

# Prisons

Aboriginal people in Western Australia are disproportionately over-represented in prison and detention centres. The extent and causes of this over-representation has been discussed earlier.<sup>1</sup> Underlying many of the Commission's proposals is the objective of reducing the number of Aboriginal people in custody. Any significant reduction in the rate of imprisonment and detention of Aboriginal people in this state will not happen overnight. Therefore, the effectiveness and suitability of custodial conditions for Aboriginal people will remain an important issue for the foreseeable future.

Imprisonment and detention cause particular difficulties for Aboriginal people because they are separated from traditional lands, family, community and culture. An Aboriginal person in Warburton stated to the Commission that:

Such [prison] placements are destructive of Aboriginal law and culture: 'All teaching gets left behind when people are going through law but then get sent to prison – they miss out on law and knowledge'.<sup>2</sup>

Therefore, the management of custodial facilities must acknowledge the detrimental impact of custody upon Aboriginal people and provide culturally appropriate programs, activities and services. The Commission notes that the Department of Justice's *Prisons Division Strategic Plan for Aboriginal Services 2002–2005* refers to the importance of addressing the cultural needs of Aboriginal prisoners. Specifically this policy acknowledges that:

Recognition that family is central to the fabric of Aboriginal society and critical to its well-being. The rich and complex Aboriginal kinship system cannot be

explained or understood within the concept of the nuclear family. This rich and complex kinship system places great importance on certain familial obligations and responsibilities.<sup>3</sup>

The Commission has emphasised in this Part that policy aims and objectives must be converted into meaningful outcomes. The position of Aboriginal prisoners and detainees is no exception. The Commission does not intend to canvass in detail the many problems and issues concerning Aboriginal people in custody. Since June 2000 the Western Australian Office of the Inspector of Custodial Services has been responsible for examining and reporting on conditions within Western Australian custodial settings. The Inspector has made numerous recommendations concerning the adequacy of prison facilities and services for Aboriginal prisoners.<sup>4</sup> Some of these recommendations have focused on the unacceptable conditions in many regional prisons.<sup>5</sup> Others have been directed towards improving the availability of culturally appropriate programs and services for Aboriginal prisoners and detainees.<sup>6</sup> Recently, the *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) (the Mahoney Inquiry) considered in detail the current state of custodial management in Western Australia. The Mahoney Inquiry (along with the Office of the Inspector of Custodial Services' *Directed Review of the Management of Offenders in Custody*) also addressed the current position with respect to Aboriginal prisoners and detainees. Given this comprehensive examination of custodial management in Western Australia the Commission does not consider that it is appropriate, or necessary, to re-examine these issues.

1. See discussion under 'Over-representation in the Criminal Justice System', above pp 95–99.

2. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 5.

3. Department of Justice, Prisons Division, *Strategic Plan for Aboriginal Services 2002–2005*, 6.

4. In particular see the Office of the Inspector of Custodial Services' inspection reports of Broome, Eastern Goldfields, Greenough and Roebourne Regional Prisons. These prisons are characterised by the Inspector as 'Aboriginal prisons' because 75 per cent or more of their population is Aboriginal. Together these prisons hold almost half of the Aboriginal prisoner population of Western Australia. Inspection reports are available on the Office of the Inspector of Custodial Services' website <<http://www.custodialinspector.wa.gov.au>>.

5. *Ibid.*

6. *Ibid.*

## Prisoner Attendance at Funerals

### The Significance of Funeral Attendance

During the Commission's consultations the most important issue expressed in relation to prisons and Aboriginal customary law was attendance by prisoners at funerals. There were numerous references during the Commission's consultations indicating the cultural importance and obligation for Aboriginal people to attend funerals.<sup>7</sup> In the Pilbara, it was stated that if an Aboriginal person does not attend a funeral this may 'break Aboriginal law'.<sup>8</sup> In Albany one Aboriginal person said that:

I wanted to attend the funeral of my first cousin, I received a letter from my mother, but I was not able to attend the funeral and now that brings shame to me and I will have problems when I leave jail.<sup>9</sup>

In Carnarvon it was stressed that

You have no choice about these matters: 'If your face is missing, it will be noticed. People's attitudes to you changes if you do not attend'.<sup>10</sup>

If attendance is required at a funeral because of the prisoner's relationship to the deceased, failure to attend will cause distress and shame. In this regard it is important to understand that responsibility under Aboriginal customary law is often strict.<sup>11</sup> The fact that a prisoner does not attend a funeral through no fault of their own (because they are in prison and have not been granted permission to attend) does not necessarily relieve them from the obligation to attend and the consequences that follow. The Mahoney Inquiry recently heard evidence that if an Aboriginal person fails to attend certain funerals they will liable to

'community sanctions'.<sup>12</sup> The requirement to attend a funeral may also extend beyond the actual funeral service to associated ceremonies that may last for a number of days.<sup>13</sup> In Laverton the Commission was told that even when Aboriginal prisoners are permitted to attend a funeral they are not allowed to attend the wake.<sup>14</sup>

Specific concerns expressed to the Commission during the consultations were that the criteria for approval for prisoner funeral attendance do not adequately recognise family and kin relationships; that the application process is difficult; and that the use of restraints during funeral attendance (such as handcuffs and shackles) is inappropriate and unnecessary.<sup>15</sup> Similarly, the Inspector of Custodial Services has emphasised that the difficulties experienced by Aboriginal prisoners with respect to funeral attendance require action.<sup>16</sup>

### Application Process and Defining Family Relationships

Pursuant to s 83 of the *Prisons Act 1981* (WA) a grant of permit may be authorised for a prisoner to attend the funeral of a near relative. The Department of Justice *Policy Directive* (PD) 9 governs the application process for adult prisoners and sets out the relevant criteria. Prisoners are required to complete a written application form.<sup>17</sup> The application is assessed against the eligibility guidelines. PD 9 stipulates that relationships of grandparent, mother, father, sister, brother, son, daughter, husband, wife, defacto husband and defacto wife are close enough to permit attendance at a funeral (if the prisoner is otherwise suitable). Outside these categories the position is not so clear. Other relationships that may justify approval are described in the PD in the following manner:

7. Similarly, concerns about funeral attendance have been expressed to the Inspector of Custodial Services during many of its prison inspections. See, for example, the Office of the Inspector of Custodial Services' inspection reports of Roebourne Regional Prison (2002); Bunbury Regional Prison (2002); Albany Regional Prison (2002); Acacia Prison (2003); Greenough Regional Prison (2003); Broome Regional Prison (2005); Rangeview Juvenile Remand Centre (2005). The issue of funeral attendance was raised during the RCIADIC; recommendation 171 stated that 'Corrective Services give recognition to the special kinship and family obligations of Aboriginal prisoners which extend beyond the immediate family and give favourable consideration to requests for permission to attend funeral services and burials and other occasions of very special family significance': see RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [25.3.15].
8. LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 11 April 2003, 13.
9. LRCWA, Project No 94, *Thematic Summaries of Consultations – Albany*, 18 November 2003, 20.
10. LRCWA, Project No 94, *Thematic Summaries of Consultations – Carnarvon*, 30-31 July 2003, 5.
11. See discussion under 'Traditional Aboriginal Law and Punishment – Responsibility Under the Law', above pp 84–85.
12. Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) [9.57].
13. *Ibid* [9.67].
14. LRCWA, Project No 94, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 15.
15. These concerns are not unique to Western Australia; similar complaints have been noted in Victoria: see 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) 146.
16. Office of the Inspector of Custodial Services, *Report of an Announced Inspection of Bunbury Regional Prison – December 2002*, Report No 16 (2003) 24.
17. Department of Justice, Policy Directive 9, [1.5]. Prisoners will often complete the written application form with the assistance of a member of the Aboriginal Visitors' Scheme, the Prison Support Officer or a Prison Officer.

Where there has been an emotional, psychological or cultural significance attached to the relationship between the prisoner and the deceased but this relationship is not as described above, for example:

- Where there has been an extensive history of contact between the prisoner and the deceased of a significant nature.
- Where there has been a demonstrated commitment by either the prisoner or the deceased to their shared relationship.
- Where either the prisoner or the deceased have significant community and/or tribal standing necessitating an obligation for attendance of the prisoner at the funeral.
- Where there will be significant negative consequences resulting either to the prisoner, his family or community because of non-attendance of the prisoner at the funeral.
- Where the relationship (between prisoner and deceased) has been that of foster child, foster parent or substitute caregiver.
- The above includes the recognition of a cross-cultural relationship where prisoners of non-aboriginal descent have a recognised standing in the aboriginal community, to attend a funeral of an aboriginal person.

The application process for juvenile detainees is contained in Juvenile Custodial Rule (JCR) 802 which provides that an application to attend a funeral must be made in writing. The guidelines in JCR 802 include that, 'except in special circumstances, attendance should be restricted to blood relatives or relationships of cultural significance'.

Although the guidelines require the consideration of culturally significant relationships, there is no definition of what constitute such a relationship. During the consultations the Commission was told that the prison system does not fully recognise the complexities of Aboriginal cultural ties with extended family members and kin.<sup>18</sup> In Laverton it was stated that the Department of Justice 'questions family connections and does not understand Aboriginal family relationships'.<sup>19</sup> In Bunbury it was argued that Aboriginal family connections need

to be respected within the prison system.<sup>20</sup> The view that Aboriginal prisoners experience difficulties in obtaining approval to attend funerals because of a lack of recognition of cultural relationships is supported by the Inspector of Custodial Services:

Aboriginal prisoners viewed the Department's handling of funeral applications as unfair and discriminatory ... displaying a lack of respect for Aboriginal family relationships and a lack of understanding of the significance funeral attendances have for family contact and obligations.<sup>21</sup>

A significant proportion of funeral applications made by Aboriginal prisoners are denied. For the period 1 July 2004 to 30 June 2005, 53.5 per cent of the applications for funeral attendance made by Aboriginal adult prisoners were not approved.<sup>22</sup> The previous year, the percentage of non-approved applications was slightly less at 44 per cent.<sup>23</sup> Although the total number of applications by non-Aboriginal prisoners is far less than for Aboriginal prisoners, the proportion of applications that are approved for non-Aboriginal prisoners is more than for Aboriginal prisoners. For example, in 2004–2005 about 70 per cent of applications by non-Aboriginal prisoners were approved.

The Coordinator of Absences at Roebourne Regional Prison<sup>24</sup> suggested to the Inspector of Custodial



18. LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 11 April 2003, 15; 22; *Carnarvon*, 30–31 July 2003, 5; *Broome*, 17–19 August 2003, *Bunbury*, 28–29 October 2003, 9.

19. LRCWA, Project No 94, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 15.

20. LRCWA, Project No 94, *Thematic Summaries of Consultations – Bunbury*, 28–29 October 2003, 9.

21. Office of the Inspector of Custodial Services, *Report of an Announced Inspection of Albany Regional Prison – September 2002*, Report No 18 (2003) 36–37.

22. Department of Justice, 'Approved and Non-Approved Applications for Authorised Absences from Prison Showing Decision-Making Agency from 1/7/04 to 30/6/05', obtained by email, 26 October 2005. Approximately 38 per cent of applications made by Aboriginal juvenile detainees were not approved: see Department of Justice, 'Approved and Non-Approved Funeral Applications for Juveniles in Custody 2003/2004 and 2004/2005', obtained by email, 9 December 2005.

23. *Ibid.*

24. Which at the time of the Inspection had an Aboriginal population of 83 per cent: Office of the Inspector of Custodial Services, *Report of an Announced Inspection of Roebourne Regional Prison – April 2002*, Report No 14 (2003) 16.

Services in 2002 that the most common reason that funeral applications were refused was because the significance of the relationship between the prisoner and the deceased was 'unclear and often identified by prisoners in terms of 'step-family, cousin, aunt and uncle relationships'.<sup>25</sup> If an Aboriginal prisoner were to describe the deceased as an uncle without any further explanation, then it is conceivable that prison authorities will not appreciate the cultural significance of the relationship. In terms of kinship the deceased may be as important as a father. There are two issues that require consideration. First, the person considering the application needs to be educated about Aboriginal kinship structures and how they differ from Western family concepts.<sup>26</sup> Second, approval of an application may be dependent upon how well the relationship is described in the application form. For Aboriginal prisoners or detainees who do not speak English as their first language, or for those who may not be able to read or write, the knowledge and cultural sensitivity of the person who assists them in making the application will be determinative. Merely stating that the deceased is an uncle is insufficient because on its own this relationship does not fall within any of the criteria listed in the policy guidelines.

Aboriginal communities consulted by the Commission complained that the application procedures were too complex.<sup>27</sup> During the Pilbara consultations it was suggested that the forms should be more culturally appropriate and that prison officers who assist prisoners in completing the application form need to be more culturally aware.<sup>28</sup> The Commission understands that Roebourne Regional Prison has produced a staff resource manual to advise prison officers of relevant cultural considerations and suggest appropriate ways of confirming information provided by prisoners in their application. For example, the manual states that language and skin group relationships for Aboriginal prisoners should be comprehensively examined and confirmed by speaking to the Chairperson of the relevant Aboriginal community.<sup>29</sup> The manual also emphasises that many Aboriginal prisoners do not speak

English as their first language and recommends that, where possible, an appropriate Aboriginal person should be present to assist with communication about the funeral application. The Commission is of the view that this manual provides a useful model to improve the practical implementation of the Department of Justice funeral applications policy.

#### Proposal 47

That the Department of Justice, in conjunction with Aboriginal communities, develop culturally appropriate policy and procedure manuals for all prisons to assist prisoners and prison officers with applications for attendance at funerals.

In drafting these manuals consideration be given to the potential role for community justice groups in assisting prisoners with the application process. Community justice group members could provide advice to prison authorities about the significance of the prisoner's relationship with the deceased and the importance of the prisoner's attendance at the funeral for the community.

The Commission is of the view that in addition to more effective practical implementation of the funeral policy guidelines, the guidelines should be more appropriately expressed.<sup>30</sup> There is presently no reference in the policy guidelines about the nature of kinship in Aboriginal society. The current criteria, which require consideration of the level of contact or commitment between the deceased and the prisoner, may well work against Aboriginal prisoners in practice. A particular relationship may be considered extremely significant from an Aboriginal perspective but this does not necessarily mean that the deceased and the prisoner would have regularly communicated with one another. Lack of contact may result from remoteness, lack of transport or lack of telephone access. The focus should not be on how often the prisoner and the deceased had been in contact but on the significance of the relationship under customary law.

25. Ibid 81.

26. For further discussion see Part VI 'The Role of Kinship in Aboriginal Society', below pp 267–68.

27. LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 11 April 2003, 16; *Laverton*, 6 March 2003, 15; *Carnarvon*, 30–31 July 2003, 5.

28. LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 11 April 2003, 16.

29. Department of Justice, *Roebourne Regional Prison Funeral Applications: Staff resource manual* (undated).

30. The Commission is aware that the Department of Justice had drafted a revised funeral policy in 2003 and that the Inspector of Custodial Services recommended that this policy should be implemented as a priority. See Office of Inspector of Custodial Services, *Report of an Announced Inspection of Broome Regional Prison*, Report No 27 (2005) 49; *Report of an Announced Inspection of Roebourne Regional Prison – April 2002*, Report No 14 (2003) 15 where it was observed that the Department of Justice was renewing funeral application processes in regard to kinship issues. The Commission is not aware of the contents of this policy and understands that it has still not been implemented.

The Inspector of Custodial Services has suggested that policy in Queensland is more inclusive of Aboriginal kinship relations.<sup>31</sup> The Queensland Department of Corrective Services' *Funeral Attendance by Indigenous Prisoners Policy*<sup>32</sup> contains the following eligibility criteria for funeral applications:

In some instances the deceased person may have had a closer relationship with the prisoner than is immediately apparent. Kinship within Indigenous cultures often extends close relationship ties where a grandparent or aunt/uncle may assume a parent role, or a cousin a brother/sister relationship. For example, where an aunt has raised a prisoner as a child she may assume a mother figure while her offspring are regarded as brothers and sisters.<sup>33</sup>

The Commission considers that the current policy is not adequate to meet the needs of Aboriginal prisoners who are required under customary law to attend certain funerals. The policy should expressly refer to Aboriginal kinship relations.

#### Proposal 48

That the Department of Justice immediately revise Policy Directive 9 and Juvenile Custodial Rule 802 in relation to attendance at funerals. The eligibility criteria should include recognition of Aboriginal kinship and other important cultural relationships.

## Use of Restraints on Prisoners and Detainees During Funerals

Prisoners and juvenile detainees attending funerals may be subject to the use of restraints (including handcuffs and shackles). All adult prisoners are to be restrained unless otherwise directed by the designated Superintendent.<sup>34</sup> For juveniles the policy states that mechanical restraints should be used as a last resort.<sup>35</sup>

The Commission is not aware of the number of prisoners or detainees that are restrained while attending funerals. During the consultations Aboriginal people were extremely critical of the practice.<sup>36</sup> In Laverton it was stated that:

Aboriginal people arrive at the funeral in handcuffs (including children). Sometimes they are even shackled. This is not acceptable and undignified.<sup>37</sup>

In Geraldton it was stated that:

Aboriginal prisoners go to funerals chained up and as a result they cannot show grief appropriately.<sup>38</sup>

Thus it can be seen that Aboriginal people consider that the use of physical restraints at funerals is disrespectful and causes immense shame to the prisoner and their family.<sup>39</sup> In the Pilbara it was stated that Aboriginal people would not run away if unrestrained.<sup>40</sup> Similarly, in Carnarvon it was said that

It was a 'bloody stupid thing'. People would not run away, 'too much shame'.<sup>41</sup>

The Commission considers that the current policy and practice regarding the use of physical restraints during funeral attendances should be reviewed. Certain prisoners, in particular those who are classified as minimum security, should not generally be restrained at funerals. The policy should acknowledge Aboriginal customary law and cultural obligations and keep in mind that Aboriginal prisoners are less likely to escape during such an important ceremony. While there may be situations that require restraints the presumption should be that restraints are generally not to be used at funerals. The Queensland Department of Corrective Services provides a useful model:

Chains attaching handcuffs to officers and/or leg shackles are not to be used for prisoners attending funerals. Where handcuffs are required to be worn, reasonable effort should be taken to hide the handcuffs

31. Office of Inspector of Custodial Services, *Report of an Announced Inspection of Roebourne Regional Prison – April 2002*, Report No 14 (2003) 82.  
32. Based on the following principle: 'Recognition is given to the special kinship and family obligations of Indigenous prisoners that extend beyond the immediate family in accordance with recommendation 171 of the Royal Commission into Aboriginal Deaths in Custody'.  
33. Queensland Department of Corrective Services' *Funeral Attendance by Indigenous Prisoners Policy* (undated) [3.1].  
34. Department of Justice, Policy Directive 28 [3.2].  
35. Department of Justice Juvenile Custodial Rule 208 [3.4] which also states that 'A Superintendent may authorise and direct mechanical restraint of a detainee where in their opinion such restraint is necessary ... to prevent the escape of a detainee during their movement to and from a Detention Centre or during their temporary absence from a Detention Centre'.  
36. LRCWA, Project No 94, *Thematic Summaries of Consultations – Carnarvon*, 30–31 July 2003, 5.  
37. LRCWA, Project No 94, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 15.  
38. LRCWA, Project No 94, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 17.  
39. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, 39. Similarly in Queensland it has been observed that the practice of restraining prisoners at funerals is degrading and inhumane: see N Morseau-Diop 'You Say You Hear Us, But Are You Really Listening or Are We Just Noise in the Distance?' (Paper presented at the Best Practice Interventions in Corrections for Indigenous People Conference convened by the Australian Institute of Criminology, Sydney, 8–9 October 2001) 5–6.  
40. LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 11 April 2003, 16  
41. LRCWA, Project No 94, *Thematic Summaries of Consultations – Carnarvon*, 30–31 July 2003, 5.

from public view. Where handcuffs are hidden from view, escorting officers are required to confirm their integrity at regular intervals.<sup>42</sup>

### Proposal 49

That the Department of Justice should review and revise its current policy in relation to the use of physical restraints on prisoners and detainees during funeral attendances. The revised policy should recognise the importance of Aboriginal prisoners attending funerals in a dignified and respectful manner. Physical restraints should only be used as a last resort and, if required, they should be as unobtrusive as possible.

## Escorting Prisoners and Detainees to Funerals

The Commission consultations did not directly refer to problems with escorting prisoners and detainees to funerals. The appropriateness of staff escorting prisoners to funerals was raised by the Inspector of Custodial Services in 2003 following an Inspection of Greenough Regional Prison. The report of that Inspection highlighted:

[T]he skill to assist Aboriginal prisoners at the time of great sorrow is underdeveloped. There is a need for better cross-cultural training at a local level, improved coordination of various departmental Aboriginal welfare services and streamlined local and Head Office procedures.<sup>43</sup>

While the majority of adult prisoner funeral escorts are conducted by AIMS Corporation, minimum-security prisoners at Karnet, Wooroloo and Boronia custodial facilities, are escorted to funerals by custodial staff.<sup>44</sup> For juvenile detainees all escorts are undertaken by detention centre staff.<sup>45</sup> The Commission is not aware of any further guidelines in relation to the nature of

escorts to funerals. The Queensland Department of Corrective Services policy on this issue states:

Escorts should be conducted in accordance with the procedure for Prisoner Escort with particular consideration being given that:

- Wherever possible Indigenous custodial officers undertake escort duties;
- Civilian (plain) clothes be worn by the prisoner and escorting staff where possible; and
- Prior to commencing escort the escorting officers be adequately briefed on the circumstances and procedures of the escort. The briefing will include the sensitivity and cultural significance of the occasion and require the escorting officers to display appropriate behaviour and sensitivity.<sup>46</sup>

An initiative of the South Australian Department of Correctional Services, which commenced in 2004, enables local Indigenous people to supervise prisoners who are attending funerals on their lands (under Aboriginal Community Supervision Agreements). There are currently four communities that have entered into these agreements and over 12 community members have been selected for training as volunteer supervisors.<sup>47</sup>

The Commission is of the view that the policy and practice concerning the escort of prisoners and detainees to funerals should be re-examined paying particular attention to ensuring that any escort arrangements are culturally sensitive and do not intrude unnecessarily on the grieving process of the prisoner and the community.

### Proposal 50

That the Department of Justice revise, in conjunction with Aboriginal communities, its policy concerning the escorting of Aboriginal prisoners and detainees to funerals.

42. Queensland Department of Corrective Services, *Funeral Attendance by Indigenous Prisoners Policy* (undated) [3.4].

43. Office of Inspector of Custodial Services, *Report of an Announced Inspection of Greenough Regional Prison – May 2003*, Report No 21 (2004) 50. The need for specific cultural awareness in relation to escorting prisoners to funerals was also referred to in N Morseau-Diop 'You Say You Hear Us, But Are You Really Listening or Are We Just Noise in the Distance?' (Paper presented at the Best Practice Interventions in Corrections for Indigenous People Conference convened by the Australian Institute of Criminology, Sydney, 8–9 October 2001) 6.

44. PD 28, [5.1.6].

45. In 2004 the responsibility for juvenile custodial transport was transferred back to the Juvenile Custodial Services (DOJ) from AIMS: see Office of the Inspector of Custodial Services, *Report of an Announced Inspection of Rangeview Juvenile Remand Centre*, Report No 29 (2005) 18–19.

46. Queensland Department of Corrective Services, *Funeral Attendance by Indigenous Prisoners Policy* (undated) [3.4].

47. The Department of Justice Correctional Services South Australia, *Annual Report 2003–2004* (Adelaide, 27 October 2005) also states that a 'culturally appropriate training package has also been developed for Port Augusta custodial officers involved in escorts to the Anangu Pitjantjatjara Yankunytjatjara Lands. Once operational, funeral leave under these Agreements for Anangu prisoners will be more culturally sensitive and humane, whilst also meeting the Department's commitment to the RCIAIC recommendations'.

In reviewing all relevant policies and practices in regard to the attendance at funerals by Aboriginal prisoners and detainees, the Commission understands that community safety and the prevention of escapes is a paramount consideration. However, the current regime is clearly not working for Aboriginal people. The customary law obligation to attend funerals should not be underestimated. The Commission believes that the policies should be revised in collaboration with Aboriginal communities and groups to ensure that all relevant matters are taken into account and practical workable solutions are developed.

## Parole and Post Release Options for Aboriginal Prisoners

### Parole and Aboriginal Customary Law

When an offender is sentenced to imprisonment a court will decide whether the offender is eligible to be released on parole. Similarly, juvenile offenders are eligible to be released on a supervised release order. The decision whether to allow the offender to be released is made by the Parole Board (for adults) or by the Supervised Release Board (for juveniles). Aboriginal customary law may be relevant to the decision to grant or deny parole or release on a supervised release order. For example, the Parole Board advised the Commission that it has been aware that in some cases, upon release from prison, an offender may be liable to traditional punishment in their own community. In the same way that courts have approached the issue, the Parole Board is unable to ‘sanction’ or ‘condone’ traditional punishment which constitutes a criminal offence.<sup>48</sup>

The Parole Board suggested that reports prepared by community corrections officers do not contain sufficient information about cultural issues.<sup>49</sup> In order to encourage more information about Aboriginal customary law and cultural issues the Commission is of the view

that the Parole Board and the Supervised Release Board should be able to receive information from Elders or members of a community justice group.

#### Proposal 51

That the *Sentence Administration Act 2003 (WA)* and the *Young Offenders Act 1994 (WA)* be amended to provide that the Parole Board and the Supervised Release Board can request to be provided with information or reports from a respected Elder in the offender’s community or a member of a community justice group.

### Lack of Programs and Services

The Commission has already emphasised the lack of suitable programs and services available for Aboriginal prisoners.<sup>50</sup> This issue has also been comprehensively examined by the Inspector of Custodial Services and the Mahoney Inquiry. The Parole Board has also expressed its concern about the shortage of programs for Aboriginal prisoners in regional prisons. The Parole Board has observed that often the only way for an Aboriginal prisoner to access programs is to transfer to another prison sometimes long distances from the offender’s community. This adds to cultural and community dislocation.<sup>51</sup> The extent to which a prisoner has engaged in programs while in prison is a consideration for the Parole Board in their determinations.<sup>52</sup> The lack of Indigenous-specific programs and services in prisons may therefore cause delays in being released on parole.

The Parole Board suggested that Aboriginal Elders could become more involved in supervising offenders while subject to parole.<sup>53</sup> Many Aboriginal people consulted by the Commission supported the involvement of Aboriginal people in the provision of programs for offenders with a focus on Aboriginal culture and community responsibility.<sup>54</sup> The Commission is of the view that its proposal for community justice groups will

48. LRCWA, Project No 94, Notes of Briefing with the Parole Board and the Supervised Release Board of Western Australia, 12 August 2003.

49. Ibid.

50. See discussion under ‘Aboriginal People and the Criminal Justice System – Programs and Services’, above p 100. For an examination of the programs and services available within the prison system, see Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004). The general lack of programs and services in regional prisons was also reiterated during the Commission’s consultations with members the Parole Board and the Supervised Release Board of Western Australia: see LRCWA, Project No 94, Notes of Briefing with the Parole Board and the Supervised Release Board of Western Australia, 12 August 2003.

51. Parole Board of Western Australia, Annual Report (June 2005) 8,12.

52. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 113.

53. Ibid.

54. See for example LRCWA, Project No 94, *Thematic Summaries of Consultations – Manguri*, 4 November 2002, 5; *Armada*, 2 December 2002, 17.

provide one method whereby Aboriginal communities can become more directly involved in the provision of programs and services to Aboriginal prisoners and detainees.

## Aboriginal Community-based Alternatives to Prison

A large number of Aboriginal prisoners are sent to prisons which are not the closest available prison to their home and community. The national standards for correctional facilities provide that prisoners should be as close as possible to their homes.<sup>55</sup> The Mahoney Inquiry identified that as at 30 June 2005 there were 343 Aboriginal regional prisoners placed in prisons 'other than the one closest to their home'.<sup>56</sup> The Mahoney Inquiry as well as the Inspector of Custodial Services has recommended the development of additional custodial facilities in specific regional areas, including Aboriginal community-based facilities for low risk offenders.<sup>57</sup>

Many Aboriginal people consulted by the Commission suggested the need for community-based alternatives to prison. Underlying these suggestions was the need to keep Aboriginal offenders near their communities, families, and country and utilise Aboriginal customary law processes in rehabilitating offenders. Aboriginal people consulted by the Kimberley Aboriginal Reference Group have also indicated strong support for alternatives such as work camps, 'healing places' and specific pre-release facilities for female prisoners.<sup>58</sup> This reference group suggested that the Boronia Pre-Release Centre for Women is an 'excellent model for

the kind of facility that would suit the custodial, rehabilitation and re-entry needs of Kimberley Aboriginal prisoners'.<sup>59</sup> Similarly, 'healing lodges' for indigenous peoples in Canada were put forward as a useful example.<sup>60</sup>

The establishment of additional and improved custodial facilities, whether they are community-based or government controlled, will assist in reducing the numbers of Aboriginal prisoners that are placed long distances from their families and communities. It may also assist with other problems experienced by Aboriginal prisoners. For example, some Aboriginal prisoners are required to find their own transport back to their community even where a long distance from the place of release.<sup>61</sup> Morgan and Motteram observed that travel arrangements are a significant concern to the Parole Board and in some cases release may be delayed until satisfactory arrangements can be made.<sup>62</sup> Funeral applications for Aboriginal prisoners may also be more readily approved if the prisoner does not have to be transported long distances to attend.

The Commission supports these recommendations to develop Aboriginal community-based custodial facilities in regional areas. This approach is consistent with the Commission's overall aim to increase the involvement of Aboriginal people in criminal justice issues as well as providing opportunities for Aboriginal customary law processes to rehabilitate Aboriginal offenders. Community justice groups proposed by the Commission could undertake a direct role in the design and implementation of alternative community-based custodial facilities.

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55. Kimberley Aboriginal Reference Group, 'Kimberley Aboriginal Reference Group's Initial Recommendations Toward the Kimberley Custodial Plan' (October 2005) 2.

56. Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) [9.74].

57. Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) [9.78] Recommendations 89–91; Office of Inspector of Custodial Services, *Directed Review of the Management of Offenders in Custody*, Report No 30 (November 2005). The Commission is aware that the Department of Justice has announced plans to develop two new regional juvenile remand centres, one in Kalgoorlie and one in Geraldton: see Department of Justice, *Regional Juvenile Remand Centres* (undated) 1.

58. Kimberley Aboriginal Reference Group, 'Kimberley Aboriginal Reference Group's Initial Recommendations Toward the Kimberley Custodial Plan' (October 2005) 4.

59. *Ibid* 3. The Boronia Pre-Release Centre for Women commenced operation in May 2004. It has been commented that this centre sets 'new standards' for custodial design and reform: see Salomone J, 'Addressing the Needs of Aboriginal Women Prisoners and their Families in Western Australia' (2005) 6(14) *Indigenous Law Bulletin* 17. Salomone commented that about 15 per cent of the prison population at the Boronia Centre were Aboriginal.

60. Kimberley Aboriginal Reference Group, *ibid*. Chris Cunneen and Melanie Schwartz observed in their background paper that in Canada sentencing laws provide for Indigenous offenders to serve their sentences in Indigenous community-based 'correctional centres': see Cunneen C & Schwartz M, *Customary Law, Human Rights and International Law: Some conceptual issues*, LRCWA, Project No 94, Background Paper No 11 (March 2005) 36.

61. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 5; *Cosmo Newbery*, 6 March 2003, 20; *Kalgoorlie*, 25 March 2003, 27; *Pilbara* 11 April 2003 16.

62. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 124.