aboriginal men and women may be liable under customary law to traditional punishment and indeed, be responsible for the administration of that punishment.[170] In her background paper for this project, Catherine Wohlan observes that traditional violence as a form a punishment was the 'responsibility of whole communities or relevant groups in those communities, both women and men'.[171] Wohlan distinguished this from what is sometimes referred to as 'bullshit traditional violence' which is not authorised by the community.[172] For example, during the Commission's consultations in Warburton there was a great deal of concern about culturally offensive behaviour. This was described as swearing 'in a way that is deliberately disrespectful, insulting or offensive on matters of law, initiation or family' and distinguished from 'whitefella' type swearing.[173] Traditionally such behaviour may have resulted in severe punishment, including death. Aboriginal people (particularly men) were concerned that this was not properly understood when it resulted in violence against women.[174] In Mowanjun one Aboriginal woman said that when people are punished under Aboriginal customary law for 'wrong way' marriage this should not be viewed as physical abuse.[175]

The Commission strongly condemns any suggestion that family violence or sexual abuse against Aboriginal women and children is justified under Aboriginal customary law. However, while the Commission accepts the potential for Aboriginal customary law to be incorrectly argued as an excuse for violent and sexual offending, this should

165. *Law Reform (Gender Sexuality and De Facto Relationships) Act 2003* (NT) s 5. During the second reading speech for this Bill the Northern Territory Attorney-General explained that although the defence based upon marriage applied on its face to all people, in fact since 1991 it was potentially only applicable to Aboriginal traditional marriages. This was because the *Marriage Act 1961* (Cth) does not generally permit marriage where one or both parties to the marriage is under the age of 18 years. See Northern Territory, *Hansard*, 15 October 2003.
166. Wilson A, 'DPP to Appeal Sentence in Elder's Child-Sex Case', *The Australian*, 20–21 August 2005, 9.
167. *R v GJ* [2005] NTCCA 20, [30], [32], [36], [39] (Mildren J, Riley & Southwood JJ concurring).
168. See separate discussions on this point in Part VII 'Traditional Aboriginal Marriage – Promised marriages', below p 332 and 'Customary Law Promised Marriages and Child Sexual Abuse', below pp 359–61.
169. *Criminal Code* (WA) s 321 (10).
170. For example in *R v Unchango* [1998] WASC 186 and *The State of Western Australia v Sturt* (Unreported, Supreme Court of Western Australia, No 5 of 2004, 1 September 2004) both offenders who were Aboriginal women were liable to traditional punishment for killing their partner.
171. Wohlan C, *Aboriginal Women's Interests in Customary Law Recognition*, LRCWA, Project No 94, Background Paper No 13 (April 2005) 35.
172. Ibid.
173. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 8.
174. Ibid 9.
175. LRCWA, Project No 94, *Thematic Summaries of Consultations – Mowanjun*, 4 March 2004, 49.

The Commission strongly condemns any suggestion that family violence or sexual abuse . . . is justified under Aboriginal customary law.

not prevent courts from considering Aboriginal customary law. The common law suggests that such arguments would today be likely to fail. Further, due to the discretionary nature of sentencing, courts are able to balance Aboriginal customary law and international human rights standards that require the protection of women and children.[176] This is consistent with the proposal of the Commission in Part IV that 'Recognition of Aboriginal customary laws and practices in Western Australia must be consistent with international human rights standards and should be determined on a case-by-case basis'.[177]

Aboriginal customary law as an aggravating factor

As discussed, an accused who has engaged in conduct that is permitted or required under Aboriginal customary law may be considered less blameworthy and as a result receive a more lenient penalty. The question arises: 'Can conduct that is prohibited under customary law be used to argue that an offence under Australian law is deserving of greater punishment?' For example, an Aboriginal offender may commit an offence of sexual assault against a person that the offender was prohibited from having contact with because of avoidance rules under customary law. While the offence of sexual assault would be viewed seriously by both Aboriginal people and non-Aboriginal people, this additional violation would make the offence more serious from the point of view of the offender's Aboriginal community. In general terms a sentencing court is entitled to take into account aggravating factors subject to the overriding principle that the sentence imposed must be proportionate to the offence committed.

The Commission's View

There is an abundance of judicial authority to support the consideration of Aboriginal customary law during sentencing proceedings. The ALRC stressed in their 1986 report on Aboriginal customary laws that there was no support for the rejection of Aboriginal customary law as a relevant sentencing factor.[178] Therefore the obvious question that arises is whether there is any need of reform.

Aboriginal people consulted for this reference indicated strong support for greater recognition of customary law in sentencing. In the international law context it has been argued that:

> In applying national laws and regulations to Indigenous peoples, States should pay due regard to their customs or customary law and should respect the methods customarily practised by Indigenous peoples in dealing with offences, including criminal offences, committed by their members.[179]

Although it is difficult to know the extent to which Aboriginal customary law has been relied upon by defendants in Magistrates Courts, the ALRC concluded that it was usually argued in more serious cases of violence and homicide and less often for minor property or public order offences.[180] The ALRC recommended that it

> should be provided in legislation that, where a person who is or was at a relevant time a member of an Aboriginal community is convicted of an offence, the matters that the court shall have regard to in determining the sentence to be imposed on the person in respect of the offence include, so far as they are relevant, the customary laws of that Aboriginal community, and the customary laws of any other Aboriginal community of which some other person involved in the offence (including a victim of the offence) was a member at a relevant time.[181]

The RCIADIC observed that 'the informal application by the criminal justice system of customary law has resulted in procedures which are ad hoc, idiosyncratic

176. For a general discussion of the need for a case-by-case approach by courts, see Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 75–76.
177. See Part IV, Proposal 5, above p 76.
178. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [516].
179. The United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities as quoted in Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 52.
180. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [497].
181. Ibid [517].

to individual police or judicial officers, confusing to Aboriginal and non-Aboriginal people alike, and potentially open to abuse and over-statement or over-simplification'.[182] In its 2000 report on the sentencing of Aboriginal offenders, the NSWLRC concluded that legislative recognition of Aboriginal customary law would 'promote consistency and clarity in the law and its application to Aboriginal people'.[183] It was also of the view that the recognition of Aboriginal customary law should not 'remain dependent upon individual judges and magistrates'.[184]

It has been suggested that, because of the lack of policy direction through legislation, courts 'struggle' with the issues that arise under Aboriginal customary law.[185] Vincent has also stressed that there is no clear direction from the legislature or the courts as to how Aboriginal customary law is to be taken into account in sentencing.[186] He recommended that there should be a statutory requirement, for both adult and juveniles offenders, that sentencing courts must take into account an offender's cultural background and any Aboriginal customary law matters that are relevant.[187]

Another reason for the need of reform is to encourage the legal system to view Aboriginal customary law more broadly. By requiring all courts to consider customary law, even for less serious offences (that do not result in physical traditional punishment), courts will be required to take into account the holistic nature of Aboriginal customary law and its potential to rehabilitate Aboriginal offenders.

It has also been argued that legislative recognition of Aboriginal customary law has 'symbolic significance' because it indicates respect for customary law.[188] The Commission considers that the recognition of Aboriginal customary law in sentencing should come from Parliament as well as the judiciary.

The single most important criticism of any legislative recognition of Aboriginal customary law is that it may result in a failure to protect Aboriginal women and children from violence and sexual abuse. The NSWLRC stated that:

> Any proposal to recognise Aboriginal customary law in sentencing must carry with it a caution to distinguish legitimate and authentic customary law from false assumptions and misconceptions.[189]

The Commission is of the view that the risk of false claims being made can be minimised by legislating about the manner in which evidence of Aboriginal customary law is presented during sentencing proceedings. This is a matter that is dealt with in detail below.

The common feature of the various suggestions for legislative recognition of customary law in sentencing is that courts should be required to consider Aboriginal customary law. This does not mean that when Aboriginal customary law is raised it will automatically lead to a reduced penalty. The Commission emphasises that courts will retain discretion and therefore can assess the appropriate weight that customary law should be given in any particular case. The NSWLRC concluded that it is not necessary for Aboriginal customary law to be defined in order for it to be recognised in sentencing legislation.[190] The Commission has already expressed its view that any codification of aspects of customary law is not appropriate.[191]

Proposal 31

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

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

182. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [29.2.52].
183. NSWLRC, *Sentencing: Aboriginal Offenders,* Report No 96 (2000) 93.
184. Ibid.
185. Sarre R, 'Sentencing in Customary Australia: An Overview of the Issues' in Sarre R & Wilson D (eds), *Sentencing and Indigenous Peoples*, Australian Institute of Criminology Research and Public Policy Series No 16 (1998) 12.
186. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 24–25.
187. Ibid.
188. NSWLRC, *Sentencing: Aboriginal Offenders,* Report No 96 (2000) 95.
189. Ibid 104–105.
190. Ibid 65.
191. See discussion under Part III 'Codification', above p 62.

Legislative recognition of Aboriginal customary law has 'symbolic significance' because it indicates respect for customary law

Evidence of Aboriginal Customary Law in Sentencing

For Aboriginal customary law to be properly taken into account as a relevant sentencing factor, it is vital that reliable evidence or information about customary law is presented.[192] As provided by s 15 of the *Sentencing Act 1995* (WA) a sentencing court 'may inform itself in any way it thinks fit'. It is not bound by the strict rules of evidence that apply to a court when conducting a trial. There is a need to balance the requirement for reliable evidence about customary law and the flexible nature of sentencing proceedings.

References to false claims being made by Aboriginal people or their lawyers that an offender had been or would be subject to traditional punishment or that behaviour was permitted under Aboriginal customary law was a recurrent theme of the Commission's consultations.[193] For example, in Kalgoorlie it was said that a lawyer had submitted to the court that violence towards women was the 'Aboriginal way'; however, this argument was firmly rejected during consultations.[194] Overall, it was suggested that Aboriginal people, especially Elders, should be involved in the presentation of information to courts about Aboriginal customary law.[195]

A number of principles can be extracted from the case law in regard to what evidence is required before a court can take Aboriginal customary law into account.

- Due to the diversity of Aboriginal customary laws credible evidence should be presented in every case.[196]
- Statements from the bar table in the form of submissions from counsel are not sufficient.[197]
- Wherever possible courts should sit in the relevant community because Aboriginal people are generally more comfortable giving evidence in their own community.[198]
- At the very least, written evidence in the form of affidavits or statutory declarations should be presented with the prosecution being given an opportunity to consider whether the witness was required for cross-examination.[199]
- It is generally preferable for the court to hear evidence from a representative group rather than from just one person.[200]
- Evidence about the nature of the traditional punishment and evidence that the punishment was, or will be, carried out in accordance with Aboriginal customary law is required.[201]

In practice, information presented to sentencing courts about Aboriginal customary law has varied. Williams noted that courts have considered expert evidence or evidence from Aboriginal Elders; oral evidence from Aboriginal people; written statements from Aboriginal people; and submissions by defence counsel which have sometimes been accepted or verified by the prosecution.[202] The observation of Williams that Western Australian courts appear to be less strict in applying the above principles is an important matter for the Commission to consider.[203] While there have been cases in Western Australia where information has come from Elders and other Aboriginal people, there are a significant number of cases where the information

192. LRCWA, Project No 94, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 13; *Fitzroy Crossing*, 3 March 2004, 41.
193. In Broome it was said that some Aboriginal people have misled their legal representatives (and therefore the courts) about Aboriginal customary law: see LRCWA, Project No 94, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, 23. In Geraldton it was noted that the prosecution need to be attentive when arguments based on customary law are presented to the court: see LRCWA, Project No 94, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 16.
194. LRCWA, Project No 94, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, 27.
195. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005)26.
196. *R v Jungarai* (1981) 9 NTR 30, 32 (Forster CJ).
197. *R v Minor* (1992) 59 A Crim R 227, 228 (Asche CJ).
198. *Munugurr v The Queen* (1994) 4 NTLR 63, [23].
199. Ibid [19].
200. *R v Wilson* (1995) 81 A Crim R 270, 275 (Kearney J). In this case three Aboriginal Elders gave their evidence together with the assistance of an interpreter.
201. *Mamarika v The Queen* (1982) 42 ALR 94; *R v Gordan* [2000] WASCA 401; *Parmbuk v Garner* [1999] NTSC 108.
202. 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) 9–13.
203. Ibid 9.

has been presented by defence counsel.[204] For the purposes of illustration, in *R v Ryan*[205] the Supreme Court of Western Australia was informed by defence counsel that the accused (who was convicted of the manslaughter of his brother) believed that he would be liable to traditional punishment in the form of spearing when he was released from prison. Defence counsel further stated that the accused wished to submit to traditional punishment and that it was likely to be inflicted by some 'elder members of the community'. There is nothing in the transcript of proceedings to suggest that the information came from anyone other than the accused himself.[206] The sentencing judge remarked that in mitigation, as well as taking into account various other factors personal to the accused, he had considered the fact that the accused would probably be subject to traditional punishment.

The Commission considers that there are problems with this type of approach. Without corroboration from the relevant Aboriginal community that the offender will face traditional punishment, this approach runs the risk that a more lenient sentence may be imposed. The accused may not in fact be subject to traditional punishment at all or perhaps in a different manner than was presented to the court.[207] On the other hand, less weight may be given in mitigation to unsubstantiated information from defence counsel in relation to an Aboriginal community's view of the offence and any relevant aspect of customary law.[208] Of particular concern are cases involving violence or sexual offences against Aboriginal women (and children) if the information about customary law is presented from the viewpoint of the male offender.[209] As Wohlan indicates in her background paper, when Aboriginal customary law has been argued as an excuse for violence against women it is rare for the views of Aboriginal women to be considered by the courts.[210]

It has been observed that courts have often looked to lawyers from Aboriginal legal services for advice about Aboriginal cultural and social factors, and the views of the Aboriginal community.[211] One problem for defence counsel is the potential for a conflict of interest between the interests of the offender and those of the relevant community.[212] Importantly, legal representatives have an obligation to present their client's instructions and present any arguments that may result in a more lenient sentence.[213] Vincent observes that in some cases it is difficult for an accused person or legal representative to produce evidence about Aboriginal customary law because of the secret nature of some aspects of customary law, as well as 'language and cultural differences or community isolation'.[214]

The ALRC was of the view that while prosecuting counsel, defence counsel and pre-sentence reports were all appropriate methods for the court to be informed about Aboriginal customary law during sentencing proceedings, it is important to ensure that representatives from the relevant communities are given an opportunity to be heard.[215]

The Commission is of the view that it is inappropriate for a court sentencing an Aboriginal offender to be informed about relevant customary law issues solely from defence counsel. This is not a criticism of defence counsel. Defence lawyers are limited by their professional obligations and also may be limited by a lack of resources to fund proper investigation into customary law issues.[216] In some cases the prosecution may accept

204. See *R v Friday* (Unreported, Supreme Court of Western Australia, No 146/1999, Templeman J, 13 October 1999); *R v Churchill* (Unreported, Supreme Court of Western Australia, No 160/1998, Scott J, 9 December 1999); *R v Gordan* [2000] WASCA 230 [18]; *R v Ryan* (Unreported, Supreme Court of Western Australia, No 229/2003, Miller J, 2 July 2004).
205. (Unreported, Supreme Court of Western Australia, No 229/2003, Miller J, 2 July 2004).
206. Ibid, Transcript of Proceedings 19.
207. Eames G, 'Aboriginal Homicide: Customary law defences or customary lawyers' defences?' in Strang H & Gerull S (eds), *Homicide: Patterns, prevention and control* (Canberra: Australian Institute of Criminology, 1993) 149, 160.
208. Ibid.
209. Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 38.
210. Wohlan C, *Aboriginal Women's Interests in Customary Law Recognition*, LRCWA, Project No 94, Background Paper No 13 (April 2005) 37. It has been observed that while courts in the Northern Territory have been willing to hear evidence about customary law from Aboriginal men there has been less focus on the views of Aboriginal women. See Lloyd J & Rogers N, 'Crossing the Last Frontier: Problems facing Aboriginal women victims of rape in central Australia' in Easteal P (ed), *Without Consent: Confronting Adult Sexual Violence* (Canberra: Australian Institute of Criminology, 1993) 159.
211. Eames G 'Aboriginal Homicide: Customary Law Defences or Customary Lawyers' Defences?' in Strang H & Gerull S (eds), *Homicide: Patterns, Prevention and Control* (Canberra: Australian Institute of Criminology, 1993) 149, 150.
212. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [524].
213. Eames G 'Aboriginal Homicide: Customary law defences or customary lawyers' defences?' in Strang H & Gerull S (eds), *Homicide: Patterns, Prevention and Control* (Canberra: Australian Institute of Criminology, 1993) 149, 154.
214. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 25.
215. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [531].
216. See discussion under 'Legal Representation', above pp 102–103.

the issues to be raised about customary law. For example, the prosecution may already be aware that traditional punishment has taken place or police may have taken statements from witnesses that contain information about Aboriginal customary law.[217]

Northern Territory and Queensland have both enacted legislative provisions dealing with the reception of information about Aboriginal customary law. In 2005 the *Criminal Code* (NT) was amended to provide that a sentencing court may receive information in relation to an aspect of Aboriginal customary law (including punishment) and may take into account views of an Aboriginal community about the offence or the offender as long as the information is received from a party to the proceedings and is presented for the purpose of arriving at the appropriate sentence. The procedural requirements stipulate that the party who wishes to present the information must give notice to each of the other parties to the proceedings who in turn must be given a reasonable time to respond. The information must also be presented in the form of evidence on oath, an affidavit or a statutory declaration.[218] The Northern Territory Attorney-General, Dr Toyne, stated in relation to this legislation that:

> If a person is going to make a claim about their rights to take some action under customary law or, in fact, if the community is going to make a claim about the inappropriateness of that person's actions according to customary law, that evidence really has to be tendered with a wider knowledge of the co-holders of customary arrangements than just simply the offender or their advocate, or the victim or their advocate. This is a collectively held system of living and needs to be tested in a wider context than just the claims of one individual to whatever end they are seeking at sentencing.[219]

Section 9(2)(o) of the *Penalties and Sentences Act 1992* (Qld) provides that when sentencing an Aboriginal or Torres Strait Islander person a court must have regard to any relevant submissions made by a representative of the community justice group in the offender's community in relation to:

- the offender's relationship to his or her community;
- any cultural considerations; or
- any programs and services in which the community justice group participates.

For the purposes of this provision a community justice group is defined as one which has been formally established under the relevant legislation;[220] a group of people within the offender's community who are involved in providing information to a court, or providing diversionary and rehabilitation activities for Indigenous people; or a group of people made up of Elders or other respected people. The provision applies to urban and rural communities. The legislation also states that a representative of a community justice group must advise the court if he or she is related to the offender or the victim or if there is a conflict of interest.[221] The same legislative provisions are contained in s 150 of the *Juvenile Justice Act 1992* (Qld).

The procedure that governs the receipt of information in Queensland is set out in Supreme Court Practice Direction No 5 of 2001. Submissions can be made in person, in writing or with the court's approval by telephone or video link. Generally submissions are made in person.[222] It has been argued that one deficiency in the practice directions is that there is no provision for the accused or the prosecution to be given any prior notice of the information that is to be presented to the court.[223] In order to ensure that relevant information is presented to the court it has been suggested that written submissions should be provided to the defence counsel and the prosecution prior to the sentencing date.[224] The Queensland Court of Criminal Appeal has held that a court is not bound to accept the submissions of a community justice group: the court is only bound to consider the submissions.[225] A sentencing court therefore retains complete discretion as to the weight to be given to any submissions that are made to the court.

In order to retain flexibility in the sentencing process, the Commission does not consider that legislation should

217. See for example *R v Rictor* (Unreported, Supreme Court of Western Australia, No 34/2002, McClure J, 30 April 2002): *R v Jackman* (Unreported, Supreme Court of Western Australia, No 250/2002, Murray J, 15 May 2003).
218. *Criminal Code* (NT) s 104A. The Northern Territory Attorney-General stated during the second reading speech of the Sentencing Amendment (Aboriginal Customary Law) Bill 2004 that the 'purpose of this bill is to ensure that courts are provided with fully tested evidence about relevant customary law issues when they are sentencing an offender': see Northern Territory, *Hansard*, 13 October 2004.
219. Ibid.
220. For a detailed discussion of community justice groups in Queensland, see 'Community Justice Mechanisms in other Australian Jurisdictions', above pp 127–29.
221. *Penalties and Sentences Act 1992* (Qld) s 9(7).
222. Hack S, 'Community-Based Sanctioning of Offenders: A New Solution for Indigenous Justice?' (2005) 30 *Alternative Law Journal* 24, 26.
223. West A, 'Criminal Law' (2001) 22 *Queensland Lawyer* 79, 85.
224. Ibid 86.
225. *R v Roberts* (Unreported, Supreme Court of Queensland, CA No 367/2001, Byrne J, 20 March 2002).

preclude particular types of information from being presented to the court. Instead, there should be a legislative provision that allows and encourages more appropriate and balanced methods of presenting evidence to a sentencing court.

Proposal 32

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

That when sentencing an Aboriginal person the court must have regard to any submissions made by a representative of a community justice group[226] or by an Elder or respected member of the Aboriginal community of the offender or the victim.

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

Sentencing Options

Diversionary Schemes

In the criminal justice system there are two types of diversionary options – those that divert offenders away from the criminal justice system and those that divert offenders away from more punitive sentencing options. The police generally control options that divert offenders from entering the criminal justice system: a choice is made whether to charge or to divert the alleged offender. The role of police in diversion is considered below.[227] The Commission examines in this section the potential for diversionary options for Aboriginal offenders in the sentencing context.

Restorative justice

Diversionary options are often based upon restorative justice practices which aim to repair the harm caused by the crime and generally involve the offender, the victim and the community.[228] These include victim-offender mediation, conferencing and circle sentencing.[229] In the past, conferencing models were considered to mirror Indigenous justice processes;[230] however, this view has now been widely rejected.[231] Chris Cunneen contends that conferencing requires a face-to-face confrontation between the victim and the offender and that this may offend Indigenous dispute resolution processes.[232]

Diversionary conferencing schemes have also been criticised because they have been developed without adequate consultation with Indigenous communities and without sufficient consideration of the local needs of specific communities.[233] The Commission has proposed the establishment of local Aboriginal community justice groups and is of the view that these groups could play an active role in diversionary justice options. The exact nature of that role will be dependent upon further community consultation and agreement.

Children

Juvenile Justice Teams

All Australian jurisdictions currently have some form of juvenile conferencing.[234] In Western Australia, pursuant

226. A community justice group is defined as a community justice group as established by the proposed 'Aboriginal Communities and Community Justice Groups Act'.
227. See discussion under heading 'Police – Diversion', below pp 239–44.
228. Stubbs J, 'Restorative Justice, Domestic Violence and Family Violence' (2004) *Australian Domestic and Family Violence Clearinghouse,* Issues Paper No 9, 1–2. For an overview of the development of restorative justice in Australia, see Daly K & Hayes H, 'Restorative Justice and Conferencing in Australia' (2001) 186 *Trends and Issues in Crime and Criminal Justice*.
229. Stubbs, ibid 2.
230. Polk K, Alder C, Muller D & Rechtman K, 'Early Intervention – Diversion and Youth Conferencing: A national profile and review of current approaches to diverting juveniles away from the criminal justice system' (National Crime Prevention, Commonwealth Attorney-General's Department, December 2003) 82. Conferencing for juveniles in New Zealand was introduced by the *Children, Young Persons and Their Families Act 1989* (NZ). One of the aims was to include elements of traditional Maori dispute resolution practices: see Strang H, 'Restorative Justice Programs in Australia: A report to the Criminology Research Council' (March 2001) 4.
231. Stubbs J, 'Restorative Justice, Domestic Violence and Family Violence' (2004) *Australian Domestic and Family Violence Clearinghouse*, Issues Paper No 9, 12; Polk et al, ibid 86; Blagg H, 'Aboriginal Youth and Restorative Justice: Critical Notes from the Australian Frontier' in Morris A & Maxwell G (eds), *Restorative Justice for Juveniles: Conferencing, mediation and circles* (Oxford: Hart Publishing, 2001) 230; Cunneen C, 'What are the Implications of Restorative Justice's Use of Indigenous Traditions?' in Zehr H & Toews B (eds), *Critical Issues in Restorative Justice* (New York: Criminal Justice Press and Willan Publishing, 2004) 341–49.
232. In some cases customary law sanctions are based on 'avoidance' such as banishment and temporary exile: see Cunneen C, 'Community Conferencing and the Fiction of Indigenous Control' (1997) 30 *The Australian and New Zealand Journal of Criminology* 292, 310.
233. Ibid 293.
234. Polk K, Alder C, Muller D & Rechtman K, 'Early Intervention – Diversion and Youth Conferencing: A national profile and review of current approaches to diverting juveniles away from the criminal justice system' (National Crime Prevention, Commonwealth Attorney-General's Department, December 2003) 27.

There should be a legislative provision that allows and encourages more appropriate and balanced methods of presenting evidence to a sentencing court.

to the *Young Offenders Act 1994* (WA), a court can refer a young person to be dealt with by a juvenile justice team. The team will usually consist of a coordinator, a police officer, the offender, the victim (if he or she consents) and sometimes an education worker or a representative of the offender's ethnic community.[235] At the team meeting participants will recommend an action plan. Successful completion of the action plan will mean that the offender does not receive a criminal conviction for the offence.[236]

When juvenile justice teams were established it was thought that they would operate as an effective diversionary option for Aboriginal juveniles.[237] However, they have been under-utilised and when used have proved to be ineffective.[238] The available evidence suggests that Aboriginal youth are referred less often than non-Aboriginal youth to juvenile justice teams.[239] During a Commonwealth inquiry into Indigenous law and justice a representative of the Department of Justice claimed that research indicates that Aboriginal juveniles are now referred to juvenile justice teams as often as non-Aboriginal juveniles.[240] Nevertheless it was acknowledged that Aboriginal juveniles come into contact with the criminal justice system at a much earlier age than non-Aboriginal juveniles.[241] This does not necessarily mean that Aboriginal juveniles commit more offences. Instead it may result from decisions by police to formally process very young Aboriginal children when very young non-Aboriginal children may be released without any formal intervention or may not even come to the attention of police in the first place. Earlier involvement in diversionary options means that for any subsequent offending these children may lose the benefit of further diversion.[242]

In 2001 court conferencing, which operates in a similar manner to juvenile justice teams, was commenced. This option was only available in the metropolitan area for more serious offenders who are ineligible for referral to juvenile justice teams.[243] Young Aboriginal offenders in regional locations are therefore disadvantaged by the lack of availability of this option.[244]

Another obstacle to the successful engagement of Aboriginal children and their families in the team process is fear and distrust of police and other government agencies.[245] Despite the differences between conferencing models and formal court processes, conferences are still part of the juvenile justice system[246] and therefore may not be seen as legitimate from the point of view of Aboriginal people.[247]

During the Commission's consultations there were calls for increased representation of Aboriginal people on juvenile justice teams.[248] In 2005 the *Young Offenders*

235. *Young Offenders Act 1994* (WA) s 37(2).
236. *Young Offenders Act 1994* (WA) s 33(2).
237. Cunneen C, 'Community Conferencing and the Fiction of Indigenous Control' (1997) 30 *The Australian and New Zealand Journal of Criminology* 292, 297.
238. Blagg H, 'A Just Measure of Shame: Aboriginal youth and conferencing in Australia' (1997) 37 *The British Journal of Criminology* 481, 496.
239. Cunneen C, 'Community Conferencing and the Fiction of Indigenous Control' (1997) 30 *The Australian and New Zealand Journal of Criminology* 292, 297; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* (2002) 174. The Commission notes that there is evidence that the rate of referral of Aboriginal youth to teams is improving: see Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2003* (Perth: Crime Research Centre, 2004) 110, 116; Fernandez J & Loh N, *Crime and Justice Statistics for Western Australia: 2002* (Perth: Crime Research Centre, 2003) 119.
240. Commonwealth of Australia, Joint Committee of Public Accounts and Audit, *Indigenous Law and Justice Inquiry*, Official Committee, *Hansard* 31 March 2005, PA 29.
241. Ibid.
242. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* (2002) 179.
243. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 89. Schedules 1 and 2 of the *Young Offenders Act 1994* (WA) contain lists of offences that cannot be referred to a juvenile justice team.
244. Morgan N & Motteram J, ibid 91.
245. Blagg H, 'A Just Measure of Shame: Aboriginal youth and conferencing in Australia' (1997) 37 *The British Journal of Criminology* 481, 496
246. Polk K, Alder C, Muller D & Rechtman K, 'Early Intervention – Diversion and youth conferencing: A national profile and review of current approaches to diverting juveniles away from the criminal justice system' (National Crime Prevention Commonwealth Attorney-General's Department, December 2003) 58.
247. Blagg H, 'Aboriginal Youth and Restorative Justice: Critical notes from the Australian frontier' in Morris A & Maxwell G (eds), *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Oxford: Hart Publishing, 2001) 231.
248. LRCWA, Project No 94, *Thematic Summaries of Consultations – Mirrabooka*, 18 November 2002, 9; *Albany*, 18 November 2003, 17.

Act 1994 (WA) was amended to provide that the coordinator of the juvenile justice team could be a member of an approved Aboriginal community. For practical or cultural reasons, a warden, Elder or other appropriate member of an approved Aboriginal community could be included rather than a police officer.[249] This is a positive development. The involvement of Aboriginal people in the team process will hopefully improve the effectiveness of juvenile justice teams for Aboriginal children.[250]

Diversion to a community justice group

Consultations indicated that there was an 'urgent need' for more effective diversionary options for Aboriginal youth[251] that deal with underlying problems and involve families.[252] Diversionary options that are managed or controlled by Aboriginal communities should be encouraged. Customary law processes as well as other programs or services established within Aboriginal communities will then be used in the rehabilitation of young offenders. This does not necessarily mean that representatives from government agencies cannot be involved. Some communities may develop programs in conjunction with police and justice officers, while others may consider the involvement of these agencies to be counter-productive. In all cases government support is required in developing and resourcing diversionary programs. In relation to community justice groups in Queensland funding and support from government was necessary to establish the groups, but the 'content and form of intervention is determined by the community'.[253]

The Commission is of the view that a court sentencing an Aboriginal young person should have the option of referring that person to an Aboriginal diversionary scheme. Section 67 of the *Young Offenders Act 1994* (WA) allows a court to dismiss a charge without imposing any punishment if the offender enters into an acceptable undertaking or has, or will be, subject to an approved alternative form of punishment. The court also has the power to adjourn sentencing until such an undertaking or punishment has been carried out.[254] The Commission's proposal in relation to the presentation of information to a court from a community justice group or respected member of the offender's community will assist in informing the court about relevant diversionary options.[255] The sentencing court will of course have complete discretion in all the circumstances as to whether the option is appropriate.

The former Aboriginal and Torres Strait Islander Social Justice Commissioner outlined the best practice principles for juvenile diversionary options. Consistent with international human rights standards it was argued that diversionary schemes must incorporate procedural safeguards such as the presumption of innocence, the right to legal representation and the right to silence.[256] A referral to a community justice group as a diversionary *sentencing* option will only occur after the offender has appeared in court and been convicted. The Commission also recognises the need for accountability and independent monitoring of any diversionary scheme.[257] This applies equally to government-controlled and Aboriginal-controlled options. Where any offender is dealt with outside the formal court system there is a risk that unfair treatment will occur because the process may not be open and accountable.[258] It may be necessary for an independent authority to hear complaints from offenders on their treatment while subject to diversionary schemes. Pilot schemes should be encouraged and monitored prior to any legislative amendments.

Adults

It is wrong to assume that restorative justice and diversionary programs are only suitable for young people or for less serious offending.[259] Recently conferencing schemes have been introduced for adults in some

249. *Young Offenders Act 1994* (WA) ss 36 & 37. An appropriate member of an approved Aboriginal community is nominated by the community council and approved by the CEO of the Department of Justice and the Commissioner of Police.
250. For example, s 34(3) of the *Juvenile Justice Act 1992* (Qld) provides that if the young person is an Aboriginal or Torres Strait Islander person the convenor of the conference must consider inviting a representative of a community justice group in the offender's community.
251. LRCWA, Project No 94, *Thematic Summaries of Consultations – Armadale,* 2 December 2002, 16. In Midland it was said that diversionary options should be used to 'break the cycle of imprisonment': see LRCWA, Project No 94, *Thematic Summaries of Consultations – Midland,* 16 December 2002, 38.
252. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wiluna,* 27 August 2003, 22.
253. Cunneen C, 'Community Conferencing and the Fiction of Indigenous Control' (1997) 30 *The Australian and New Zealand Journal of Criminology* 292, 306.
254. *Young Offenders Act 1994* (WA) s 68.
255. See discussion under 'Evidence of Aboriginal Customary Law in Sentencing', above pp 221–24.
256. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* (2002) 136.
257. Ibid 136–37.
258. In Strang H, 'Restorative Justice Programs in Australia: A report to the Criminology Research Council' (March 2001) 35, it was noted that there are risks associated with any informal justice process.
259. Ibid 27.

The underlying theme of this discussion is the need to increase the participation of Aboriginal people in the design and delivery of community-based sentencing options.

Australian jurisdictions.[260] In 2002, as part of its proposed reforms to adult justice, the Department of Justice stated that adult conferencing would be introduced.[261] Apart from victim-offender mediation run by the Department of Justice there are currently no formal conferencing options for adults in Western Australia.[262] While conferencing or other restorative justice programs may be beneficial for all adult offenders, in the context of this project the Commission supports the use of Aboriginal-controlled diversionary options for adult Aboriginal offenders. This is a response to the disproportionate rate of Aboriginal imprisonment.

Under the current sentencing legislation, a court could consider referring an adult offender to a diversionary or restorative justice program in two ways. The first is by making a conditional release order under s 48 of the Act, which is essentially a bond to be of good behaviour for a set period of time, and it can be used to impose conditions upon the offender to attend diversionary programs established by an Aboriginal community.[263] The second way that a court could refer an offender to a diversionary program is to adjourn sentencing until the program is completed. Section 16 of the Act allows the sentencing of an offender to be adjourned for up to six months. For a longer adjournment the court must impose a pre-sentence order under Part 3A of the Act. A pre-sentence order can only be imposed if the seriousness of the offence warrants a term of imprisonment.[264] In order to provide for greater flexibility the Commission considers that a court sentencing an adult offender should have the power to adjourn sentencing for up to 12 months. This should allow sufficient time for programs or processes to be decided upon and completed.

Proposal 33

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

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

Community-Based Sentencing Options

The underlying theme of this discussion is the need to increase the participation of Aboriginal people in the design and delivery of community-based sentencing options.[265] The Commission's consultations indicated extensive support for more effective and culturally appropriate sentencing options as well as increased involvement of Aboriginal people in the justice system. For example, in Midland it was stated that:

> We need a different system of punishment that deals with Aboriginal people in a culturally appropriate way.[266]

The continuing over-representation of Aboriginal people in custody demands innovative action. Earlier in this Part the Commission has proposed the establishment of community justice groups. The purpose of this section is not to critically examine all available community-based sentencing options, but to consider

260. Ibid. Queensland has informal conferencing for adults run by the police. In the Australian Capital Territory restorative justice programs are available for adults: see *Crimes (Restorative Justice) Act 2004* (ACT) s 15. In Western Australian pilot restorative justice projects for adults have operated in Fremantle and Perth. The Statutes Amendment (Intervention Programs and Sentencing Procedures) Bill 2005 (SA) Clause 7 provides for a conferencing scheme for adult Aboriginal offenders. This proposed scheme stipulates that a conference may include an Aboriginal Elder. See also *Sentencing Act 2002* (NZ) s 8(j) which provides that a sentencing court is to take into account any outcomes of a restorative justice process. New Zealand has community managed restorative justice programs available for both juveniles and adults: see Paulin J, Kingi V & Lash B, *The Wanganui Community-Managed Restorative Justice Programme: An evaluation* (Wellington: Ministry of Justice, 2005) 22.
261. Department of Justice, *Reform of Adult Justice in Western Australia* (2002) 19.
262. Dot Goulding, Post Doctoral Research Fellow at the Centre for Social and Community Research, Murdoch University advised on 9 November 2005 that the previous restorative justice conferencing pilot (described as a 'communitarian model') was no longer in operation.
263. *Sentencing Act 1995* (WA) s 49(1) provides that a court can impose conditions on a conditional release order other than supervision by a community corrections officer. The court also has the power under s 50 to require that the offer re-appear in court to determine whether he or she has complied with the order.
264. *Sentencing Act 1995* (WA) s 33A(3). If a pre-sentence order is made the court can adjourn sentencing for up to two years: see s 33B.
265. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) Recommendations 104, 111, 113 & 116; NSWLRC, *Sentencing: Aboriginal Offenders,* Report No 96 (2000) 134.
266. LRCWA, Project No 94, *Thematic Summaries of Consultations – Midland,* 16 December 2002, 36.

the scope for community justice groups or other Aboriginal community justice mechanisms to be involved in sentencing orders.

Adults

Fines

Aboriginal people, especially women, continue to be imprisoned for fine default at a significantly higher rate than non-Aboriginal people.[267] In 2003 Aboriginal women constituted 79 per cent of all female fine defaulters and 46 per cent of all Aboriginal women who were in prison were there because of fine default.[268] Strategies have been introduced to reduce the level of imprisonment for fine default.[269]

In 2002 the Ngaanyatjarra Community identified specific problems relating to fines enforcement procedures for remote communities. For example, there was no person available in the community for an offender to apply to for a time to pay order under s 33 of the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA).[270] Further difficulties were experienced by members of that community because of a lack of education about how the fines enforcement system worked.[271]

Section 57A of the Act allows an offender to apply to the court at the time a fine is imposed for a fine enforcement (WDO) order. The offender must show the court that they do not have the means to pay the fine, that other fines enforcement methods would be unlikely to result in the fine being paid and that they are capable of doing community work. This provision is important although it will not assist those people who cannot afford to pay the fine and, due to health or family issues, are unable to complete community work. It has been observed that community work orders are difficult to manage in remote Aboriginal communities.[272] If the offender does not complete the community work then a warrant of commitment to prison can be ordered within seven days.[273]

During the Midland consultations the Commission was told that fines on Aboriginal offenders were often too high compared with the means of the offender.[274] The Ngaanyatjarra Community has recommended that there should be a means test before a fine is imposed.[275] However, s 53 of the Act provides that when determining the amount of a fine, a court should 'as far as practicable' take into account the means of the offender and the extent to which the fine will burden the offender. When deciding the amount to be imposed the option of converting a fine to community work should not be seen as a reason for ignoring the capacity of the offender to pay the fine. Further research is required into the extent that excessive fines are imposed on Aboriginal offenders.

Some of the practical enforcement problems could be solved with the involvement of community justice groups. With adequate resources an Aboriginal community justice group would be able to assist with community education about fines enforcement issues and possibly assist with the collection of fines and the supervision of community work and development orders.

Community work

The RCIADIC recommended that Aboriginal communities should participate in the planning and implementation of local community work programs that are of value to the community.[276] Such programs are currently undertaken through the use of Community Service Agreements. The number of agreements in place at any given time varies and is subject to the conditions

267. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery,* LRCWA, Project No 94, Background Paper No 7 (December 2004) 17.
268. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2003* (Perth: Crime Research Centre, 2004) 139.
269. The *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) was introduced to provide alternative non-custodial methods of enforcing fines. This legislation introduced the use of drivers licence suspension as an incentive to recoup unpaid fines. Although the intention of the legislation was to reduce the level of imprisonment for fine default there has been unintended consequences resulting from licence suspensions. Those who have continued to drive while suspended, often without knowing of the suspension have then received further fines as a result of the offence of driving whilst under suspension. Recently, the Department of Justice has introduced the *Time to Pay Up Strategy* which is designed to inform people who are not aware that their licences have been suspended and assist with more effective methods of making payments: see <http://www.justice.wa.gov.au> 'Fines and Infringements'.
270. Ngaanyatjarra Community, *Law and Justice Submission to the Attorney-General of Western Australia* (April 2002) 10.
271. Ibid.
272. Ibid 13.
273. Ibid.
274. LRCWA, Project No 94, *Thematic Summaries of Consultations – Midland,* 16 December 2002, 37. In Laverton it was also stated that the system of fines and work and development orders do not work for Aboriginal people. See LRCWA, Project No 94, *Thematic Summaries of Consultations – Laverton,* 6 March 2003, 15.
275. Ngaanyatjarra Community, *Law and Justice Submission to the Attorney-General of Western Australia* (April 2002) 15.
276. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [22.5.46] Recommendation 116.

of the community and the willingness of the community to supervise offenders.[277]

During the Warburton consultations suggestions were made as to how community-based sentencing options 'could be better used to reinforce community responsibility and respect for culture and law'.[278] For example, it was proposed that community work could be set as a 'task' to be supervised by Elders.[279] If the offender did not comply, Elders would be able to act more quickly than the community corrections officer.[280]

The Commission considers that it would be premature at this stage to suggest amendments to the Act to provide for a community service task in lieu of a set number of hours. Initially courts could consider imposing the completion of a community service task in the relevant Aboriginal community as a condition attached to a conditional release order. Alternatively the same result could be achieved as part of a diversionary process. In time and after further consultation with Aboriginal communities legislative amendments could be made.

Community-based orders

Aboriginal people generally have a higher breach rate for community-based orders than non-Aboriginal people.[281] While this is probably due in part to socio-economic disadvantages faced by many Aboriginal offenders, some of the blame must lie with the lack of suitable rehabilitative programs and services for Aboriginal offenders. In their background paper, Morgan and Motteram examined in detail the programs and services available in the community for Aboriginal offenders. They found, in general, that there are a very limited number of Aboriginal specific programs and services and many of those that exist are still in the developmental stage.[282]

An offender placed on a community-based order will usually require supervision. Generally this supervision is undertaken by the local community corrections officer. In remote locations this is particularly difficult. One solution to this problem has been the use of Aboriginal Community Supervision Agreements between the Department of Justice and Aboriginal communities. Essentially Aboriginal people from the offender's community take over the supervision of the offender. As discussed earlier, these agreements may provide practical benefits in some communities. They do not allow for Aboriginal-controlled or customary law processes to be used.[283]

Supervision by a member of an Aboriginal community or community justice group could be facilitated through diversionary processes or by imposing conditions attached to a conditional release order. The broad nature of these options would allow customary law processes to operate. If community justice groups wish to have a direct role in the supervision of offenders on community based orders—instead of replacing community corrections officers through the use of Community Supervision Agreements—then amendments to the Act will be required.

Children

Community consultations revealed strong support for incorporation of aspects of Aboriginal customary law when sentencing young offenders. In Broome it was suggested that some young people who commit offences against both customary law and Australian law should be required to undergo education in traditional law as part of their sentence.[284] In Wiluna 'bush camps' run by Aboriginal people were suggested as an alternative to imprisonment.[285] In Rockingham one Aboriginal person said:

> There should be 'culture camps' again for kids who get into trouble to teach children respect for their laws, land and people ... children should walk the old tracks again.[286]

277. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, Programs and Delivery,* LRCWA, Project No 94, Background Paper No 7 (December 2004) 70.
278. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton,* 3–4 March 2003, 6.
279. Ibid.
280. Ibid 7.
281. Auditor-General of Western Australia, *Implementing and Managing Community Based Sentences,* Report No 3 (May 2001) 50. See also Blagg H, Morgan N, Cunneen C & Ferrante A 'Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System' (in press) 14; Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [9.32].
282. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery,* LRCWA, Project No 94, Background Paper No 7 (December 2004) 128–29.
283. See discussion under 'Aboriginal Community Supervision Agreements', above pp 111–12.
284. LRCWA, Project No 94, *Thematic Summaries of Consultations – Broome,* 17–19 August 2003, 22.
285. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wiluna,* 27 August 2003, 25.
286. LRCWA, Project No 94, *Thematic Summaries of Consultations – Rockingham*, 9 December 2002, 30. During the Commission's consultations with the ALS there was support for cultural camps for young people see LRCWA, Project No 94, *Thematic Summaries of Consultations – Aboriginal Legal Service of Western Australia*, 29 July 2003, 6.

Community supervision agreements are also in place for young offenders. Section 17B of the *Young Offenders Act 1994* (WA) provides that the Chief Executive Officer of the Department of Justice may enter into an agreement with the council of an Aboriginal community, with or without the assistance of a 'monitor', to supervise young offenders who are subject to community-based orders. A monitor may be appointed by the Chief Executive Officer from a panel of suitable persons nominated by the council of the relevant Aboriginal community.[287]

Once established, community justice groups would be able to supervise young offenders or provide specific programs in a more direct manner than currently operates. Instead of acting in the place of a community corrections officer, Aboriginal community supervision could be provided for in the legislation and ordered by the sentencing court.

The Commission's View

If a sentencing court is considering making an order that requires an Aboriginal offender to be supervised by members of an Aboriginal community or a community justice group or diverting an offender to be dealt with by their community, it is vital that the court is properly informed of the views of the community (or the community justice group). The ALRC was told of instances where courts had structured orders without first consulting the community.[288] The Commission recognises that there may be some Aboriginal offenders who may not be welcome back to their community for a period of time and there may be some communities who are not willing to supervise some offenders.

The ALRC also observed that it may be inappropriate for courts to order that Aboriginal customary law punishments take place (irrespective of the legality of the punishment) because such punishments are not 'rule-governed' but are the 'result of a community process of dispute, discussion and reconciliation'.[289] It is important for judicial officers to be flexible in this area, focusing on the outcome of the process from the perspective of the offender, the victim and the community. Any sentencing order should provide for the involvement of the Aboriginal community without being unduly restrictive about the nature of that involvement. The court retains an overall monitoring role in this model by the requirement that the offender re-appear in court on a specified day to determine the final outcome, in the light of their response to the program or supervision.

The Commission has separately discussed the establishment of Aboriginal courts in Western Australia.[290] Under the Commission's proposals in relation to sentencing, any court will be required to consider relevant Aboriginal customary law matters and the views of a community justice group. Aboriginal courts will facilitate this process and provide a space within the criminal justice system where all of those involved in the proceedings are fully aware of the issues.

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287. *Young Offenders Act 1994* (WA) s17C.
288. ALRC, *The Recognition of Aboriginal Customary Laws*, Final Report No 31 (1986) [512].
289. Ibid [513].
290. See discussion under 'Aboriginal Courts – The Commission's View', above pp 156–57.