

Police

Historically, Aboriginal people have been subject to oppressive treatment by police. As stated by the RCIADIC:

Throughout the many decades when policies of protection, welfare, segregation or assimilation called for Aboriginal people to be controlled, confined or moved, often with great anguish, from areas of traditional attachment, or for their children to be taken away to their irreparable heartbreak, police were always involved.¹

The Western Australia Police Service has conceded that its 'relationship with Aboriginal people had suffered from historical legacies'. This has resulted in 'difficulty in building trust between police and Aboriginal people'.² The RCIADIC observed that Aboriginal people resent the excessive intervention in their lives by police and are hesitant to seek assistance from them.³ Similarly, the Gordon Inquiry found that one of the primary reasons for the reluctance of Aboriginal people to report family violence and child abuse was distrust of police.⁴

The RCIADIC made extensive recommendations about the criminal justice system, a substantial number of which were directed to police services.⁵ In general the RCIADIC recommended that the effectiveness of policing to Aboriginal communities should be reviewed with particular emphasis on whether there is over-policing or inappropriate policing of Aboriginal people.⁶

Because police have wide discretion about who to arrest and charge, as well as where to patrol and which

offenders will be targeted, they play a direct role in the over-representation of Aboriginal people in the system.⁷ It has been asserted that:

The police are arguably the criminal justice system's most significant decision makers. It is they who provide the first interface with the system and who are, in effect, its 'gate-keepers'. Police decisions – such as whether to intervene in a particular situation, whether to deal with a matter formally or informally, which charges to lay, and whether to proceed by way of arrest and charge or by summons – can have far reaching implications.⁸

The Commission holds the view that over-policing and inappropriate policing of Aboriginal people continues today. One of the most notorious examples of over-policing is the 'trifecta': drunkenness, obscene language and resisting arrest.⁹ Following the decriminalising of drunkenness the 'trifecta' now includes disorderly conduct, resisting arrest and assaulting a police officer.¹⁰ Many of the 'trifecta' charges eventuate because police approach Aboriginal people in public spaces for behaviour that would go unnoticed if committed by non-Aboriginal people.¹¹ As a consequence Aboriginal people react and this reaction escalates to the point where police decide to arrest.

Section 50 of the *Police Act 1892* (WA) provides that a police officer has the power to order that a person leave a public place for up to 24 hours if the officer reasonably suspects (amongst other things) that the person is committing a breach of the peace or intends to commit an offence. This section came into operation

1. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [13.3.6].
2. Western Australia Police Service, *Strategic Policy on Police and Aboriginal People: A strategic approach to working with Aboriginal people in providing equitable and accessible policing services – policy statement and rationale* (2004) 2.
3. RCIADIC, *Regional Report of Inquiry into Underlying Issues in Western Australia* (1991) [5.12.3].
4. Gordan S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities* (2002) 207.
5. For a detailed consideration of the implementation of individual recommendations, see Government of Western Australia, *2000 Implementation Report of the Royal Commission into Aboriginal Deaths in Custody* (Aboriginal Affairs Department, June 2001).
6. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [21.2.46] recommendation 88.
7. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 245.
8. Blagg H, Morgan N, Cunneen C & Ferrante A, 'Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System' (in press) 10.
9. Dillon C, 'Law Enforcement and Indigenous Australians' (Paper presented to the 3rd National Outlook Symposium on Crime in Australia: Mapping the Boundaries of Australia's Criminal Justice System, Australian Institute of Criminology, Canberra, 22–23 March 1999) 4.
10. Morgan N, 'The Abolition of Six-month Sentences, New Hybrid Orders and Truth in Sentencing: Western Australia's latest sentencing laws' (2004) 28 *Criminal Law Journal* 8, 15.
11. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 248. See also Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [9.26].

in June 2005. Failure to comply with the order, without a reasonable excuse, is an offence and the penalty is a maximum of 12 months' imprisonment. More than 120 'move-on notices' were issued in the first two weeks that this provision came into operation. It has been reported that 36 per cent of these 'move-on notices' were issued to Aboriginal people.¹²

Examples of over-policing were given during the consultations. Aboriginal people informed the Commission that police officers sometimes target specific places to catch people driving under suspension.¹³ In Fitzroy Crossing it was stated that 'police "lie in wait" for Indigenous drivers, they don't stop white people when they come out [of] the pub'.¹⁴ In Laverton there were numerous comments about 'heavy handed tactics' by the police especially in relation to public arguments – 'Aboriginal people have nowhere to hide when drinking and arguing'.¹⁵

During the Commission's consultations it became clear that relations between Aboriginal people and the police are still extremely strained. Lack of respect for Aboriginal people generally and for Elders and community leaders were highlighted.¹⁶ Many Aboriginal people believe that there is extensive racism within the police service.¹⁷ Lack of sensitivity by police towards Aboriginal victims and lack of appropriate support for victims of family violence were also mentioned.¹⁸ Many communities commented that young Aboriginal people were treated poorly by police.¹⁹ A similar finding was made in 2002 by the former Aboriginal and Torres Strait Islander Social Justice Commissioner who reported that young Aboriginal people felt that they were 'targeted by police in public spaces'.²⁰ In some places it was claimed that police use excessive force against young Aboriginal people.²¹

In order to maintain law and order in Aboriginal communities, effective cooperation between Aboriginal

communities and the police is essential.²² The Commission's consultations revealed some support for working together to improve the relationship between police and Aboriginal people. In Fitzroy Crossing the need for consistency between police personnel was seen as a problem. It was said that when a new sergeant is appointed existing protocols developed between the local police and the community may be ignored.²³ In Warburton there were complaints that police fail to seek permission to come into the community or even advise the reason why they are there:

The police come – don't ask permission from the community and don't tell us the reasons. They say 'just open the door and let us in'. We are still waiting to work properly with the police.²⁴

The Commission acknowledges that there are many police who 'work well with Aboriginal communities on a basis of mutual respect and trust'.²⁵ However, in order to improve the status of police-Aboriginal relations and to ensure more effective policing of Aboriginal communities, reform is necessary.

Police and Aboriginal Customary Law

The Policy and Practice of the Western Australia Police Service

A difficult issue confronting police officers in their dealings with Aboriginal people is the appropriate response to physical traditional punishment that may constitute an offence under Australian law. There are two important issues – whether police should 'allow' physical traditional punishment to take place and whether police should lay charges against a person who has inflicted traditional punishment pursuant to Aboriginal customary law.

12. Morfesse L, 'Youth Targeted in New Orders to Move Along', *The West Australian*, 13 June 2005, 11.

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

14. LRCWA, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 43.

15. LRCWA, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 15.

16. LRCWA, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 42; *Derby*, 4 March 2004, 52.

17. LRCWA, *Thematic Summaries of Consultations – Derby*, 4 March 2004, 53; *Mowanjun*, 4 March 2004, 49.

18. LRCWA, *Thematic Summaries of Consultations – Midland*, 16 December 2002, 37; *Broome*, 17–19 August 2003, 29; *Fitzroy Crossing*, 3 March 2004, 43; *Derby*, 4 March 2004, 53.

19. LRCWA, *Thematic Summaries of Consultations – Carnarvon*, 30–31 July, 2003, 6; *Broome*, 17–19 August 2003, 21; *Mirrabooka*, 4 November 2002, 14; *Albany*, 18 November 2003, 19.

20. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* (2002) 179.

21. LRCWA, *Thematic Summaries of Consultations – Derby*, 4 March 2004, 53.

22. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [214].

23. LRCWA, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 43.

24. LRCWA, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 7.

25. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 29. For example during the Commission's consultations in Wiluna the community showed support for their local sergeant: see LRCWA *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, 24.

During the Commission's consultations Aboriginal people indicated that when an Aboriginal person has committed an offence against Australian law and has also contravened customary law it is vital that customary law processes take place first.²⁶ Physical traditional punishment under customary law is often required when an Aboriginal person is involved in the death of another Aboriginal person. If the offence is murder or manslaughter under Australian law, once the accused is arrested by police it is extremely unlikely that he or she will be released on bail prior to appearing in court.²⁷

The decision by a police officer to arrest an accused prior to traditional punishment taking place may have dire consequences for the accused, the accused's family and the relevant Aboriginal communities. As discussed earlier, if the accused is not available for punishment a member of their family may be punished instead. The failure of traditional punishment to take its course can also cause disharmony in communities and in some cases lead to ongoing conflict or feuding. An accused who is not punished under customary law may spend a number of years in prison wondering whether family members are suffering or if upon release they will still be punished.²⁸

The Western Australia Police Service *Strategic Policy on Police and Aboriginal People* emphasises that 'violent aspects of customary law' are inconsistent with Western Australian criminal law and contravene international human rights standards.²⁹ On the other hand, it is recognised that there are positive features of non-violent aspects of Aboriginal customary law, such as maintaining the 'social structure of Aboriginal communities'.³⁰ This policy states that:

The Police Service will pursue charges relating to the carrying out of violent aspects of customary law and

will also support witnesses and protect them from retribution.³¹

The police (as well as the prosecuting agencies) have discretion whether or not to charge an alleged offender. It appears that in practice police officers do not often charge Aboriginal people for inflicting traditional punishment and in some cases police officers are actually present when the punishment takes place.³² It has been observed that despite the overall discriminatory use of police discretion against Aboriginal people, the instances where police and prosecuting authorities have exercised their discretion in favour of Aboriginal people has usually been in relation to matters connected to Aboriginal customary law.³³

A sergeant at Wiluna Police Station reportedly said that police probably wouldn't proceed to charge a person for inflicting traditional punishment if the complainant (the person punished) did not wish to pursue the matter.

Often the police attempt to overlook tribal punishment so long as the consequences or injuries are not too severe.³⁴

In 2001 a senior constable working in Kalgoorlie intervened to help an Aboriginal man after traditional punishment was at an end. The police officer assisted the man, who had been beaten and speared, to his feet. Once the members of the community saw that the man could walk he was speared a further 10 times. It was submitted during the sentencing proceedings (of the man who was tribally punished) that 'one of the purposes of traditional punishment is to disable to the point that the person cannot walk nor get off the ground'.³⁵ The police officer was quoted in *The Australian* newspaper as saying: 'I knew what was going to happen, I had to let it happen'.³⁶

26. The relevance of customary law to decisions regarding bail has been considered separately. See discussion under 'Traditional Punishment and Bail', above pp 198–201.

27. Ibid.

28. Ibid.

29. Western Australia Police Service, *Strategic Policy on Police and Aboriginal People: A strategic approach to working with Aboriginal people in providing equitable and accessible policing services – policy statement and rationale* (2004) 10. As discussed above in Part IV (above pp 67–76) and in the present Part under 'Consent' (above pp 163–72), the question whether traditional punishments under Australian Aboriginal customary law will contravene international human rights standards is undecided. As stressed in Part IV, there are many customary law practices, including some traditional punishments, that will not contravene such standards.

30. Ibid.

31. Ibid.

32. In recent years the only case known to the Commission (in a superior court) where an Aboriginal person has been charged with an offence resulting from the infliction of traditional punishment is *R v Judson* (Unreported, District Court of Western Australia, POR No 26/1995, O'Sullivan J, 26 April 1996): see discussion under 'Consent', above pp 163–72. A number of sentencing cases indicate that the police were either present during the punishment or were at the very least aware of it. See for example *R v Njana* (Unreported, Supreme Court of Western Australia, No 162/1997, Scott J, 13 March 1998); *R v Richtor* (Unreported, Supreme Court of Western Australia, No 34/2002, McClure J, 30 April 2002); *R v Nelson* [2003] NTSC 64 (4 June 2003).

33. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 245–46.

34. Hotwagner H, 'Two Rules of Law, Payback or Whiteman's?', *eMU News Online*, 29 April 2005 <<http://emunews.murdoch.edu.au/crime26.htm>>.

35. *R v Richtor* (Unreported, Supreme Court of Western Australia, No 34/2002, McClure J, 30 April 2002) 20.

36. Laurie V, 'Justice in Black and White', *The Weekend Australian*, 20–21 October 2001, 20.

In *R v Njana*³⁷ the Supreme Court of Western Australia heard evidence from a detective that the police were aware that traditional punishment had been decided by the Elders and that they were powerless to prevent it. It appears that the police made the decision to wait until after traditional punishment had ended before arresting the accused because they were concerned for their own safety if they tried to intervene.³⁸

The Commission's consultations also indicated the divergence between practices of police in different locations and at different times. In the Pilbara it was stated that in the past the police would 'sanction' traditional punishment. It was said that police would consult with Elders and release 'guidelines' about the degree of injury that would be permitted.³⁹ In Broome it was contended that there was 'guarded support for traditional punishment by some police officers'.⁴⁰ The potential of liability for police officers if the punishment went wrong was acknowledged.⁴¹ During the consultations in Bandyup Prison it was stated that the police in Kalgoorlie knew that they should not interfere with traditional punishment and would 'take men back for punishment, then to jail'.⁴²

Aboriginal people consulted by the Commission in Laverton resented the fact that police had taken certain people, who were liable to face traditional punishment, away before there was a chance for customary law processes to take place.⁴³ In Fitzroy Crossing, Aboriginal respondents criticised police who refused to grant bail for an offender who was liable to traditional punishment. They stated that the police do not understand that family members will be punished if the offender is not available.⁴⁴

Despite these very real concerns the Commission does not consider that it is appropriate to recommend that police officers should in any way facilitate the infliction of unlawful violent traditional punishment.

Discretion to Charge or Prosecute

The decision to charge or prosecute an Aboriginal person, for an offence against Australian law that occurred because the conduct giving rise to the offence was required under Aboriginal customary law, is a different matter. The ALRC found that, apart from discretionary decisions during sentencing proceedings, recognition of Aboriginal customary law had occurred principally in the use of police or prosecutorial discretion. Where offences are based upon customary law, decisions are sometimes made not to charge a person or to substitute a less serious offence.⁴⁵ It was observed that in some cases the decision not to charge may have been influenced by the fact that the complainant did not wish to proceed.⁴⁶

In Western Australia, prosecutorial guidelines require that a prosecution must be in the public interest.⁴⁷ Some of the factors set out in the prosecutorial guidelines could be applicable to offences committed in circumstances involving Aboriginal customary law. These include the attitude of the victim, the degree of culpability of the alleged offender and whether there are available alternatives to a prosecution.⁴⁸ The guidelines for police in the *Commissioner's Orders and Procedures Manual (COPs Manual)* in relation to charging are more limited than those for decisions about whether to continue a prosecution. Although public interest is a relevant factor it is stated that for indictable offences, and in the absence of specific legislation such as the *Young Offenders Act 1994 (WA)*, police officers should bring charges if there is sufficient credible evidence.⁴⁹

The ability of prosecutorial guidelines to cover situations involving customary law is constrained by the express directive that when considering the question of public interest the 'race, colour, ethnic origin, sex, religious beliefs, social position, marital status, sexual preference, political opinions or cultural views of the alleged offender' are not to be taken into account.⁵⁰ The ALRC

37. (Unreported, Supreme Court of Western Australia, No 162/1997, Scott J, 13 March 1998).

38. *Ibid* 46.

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

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

41. *Ibid*.

42. LRCWA, *Thematic Summaries of Consultations – Bandyup Prison*, 17 July 2003, 6.

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

44. LRCWA, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 42.

45. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [471].

46. *Ibid* [472].

47. Office of the Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines 2005*, Policy Guideline No 23, 7; Western Australia Police Service, *COPs Manual (Public Version)* (25 January 2005) OP-28.1.6.

48. Office of the Director of Public Prosecutions, *ibid*, Policy Guideline No 31, 9; Western Australia Police Service, *ibid*.

49. Western Australia Police Service, *ibid*, DP-1.1.1.

50. Office of the Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines 2005*, Policy Guideline No 33, 10; Western Australia Police Service, *ibid*, OP-28.1.6.

considered the benefits of specific prosecutorial guidelines for cases involving Aboriginal customary law. It observed that although guidelines are unenforceable they would at least direct police officers and prosecutors to take into account customary law when making a decision.⁵¹ Philip Vincent has also suggested that prosecutorial guidelines should include relevant matters under Aboriginal customary law.⁵²

In the same way that customary law may be relevant to sentencing⁵³ there is no reason in principle to prevent a prosecuting agency from considering customary law when making a decision to continue a prosecution. If customary law provides significant mitigation it may be appropriate not to prosecute. Of course, the decision will have to balance the seriousness of the offence against customary law considerations.

The ALRC recommended that the following factors should be included in guidelines concerning cases where Aboriginal customary law provides significant mitigation for an offence and the relevant Aboriginal community has resolved the matter:

- If the offence has been committed in circumstances where there is 'no doubt that the offence had a customary law basis'.
- Whether the accused knew that he or she had committed an offence against Australian law.
- Whether the matter had been resolved by the relevant Aboriginal community or communities through customary law processes and the community or communities do not wish for the matter to proceed.
- If the victim of the offence does not wish the matter to proceed.
- Whether there are alternatives such as diversion available.
- If the public interest would not be served by prosecuting the offence.⁵⁴

The Commission agrees with the substance of these factors but it does not consider that guidelines should be limited only to offences that are based on customary law. For example, an Aboriginal person may have committed an offence that is not a violation of customary law itself (such as burglary or alcohol related

offensive behaviour) and the Aboriginal community may have already invoked customary law processes, such as banishment or cultural shaming, to deal with the offender.

The decision not to charge or not to pursue a prosecution must take into account customary law in its broadest sense if there is to be effective diversion away from the criminal justice system for Aboriginal people. The Commission notes that the Western Australia Police Service *Strategic Policy on Police and Aboriginal People* recognises the positive benefits of non-violent customary law processes.⁵⁵ The Commission is of the view that this policy should be formally recognised in the guidelines for both police and prosecuting authorities to encourage greater diversion to Aboriginal community justice mechanisms.

Proposal 36

That the Western Australia Police Service *COPs Manual* OP-28 be amended to require relevant Aboriginal customary law issues to be taken into account in the decision to charge or prosecute an offender.

That the Director of Public Prosecutions consider amending the *Statement of Prosecution Policy and Guidelines 2005* to include that any relevant Aboriginal customary law issues should be taken into account in the decision to prosecute an offender.

Diversion

Diversionary measures aim to redirect offenders away from the formal criminal justice system or, alternatively, away from more punitive options such as imprisonment. The Commission has discussed court diversion in the section on sentencing.⁵⁶ This section focuses on diversion from the criminal justice system. Because of the primary role of police in deciding who enters the criminal justice system the discussion is focused on ways of achieving greater diversion rather than analysing the existing diversionary options.⁵⁷ The relationship

51. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [473] & [475].

52. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 32.

53. See discussion under 'Aboriginal Customary Law and Sentencing', above pp 212–24.

54. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [478].

55. Western Australia Police Service, *Strategic Policy on Police and Aboriginal People: A strategic approach to working with Aboriginal people in providing equitable and accessible policing services – policy statement and rationale* (2004) 10.

56. See discussion under the 'Sentencing Options', above pp 224–30.

57. For a discussion of the various diversionary schemes operating in Australia, see McDougall J & Lam H, 'Sentencing Young Offenders in Australia' (2005) 86 *Reform* 39; National Crime Prevention, *Early Intervention: Diversion and youth conferencing* (Commonwealth Attorney-General's Department, 2003).

between diversion to an Aboriginal community justice group and the role of police is also considered.

The best way to enhance community safety in the long-term is to prevent young offenders from entering the criminal justice system.⁵⁸ The Western Australian Office of the Director of Public Prosecutions, in the *Statement of Prosecution Policy and Guidelines 2005*, acknowledges that special considerations apply to the prosecution of juveniles. It is stated that

The longer term damage which can be done to a juvenile because of an encounter with the criminal law early in his or her life should not be underestimated.⁵⁹

This principle is also recognised in s 7(g) of the *Young Offenders Act 1994* (WA) which provides that non-judicial proceedings for young offenders should be considered providing it would not jeopardise the safety of the community.

Aboriginal juveniles have generally been referred by police to diversionary options less often than non-Aboriginal juveniles.⁶⁰ The RCIADIC recommended that legislation and police standing orders should be reviewed to ensure that Aboriginal juveniles are not arrested in circumstances where they could be cautioned or given a notice to attend court.⁶¹ Although there are some legislative and policy guidelines in relation to police diversion it has been observed that the emphasis is on 'may' rather than 'must' and that police do not consider that they are bound by police guidelines.⁶²

The following case provides a useful example of the problems that can occur when a young person is not given the benefit of diversionary options. In May 2005 a young Aboriginal boy from Onslow was detained in custody for 12 days for attempting to steal an ice-cream. After being arrested by a police officer and refused bail, the boy was driven in police custody for 300 kilometres to Karratha where he spent the night in the Karratha police station.⁶³ After appearing before two justices of the peace he was remanded in custody and taken by aeroplane to a Perth juvenile detention centre (at a cost to the public purse of \$10,000).

Although the young boy was subject to a conditional release order (in respect of a previous offence) imposed by the President of the Children's Court, it was stressed by his defence counsel that the police failed to exercise their discretion in the boy's favour in a number of ways: he was arrested rather than served with a notice to attend court; he was remanded in custody rather than being released on bail; and he was formally charged rather than cautioned or referred to a juvenile justice team – all for an offence that does not include imprisonment as a penalty.⁶⁴ When he was finally dealt with by the President of the Children's Court in Perth the boy was released with no further punishment.⁶⁵

Current Diversionary Options for Juveniles

Cautions

There are various options open to the police when dealing with a young person who they believe has committed an offence. Before commencing formal proceedings, a police officer must consider whether it would be more appropriate to take no action or administer a caution.⁶⁶ A caution is a warning to the young person about the allegedly unlawful behaviour. The legislation states that a caution should be preferred to formal proceedings unless, because of the number of previous offences or cautions and the seriousness of the offence, it would be inappropriate.⁶⁷ A caution cannot be given for any offence that is listed in Schedule 1 or Schedule 2 of the *Young Offenders Act 1994* (WA).

In Western Australia a caution can only be administered by a police officer. Due to the level of animosity felt by Aboriginal children towards police it is unlikely that a caution issued by a police officer would be as effective as a caution given by an Aboriginal person with cultural authority. In Queensland, New South Wales and Tasmania a caution may be administered to a young Aboriginal person by an Elder or a respected member of the young person's community.⁶⁸ The Commission is

58. Jackson H, 'Juvenile Justice – The West Australian Experience' in Atkinson L & Gerull S (eds), *National Conference on Juvenile Justice* (Canberra: Australian Institute of Criminology, 1993) 86.

59. Office of the Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines 2005*, Policy Guideline No 34, 10.

60. See discussion under 'Aboriginal People and the Criminal Justice System – Police Diversion of Juveniles', above p 96.

61. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [30.2.18], recommendation 239.

62. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* (2002) 177.

63. The Commission notes that recommendation 242 of the RCIADIC stated that apart from exceptional circumstances juveniles should not be detained in police lock ups: see RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [30.6.1].

64. The maximum penalty for an offence of stealing (or attempted stealing) where the property involved is valued at less than \$1,000 is a fine of \$6,000: see *Criminal Code* (WA) s 426.

65. Banks A, 'Boy Jailed for an Ice-cream', *The Australian*, 4 June 2005.

66. *Young Offenders Act 1994* (WA) s 22B.

67. *Young Offenders Act 1994* (WA) s 23.

68. *Young Offenders Act 1997* (NSW) s 27(2); *Juvenile Justice Act 1992* (Qld) s 17; *Youth Justice Act 1997* (Tas).

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of the view that a similar provision would be effective in Western Australia.

Proposal 37

That Part 5, Division 1 of the *Young Offenders Act 1994* (WA) be amended to provide that police officers must consider, in relation to an Aboriginal young person, whether it would be more appropriate for the caution to be administered by a respected member of the young person's community or a member of a community justice group.

Previous cautions do not prevent a police officer from issuing a subsequent caution. Nevertheless, a young person's history of previous cautions and diversions is relevant to the decision of a police officer to further caution or divert the young person. The *COPs Manual* provides that a police officer may issue subsequent cautions if there is a lapse of time between offences or if the offence is of a minor or different nature.⁶⁹ Although the *COPs Manual* directs a police officer to establish that there is sufficient evidence that the young person committed the offence before deciding to issue a caution, the young person does not have to admit the offence or consent to the caution. The *COPs Manual* provides that previous cautions issued to the young person can be included in the instructions to the prosecutor and used in court if required.⁷⁰ It has been observed that in Western Australia a practice has developed in the Children's Court where the police prosecutor refers to the number of previous cautions and referrals to a juvenile justice team.⁷¹ The Commission finds it unacceptable that a diversionary option that does not require any proof or admission of guilt is subsequently used against a young person in court.

A solution would be to provide that a caution can only be administered if the young person accepts responsibility for the offence and consents to being

cautioned.⁷² Many Aboriginal children—given the state of their relationship with police—would be unlikely to consent or admit guilt without adult support or legal advice. As a consequence of not accepting responsibility or consenting, Aboriginal children would be charged instead. This would only increase the high levels of Aboriginal children being dealt with formally in the criminal justice system. The preferable option is to ensure that a previous caution cannot be used or referred to in all proceedings before a court.

Proposal 38

That the *Young Offenders Act 1994* (WA) be amended to provide that any previous cautions issued under this Act cannot be used in court against the young person.

Juvenile justice teams

The legislative provisions dealing with juvenile justice teams expressly acknowledge that, where a young person has committed an offence that is not part of a 'well-established pattern of offending', it is important to avoid exposing the young person to negative influences and it is preferable to encourage the young person's family or other group to assist in dealing with the behaviour.⁷³ A young person must accept responsibility for the offence and agree to be dealt with by a juvenile justice team.⁷⁴ Recent amendments to the *Young Offenders Act 1994* (WA) which allow the involvement of Aboriginal Elders in the team process have been discussed earlier.⁷⁵

Section 29 of the *Young Offenders Act 1994* (WA) provides that, if the young person has not previously offended against the law, the discretion to refer to the juvenile justice team is to be exercised in favour of referral. The Full Court of the Supreme Court of Western Australia held that this section does not require that every first offender (for non-schedule offences) *must*

69. Western Australia Police Service, *COPs Manual (Public Version)* (25 January 2005) OP-24.1

70. *Ibid.*, OP-24.1.3.

71. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* (2002) 183.

72. *Juvenile Justice Act 1992* (Qld) s 16. But note that s 15(3) also provides that a caution is not part of the child's criminal history.

73. *Young Offenders Act 1994* (WA) s 24.

74. *Young Offenders Act 1994* (WA) s 25.

75. See discussion under 'Sentencing Options – Juvenile Justice Teams', above pp 224–26.

be referred to the juvenile justice team.⁷⁶ The Commission notes that the recently passed *Youth Justice Act 2005* (NT) provides that referral to a diversionary option *must* take place unless the offence is a prescribed serious offence or the history of the young person including previous diversions makes it an unsuitable option.⁷⁷ The Commission considers that there should be a stronger direction that requires diversion to a juvenile justice team unless there are exceptional circumstances. In this context, exceptional circumstances may include that the circumstances of the offence are very serious or there are a large number of offences at the one time. Where the young person does not comply with the requirement of the team or any participant of the team does not agree to the proposed action plan the matter will be referred to the court.⁷⁸

Proposal 39

That Part 5, Division 2 of the *Young Offenders Act 1994* (WA) be amended to provide that, subject to the young person's consent and acceptance of responsibility for the offence, a police officer must refer a young person to a juvenile justice team for a non-scheduled offence if the young person has not previously offended against the law, unless there are exceptional circumstances that justify not doing so.

In determining whether a young person has previously offended against the law, previous cautions cannot be taken into account.

The Commission also considers that the categories of offences that are excluded from the operation of juvenile justice teams are unduly restrictive. Certain 'scheduled' offences cannot be referred to juvenile justice teams.⁷⁹ Although for the most part these offences are serious, this is not always the case. For example, an offence of selling or supplying a prohibited drug cannot be referred to a juvenile justice team (and also cannot be the subject of a caution). A young person may commit this offence by sharing cannabis with his or her friends. Similarly an offence of assaulting a police officer cannot be referred. Although assaulting a police officer is generally considered to be a serious

offence, in some cases (such as where an offender lightly pushes a police officer) the circumstances may be less serious. Because of the constraints upon referral, the Children's Court has developed a diversionary conferencing program to deal with those scheduled offences where the circumstances of the offence are less serious. However, this option is not currently available in regional areas.⁸⁰

Proposal 40

That the categories of offences listed in Schedule 1 and Schedule 2 of the *Young Offenders Act 1994* (WA) be immediately reviewed to enhance the availability of diversion to the juvenile justice teams for offences committed in circumstances considered less serious.

The Commission also considers, for the same reasons discussed in relation to cautions, that a referral to a juvenile justice team should not later be used against a juvenile as part of their previous history of offending. Although a young person must accept responsibility for the alleged offence and consent to the referral, this is not the same as proof of guilt. A person may accept responsibility without being aware that a defence to the charge was available. For some Aboriginal children, an acceptance of responsibility may be based on customary law notions of collective responsibility. For example, a young Aboriginal person may accept responsibility for an offence because they were merely present while others committed the crime.

An exception should be provided where a court requires information about a past referral by police to a juvenile justice team in order to determine whether there should be another referral by the court.

Proposal 41

That the *Young Offenders Act 1994* (WA) be amended to provide that any previous referrals by the police to a juvenile justice team cannot be used in court against the young person unless it is necessary to determine whether the young person should again be referred to a juvenile justice team.

76. *B v Morrissey* (Unreported, Supreme Court of Western Australia, Full Court, No 162, 163 and 164 of 1995, 15 August 1996).

77. *Youth Justice Act 2005* (NT) s 39. The Commission is not aware of the types of offences that will be considered 'serious offences'.

78. *Young Offenders Act 1994* (WA) s 32.

79. *Young Offenders Act 1994* (WA) s 25.

80. See discussion under 'Sentencing Options', above pp 224–30.

Attending court without arrest

In Western Australia a police officer can institute criminal proceedings against a young person either by way of arrest or by issuing a notice to attend court. The choice of arrest is the more punitive option because it requires the young person to be taken to a police station, processed and either released on bail or remanded in custody. Section 42 of the *Young Offenders Act 1994* (WA) provides that unless inappropriate, a notice to attend court is the preferred option. The *COPs Manual* provides that a police officer may arrest a young person for a scheduled offence if the offence is serious; if destruction of evidence is likely if the child is not arrested; if it will prevent a further offending; if it will ensure attendance at court; or if there is no other appropriate course of action.⁸¹

Criteria for arrest are contained in legislation in other jurisdictions. Section 22 of the *Youth Justice Act 2005* (NT) provides that a police officer must not charge a young person (instead of issuing a summons) unless there are reasonable grounds for believing that the young person will not appear in court or there is a substantial risk of further offending, destruction of evidence or harm to the young person. Similar criteria apply in Queensland under the *Juvenile Justice Act 1992* (Qld).⁸² The Commission considers that the criteria for arrest should be specified in legislation.

Proposal 42

That the *Young Offenders Act 1994* (WA) include the relevant criteria (as set out in the *COPs Manual*) for the decision whether to arrest a young person or alternatively to issue a notice to attend court.

Diversion to a Community Justice Group

It has been recognised that Aboriginal people should be involved in the development and delivery of diversionary programs for Aboriginal offenders, especially young offenders.⁸³ The Commission strongly supports

the development of Aboriginal-controlled diversionary programs and in particular programs or processes determined by a community justice group. In a case involving a potential breach of Western Australian criminal law members of the group may decide, that it is appropriate for the matter to be dealt with by the group or a specific diversionary program within the community.⁸⁴ This approach can be termed 'pure' diversion: there is no involvement in the criminal justice system at all. It is no different to a family discovering that their child is using drugs and deciding to deal with it without recourse to the criminal law. Similarly, children may be involved in behaviour at school, that strictly speaking constitutes an offence, but the authorities and those involved make a choice to deal with it internally. In other cases a matter may come to the attention of the police (via the victim, a member of the community, or directly as a result of witnessing the behaviour). In this situation the police must consider whether referral to a community justice group or Aboriginal diversionary program would be appropriate.

The Commission considers that it is inappropriate to prescribe excessive procedural safeguards to the operation of community justice groups. To do so would reduce both the flexibility of the group and the ability to determine its own issues and processes. As discussed already there is no restriction (apart from the constraints of Australian law) on the processes to be developed by a community justice group.⁸⁵ In relation to matters that have come to the attention of the police (that is, offences against Australian law) the alleged offender will have to consent to being dealt with by the community justice group. This factor will operate as a safeguard upon the procedures developed. There should be no restrictions on the types of offences or number of times that a young person can be referred.

Just as it is important that cautions and police referrals to a juvenile justice team are not held against a young person later in court, any diversion to a community justice group should not be subsequently mentioned in court. It is vital to ensure that a referral to a community justice group does not have any negative

81. Western Australia Police Service, *COPs Manual (Public Version)* (25 January 2005) OP-24.4.

82. *Juvenile Justice Act 1992* (Qld) ss 12–13.

83. National Aboriginal Justice Advisory Committee, *Recommendations from the Ministerial Summit on Indigenous Deaths in Custody* (February 1997) <http://www.atsic.gov.au/issues/law_and_justice/rciadic/ministerial_summit/minsummit_7.asp>; Aboriginal Justice Council, *Our Mob Our Justice: Keeping the Vision Alive 1998 Monitoring Report of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody in Western Australia* (1999) 66.

84. In this situation it will always be possible for the victim of an offence to make a complaint to the police.

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

legal outcomes for the young person. It is acknowledged, however, that a court may wish to be informed of a previous referral if the court is itself considering referral to a community justice group.

Proposal 43

That a diversionary scheme for young Aboriginal people be established to involve the referral by the police of young offenders to community justice groups. Initially, this scheme should be introduced via pilot programs in at least one metropolitan and one remote or regional location. After a suitable period the effectiveness of the scheme should be evaluated and the need for any legislative or policy changes should be considered. The scheme should ensure that:

- Aboriginal community justice groups are adequately resourced to institute diversionary programs.
- The scheme is flexible enough to allow different communities to develop their own processes and procedures.
- As an overriding safeguard the alleged offender must consent to being referred by the police to the community justice group.
- If the young person does not consent, if the community justice group does not agree to deal with the matter, or if the community justice group is not satisfied with the outcome, the matter can be referred back to police to be dealt with in the normal manner.
- A previous referral to a community justice group does not count as a conviction against the young person and is not to be referred to in a court unless, and only for the purpose of, considering whether the young person should again be referred to a community justice group.

Police Interrogations

The Vulnerability of Aboriginal Suspects

A person being questioned by police is potentially vulnerable. Nervousness, fear, intimidation or lack of understanding may lead to miscommunication and false confessions. Rules have developed over time to protect suspects. Apart from limited exceptions, such as the requirement for a person to give their name and address, a person can refuse to answer questions by police. A confession (that is, an admission of guilt of an offence) or an admission (that is, an admission of a particular element of an offence) cannot be used as evidence unless made voluntarily 'in the exercise of a free choice to speak or be silent'.⁸⁶ Further, a court has discretion to refuse to admit confessional material (confessions or admissions) if it considers that it would be unfair for the material to be used against the accused.⁸⁷

The vulnerability of Aboriginal suspects who are being questioned in police custody has been recognised for a long time.⁸⁸ Aboriginal people under police interrogation face problems with language, communication and cultural barriers coupled with a long-standing fear and mistrust of police. Specific problems, such as 'gratuitous concurrence', are considered in detail in the section on evidence.⁸⁹ It is sufficient to note at this stage that Aboriginal suspects may be more likely to agree with propositions put to them by police even when these propositions are false. Miscommunication can undoubtedly occur between a police officer and the suspect where English is not the suspect's first language. Further, traditional Aboriginal people may find it difficult to understand the concept of guilt under Australian law. Under customary law the concept of responsibility is much broader and collectively based.⁹⁰ Thus a simple assertion by a traditional Aboriginal person that he or she is guilty or responsible for the alleged crime must be viewed cautiously. The high level of hearing loss that exists in some Aboriginal communities

86. *MacPherson v The Queen* (1981) 147 CLR 512, 519 (Gibbs CJ and Wilson J). Once an issue about voluntariness of an admission or a confession has been raised, the burden is on the prosecution to prove on the balance of probabilities that it was made voluntarily: see Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [7.5.1].

87. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 254.

88. Eggleston E, *Fear, Favour of Affection: Aborigines and the criminal law in Victoria, South Australia and Western Australia* (Canberra: Australian National University Press, 1976) 46; Sweeney D, 'Police Questioning of Aboriginal Suspects for Commonwealth Offences – New Laws' [1992] *Aboriginal Law Bulletin* 5; ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [546].

89. See discussion under Part IX 'Leading Questions', below pp 398–99.

90. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [7.5.1].

causes additional communication problems between Aboriginal suspects and police.⁹¹

A useful case study was considered in Catherine Wohlan's background paper for this reference.⁹² The suspect was arrested by police at 3:00 am in relation to a homicide. The interview commenced at 11:45 am. The suspect spoke Standard English as his fourth language. There was no interpreter in the room. Although the suspect was accompanied by a family member, this person had the same language constraints as the suspect. After administering the standard caution to the suspect that he did not have to answer any police questions the following exchange took place:

Police: Do you understand that?
Suspect: (Nods) no audible response.
Police: Okay? So do you have to talk to us? If I ask you a question, do you have to answer it? Can you talk when you answer questions?
Suspect: I'll leave it out.
Police: So do you have to talk to me or not?
Suspect: I'll leave it or—
Police: You can leave it if you—if I ask you a question and you don't want to answer if—
Suspect: Yeah.
Police: —you just say “no, I don't want to answer that question”.
Suspect: I'll leave it on the murder.
Police: That question.
Suspect: Yeah.
Police: Yeah, But you don't want to talk to us at all?
Suspect: No.
[After the suspect's relative left the room]
Police: Okay. Now, just going back, do you have to—if I ask you a question and if you don't want to answer that question, do you have to?
Suspect: Yeah.
Police: Do you have to talk to me?
Suspect: Yes.
Police: If I ask you a question and you don't want to answer it, what happens then? What do you do?
Suspect: If you're asking me a question?
Police: Yeah. If you don't want to—if I ask you a question that you don't like, do you have to tell me something?
Suspect: Yeah.
Police: Or can you say “no, I don't want to talk to you”?
Suspect: Yeah I'll try.
Police: You only talk to me if you want to.
Suspect: Yeah.

Police: You want to talk?
Suspect: Talk now?
Police: Yeah
Suspect: No.
Police: You just told us before though—
Suspect: Yeah.

The suspect then made what was considered by the police to amount to a confession. Wohlan notes that the suspect agreed to propositions put by the police rather than speaking in his own words: 'gratuitous concurrence' was therefore evident during the interview. When the matter was heard in court it was accepted that the interview was inadmissible. The accused was convicted of manslaughter.⁹³ Wohlan refers not only to the unfairness of the interrogation process but also to the dissatisfaction of the victim's family with the result. The Commission emphasises that the failure of police to ensure that an interview is conducted properly has two potential undesirable consequences: an innocent person is convicted or alternatively a guilty person is acquitted because the evidence of the confession cannot be used in court. The interests of justice for all concerned demands that police interrogations are undertaken fairly.

In another example, an Aboriginal accused was asked no less than 20 separate questions in relation to whether he understood that he was not obliged to answer questions by police. Regardless of the manner in which the question was asked the accused responded 'yes' and nothing other than 'yes' on every occasion.⁹⁴

The 'Anunga Rules'

In *R v Anunga*⁹⁵ Forster J in the Northern Territory Supreme Court set out a number of guidelines to be followed by police when questioning an Aboriginal suspect. He observed that Aboriginal suspects may be disadvantaged because they may not fully understand English, may be more likely to agree with propositions put by the police and may find the standard caution confusing.⁹⁶ The guidelines were not intended as mandatory requirements; however, the failure to comply without sufficient reason has led to the exclusion of the confessional material.⁹⁷ The guidelines can be summarised as follows:

91. Howard D, Quinn S, Blokland J & Flynn M, 'Aboriginal Hearing Loss and the Criminal Justice System' [1993] *Aboriginal Law Bulletin* 58.

92. Wohlan C, *Aboriginal Women's Interests in Customary Law Recognition*, LRCWA, Project No 94, Background Paper No 13 (April 2005) 3–10.

93. Wohlan notes that the charge was reduced from murder to manslaughter but it is not clear whether the accused then pleaded guilty or was convicted after trial: *Ibid* 8.

94. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 254.

95. (1976) 11 ALR 412 (Forster J).

96. *Ibid* 414.

97. *Ibid* 415.

- Unless the suspect is fluent in English an interpreter should be provided.
- Wherever practicable a 'prisoner's friend' should be present and this person should be someone in whom the suspect has confidence.
- The caution should be administered very carefully and simply. The interviewing officer should ensure that the suspect can explain the meaning of the caution and should not proceed to question the suspect unless satisfied that he or she understands the right to remain silent.
- Questions that are suggestive of the answer or amount to cross-examination should be avoided.
- Even when the suspect has confessed to the offence, police should continue to investigate the matter in order to find additional proof.
- The suspect should be offered food and drink and the use of a toilet.
- The suspect should not be interrogated when he or she is tired, intoxicated or ill.
- All reasonable steps should be taken to obtain legal assistance if requested by the suspect.
- If the suspect indicated that he or she does not wish to answer questions the interrogation should stop.⁹⁸

The Law in Western Australia

Western Australian police are directed by the *COPs Manual* to observe the Anunga Rules.⁹⁹ The directions or guidelines contained in the *COPs Manual* are not binding. Failure to comply with the *COPs Manual* does not render a confessional statement inadmissible.¹⁰⁰ Courts in Western Australia have recognised problems faced by Aboriginal people during police interrogations, making reference to the Anunga Rules when appropriate. However, Western Australian courts have consistently maintained that the guidelines are not

binding law in this state, but simply constitute a general indication of what would be regarded as a fair interrogation.¹⁰¹ Vincent has commented that different judges in this state place varying weight on the Anunga Rules.¹⁰²

The repealed s 49 of the *Aboriginal Affairs Planning Authority Act 1972 (WA)*¹⁰³ covered both the acceptance of a plea of guilty and a confession during police questioning. Section 49 was not discretionary: if the accused lacked the relevant capacity to understand then the court was required to exclude the confessional material. In *Simon v The Queen*,¹⁰⁴ Roberts-Smith J stated that when considering the admissibility of confessional material:

The trial judge is obliged by s 49 to have regard, not only to the content of the interview or statements constituting the admissions, but to the accused's demeanour whilst testifying on the voir dire or otherwise being examined in the court, to determine whether or not he was capable of comprehending the circumstances under which he had foregone his right to remain silent and under which he had confessed and whether he was a person capable of understanding the confession that he had made.¹⁰⁵

Many cases in Western Australia have relied on s 49 in addition to the general common law principles on the admissibility of confessional material.¹⁰⁶ As s 49 was only repealed in 2004 it is difficult to know whether its abolition will have a significant impact upon Aboriginal people. The new *Criminal Procedure Act 2004 (WA)* now covers the issue of acceptance of a plea of guilty, but there is no provision in relation to confessional material.

There is only one legislative provision in Western Australia specifically covering police interrogations.¹⁰⁷ Section 570D of the *Criminal Code (WA)* requires an interview in relation to a serious offence to be video-recorded.¹⁰⁸ Any admission or confession that is not recorded on video will be inadmissible unless the prosecution can prove, on the balance of probabilities,

98. Ibid 414–15.

99. Western Australian Police Service *COPs Manual (Public Version)* (25 January 2005) AD-1.3.

100. *Norton v The Queen* [2001] WASCA 207 (20 July 2001), [201] (Roberts-Smith J; Wallwork and Pidgeon JJ concurring).

101. See *Webb v The Queen* (1994) 13 WAR 257; *R v Nandoo* (Unreported, Supreme Court of Western Australia, No 130 of 1996, Owen J, 20 June 1996); *Njana v The Queen* (Unreported, Supreme Court of Western Australia, No 162 of 1997, Scott J, 11 February 1998); *Simon v The Queen* [2002] WASCA 329, [34] (Roberts-Smith J, Steytler J and Templeman J concurring).

102. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 41.

103. See discussion under 'Fitness to Plead', above pp 232–34.

104. [2002] WASCA 329.

105. Ibid [30] (Steytler and Templeman JJ concurring).

106. See for example *Cox v The Queen* [2002] WASCA 358 (19 December 2002); *Simon v The Queen* [2002] WASCA 329 (10 October 2002).

107. The Commission is aware of the Criminal Investigation Bill 2005 currently before Parliament and it is considered below in this discussion.

108. A serious offence is defined as an indictable offence that must be dealt with in a superior court for an adult and for a juvenile any indictable offence: see *Criminal Code (WA)* s 570D (1).

that there was a reasonable excuse for not video-taping the material or the court is satisfied that there are exceptional circumstances, which in the interests of justice, justify the admission of the evidence. A reasonable excuse may include that the accused did not consent to the interview being video-taped, the equipment malfunctioned or that it was not practicable to video-tape the interview.

Interviewing juveniles

The above principles and guidelines are equally applicable to the interrogation of children. In addition, s 20 of the *Young Offenders Act 1994* (WA) states that a police officer is required to notify a responsible adult before questioning a young person about an offence. There is no legislative requirement that a young person must be provided with an opportunity to speak to a responsible adult prior to any questioning. Nor is there any legislative requirement that a responsible person must be present during the interview.

The *COPs Manual* provides extensive guidelines about interviewing children;¹⁰⁹ in particular that the caution must be administered properly having regard to the young person's age, cultural background and maturity. The manual further provides that unless an independent person is present during an interview any admission may be ruled inadmissible. The manual suggests, where possible, the independent person should be of the same gender as the young person and of a similar cultural background.

Other Australian jurisdictions provide greater legislative protection for young people. Section 23 K of the *Crimes Act 1914* (Cth) provides that a young person must not be questioned without an interview friend being present and the young person must be given an opportunity to communicate with the interview friend in private.¹¹⁰ Section 252 of the *Police Powers and Responsibilities Act 2000* (Qld) provides that a police officer must not question a young person unless an opportunity has been provided for the young person to speak to a support person of their own choice. The recently passed *Youth Justice Act 2005* (NT) provides that police officers are required to explain all matters

connected with an investigation of an offence to a young person in a 'language and manner the youth is likely to understand, having regard to the youth's age, maturity, cultural background and English language skills'.¹¹¹ Under this legislation a police officer cannot question a young person without a support person being present.¹¹²

The Need for Reform

The ALRC concluded that protective interrogation rules or guidelines should apply to all Aboriginal people that have difficulties with comprehending their rights under interrogation regardless of whether difficulties are caused by 'lack of education, or lack of understanding based on different conceptions of law, or undue deference to authority'.¹¹³ It recommended that the basic interrogation guidelines should be enacted in legislation to make it clear they are to be taken 'seriously'.¹¹⁴

In the Northern Territory, Mildren J has argued that the rules are not being adequately put into practice. He identified ongoing problems of 'gratuitous concurrence'; the use of leading questions; inappropriate choice of interview friends; and inadequate use of interpreters.¹¹⁵ During the Commission's consultations in Fitzroy Crossing it was stated that the Anunga Rules were not followed and that police did not make proper use of the Kimberley Interpreter Service.¹¹⁶ Vincent suggested that there should be new rules for the interrogation of Aboriginal people and that these rules should stress the requirement for fully informed consent to the interview process.¹¹⁷

The matters outlined above suggest that Aboriginal suspects remain disadvantaged in police interrogations. The Commission is of the view that in addition to the common law rules, there should be legislative provisions that set out the minimum requirements for police questioning. Other jurisdictions in Australia have enacted legislation covering the rights of a suspect during police questioning and have included limited exceptions providing some flexibility. For example, in Queensland the police do not have to comply with

109. Western Australia Police Service, *COPs Manual (Public Version)* (25 January 2005) OP-24.17.

110. In the case of an Aboriginal or Torres Strait Islander young person, an interview friend can be chosen from a relevant list of suitable persons.

111. *Youth Justice Act 2005* (NT) s 15. This act was assented to on 22 September 2005.

112. *Youth Justice Act 2005* (NT) s 18.

113. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [565].

114. *Ibid* [573].

115. Mildren D, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21 *Criminal Law Journal* 7, 8–12.

116. LRCWA, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 44.

117. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 41.

the requirement to allow a suspect to speak with an interview friend if urgent questioning is required in order to protect the safety of a member of the public.¹¹⁸

The Criminal Investigation Bill 2005 (WA) is currently being considered by Parliament. It provides (amongst other things) that a suspect is entitled to:

- be informed of the offences that he or she is suspected of having committed;
- be cautioned before being interviewed;
- be given a reasonable opportunity to communicate or attempt to communicate with a lawyer;
- be given a reasonable opportunity to communicate or attempt to communicate with a relative or friend to inform them of his or her whereabouts; and
- the services of an interpreter before being interviewed if he or she for any reason is unable to adequately understand or communicate in spoken English.¹¹⁹

Although the Commission supports the legislative protection of these rights it does not consider that the proposed Bill provides adequate protection for Aboriginal people. Discussed below are the four essential requirements for any police interview for both adults and juveniles.

Caution

Before a police officer questions a suspect he or she is required to issue a caution: that the suspect is not obliged to answer any questions but if so any answers may be used in evidence against the suspect. As recognised in *R v Anunga* the standard form of the caution may be confusing. In *Cox v The Queen*¹²⁰ the accused was asked a number of times whether he understood the meaning of the caution – in answer to each of these questions he simply replied ‘yeah’. Olsson AUJ observed that his response was in ‘a manner which is typical of Aboriginal people in such situations and, of itself, is not reliable indication of any positive comprehension at all’.¹²¹

The Criminal Investigation Bill 2005 provides for the requirement to issue a caution;¹²² however, it is the

Commission’s opinion that this alone is not adequate. The Commission is of the opinion that it is not sufficient to argue that procedural safeguards are complied with most of the time. Proper understanding of the caution goes to the heart of whether a confession is voluntary and therefore also admissible. The Commission is concerned about the (as yet unknown) impact of the repeal of s 49 of the *Aboriginal Affairs Planning Authority Act 1972* (WA). Section 258 of the *Police Powers and Responsibilities Act 2000* (Qld) provides that prior to questioning a police officer must caution the person and the caution must be given or ‘translated into a language in which the person is able to communicate with reasonable fluency’. It is also a legislative requirement in Queensland that the police ask the suspect to explain the caution in their own words.¹²³ The police in Western Australia should be required to ensure that a suspect understands the caution before asking any further questions.

Legal representation

Bearing in mind the problems experienced by Aboriginal people in the criminal justice system and poor Aboriginal-police relations, the ability to seek legal advice prior to any interrogation takes on increased importance. The *COPs Manual* provides that, with the approval of the suspect, the police are required to notify the ALS whenever an Aboriginal person is charged.¹²⁴ Apart from the limitations of a non-binding set of directions, the guidelines only require notification if the person is *charged*. In the context of interrogations it is vital that Aboriginal people are made aware of their right to contact a lawyer and are given an opportunity to exercise that right before any questioning commences. The Commission notes that there is no reason to limit this requirement to Aboriginal people.

In Queensland, police are generally required to advise a suspect of their right to speak to a lawyer (or a friend). In addition the police must allow a reasonable time for a lawyer to attend and once in attendance the suspect and the lawyer must be allowed to speak in private.¹²⁵ The requirement to advise a suspect of

118. *Police Powers and Responsibilities Act 2000* (Qld) s 268(2).

119. Criminal Investigation Bill 2005 (WA) cl 135 & 136.

120. [2002] WASCA 358 (19 December 2002).

121. *Ibid* [35] (Olsson AUJ; Anderson and Templeman JJ concurring).

122. For example, *Crimes Act 1958* (Vic) s 464A; *Police Powers and Responsibilities Act 2000* (Qld) s 258.

123. It has been noted that the Northern Territory has developed a ‘preamble’ to the caution using Aboriginal languages and concerting legal concepts, such as the right to remain silent into an understandable form: see ATSIC, *Ministerial Summit on Indigenous Deaths in Custody* (Canberra, July 1997).

124. Western Australia Police Service, *COPs Manual (Public Version)* (25 January 2005) LP-2.1.

125. *Police Powers and Responsibilities Act 2000* (Qld) ss 249, 250. The Commission notes that s 268 provides that the police do not have to comply with the requirements under the legislation if having regard to the safety of other people, or the police reasonably suspect that questioning is so urgent that it should not be delayed. A similar provision is contained in the *Crimes Act 1914* (Cth) s 23G.

the right to speak to a lawyer and to provide an opportunity for communication to take place is also set out in legislation in other jurisdictions as well as the Criminal Investigation Bill 2005.¹²⁶

The Queensland and Commonwealth legislation provide specifically that when questioning an Aboriginal or Torres Strait Islander person there is an additional requirement for the police to notify a legal aid organisation unless the police officer reasonably suspects that the person is not disadvantaged compared to the general Australian community.¹²⁷

Interpreters

The right to an interpreter during police questioning is fundamental. It can never be fair to a suspect to proceed with an interrogation if the suspect does not fully understand the questions. It is well recognised that in Western Australia there is inadequate use of interpreters.¹²⁸ The Commission supports the inclusion of the right to an interpreter in the Criminal Investigation Bill 2005. Similarly, other jurisdictions in Australia provide in legislation that a suspect has a right to an interpreter where he or she is unable to speak English with reasonable fluency.¹²⁹

In practice, one difficulty may be recognising that where an Aboriginal person speaks English to a limited extent he or she may still require the services of an interpreter. In this context it is vital to take into account the difference between Standard English and Aboriginal English. These differences are discussed in Part IX 'Aboriginal Customary Law in the Courtroom: Evidence and Procedure'.¹³⁰ The Commission has already referred to the Northern Territory Law Society Protocols for lawyers representing Indigenous people.¹³¹ These protocols contain an interpreter test with suggested questions. The Commission considers that in addition to a statutory requirement that an interpreter should be provided prior to police questioning, the Western Australia Police Service, in conjunction with appropriate Indigenous interpreters, should develop a set of protocols.

Proposal 44

That the Western Australia Police Service and relevant Aboriginal interpreter services develop a set of protocols for the purpose of considering whether an Aboriginal person requires an interpreter during an interview.

Interview friend

The particular vulnerability of Aboriginal people in police custody can be overcome to some degree by the presence of an interview friend. In Queensland and Victoria police are required to advise a suspect of their right to speak to a relative or a friend.¹³² Section 23H of the *Crimes Act 1914* (Cth) deals specifically with Aboriginal and Torres Strait Islander people. It provides that the police should not interview the suspect if an interview friend is not present unless the suspect has expressly waived the right to an interview friend (the burden is on the prosecution to prove that the suspect waived their right in this regard). If the suspect does not exercise their right to choose an interview friend the police can choose a representative from an Aboriginal legal aid organisation or from a relevant list of suitable persons.

The question who should undertake the role of an interview friend is subject to debate. One view is that the interview friend should be freely chosen by the suspect.¹³³ On the other hand, if the person chosen is in a similar position with respect to understanding and communication as the suspect, it is unlikely that they will be of any real assistance. The ALRC observed the difficulty:

The question is whether an Aboriginal suspect should have the right to choose a 'friend' even if that person will not be able to assist him. Such a choice may have some psychological advantages and make the suspect more at ease, but the chosen 'friend' may be able to do little or nothing to prevent him being overborne. A person who is better able to protect a suspect's legal rights may be of greater benefit to a suspect even though unknown to him.¹³⁴

126. *Crimes Act 1914* (Cth) s 23G; *Crimes Act 1958* (Vic) s 464C.

127. *Police Powers and Responsibilities Act 2000* (Qld) s 251; *Crimes Act 1914* (Cth) s 23H.

128. For a detailed discussion of interpreters, see discussion under Part IX 'Overcoming Difficulties of Aboriginal Witnesses in the Court Process', below pp 401–406.

129. See for example *Police Powers and Responsibilities Act 2000* (Qld) s 260; *Crimes Act 1914* (Cth) s 23N; *Crimes Act 1958* (Vic) s 464D.

130. See discussion under Part IX 'Aboriginal English', below pp 397–98.

131. See discussion under 'Legal Representation,' above pp 102–103.

132. *Police Powers and Responsibilities Act 2000* (Qld) s 249; *Crimes Act 1958* (Vic) s 464C.

133. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [568].

134. *Ibid* [567].

In Western Australia the only direction comes from the *COPs Manual* which states that an interview friend should be a person that the suspect has confidence in.¹³⁵ The right to choose an interview friend is essential. However, where a suspect does not exercise that right, appropriate Aboriginal persons should be considered. Members of a community justice group could, after receiving training about the relevant aspects of the criminal justice system, provide a suitable panel of interview friends.

The Commission's View

The Commission considers that strengthening the existing guidelines in relation to the interrogation of Aboriginal suspects is required. Legislation should set out the minimum requirements for any police questioning. The current provisions of the Criminal Investigation Bill 2005 do not go far enough. The Commission acknowledges that there will need to be appropriate exceptions. This approach would constitute a strong direction to police officers and courts of the *minimum* requirements for a fair interview.

Proposal 45

That the following rights be protected in legislation so as to render inadmissible any confessional evidence obtained contrary to them save in exceptional circumstances:

- That an interviewing police officer must caution a suspect and must not question the suspect until satisfied that the suspect understands the caution. In order to be satisfied that the suspect understands the caution the interviewing officer must ask the suspect to explain the caution in his or her own words.
- If the suspect does not speak English with reasonable fluency the officer shall ensure that the caution is given or translated in a language that the suspect does speak with reasonable fluency and that an interpreter is available before any interview commences.
- That before commencing an interview the interviewing police officer must advise the suspect that he or she has the right to contact

a lawyer and provide a reasonable opportunity for the suspect to communicate (in private) with a lawyer.

- In the case of a suspect who is an Aboriginal person the police must notify the Aboriginal Legal Service prior to the interview commencing and advise that the suspect is about to be interviewed in relation to an offence and provide an opportunity for a representative of the Aboriginal Legal Service to communicate with the suspect. The interviewing officer does not have to comply with this requirement if the suspect has already indicated that he or she is legally represented by another lawyer or if the suspect states that he or she does not want the Aboriginal Legal Service to be notified.
- If the suspect does not wish for a representative of the Aboriginal Legal Service to attend or there is no representative available the interviewing officer must allow a reasonable opportunity for an interview friend to attend prior to commencing the interview. The interviewing officer does not have to comply with this requirement if it has been expressly waived by the suspect.
- That appropriate exceptions be included, such as an interviewing officer is not required to delay the questioning in order to comply with this provision if to do so would potentially jeopardise the safety of any person.

Policing Aboriginal Communities and Aboriginal Involvement in Policing

Policing Aboriginal Communities

The lack of police presence in some Aboriginal communities is a major concern.¹³⁶ In an area where there is no permanent police presence, policing is conducted by periodic patrols and reactive police attendance when required. Some communities use Aboriginal wardens and in some cases an Aboriginal Police Liaison Officer is stationed in the community.¹³⁷

135. Western Australia Police Service *COPs Manual (Public Version)* (25 January 2005) AD-1.3. It also states that the Commonwealth Attorney-General's Department has a list of suitable persons to act as an interview friend or as an interpreter and this list is made available to state police.

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

137. Ibid 10.

The Commission has already discussed the role of Aboriginal wardens in policing and enforcement of by-laws (where they exist) in remote Aboriginal communities.¹³⁸ The Commission suggested that increasing the enforcement powers of wardens was not the best approach. Aboriginal wardens experience problems in enforcing 'white laws' in their own communities due to customary law considerations such as avoidance rules and kinship obligations. Most of the communities consulted by the Commission expressed the desire for full-time police presence.¹³⁹ It is the view of the Commission that wardens should not be required to do the job of police, not least because remote Aboriginal communities are entitled to the same level of policing as any other Australian community. This does not mean, of course, that Aboriginal communities cannot develop informal self-policing such as the current patrols.¹⁴⁰ Each community has different needs and the structure of any self-policing scheme must be determined by the community. The establishment of Aboriginal community justice groups represents one method under which communities can determine their own justice issues and the most appropriate methods of enforcing community rules and sanctions in discrete Aboriginal communities.¹⁴¹

In response to the Gordon Inquiry the government announced its plan to establish a permanent police presence in nine remote locations.¹⁴² The Western Australia Police Service's *Strategic Policy on Police and Aboriginal People* acknowledges that all Western Australians are entitled to 'an equitable level and quality of police protection and services'.¹⁴³ In addition, it was planned that multi-functional facilities, incorporating various government agencies including the police, Department of Justice and Department of Community Development would be built. The first multi-functional facility was opened in April 2004 at Kintore with one Western Australian police officer permanently stationed

and working in conjunction with Northern Territory police officers.¹⁴⁴ On 8 September 2005 the Western Australia Police Service announced that the second multi-functional facility at Wirrimanu (Balgo) community had opened.¹⁴⁵ The next facility is scheduled for construction at Warburton.

Aboriginal Police Liaison Officers

Schemes that encourage participation of Aboriginal people in policing throughout Australia have been in existence for many years.¹⁴⁶ In 1975 the Aboriginal Police Aide Scheme commenced in Western Australia.¹⁴⁷ Aboriginal Police Liaison Officers (APLOs) are appointed under s 38A of the *Police Act 1892* (WA) which still uses the term 'Aboriginal aides'. The instrument of appointment specifies that APLOs have the same powers as ordinary police officers except that these powers are limited to Aboriginal people. APLOs can only exercise powers against non-Aboriginal people if assisting or directed by a mainstream police officer.¹⁴⁸ The original intention of the scheme was to:

- improve Aboriginal–police relations;
- improve communication between Aboriginal people and the police;
- assist Aboriginal people in police custody;
- assist Aboriginal people to understand Australian laws;
- encourage Aboriginal people to approach police for assistance; and
- improve race relations in the community.¹⁴⁹

There are currently just over 140 APLOs in Western Australia. Approximately one-third of these are female. Their role has altered over time and APLOs are now more involved in law enforcement.¹⁵⁰ With a greater emphasis on enforcement APLOs may experience cultural pressure from families or kin.¹⁵¹ It has been

138. See discussion under 'The Operation of the *Aboriginal Communities Act 1979* (WA)'; above pp 116–18.

139. Similarly the ALRC found that all communities consulted recognised the need for police presence: see ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [847].

140. See discussion under 'Patrols'; above pp 112–14.

141. See discussion under 'The Commission's Proposal for Community Justice Groups', above pp 133–41. The ALRC referred to an example at Roper River in the Northern Territory where local Aboriginal 'police' were appointed (informally) from each relevant skin group: see ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [859].

142. Remote Service Delivery Project Steering Committee, *Warburton Multi-Functional Police Facility: Services delivery model*, Final Report (September 2003) 4. The nine locations are Warburton, Kalumburu, Balgo, Jigalong, Dampier Peninsula, Bidyadanga, Warmun, Wakakurna (Dockar River) and Kintore (the latter is a multi-jurisdiction project with the Northern Territory and South Australia).

143. Western Australia Police Service, *Strategic Policy on Police and Aboriginal People: Policy Statement and Rationale* (2004) 3.

144. Western Australia Police Service, 'New Police Facility for Remote Community' (Media Release, 8 September 2005).

145. *Ibid.*

146. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [852].

147. Galton-Fenzi AK, *Policing Remote/Discrete Communities in Western Australia* (Perth: Western Australia Police Service, June 2002) 24.

148. Western Australia Police Service, *COPs Manual (Public Version)* (25 January 2005) AD-1.2.2.

149. Galton-Fenzi AK, *Policing Remote/Discrete Communities in Western Australia* (Perth: Western Australia Police Service, June 2002) 24.

150. Interview with Inspector Keith Galton-Fenzi, Western Australian Police Service (Telephone interview, 22 September 2005).

151. *Ibid.*

observed that police aides (as they were called in 1991) have described themselves as 'caught between two worlds, neither full members of the police force, nor accepted by the local Aboriginal community'.¹⁵² A further criticism of the police aide scheme was that (until recently) there was no method for transition to mainstream policing.¹⁵³ Vincent commented that the specialist liaison role of APLOs is 'undervalued and underutilised'.¹⁵⁴

The Commission received mixed views in relation to the effectiveness of APLOs. In Fitzroy Crossing it was stated that Aboriginal people generally do not want to become APLOs because they do not want to 'lock up our people'. Also it was claimed that when an APLO comes from a different area he or she will not be considered representative of the Aboriginal community.¹⁵⁵ In Cosmo Newbery it was said that APLOs 'think they are policemen, not liaison with the community. They are sometimes not from the community, and so do not understand local ways'. In Kalgoorlie it was suggested that the functions of APLOs need to be reviewed. Instead of undertaking ordinary police duties the original liaison role should be brought back.¹⁵⁶

The Gordon Inquiry concluded that APLOs serve an important role in providing policing services to Aboriginal communities and supported the creation of 40 new APLO positions. It also called for increased recruitment of female APLOs.¹⁵⁷

In 2001 the Western Australian Police Service developed a Transitional Model which provides for APLOs to make the transition to mainstream police positions. This model allows accreditation for years served as APLOs.¹⁵⁸ In 2005 the Transitional Model commenced and all 144 APLOs received a letter asking if they wished to make the transition or remain as liaison officers.¹⁵⁹ The long-term objective is for more Aboriginal people to enter the mainstream police service.¹⁶⁰ The Commission has also been advised that the future aim is to employ unsworn Aboriginal liaison officers.¹⁶¹

The voluntary option for APLOs to make the career transition to an ordinary police officer is supported by the Commission. The current practice of using APLOs as front-line police officers while at the same time including them in a category that is perceived as second class is not appropriate. An increase in Aboriginal mainstream police officers also has the potential to reduce the lack of understanding of Aboriginal culture and customary law in the service. Whether the original objectives of the scheme can be achieved through the appointment of unsworn Aboriginal liaison officers remains to be seen. Those objectives remain valid and important. In this regard, the Commission suggests that members of Aboriginal community justice groups as well as any informal wardens or patrols members operating in their respective communities be used for this role.

In conclusion, there should be Aboriginal police officers with the same powers and responsibilities as all other police. Aboriginal police officers will be responsible to the Police Service. This is a matter of choice for the individual concerned. On the other hand Aboriginal community members as described above can appropriately undertake a liaison role while still maintaining accountability to their community.

Cultural Awareness Training

The Gordon Inquiry was informed by the Western Australia Police Service that 'cultural sensitivity training' commenced during the 1980s and at the time of the inquiry involved a four-day training course as well as a further two-day course required for promotion to the level of senior constable. The Gordon Inquiry recommended that cultural sensitivity training 'about and in conjunction with, local Aboriginal communities' should be undertaken when a police officer joins a police station.¹⁶²

The *COPs Manual* contains a direction that the officer in charge of a police station 'shall, as soon as practical, ensure that upon the arrival of a new sworn member, that member receives a period of instruction on issues

152. Western Australian Equal Opportunity Commission as quoted in Payne S, 'Aboriginal Women and the Law' in Eastale P & McKillop S (eds), *Women and the Law* (Australian Institute of Criminology Conference Proceedings No 16, Canberra, 1993) 65, 70.

153. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [854].

154. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 30.

155. LRCWA, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 44.

156. LRCWA, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, 26.

157. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities* (2002) 218.

158. *Ibid* 219.

159. Eliot L, 'Police APLOs to Join the Ranks or Vanish', *The West Australian*, 5 July 2005, 35.

160. Interview with Inspector Keith Galton-Fenzi, Western Australia Police Service (Telephone interview, 22 September 2005).

161. Interview with Superintendent Dwayne Bell, Western Australia Police Service (Telephone interview, 17 November 2005).

162. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities* (2002) 220.

of concern to the local Aboriginal community by a member of that community'.¹⁶³ It is also noted that there is a strategy in place for cultural orientation training for officers who transfer to areas with Aboriginal representation in the community.¹⁶⁴ Police officers apparently receive training about the guidelines and the interrogation of Aboriginal people.¹⁶⁵

Despite these provisions, Aboriginal people consulted by the Commission considered that there was a continuing need for better cultural awareness training for police. It was suggested that this training should be conducted by local Elders.¹⁶⁶ In Fitzroy Crossing it was stated that:

Police have no clue about cultural issues – even though they all profess to. One police officer said 'my boys understand the lingo', meaning the five Aboriginal dialects spoken in the area. This is not true.¹⁶⁷

The Police Service recognises that Aboriginal people need 'police officers to be culturally sensitive and aware of local traditions so they carry out their role without causing offence or embarrassment'.¹⁶⁸ The *Strategic Policy on Police and Aboriginal People: Policy Statement and Rationale* states that the Police Service is 'committed to the development of locally specific inter-agency cultural sensitivity training'.¹⁶⁹ The Commission



is of the view that given the continuing perception of Aboriginal people that the police are not generally culturally sensitive and because of the high numbers of Aboriginal people that come into contact with police, appropriate local cultural awareness training must be an immediate priority.

Proposal 46

That the Western Australian government provide adequate resources to ensure that every police officer who is stationed at a police station that services an Aboriginal community participates in relevant Aboriginal cultural awareness training.

This cultural awareness training should be presented by local Aboriginal people including, if appropriate, members of a community justice group.

The Future of Police and Aboriginal Relations

The need for effective cooperation between Aboriginal people and the police was acknowledged by the ALRC.¹⁷⁰ The Aboriginal Affairs Directorate was established in 1996 to provide assistance to Aboriginal people in their dealings with the police service, to provide strategic planning and policy services and to maintain the Aboriginal police liaison officer scheme.¹⁷¹ The Commission understands that the Aboriginal Affairs Directorate was abolished some time ago and replaced with the Aboriginal Policy and Services Unit. This unit was no longer responsible for the management of the Aboriginal police liaison officer scheme. APLOs were then directly answerable to the officer in charge of their district.

In November 2005 the Aboriginal and Policy Services Unit was amalgamated with the Strategic Policy and Development Unit. According to Superintendent Dwayne Bell the amalgamation has not resulted in any

163. Western Australia Police Service, *COPs Manual (Public Version)* (25 January 2005) AD-1.6.

164. *Ibid.*

165. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [7.5.3].

166. LRCWA, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 10; *Derby*, 4 March 2004, 53; *Kalgoorlie*, 25 March 2003, 26. The Commission notes that in Warrnambool, Victoria police have held cultural awareness training for new members. About 20 Aboriginal Elders attended the police stations and police officers were invited to speak to the Aboriginal community: see Davis S, 'Warrnambool Koori Court: Improving relations between indigenous people and Victorian police' (2005) 6 (14) *Indigenous Law Bulletin* 6.

167. LRCWA, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 44.

168. Western Australia Police Service, *Strategic Policy on Police and Aboriginal People: Policy Statement and Rationale* (2004) 3.

169. *Ibid.* 8.

170. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [847].

171. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities* (2002) 211.

Aboriginal people consulted by the Commission considered that there was a continuing need for better cultural awareness training for police.

reduction in staff – the same staff positions that were in the Aboriginal and Policy Services Unit are now included in the Strategic Policy and Development Unit and their role remains the same. Superintendent Bell explained that the purpose of the amalgamation is not to reduce the focus on Aboriginal policy, rather to ensure that all strategic policy within the police service does not overlook the needs of Aboriginal people. In addition the staff positions that formed the Aboriginal Policy and Services Unit will now have access to and assistance from other staff working in the policy area.¹⁷²

The Commission appreciates that the amalgamation may well be designed to ensure that policy and services concerning Aboriginal people are more effective. However, the failure to maintain a designated Aboriginal unit is contrary to the recommendations of RCIADIC that police should establish an Aboriginal specific policy and development unit, headed by an Aboriginal person reporting directly to the Commissioner of Police or his or her delegate.¹⁷³ One justification for a designated unit is that it goes some way to ensuring that the momentum to improve Aboriginal police relations and to develop policy continues. The incorporation of Aboriginal policy into a mainstream policy unit runs the risk that the impetus will be lost. The effectiveness of

an Aboriginal policy unit would otherwise have been enhanced by an increase in its resources. The Commission's proposed community justice groups will be far more effective where there are good working relationships between community justice group members and police. Bearing in mind the infancy of the new amalgamated Strategic Policy and Development Unit, it is difficult to know its capacity to take a more active role in improving justice outcomes for Aboriginal people and working with local Aboriginal community justice groups. Therefore, the Commission invites submissions as to whether the Aboriginal Policy and Services Unit should be reinstated and, further, provided with additional resources to adequately implement the proposals made in this Discussion Paper which impact upon the Police Service.

Invitation to Submit 8

The Commission invites submissions as to whether, in light of the Commission's proposals in relation to criminal justice (or for any other reason), the Western Australia Police Service's former Aboriginal Policy and Services Unit should be reinstated and provided with additional resources.

172. Information received from Superintendent Dwayne Bell by telephone, 17 November 2005. The Commission notes that of the two policy staff positions that formed the Aboriginal Policy and Services Unit, one position is a designated Aboriginal position and the other is currently occupied by an Aboriginal person in an acting capacity.

173. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991), Recommendation 225.