

# PART VII

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## Aboriginal Customary Law and the Family

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# Aboriginal Customary Law and the Family

## Jurisdictional Limitations

Under the Australian Constitution, the power to make laws regarding marriage, nullity and divorce, matrimonial causes (property, child support and spousal maintenance disputes) and the custody of children the subject of a marriage is vested exclusively in the Commonwealth Parliament.<sup>1</sup> The Western Australian Parliament therefore has no power to effect recognition of Aboriginal customary law in these areas. However, unlike the other Australian states and territories (which have conceded certain powers to the Commonwealth) Western Australia chose to retain legislative power to deal with family law matters not covered by the Australian Constitution (that is, not concerning a legal marriage). These include:

- parenting disputes involving ex-nuptial children;
- de facto marriage financial and property disputes; and
- child support for ex-nuptial children.<sup>2</sup>

For these purposes Western Australia established its own discrete Family Court exercising combined state and federal jurisdiction in family law matters. In this regard the *Family Law Act 1975* (Cth) governs disputes relating to the dissolution of a lawful marriage, including disputes involving the children of a marriage, whilst the *Family Court Act 1997* (WA) governs disputes relating to ex-nuptial children and the dissolution of de-facto relationships.<sup>3</sup> The application of these laws to children the subject of parenting disputes is of particular concern. In all other Australian jurisdictions the Commonwealth Act applies to ex-nuptial children *and* the children of a marriage; however in Western Australia, the Commonwealth Act applies to nuptial children while the Western Australian Act applies to ex-nuptial

children. Because changes in either law create the potential for different laws applying within Western Australia for nuptial and ex-nuptial children, it is customary that the Western Australian Act mirrors the provisions of the Commonwealth Act to ensure that all Australian children are treated equally before the law.<sup>4</sup>

Aboriginal people consulted by the Commission for this reference identified problems with Western Australia's jurisdictional limitations, such as the artificiality of state boundaries in respect of particular Aboriginal customary laws and communities. Some respondents also suggested that any attempt to address family law issues in Western Australia without reconsideration of the national laws under Commonwealth jurisdiction would be 'superficial'.<sup>5</sup> The extent to which Western Australia can make meaningful changes to the law in this area for the benefit of all Aboriginal people in this state is therefore reasonably constrained.

The recognition of Aboriginal customary law in relation to family law at the Commonwealth level was considered in detail by the ALRC in its 1986 report. The ALRC made certain recommendations in this area, including that traditional marriages be 'functionally recognised' for the purposes of particular laws (such as those governing superannuation, tax and inheritance, and for the purposes of legitimating children of a union) but that it not be given full legal status of marriage under the *Marriage Act 1961* (Cth).<sup>6</sup> The ALRC also made recommendations regarding the placement of Aboriginal children in cases relating to child custody and adoption.<sup>7</sup> Whilst noting that the ALRC report is now almost 20 years old, the Commission broadly supports its recommendations pertaining to family law at the Commonwealth level. However, there are some recommendations, such as that regarding recognition

1. Australian Constitution ss 51 (xxi) & (xxii).

2. *Family Court Act 1997* (WA). See Buti T & Young L, *Family Law and Customary Law*, Law Reform Commission of Western Australia (LRCWA), Project No 94, Background Paper No 4 (August 2004) 19.

3. Under the *Family Law Act 1975* (Cth) and the *Family Court Act 1997* (WA). For a fuller discussion of jurisdictional issues see Buti & Young, *ibid* 18–22.

4. See discussion in Buti & Young, *ibid* 18–20.

5. *Ibid*. See also LRCWA, Project No 94, *Thematic Summaries of Consultations – Manguri*, 4 November 2002.

6. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [257].

7. *Ibid* [366]–[390].

of promised marriages as a defence against unlawful carnal knowledge, that the Commission does not support. In these instances the Commission makes clear its objections and its own proposals for reform in the following discussion.

The discussion in this Part is confined mainly to those areas of law over which the state retains some legislative jurisdiction or where it can make some meaningful administrative or procedural change to recognise the cultural differences and needs of Aboriginal families. Where relevant to the position in Western Australia and the state's jurisdictional capacity, the Commission will discuss the ALRC's findings and recommendations and those of other relevant bodies.

## Marriage

Although, as mentioned earlier, marriage is one area in which the Western Australian Parliament has no legislative capacity, it is useful here to briefly discuss the interaction of current Commonwealth laws of marriage and Aboriginal customary laws of marriage in Western Australia. This discussion will provide some background to the understanding of traditional Aboriginal family structures as well as assist in identifying areas where Western Australia might be able to make some changes that will assist Aboriginal families to negotiate the laws in this area.

### Traditional Aboriginal Marriage

In their background paper for this reference Tony Buti and Lisa Young say that, like non-Aboriginal society, marriage is a central tenet of Aboriginal family life.<sup>8</sup> However, they qualify that:

[C]ustomary Aboriginal marriage is not something that necessarily develops according to the free choice of the individuals concerned. Freedom of marriage in traditional Aboriginal society is restricted by rules that

prohibit marriage of certain close relatives and by the 'rule of exogamy', which prohibits marriage outside one's clan. In Aboriginal society, it is important that the 'right' marriages take place so that the offspring of marriage are the product of the correct family groups and affiliations.<sup>9</sup>

The rules of kinship are of primary importance to the traditional regulation of marriages and other relationships (both social and intimate) in Aboriginal societies. It has been observed that '[a]ll members of a tribe, and sometimes even those outside it, [are] linked in a complex network of reciprocal relationships which [form] the social basis of everyday activity'.<sup>10</sup> According to Berndt, traditional marriage rules vary 'from one tribal unit to another',<sup>11</sup> but invariably the notion of kinship dictates whom one can marry and whom one must avoid.<sup>12</sup> Marriage rules served various purposes in traditional Aboriginal societies including the maintenance of genetic integrity;<sup>13</sup> the assurance of continuing inheritance and performance of ritual (spiritual) obligations to land;<sup>14</sup> the creation of alliances and reciprocal obligations between individuals, families and groups;<sup>15</sup> and the maintenance of traditional economies trading on these familial obligations.<sup>16</sup> Importantly, in traditional Aboriginal societies 'marriage is not seen as a contract between individuals but rather as one which implicates both kin and country men of the parties involved'.<sup>17</sup>

Traditional Aboriginal marriage involves a number of stages which usually begin with the betrothal of the female partner to the male partner, often when one partner (usually the female) is still an infant.<sup>18</sup> In common parlance these betrothals have become known as 'promised marriages'.

### Promised marriages

Promised marriages are marriages negotiated by kin and take the form of a contract (or at least an exchange of promises) between the families of the betrothed or

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8. Buti T & Young L, *Family Law and Customary Law*, LRCWA, Project No 94, Background Paper No 4 (August 2004) 6. This background paper provides a detailed discussion of the position of family law and Aboriginal customary law in Western Australia and canvasses proposals for minor legislative reform.
  9. *Ibid* (footnotes omitted).
  10. Berndt RM, 'Tribal Marriage in a Changing Social Order' (1962) 5 *University of Western Australia Law Review* 326, 332.
  11. *Ibid* 331.
  12. Generally the application of traditional marriage rules establishes the 'ideally correct' marriage for a particular person within a group; however, Berndt reported in 1962 that alternative matches were becoming increasingly permissible, generally with the sanction of the group. *Ibid* 333.
  13. LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 3.
  14. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [223].
  15. *Ibid*.
  16. Kimm J, *A Fatal Conjunction: Two laws, two cultures* (Sydney: The Federation Press, 2004) 66.
  17. Dianne Bell as cited in ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [223].
  18. Occasionally a child is betrothed prior to its birth. See Berndt RM, 'Tribal Marriage in a Changing Social Order' (1962) 5 *University of Western Australia Law Review* 326, 334.

between the girl's family and the prospective husband. As mentioned above, a girl would usually be betrothed as an infant or young child, sometimes to a youth but more often to an older man.<sup>19</sup> Generally gifts are exchanged to establish and maintain the marriage contract until such time as the girl has reached puberty or the families believe that the girl is ready to follow through with confirming the marriage.<sup>20</sup> Sometimes the prospective husband has responsibilities such as providing food to the girl's family during the betrothal period, which may be many years.<sup>21</sup> In other cases the girl may go to live with the prospective husband's clan for a period of time before cohabiting with the husband.<sup>22</sup>

The first indication of a confirmed promised marriage in traditional Aboriginal society is the occurrence of public cohabitation whereby the partners to the promised marriage take on all 'marital responsibilities including sexual relations'.<sup>23</sup> Consummation of the marriage is not usually marked with ceremony.<sup>24</sup> The final stage of confirmation is the birth of the first child of a traditional marriage. This is considered to strengthen the union between the parties to the marriage.<sup>25</sup>

Though it is a contract of sorts, a promised marriage is not always absolute; there are ways of avoiding the match. For instance, a betrothal may be broken off and the girl may marry another with the consent of the intended husband.<sup>26</sup> It is also possible for a betrothed girl to elope with another man and, provided that the match is accepted within the kinship rules, the intended husband may cede his rights to the girl upon payment of compensation.<sup>27</sup> If, however, the marriage had already taken place, there might be the possibility of punishment for one or both of the eloping couple, sometimes resulting in death.<sup>28</sup>

## Recognition of promised marriage contracts

The historical effects of colonisation and past government policy on Aboriginal culture and the increasing urbanisation of Western Australia's Aboriginal population have each led to the erosion of certain cultural practices. The practice of promised marriages appears to be one such custom that has declined in Western Australia; although there were indications that the practice remained current in some remote Aboriginal communities.<sup>29</sup> Like the NTLRC inquiry, the Commission found that where arranged marriages still existed there was some degree of choice as to whether the girl would enter the marriage upon reaching puberty.<sup>30</sup> However, the Commission received contradictory accounts of the consequences for a girl who chose not to continue with an arranged marriage<sup>31</sup> and, in these circumstances, the 'choice' might be considered more illusory than real. The NTLRC pointed out in its recent report that there would usually be significant social expectations that a marriage would proceed as arranged and that there might be worrying issues of imbalance of power relationships in promised marriages, particularly where girls under 16 years were matched to adult, and sometimes quite senior, men.<sup>32</sup>

The imbalance of power relations, particularly in respect of a young girl's ability to refuse sexual advances in a customary law relationship, is discussed further below under the heading 'Customary Law Promised Marriages and Child Sexual Abuse'.<sup>33</sup> It is important here though to make reference to the lack of consent, at least on behalf of the female, to a promised marriage which is arranged and negotiated between kin. As acknowledged by the ALRC in its report on recognition of Aboriginal customary laws, Australia is under certain

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19. Ibid. See also ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [224]. It should be noted that a man was not considered ready for marriage until he had undergone 'a substantial portion of their initiation process' which would often mean that a prospective husband would be in his late twenties. See Tonkinson R, *The Jigalong Mob: Aboriginal victors of the desert crusade* (California: Cummings Publishing Co., 1974) 47.

20. Tonkinson R, *The Mardudjara Aborigines: Living the dream in Australia's desert* (New York: Holt, Rinehart and Winston, 1978) 80.

21. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986). See also Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life, past and present* (Canberra, Aboriginal Studies Press, 5th ed., 1999) 122.

22. Kimm J, *A Fatal Conjunction: Two laws, two cultures* (Sydney: The Federation Press, 2004) 65.

23. Berndt RM, 'Tribal Marriage in a Changing Social Order' (1962) 5 *University of Western Australia Law Review* 326, 339.

24. Ibid 335.

25. Ibid.

26. Ibid 334.

27. Ibid 336.

28. Ibid. See also Berndt RM and Berndt CH, *The World of the First Australians* (Sydney: Lansdowne Press, 2nd ed, 1982) 190–91.

29. Specifically in remote communities in the Pilbara region; Warburton in the Goldfields/Central Desert region; and Wiluna in the Mid-West region.

30. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 23.

31. For instance, some respondents in Wiluna suggested that a woman could reject a promised marriage without reprisal, whilst others indicated that punishment would follow for the girl (and, if she eloped, her new husband) to ensure acceptance back into the community. The extent of such punishment was not revealed.

32. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 23.

33. See 'Customary Law Promised Marriages and Child Sexual Abuse', below pp 359–61.

international obligations<sup>34</sup> relating to the rights of women to freely choose a spouse and to enter into marriage with full consent and the present state of the law in Australia reflects this position.<sup>35</sup> The ALRC therefore recommended against change to the general law to allow recognition or enforcement of a promised marriage contract.<sup>36</sup>

The Commission agrees with the ALRC that Australia's international obligations preclude the recognition of non-consensual or underage customary law marriage and that any such recognition would result in the denial of fundamental human rights to Aboriginal women and children.<sup>37</sup> However, the Commission notes that the mere denial of recognition does little to practically enhance the rights of young Aboriginal girls, who may be the subject of a customary law promise to marry. The matter has been considered more recently by the NTLRC which recommended:

That so far as the concept of 'promised brides' exists in Aboriginal communities, the government sets up a system of consultation and communication with such communities to explain and clarify government policy in this area.<sup>38</sup>

The Commission proposes that a similar course be taken in Western Australia. The Commission notes that education about the requirement of consent of both parties to a marriage, freedom of choice of marriage partner and the fact that sexual relations with a child under the age of 16 can attract significant criminal sanctions could be readily included in the educative initiatives already planned in response to the Gordon Inquiry. Implementation of the following proposal will also assist Australia to meet its positive obligations under relevant international treaties; in particular the obligation to institute 'preventative measures, including public information and education programs to change attitudes concerning the roles and status of men and women' under the *Convention on the Elimination of All Forms of Discrimination Against Women*.<sup>39</sup>

### Proposal 63

That the Western Australian government include in the educative initiatives planned in response to the Gordon Inquiry, relevant information relating to the requirements under Australian law (and international law) of freedom of choice in marriage partners and the criminality of acts of sexual relations with children under the age of 16 regardless of marriage status under Aboriginal customary law.

## Aboriginal Marriage Today

The decline of arranged marriages in Aboriginal society has undoubtedly resulted in more freedom of choice in respect of marriage partner; however, this freedom can have negative implications for the maintenance of Aboriginal culture because marriages more often occur without regard for traditional skin groupings or other marriage rules of relevant clans. Marriages or domestic relationships that disregarded traditional Aboriginal marriage rules were referred to as 'wrong-way' or 'wrong-skin' relationships by those consulted by the Commission during its visits to the regions. Some respondents blamed 'wrong-way' marriages for the breakdown of customary law whilst others suggested that in some cases the knowledge of how to establish an ideal match was in danger of being lost. Certainly many younger Aboriginal people now have limited knowledge of traditional marriage rules and more individuals are marrying (or entering marriage-like relationships) for reasons that have little to do with these rules. According to Buti and Young, the typical Aboriginal marriage today is 'one which has its genesis in a non-marital union that is eventually accepted over time as a marriage by the relevant kin'.<sup>40</sup> Because such unions do not necessarily observe traditional Aboriginal marriage rules they would not normally be accorded the status of traditional Aboriginal marriages under

34. The *International Covenant on Civil and Political Rights* (Art 23(3)); the *International Covenant on Economic, Social and Cultural Rights* (Art (10(1))); and the *Convention on the Elimination of All Forms of Discrimination Against Women* (Art 16(2)); *Universal Declaration of Human Rights* (Art 16(2)) provide that marriages must be entered into with the free and full consent of the parties and that the betrothal of a child shall have no legal effect. Child marriage may also breach certain provisions of the *Convention of the Rights of the Child*. For further discussion of Australia's international obligations see above, Part IV.

35. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [246]–[253]. See also the discussion in McIntyre G, *Aboriginal Customary Law: Can it be recognised?*, LRCWA, Project No 94, Background Paper No 9 (February 2005).

36. ALRC, *ibid* [251].

37. In arriving at its decision not to support recognition of non-consensual or underage marriage as a cultural right of Aboriginal peoples, the Commission has been informed by the test propounded by the United Nations Human Rights Committee in *Lovelace v Canada* (HRC 24/77) as discussed in Part IV 'Aboriginal Customary Law in the International Law Context', above pp 67–76.

38. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003), recommendation 5.

39. United Nations Committee on the Elimination of All Forms of Discrimination Against Women, CEDAW General Recommendation No 19, Art 24(t). It is noted that the Australian Government's National Action Plan *Australia's National Framework for Human Rights* (December 2004) highlights the responsibility of all Australian states and territories in giving domestic effect to international treaties (at 17).

40. Buti T & Young L, *Family Law and Customary Law*, LRCWA, Project No 94, Background Paper No 4 (August 2004) 9.

## Australia's international obligations preclude the recognition of non-consensual or underage customary law marriage . . .

customary law but would be recognised under Australian law as de facto relationships.

In those Aboriginal communities where the influence of Christian missionaries has been strong there is more likely to be a higher incidence of marriages solemnised according to the provisions of the *Marriage Act 1961* (Cth).<sup>41</sup> On the other hand, where exposure to white Christian culture has been limited many traditional Aboriginal marriage practices have remained intact and 'right-way' customary law marriages following traditional marriage rules are common. However, these marriages do not satisfy the provisions of the *Marriage Act* and, like 'wrong-way' or non-traditional marriages, these traditional marriages would be considered by current Australian law to be de facto relationships.<sup>42</sup>

### Recognition of Traditional Aboriginal Marriage

As mentioned earlier, all matters having a connection to marriage (including the dissolution of a marriage) are within the Commonwealth's legislative jurisdiction. In 1986 the ALRC, reporting to the Commonwealth government, identified four ways in which traditional Aboriginal marriage could be recognised:

- by enforcing traditional marriage rules under Australian law;
- by categorical recognition of traditional marriage as a lawful marriage under the *Marriage Act 1961* (Cth);
- by equating a traditional marriage to a de facto relationship under Australian law; and
- by functional recognition of traditional marriage for particular purposes.<sup>43</sup>

The first method of recognition, that of enforcement of traditional marriage rules, has been dealt with above

under the heading 'Recognition of promised marriage contracts'.<sup>44</sup> The second method has not been considered by the Commission as it is not within Western Australia's legislative capacity to redefine 'marriage' under Australian law. The last two methods of recognition do fall into Western Australia's legislative capacity and are therefore considered below.

### Recognition of traditional Aboriginal marriage as a de facto relationship

One way of extending the legal benefits of marital status under Australian law to traditional Aboriginal marriages is to recognise them as de facto relationships. Recent amendments to the *Family Court Act 1997* (WA) have given most separating de facto couples in Western Australia access to remedies similar to those for married couples in regard to spousal maintenance and division of property.<sup>45</sup> It has been noted that the same is not necessarily true of other Australian jurisdictions where there is considerable variation in laws relating to the status of de facto relationships and the rights of separating de facto couples.<sup>46</sup> What this means for traditional Aboriginal marriages in Western Australia is that the present state of the law can provide clear, equitable resolutions to the problems that follow breakdown of traditional marriages that meet the requirements of a de facto relationship.

In Western Australia the term 'de facto relationship' is defined as a relationship (other than a legal marriage) between two persons who live in a marriage-like relationship.<sup>47</sup> In determining whether a de facto relationship exists the following factors are relevant:

- the length of the relationship;
- the fact of cohabitation;
- the existence of a sexual relationship;

41. Robert Tonkinson writes of the first Christian marriage of an Aboriginal couple in Jigalong (then a Christian mission camp) in July 1964. See Tonkinson R, *The Jigalong Mob: Aboriginal victors of the desert crusade* (California: Cummings Publishing Co, 1974) 38. It has been reported that 85 per cent of Aboriginal people in the Kimberley now identify as Christian. See *Mission Accomplished*, SBS Video, 1997, as cited in Wohlan C, *Aboriginal Women's Interests in Customary Law Recognition*, LRCWA, Project No 94, Background Paper No 13 (April 2005) 31.

42. Wilkinson D, 'Marrying Law and Custom: The Commonwealth's power to recognise customary law marriages' (1995) 20 (1) *Alternative Law Journal* 23, 23.

43. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) ch 13.

44. See above pp 333–34.

45. Child support for ex-nuptial children of a de facto union is covered by the *Child Support (Adoption of Laws) Act 1990* (WA) which adopts the Commonwealth administrative scheme of child support assessment.

46. Buti T & Young L, *Family Law and Customary Law*, LRCWA, Project No 94, Background Paper No 4 (August 2004) 21.

47. *Interpretation Act 1984* (WA) s 13A(1).

- the degree of financial dependence/interdependence and any agreements for financial support between the parties;
- the ownership, use and acquisition of property;
- the degree of mutual commitment to a shared life;
- whether the parties care for and support children; and
- the reputation of the parties and public aspects of their relationship.<sup>48</sup>

The definition of de facto relationship offered under s 13A of the *Interpretation Act 1984* (WA) is very broad and expressly includes same-sex couples and couples where one or both partners is simultaneously lawfully married to another person. The current definition does not expressly recognise traditional Aboriginal marriage as equivalent to a de facto relationship under Western Australian law; however, it would appear to cover the typical features of such a marriage and therefore offer the same protection.<sup>49</sup> To ensure that traditional marriages were accorded the same status as de facto relationships under Western Australian law, it would be open to the Western Australian government to amend the Interpretation Act to provide for express recognition of traditional Aboriginal marriage as a de facto relationship.

However, where such an approach has been investigated in the past, Aboriginal people have expressed the fundamental objection that to treat a traditional marriage as a mere de facto relationship would significantly degrade the traditional status and dignity of the union. Acknowledging this objection the ALRC concluded in its 1986 report that:

To treat a traditional marriage as a de facto relationship is to deny recognition of what it purports to be. It is true that Aborigines enter into de facto relationships. But some Aborigines enter into traditional marriages, recognised by themselves and others as distinctive, socially-sanctioned arrangements. If possible these should be specifically recognised, thus maintaining rather than eroding a distinction Aborigines themselves are concerned to maintain.<sup>50</sup>

At the time the ALRC examined this issue the status of de facto relationships and the protection accorded

to separating de facto spouses was of a very different order to the status and protection accorded to married couples. Despite the fact that Western Australian laws now offer similar protection to spouses in de facto unions as to spouses in lawful marriages, the Commission agrees with the ALRC that an approach according traditional marriages the same status as de facto relationships would be undesirable and would deny their legal reality in customary law.<sup>51</sup>

### Functional recognition of traditional Aboriginal marriage

The course recommended by the ALRC was functional recognition of traditional marriage for particular purposes under Australian law (or in the present case, Western Australian law). Functional recognition involves an examination of the specific legal and social problems that can arise from the failure to recognise traditional Aboriginal marriage as a lawful marriage to ensure that, wherever possible, the benefits, obligations or protections that lawful marriage attracts under Western Australian law are also extended to traditional marriage.

Functional recognition was considered by the ALRC to be the 'least intrusive way of recognising Aboriginal traditional marriages'.<sup>52</sup> In the ALRC's words:

It does not require codification or enactment of traditional marriage rules, and it thus provides freedom to develop rules to cope with new situations ... It is a recognition, even if indirect, of important aspects of the Aboriginal social fabric and of customary laws, and it makes provision for Aboriginal spouses which ought to be made.<sup>53</sup>

The concept of functional recognition endorsed by the ALRC also has the advantage that it can avoid the recognition or enforcement of aspects of traditional marriage (such as underage marriage) that may infringe basic rights or international obligations. Another benefit is that functional recognition can recognise traditional marriages that are actually or potentially polygamous,<sup>54</sup> providing protection for all partners of a marriage.

It is not known to what extent polygamy is practised in Western Australian Aboriginal communities today and the Commission did not receive any submissions on this

48. *Interpretation Act 1984* (WA) s 13A(2) as paraphrased in Buti T & Young L, *Family Law and Customary Law*, LRCWA, Project No 94, Background Paper No 4 (August 2004) 21.

49. Buti & Young, *ibid* 26.

50. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [245].

51. Buti T & Young L, *Family Law and Customary Law*, LRCWA, Project No 94, Background Paper No 4 (August 2004) 27.

52. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [257].

53. *Ibid*.

54. That is, where a man has more than one wife under traditional law, usually of varying ages. *Ibid* [258]–[260].

*To treat a traditional marriage as a mere de facto relationship would significantly degrade the traditional status and dignity of the union.*

issue during its community consultations. However, it is noted that in its recent report on Aboriginal customary law the NTLRC saw fit to suggest the review of legislation and administrative policy and procedure to take account of traditional Aboriginal polygamous marriages.<sup>55</sup> The Commission therefore seeks submissions on this matter. In particular, the Commission is interested to hear of the potential of polygamous marriage practices in Aboriginal communities that span the borders of Western Australia and South Australia or the Northern Territory. The Commission is keen to avoid, where possible, any discrimination resulting from different laws in neighbouring jurisdictions.

#### **Invitation to Submit 13**

The Commission invites submissions on the extent to which polygamy is practised in Western Australian Aboriginal communities and the need for recognition of traditional Aboriginal polygamous marriages for particular purposes under Western Australian law.

## **Defining Traditional Aboriginal Marriage for the Purposes of Recognition in Western Australia**

The Commission has examined current Western Australian legislation that provides for certain benefits, protections and obligations that accrue to partners of a lawful marriage or to partners in a de facto relationship. Such matters range from spousal compellability to give evidence to the ability to apply for entitlements on the death of an intestate partner. The Commission has considered the potential of legal and social problems that may arise from the failure to recognise traditional Aboriginal marriage for the purpose of Western Australian laws and has concluded that explicit

recognition of Aboriginal traditional marriage would be desirable.

In considering the form of words to define a traditional Aboriginal marriage for the purposes of recognition in Western Australian written laws, the Commission has had reference to the matters discussed above in regard to traditional marriage rules, to the statutory formula provided by the ALRC in its report on the recognition of Aboriginal customary laws<sup>56</sup> and to the definitions provided in the laws of other jurisdictions.<sup>57</sup> The Commission has formulated the following as a proposed definition of traditional Aboriginal marriage to be inserted into the *Interpretation Act 1984* (WA).

#### **Proposal 64**

That the following term be added to the *Interpretation Act 1984* (WA):

##### **5. 'Definitions applicable to written laws'**

'Traditional Aboriginal marriage' means a relationship between two Aboriginal persons, over the age of 18 years, who are married according to the customs and traditions of the particular community of Aboriginals with which either person identifies.

#### **Proposal 65**

That the following section be inserted into the *Interpretation Act 1984* (WA):

##### **13B. Definitions of certain domestic relationships**

- (1) A reference in a written law to 'spouse', 'husband', 'wife', 'widow' and 'widower' will be taken to include the corresponding partner of a traditional Aboriginal marriage.
- (2) Section 13B(1) does not apply to the *Family Court Act 1997* (WA).

55. NTLRC, *Legal Recognition of Aboriginal Customary Law*, Background Paper No 3 (2003) 18.

56. See Draft Aboriginal Customary Laws (Recognition) Bill 1986 s 10: ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) Appendix A.

57. For example, the *Family Provision Act 1980* (NT) s 7(1A) (now repealed); the *Interpretation Act 1980* (NT) s 19A; *Adoption Act 1988* (SA) s 4(3); *Safety and Rehabilitation and Compensation Act 1988* (Cth) s 4.

## Spousal Maintenance and Property Settlement

Because the Commonwealth has already legislated on matters of spousal maintenance and property settlement in relation to marriage, Western Australia has no jurisdiction to effect change in this area to accommodate such matters in respect of Aboriginal traditional marriages. For this reason the above definition of traditional Aboriginal marriage has been held not to apply to the *Family Court Act 1997* (WA) for which the Commonwealth definition of 'marriage'—that is, a lawful marriage under the *Marriage Act 1961* (Cth)—otherwise applies. However, as mentioned above, Western Australia does possess jurisdiction to deal with spousal maintenance and division of property upon the breakdown of a de facto relationship. In this respect, the 2002 amendments to the *Family Court Act* have provided for the availability of remedies to separating de facto couples that are of a very similar nature to those provided for married couples.



It was mentioned earlier that the Commission accepts the fundamental objection raised by Aboriginal people (and acknowledged by the ALRC) to equating a traditional marriage with the status of a de facto relationship under Australian law. However, for the purposes of spousal maintenance and property distribution upon the dissolution of a traditional marriage, the ALRC recommended that the general law, including the law of de facto relationships, apply.<sup>58</sup> In this regard, the Commission is mindful that because traditional Aboriginal marriage is not explicitly recognised in s 13A of the *Interpretation Act*,<sup>59</sup> a couple the subject of such a union might, in rare circumstances, be denied the remedies available to separating de facto couples under the *Family Court Act*. This is because the *Family Court Act* only applies to de facto unions which have been in existence for at least two years (unless there is a child of the union or other specified circumstances exist).<sup>60</sup>

This position may be remedied by amending the *Family Court Act* to expressly ensure that traditional Aboriginal marriage be recognised for the purposes of spousal maintenance and property distribution under Part 5A only of the *Family Court Act*. It is important to note that the term 'traditional Aboriginal marriage' used in the following proposed amendment would take the definition accorded by the proposed s 13B to the *Interpretation Act* set out in Proposal 3 (above page 49).

### Proposal 66

That s 205U of the *Family Court Act 1997* (WA) be amended to read:

#### 205U. Application of Part generally

- (1) This Part applies to de facto relationships and traditional Aboriginal marriages.
- (2) However, this Part does not apply to a de facto relationship or traditional Aboriginal marriage that ended before the commencement of this Part.
- (3) This Part does not authorise anything that would otherwise be unlawful.

58. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [290].

59. Section 13A defines 'de facto relationship' for the purposes of all written laws in Western Australia. See above p 336.

60. *Family Court Act 1997* (WA) s 205Z.

# Care and Custody of Aboriginal Children

## Appreciating Cultural Difference

Aboriginal communities know what is at stake. They know that there is nothing more vital to their dignity, integrity and continued existence than their children.<sup>1</sup>

Perhaps more than any other area dealt with in this reference, the policies of governments in relation to the care and custody of Aboriginal children have the potential to negatively impact across generations of Indigenous Western Australians. The experiences of the stolen generation are testament to the ongoing detrimental effects of past policies of removal of Aboriginal children from their families and as a consequence many Aboriginal people are suspicious of government intervention in the areas of child care and custody.

Recent amendments made to child welfare legislation in Western Australia demonstrate that government is today more sensitive to the cultural needs of Aboriginal children; however, certain assumptions reflecting the dominant Western paradigm of family structure and child-rearing practices remain. The proposals that follow seek to address these issues and encourage broader appreciation of the fundamental differences between Aboriginal and non-Aboriginal culture in this important area.

## Customary Child-Rearing Practices

As mentioned earlier, kinship systems in Australian Aboriginal societies are constructed differently to those

in Western (or European) societies.<sup>2</sup> An important difference can be seen in the structure of the basic family unit. In Western societies the model of the 'nuclear' family unit with parental responsibility resting primarily with the biological parents is the dominant norm. In contrast, the family unit in Aboriginal societies is extended with many relatives, and often whole communities, sharing child-rearing responsibilities with the biological parents.<sup>3</sup> As a result, child-rearing practices in Aboriginal Australia are not underwritten by the permanence and stability of a single home that is typical of non-Aboriginal Australian families. 'Indigenous culture', John Dewar says, 'sees movement of children, either geographically or between or within kinship groups, as beneficial'.<sup>4</sup>

In recognition of this, the federal government's Family Law Pathways Advisory Group recommended in 2001 that the *Family Law Act 1975* (Cth) be amended to explicitly recognise the 'unique kinship obligations and child-rearing practices of Indigenous culture'.<sup>5</sup> The Group also recommended that:

[S]ection 60B(2) (which relates to principles underlying a child's right to adequate and proper parenting) should include a new paragraph stating that children of indigenous origins have a right, in community with other members of their group, to enjoy their own culture, profess and practice their own religion, and use their own language.<sup>6</sup>

The Commission supports the recognition of cultural differences between non-Aboriginal and Aboriginal child-rearing practices and extended family networks

1. Lynch P, 'Keeping Them Home: The best interests of Indigenous children and communities in Australia and Canada' (2001) 23 *Sydney Law Review* 501, 519.
2. See especially, Part VI, 'The Role of Kinship in Aboriginal Society', above pp 267–68.
3. New South Wales Law Reform Commission (NSWLRC), *The Aboriginal Child Placement Principle*, Research Report No 7 (March 1997) 36.
4. Dewar J, 'Indigenous Children and Family Law' (1997) 19 *Adelaide Law Review* 217, 222. In his regional report to the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), Commissioner Patrick Dodson noted reports that the mobility of Aboriginal children in extended families made it difficult to follow-up in relation to schooling issues. RCIADIC, *Regional Report of Inquiry into Underlying Issues in Western Australia* (Vol 1, 1991) [6.10].
5. Family Law Pathways Advisory Group (Cth), *Out of the Maze – Pathways to the Future for Families Experiencing Separation* ('the Pathways Report') (August 2001) 91, recommendation 22. However, it should be noted that the Commission agrees with the Family Law Council that the recognition of extended family and kinship networks and child-rearing practices of Indigenous culture would be better expressed as a general principle within the *Family Law Act 1975* (Cth) and its Western Australian counterpart, rather than in s 61C as recommended by the Pathways Report. See Family Law Council, *Recognition of Traditional Aboriginal and Torres Strait Islander Child-rearing Practices: Response to Recommendation 22 of the Pathways Report* (December 2004) 16–17.
6. The Pathways Report, *ibid*. This recommendation appears to reflect the wording of Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR).

expressed in recommendation 22 of the Family Law Pathways Advisory Group report.<sup>7</sup> But whilst it is within the state government's power to amend the equivalent provisions of the *Family Court Act 1997* (WA) to implement recommendation 22, it is noted that such an action would result in different provisions for nuptial and ex-nuptial children in Western Australia.<sup>8</sup> It is also noted that such change would result in different laws applying to ex-nuptial children in Western Australia than in the rest of Australia. In these circumstances the Commission does not recommend unilateral change to the Western Australian Act unless and until the Commonwealth Act is amended. This position also reflects the concerns expressed by Aboriginal people during the Commission's consultations that, where possible, the artificiality of state boundaries not result in different laws for Aboriginal people residing in cross-border communities.

## International Obligations

The project's Terms of Reference require the Commission to have regard not only to relevant Commonwealth legislation, but also to Australia's international obligations. When dealing with the rights of children, and particularly of Indigenous children, several international covenants must be acknowledged.<sup>9</sup>

Perhaps the most important of these is the United Nations *Convention on the Rights of the Child* (CROC) ratified by Australia on 17 December 1990. This convention establishes common standards for children throughout the world and sets out the obligations of member states to protect the civil, political, economic and cultural rights of children. CROC is underpinned by the principle, set out in Article 3(1), that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies,

the best interests of the child shall be a primary consideration.

CROC also makes specific reference to the particular rights of Indigenous children. Article 30 states that:

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her culture, to profess and practise his or her own religion, or to use his or her own language.<sup>10</sup>

Where a child cannot remain, for reasons in the child's best interests, in the family home, CROC directs state parties to have regard to 'continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background'<sup>11</sup> in considering options for placement of the child. Additionally, CROC's preamble stresses 'the importance of the traditions and cultural values of each people for the protection and harmonious development of the child'. The New South Wales Law Reform Commission (NSWLRC) considers that this obliges Australian authorities to ensure that all decisions made in relation to the welfare of Indigenous children are made with reference to the child's cultural context.<sup>12</sup>

Other relevant international instruments are the *International Convention on Civil and Political Rights*, which recognises the rights of ethnic minorities to enjoy their own culture, and the *United Nations Draft Declaration on the Rights of Indigenous People*, which although currently not binding in international law arguably has some degree of moral force in Australia.<sup>13</sup> The Draft Declaration refers specifically to the removal of Indigenous children from their families and communities in Article 6 suggesting that such removal 'under any pretext' should not be permitted. This has implications for the placement of Indigenous children under Western Australian adoption and child welfare laws.

7. The Commission also acknowledges the recent review of recommendation 22 conducted by the Family Law Council which, whilst agreeing with the Pathways Report recommendation in principle, qualifies the wording to take account of the practical application of the potential amendments. The Commission finds nothing objectionable in the Family Law Council's treatment of recommendation 22. See Family Law Council, *Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices: Response to Recommendation 22 of the Pathways Report* (December 2004) 16–17.

8. Buti T & Young L, *Family Law and Customary Law*, LRCWA, Project No 94, Background Paper No 4 (August 2004) 34.

9. According to the High Court in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 the ratification of international instruments creates a legitimate expectation that administrative decision-makers will have regard to relevant ratified instruments in making their decisions. The Commonwealth government has attempted on several occasions to defeat the effects of *Teoh* but in each case, the Bill has lapsed. See discussion in Part IV, above p 69.

10. This provision echoes Article 27 of the ICCPR.

11. *Convention on the Rights of the Child*, Article 20.

12. NSWLRC, *The Aboriginal Child Placement Principle*, Research Report No 7 (March 1997) 163.

13. *Ibid* 174.

*The experiences of the stolen generation have shown that the removal of Aboriginal children from their families can cause ongoing psychological trauma.*

## Aboriginal Child Custody Issues

Aboriginal child custody issues may arise in relation to adoption, foster care or short-term placement and custody or parenting disputes upon the dissolution of a marriage or de facto relationship. In Western Australia, each of these custody issues is governed by separate legislation. Before examining each custody issue in turn, it is necessary to refer to the guiding principles which ideally should inform all custody issues in relation to Aboriginal children.

## Guiding Principles

### The Aboriginal Child Placement Principle

The Aboriginal Child Placement Principle was formulated in the late 1970s by Aboriginal child welfare agencies that were concerned at the number of Aboriginal children in the care of non-Aboriginal families.<sup>14</sup> The Principle essentially outlines an order of preference for the placement of Aboriginal children outside of their immediate family. The order of preference is generally expressed to be:

- within the child's extended family;
- within the child's Aboriginal community; and, failing that,
- with other Aboriginal people.<sup>15</sup>

The Principle was first adopted by government in 1980 when the Commonwealth Department of Aboriginal Affairs published policy guidelines for the adoption and fostering of Indigenous children.<sup>16</sup> However, this statement of principle had limited effect because adoption and fostering remained the preserve of state and territory governments. In its 1986 report on Aboriginal customary laws the ALRC recommended that state and territory legislation dealing with the placement

of children should provide expressly that in relation to the placement of Aboriginal children

preference should be given, in the absence of good cause to the contrary, to placements with (1) a parent; (2) a member of the child's extended family; (3) other members of the child's community (and in particular, persons with responsibilities for the child under the customary laws of that community).<sup>17</sup>

In the same year, the social welfare Ministers of each state and territory agreed to implement the Aboriginal Child Placement Principle as policy.<sup>18</sup> At various stages over the years following the Principle was adopted in legislative form by the states and territories with Western Australia being the last state to legislatively implement the Aboriginal Child Placement Principle in 2002–2004.<sup>19</sup> The legislative form of the Principle varies from jurisdiction to jurisdiction but each form shares the objective of maintaining an Aboriginal child's cultural connection with its Aboriginal community. The experiences of the stolen generation have shown that the removal of Aboriginal children from their families can cause ongoing psychological trauma. The recent enactment of the Principle in relevant Western Australian legislation will ultimately assist in reducing such trauma by ensuring that as close as possible connection to a child's culture is maintained where there is no option but to remove a child from its family. The Principle has drawn broad support from Aboriginal communities, as evidenced in the Commission's consultations.<sup>20</sup>

### The 'best interests of the child' principle

In all child welfare and custody legislation the principle of the 'best interests of the child' is the paramount, or at least a primary, consideration. The best interests principle is the guiding principle of CROC and is set out above under the heading 'International Obligations'.<sup>21</sup>

14. Ibid 55–56.

15. Ibid 50.

16. Ibid 59.

17. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [366]. The ALRC also recommended that the Commonwealth legislate to enshrine the Principle.

18. NSWLRC, *The Aboriginal Child Placement Principle*, Research Report No 7 (March 1997) 62.

19. Although it is noted that in relation to foster care arrangements in Western Australia the Principle has been in place as departmental policy since 1984.

20. See, for instance, LRCWA, Project No 94, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 11.

21. See above p 340.

However, the best interests of an Aboriginal child may be quite different to those of a non-Aboriginal child and the application of the principle must be informed by relevant cultural considerations.

In relation to determining the best interests of an Aboriginal child Australian courts<sup>22</sup> have suggested that regard may be had to:

- the Aboriginal origins of the child;
- the difficulties encountered by part-Aboriginal children in integrating into the society of a European parent after marriage breakdown;
- the custodial parent's attitude to the child's Aboriginal background;
- the effect of loss of contact with the Aboriginal parent's traditions and culture; the extended family support that may be available to a child in an Aboriginal community;
- the difference in attitudes between the Aboriginal and non-Aboriginal communities where relevant to the child's situation;
- the racial prejudice a child may suffer;
- whether the child will be brought up in an atmosphere of racial tension;
- the extent of discrimination the child may be subject to in a particular situation;
- identity problems Aboriginal children may suffer when raised in European society;
- evidence relating to the experience of Aboriginal children in non-Aboriginal environments;
- health and hygiene factors in a particular location; and
- the disadvantages of not placing a child with his or her community, including (a) loss of relations with a broad range of kin who would otherwise assist with social relations and economic interactions and provide emotional and physical support, educative knowledge and spiritual training; (b) loss of knowledge stemming from these social interactions; and (c) ambiguities in or loss of identity with kin and country.<sup>23</sup>

Because the best interests principle is subjectively applied by administrative decision-makers (and, in relation to court custody proceedings, by judges) attention must be paid to the process of application to avoid ethnocentrism. For example, Dewar has noted that the 'child-rearing practices regarded as normal and desirable in Indigenous society may be considered aberrant and harmful by dominant conceptions of children's best interests'.<sup>24</sup> The involvement of Aboriginal people and Aboriginal organisations in cases involving the placement of an Aboriginal child is therefore considered imperative in order to avoid ethnocentric assumptions unnecessarily colouring the decision-making process.<sup>25</sup>

## Adoption

Adoption is the absolute transfer of legal rights to parenting and usually severs all ties with a child's natural family. Adoption is said to be alien to Aboriginal societies,<sup>26</sup> primarily because the extended nature of Aboriginal families precludes the need for adoption.<sup>27</sup> As Carol Martin MLA said during the parliamentary debates for the 2002 amendments to the *Adoption Act 1994* (WA):

Adoption for Aboriginal people does not work and is not part of our culture. It is not what our kids need. If something happened to me, I have 20 sisters—they may not be biological sisters—who have the same role and responsibility for my children as I do for their children. There is therefore no place for adoption where I come from. Our kids have a place and there has always been a place for them.<sup>28</sup>

The NSWLRC has reported that there is no clear view amongst Aboriginal people about whether adoption should ever be contemplated for Aboriginal children.<sup>29</sup> Although birth-parents of Aboriginal children must have the same access to the alternative of adoption as those of non-Aboriginal children, the very few adoptions of Aboriginal children in Western Australia each year suggest that better options might be available.<sup>30</sup>

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22. The primary cases in this regard are: *In the Marriage of B and R* (1995) 127 Federal Law Review 438; *In the Marriage of Goudge* (1984) 54 ALR 514; *Fv Langshaw* (1983) 8 FamLR 833; *In the Marriage of Sanders* (1976) 10 ALR 604; and *Re CP* (1997) 137 Federal Law Review 367.

23. 'Relevant factors: Best interests in the Aboriginal context', *LexisNexis Online*, [5-3965], <<http://www.lexisnexis.com>> (footnotes omitted). See also the discussion in Buti T & Young L, *Family Law and Customary Law*, LRCWA, Project No 94, Background Paper No 4 (August 2004) 11–13.

24. Dewar J, 'Indigenous Children and Family Law' (1997) 19 *Adelaide Law Review* 217, 230.

25. NSWLRC, *The Aboriginal Child Placement Principle*, Research Report No 7 (March 1997) 208–213.

26. *Ibid* 36.

27. This is not the case for Torres Strait Islander families where adoption is recognised as a common customary practice. See Ban P, 'Developments in the Legal Recognition of Torres Strait Islander Customary Adoption' (1996) 78 (3) *Aboriginal Law Bulletin* 14–15.

28. Western Australia, *Parliamentary Debates*, Legislative Assembly, 16 October 2002, 1872 (Mrs Carol Martin). Mrs Martin is an Indigenous member of the Western Australian Parliament.

29. NSWLRC, *The Aboriginal Child Placement Principle*, Research Report No 7 (March 1997) 37.

30. According to the Department of Community Development Adoption Services there was only one adoption of an Indigenous child in Western Australia in 2002/2003 and none in 2003/2004. Statistics show that Indigenous adoptions in Western Australia have been fairly steady at between zero and two per year since 1990: NSWLRC, *The Aboriginal Child Placement Principle*, Research Report No 7 (March 1997) 157.



Indeed, in practice, after the requisite counselling and investigation of options, most birth-parents considering adoption for their Aboriginal child find alternative placement for the child, often in the child's extended family.<sup>31</sup> In these circumstances, while the primary care and responsibility of the child will lie with another, legal guardianship of the child remains with the child's biological parents.

### *Adoption Act 1994*

Despite the very few adoptions of Aboriginal children recorded each year, the recent legislative enactment of the Aboriginal Child Placement Principle within the *Adoption Act 1994* (WA) (the Act) is considered by the Commission to be an important advance. Schedule 2A of the Act provides:

#### Aboriginal and Torres Strait Islander children – placement for adoption principle

The objective of this principle is to maintain a connection with family and culture for children who are Aboriginal persons or Torres Strait Islanders and who are to be placed with a person or persons with a view to adoption by the person or persons.

If there is no appropriate alternative to adoption for the child, the placement of the child for adoption is to be considered in the following order of priority.

1. The child be placed with a person who is an Aboriginal person or a Torres Strait Islander in the child's community in accordance with local customary practice.
2. The child be placed with a person who is an Aboriginal person or a Torres Strait Islander.
3. The child be placed with a person who is not an Aboriginal person or a Torres Strait Islander but who is sensitive to the needs of the child and capable of promoting the child's ongoing affiliation with the child's culture, and where possible, family.

The Commission notes that the reference in the context of adoption to placement of a child 'in accordance with local customary practice' may be redundant given that adoption has no place in traditional Aboriginal society. However, in the circumstances of the express acknowledgment in s 3(2) that 'adoption is not part of Aboriginal ... culture and that therefore the adoption of a child who is an Aboriginal person ... should occur only in circumstances where there is no other appropriate alternative for that child', the Commission considers that the meaning of the phrase 'in accordance with customary practice' must refer to the customary practice of alternative child placement within the child's kinship group rather than relinquishment of legal parental rights by adoption.<sup>32</sup>

The Act also provides in s 16A that the Director-General must consult with an Indigenous child welfare agency regarding the prospective adoption of an Indigenous child and for an Indigenous officer of the Department to be 'involved at all relevant times in the adoption process' of an Indigenous child. The importance of such consultation in regard to the placement of an Indigenous child, particularly in determining the best interests of such a child, is emphasised above. However, the Commission considers it equally important that consultation be had with the child's extended family or community, especially in light of the need to establish 'local customary practice' in application of the Aboriginal Child Placement Principle under the Act. The Commission therefore proposes the following amendment to Schedule 2A of the Act.

#### **Proposal 67**

That following clause 3 of Schedule 2A of the *Adoption Act 1994* (WA) a new paragraph be added:

In applying this principle all reasonable efforts must be made to establish the customary practice of the child's community in regard to child placement. In particular, consultations should be had with the child's extended family and community to ensure that, where possible, a placement is made with Aboriginal people who have the correct kin relationship with the child in accordance with Aboriginal customary law.

31. According to the Department of Community Development Adoption Services.

32. It is perhaps important to note with respect to customary practice of child placement that the equivalent provision of the *Adoption of Children Act 1994* (NT) makes clear that where a child cannot be placed within its own extended family then the child should, as the next preferred alternative, be placed 'with Aboriginal people who have the correct relationship with the child in accordance with Aboriginal customary law'. See *Adoption of Children Act 1994* (NT) s 11(1).

## Foster Care and Alternative Child Welfare Placement

Similar to the process for adoption, the process for foster care or alternative placement of children in Western Australia has recently been reviewed. The recently enacted *Children and Community Services Act 2004* (WA) (the CCS Act), which provides for the protection and care of children,<sup>33</sup> was established partly in response to the findings of the Gordon Inquiry which reported serious abuse and neglect of children in some Aboriginal communities. It also repeals the *Child Welfare Act 1947* (WA) the *Welfare and Assistance Act 1961* (WA) and the *Community Services Act 1972* (WA) which were considered outdated and did not adequately reflect best practice or current research in relation to the care and protection of children.<sup>34</sup>

The CCS Act provides for a number of different types of protection orders<sup>35</sup> and for placement arrangements at the behest of parents where parents cannot adequately provide for their children.<sup>36</sup> Division 3 of the CCS Act embraces the Aboriginal Child Placement Principle in relation to arrangements made for the care and protection of Indigenous children.<sup>37</sup> The need for such clear statement of principle is not academic. As at June 2004 there were 660 Aboriginal children in care in Western Australia. Of these, 569 were placed in the care of relatives, Aboriginal carers or placement services with Indigenous carers and 91 were placed with non-Aboriginal carers.<sup>38</sup> At 13.8 per cent, the amount of Aboriginal children placed with non-Aboriginal carers is still significant; however, as with adoption, the principle of the best interests of the child is the paramount consideration governing the placement of a child under care and protection legislation. In this respect it is important to note that placement within a child's community may not, in some circumstances, be in the best interests of a particular child. The NSWLRC has noted that:



A child also has the right to be protected from all forms of abuse. Often protective mechanisms exist within Aboriginal communities through the positive intervention of the extended family. However, in some extended families these mechanisms may have broken down due to the levels of domestic violence and drug and alcohol abuse. In some Aboriginal communities the level of alcoholism, domestic violence and abuse may mean that there are no appropriate placements available for Aboriginal children in need of care. In such instances other options would need to be explored, such as Aboriginal group homes. A placement with a non-Aboriginal family which is supportive on contact with the Aboriginal community may be an appropriate option, but only after all other options have been exhausted.<sup>39</sup>

While the CCS Act makes considerable and appropriate provision for the processes and principles relating to care and protection orders for Aboriginal children, at the time of writing the relevant provisions of the CCS Act had not been proclaimed. The Commission understands that proclamation will follow as soon as the regulations and guidelines associated with the new Act are settled and that this is projected for early 2006. The care and protection of children in Western Australia therefore continues at this time to be governed by the *Child Welfare Act 1947*. Whilst that Act does not make legislative reference to the Aboriginal Child Placement Principle it is embraced in departmental

33. The Act also makes provisions in relation to the employment of children and the operation of child-care services.

34. Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 December 2003, 14244 (Ms SM McHale).

35. Ranging from supervision and time limited orders to enduring parental responsibility orders and orders giving the CEO of the Department parental responsibility for the child until the age of 18. See *Children and Community Services Act 2004* (WA) Division 3. Protection orders are applied to ensure the welfare of a child where the child is found to have suffered or is likely to suffer abuse, harm or neglect or where the child's parents have been incapacitated or have died or have abandoned the child: *Children and Community Services Act 2004* (WA) s 28.

36. In such circumstances the parents retain legal parental responsibility for the child. Such arrangements will only, however, be made in cases where no protection issues exist.

37. Provision is also made for consultation with an Aboriginal child welfare agency and the involvement at all stages of an Indigenous case officer in cases involving placement of an Indigenous child. See *Children and Community Services Act 2004* (WA) s 81.

38. Western Australia, *Parliamentary Debates*, Legislative Assembly, 27 August 2004, 5807 (Ms Ljiljana Ravlich).

39. NSWLRC, *The Aboriginal Child Placement Principle*, Research Report No 7 (March 1997) 169–70 (footnotes omitted). The inability of some communities to care for children was also noted by Indigenous respondents to the Commission's consultations in the Pilbara. In the Commission's Thematic Summary for the Pilbara consultations it was noted that '[r]eference was made to the conditions of drunkenness, drugs and offending in town from which people in the community would wish to remove children or grandchildren. However, the European system did not support such removal'.

policy<sup>40</sup> and applied as a strict guide to practice in all dealings with Aboriginal children requiring the care and protection of the state.

Nonetheless, government practices of child welfare placement were criticised by Aboriginal people during the Commission's consultations.<sup>41</sup> In particular the Commission's consultations in the Pilbara region recorded that:

There was a problem where children had left dysfunctional parents, of a lack of clarity as to who now had responsibility for them. Many children were left to wander the streets without any other adults clearly responsible for them. Something was needed that would not resort to interventionist custodial arrangements, on the one hand, or to a simple hands off position, on the other. Times have changed from the days when the state always intervened and took kids away. Families now take on additional burdens of care. There needs to be clear protocols in place for the placement of Indigenous children, there are 'too many orphans in this community' and white men 'just take stabs in the dark' when it comes to placing children. Aboriginal people need to be consulted more about family issues.<sup>42</sup>

It was also noted that the 'Department of Community Development does not know whole family networks or how placement of children may put a burden on one person'<sup>43</sup> and that the laws relating to care arrangements 'involve too much paperwork and insufficient support [including financial support] for Aboriginal people'.<sup>44</sup> In this regard it is important to note that extended family relationships in Aboriginal society impose significant cultural obligations on family members to care for others. In these circumstances family members approached by the Department to provide care for a child who is the subject of a protection order may find it difficult to refuse such a request, even if they clearly do not have the necessary financial, physical and emotional resources to take care of the child.

The comments of Aboriginal people consulted for this reference suggest that the current child welfare system

does not always work to the benefit of Aboriginal children or their carers. It is true that some of the criticisms reported to the Commission may originate from carers of children who are not the subject of a protection order but who have been removed from parents by family intervention. In these cases it is possible that the Department is not aware of the private care arrangements and is therefore unable to offer support and assistance to these carers. Certainly many extended family carers, in particular grandparents, reported the lack of financial assistance to aid the upbringing of children in their care.<sup>45</sup>

It is important that the Department of Community Development recognise the role that the extended family play in the care of Aboriginal children and that often care arrangements for children in need of protection are made through private family intervention. It is clear from the above that there is insufficient communication by the Department of the support services and benefits available for extended family carers of Aboriginal children. Endeavours should be made to ensure that such information is made readily available to Aboriginal communities so that all primary carers (regardless of whether the care arrangements are made by the Department or privately) are aware of the services in place to assist them in caring for children.

### Proposal 68

Recognising the custom in Aboriginal communities of making private arrangements to place a child in the care of members of the child's extended family where necessary for the proper care and protection of the child, the Department of Community Development should make available to Aboriginal communities information regarding support services and government benefits (whether Commonwealth or state) to assist extended family carers.

40. See Department of Family and Children's Services (WA), 'Substitute Care Policy in Relation to Aboriginal Child Placement' (1984); reproduced in NSWLRC, *The Aboriginal Child Placement Principle*, Research Report No 7 (March 1997) Appendix 1.
41. The Commission also acknowledges criticisms of the Western Australian child welfare system heard by the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families. See *Bringing Them Home* (April 1997) ch 20.
42. LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara* (6–11 April 2003) 18.
43. *Ibid.*
44. *Ibid.*
45. At a number of consultations it was said that mothers who had relinquished the care of their children (most likely through private arrangements) to grandparents, sisters or aunts still retained the single mother's allowance or Family Tax Benefits awarded by Centrelink. This was said to be a particular issue for grandparents, who have key responsibilities in relation to the care of grandchildren in Aboriginal families. It is noted that payments may be made to carers under the CCS Act and that certain federal government benefits are available to those who have the day-to-day care of a child not the subject of a protection order through Centrelink. However, according to Centrelink such assistance is generally not available if a parent of the child lives in the same house as the carer. In Aboriginal communities extended families often live together and carers may well be disadvantaged if payments are not made directly to them.

# Family Court Custody Disputes

## The Family Court of Western Australia

As mentioned earlier, Western Australia has established its own discrete Family Court exercising joint jurisdiction under the Commonwealth *Family Law Act 1975* (in relation to the dissolution of marriages, spousal maintenance and property disputes, and custody of children the subject of a marriage) and the Western Australian *Family Court Act 1997* (in relation to spousal maintenance or property disputes upon the dissolution of de facto relationships and custody or parenting orders in respect of ex-nuptial children).

Background Paper No 4 to this reference discusses a number of issues in relation to family law and Aboriginal customary law. In that paper Buti and Young note that current Family Court processes negatively affect Aboriginal people in a number of ways, including:

- the failure to accept oral testimony in certain circumstances;<sup>46</sup>
- the failure to make provision for Aboriginal avoidance protocols under customary law;<sup>47</sup>
- inadequate provision of interpreters where culture or language presents a barrier for a party;<sup>48</sup>
- inadequate provision of culturally appropriate services to Aboriginal clients;<sup>49</sup>
- the lack of recorded Family Court data on Indigenous family disputes;<sup>50</sup>
- the lack of Aboriginal counsellors in the Family Court Mediation and Counselling Service;<sup>51</sup> and
- the lack of Aboriginal alternative dispute resolution services for family court matters.<sup>52</sup>

Many of these matters were also raised by participants in the Commission's community consultations. These issues are not, however, confined to Western Australia. The Commonwealth's Family Law Pathways Advisory

Group recommended various ways of expanding culturally appropriate service delivery in the family law system, including enhanced cultural training for all staff; the development of an Indigenous employment strategy; the provision of interpreters; the sponsoring of local level Indigenous community networks; the development of an Indigenous family law database and facilitation of research into Aboriginal customary law and family issues; and the development, in partnership with Indigenous communities, of narrative therapy and Indigenous family law conferencing to enhance family dispute resolution.<sup>53</sup> Such focus on alternative dispute resolution is particularly crucial in Western Australia where the new *Family Law Rules 2004 (WA)* compel families to participate in primary dispute resolution such as 'negotiation, conciliation, mediation, arbitration and counselling'<sup>54</sup> prior to commencing court procedures. In these circumstances, the lack of culturally appropriate dispute resolution services for Aboriginal clients represents a significant problem.

The Commission considers that the government can do more to meet the needs of Aboriginal clients in the Family Court of Western Australia. In this regard the Commission supports Recommendation 23 of the Family Law Pathways Advisory Group and proposes that the Western Australian government seek federal funding in whole or in part for its immediate implementation in the Family Court of Western Australia.

### Proposal 69

That the Western Australian government take immediate steps to implement Recommendation 23 of the Family Law Pathways Advisory Group's Report *Out of the Maze – Pathways to the Future for Families Experiencing Separation* to enhance culturally appropriate service delivery to Aboriginal clients of the Family Court of Western Australia.

46. Buti T & Young L, *Family Law and Customary Law*, LRCWA, Project No 94, Background Paper No 4 (August 2004) 35.

47. Ibid 36. In particular, in respect of cross-examination of evidence where a mother-in-law and son-in-law might be in the court at the same time. Buti and Young suggest that where avoidance protocols are in issue provision should be made for the relevant parties to hear witness evidence electronically.

48. Ibid. Aboriginal respondents at the Mirrabooka consultation suggest the right of a party to request that a significant other in the form of an Elder or Aboriginal lawperson be permitted to attend Family Court hearings and advocate where necessary.

49. Ibid.

50. Ibid. Buti and Young note that the Family Court of Western Australia has recently begun to record such data but that there remains a 'dearth of family law research directed at the problems facing Aboriginal families'.

51. Ibid 37.

52. Ibid.

53. Family Law Pathways Advisory Group (Cth), *Out of the Maze – Pathways to the Future for Families Experiencing Separation* (August 2001) 91, recommendation 23. The full recommendation and accompanying text is reproduced in Buti T & Young L, *Family Law and Customary Law*, LRCWA, Project No 94, Background Paper No 4 (August 2004) 39.

54. *Family Law Rules 2004 (WA)* sch 1, Pt 1.

## The Commission considers that the government can do more to meet the needs of Aboriginal clients in the Family Court of Western Australia.

### Parenting disputes

During its consultations the Commission found that another area of concern to Aboriginal people in the current family law system is in relation to parenting disputes or disputes in relation to the custody of children.<sup>55</sup> Where parenting disputes arise and orders are sought to legally transfer parental responsibility for a child (as opposed to an informal arrangement where the care of a child may be given to a family or community member but legal parental responsibility for that child remains with the birth-parents) Aboriginal people may find themselves at a disadvantage. This is because the system does not explicitly recognise the customary practice of extended family placement; instead the Commonwealth and state family law Acts are premised upon the concept of the 'nuclear' family where one or both of the child's parents have parental responsibility for the child.<sup>56</sup>

As Buti and Young note, in the case of a non-Aboriginal family parenting matters are often resolved by consent orders sharing parental responsibility for children between the biological parents. However, where parents of an Aboriginal child wish to obtain court orders to transfer legal care of a child or share parenting responsibilities with another person they cannot do so by consent but must submit to an extended process of counselling and ultimate consideration by the Family Court.<sup>57</sup> It was observed in the background paper that:

It seems these are not just hypothetical problems. In the Thematic Summary for the Commission's consultations in Kalgoorlie, reference was made to the case of a grandmother caring for her grandchildren. Though the particular circumstances of the case are not clear from the Summary, it was noted that the grandmother '... was not supported by the law and was, in fact, punished by it. This produced

family breakdown and delinquency'. In the Thematic Summary of the Commission's consultations in Laverton, mention was made of the need for the system to automatically recognise the care of a child by an extended family member, as happened in Aboriginal custom.

A similar problem might arise on the death of the parents. In the Thematic Summary for the Commission's consultations in Kalgoorlie, the Aboriginal custom of a maternal uncle taking over the care of nieces or nephews on the death of their parents was noted. This relative would have no standing nor legal rights as a carer in mainstream family law in the absence of a parenting or adoption order. That is, his customary guardianship would not be recognised unless he sought orders to formalise it.<sup>58</sup>

The Family Law Council has recently examined this issue and has highlighted the importance of legal recognition of persons with 'primary parental responsibility' for a child to ascertain whether that person (rather than the biological parents) is entitled to receive applicable tax benefits or child support and to be able to give consent for medical treatment or to enrol a child in school.<sup>59</sup> The Council recommended that governments (state and federal) create a special legislative procedure for recognition and registration of persons with primary parental responsibility (in particular under relevant customary law) in order to avoid the costly court processes that are currently required to obtain a parenting order.<sup>60</sup>

The Commission strongly supports this recommendation; however, as noted earlier, in the interests of maintaining equality in relation to ex-nuptial and nuptial children in Western Australia, the Commission is unwilling to propose that Western Australia unilaterally amend the *Family Court Act* to establish this procedure unless and until similar

55. Whether of a marriage, a traditional Aboriginal marriage, a de facto relationship or otherwise. See for instance the Commission's thematic summaries of consultations for Kalgoorlie, Laverton and the Pilbara region as well as Manguri in the metropolitan area.

56. This principle is enshrined in the *Family Law Act 1975* (Cth) s 61C and the *Family Court Act 1997* (WA) s 69.

57. Buti T & Young L, *Family Law and Customary Law*, LRCWA, Project No 94, Background Paper No 4 (August 2004) 31. Buti and Young note that 'the obvious intent of this [process] is to avoid de facto 'adoptions' using consent parenting orders (at 32).

58. *Ibid* 32.

59. Family Law Council, *Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices: Response to Recommendation 22 of the Pathways Report* (December 2004) 18.

60. *Ibid* 18–19. The consent of both biological parents would be required for such an order and consent may be withdrawn at any time.

*The Child Support Scheme makes little sense in Aboriginal communities where child-rearing is shared, often between parents and members of the child's extended family.*



### Child support scheme

The child support scheme (a Commonwealth scheme adopted by Western Australia) sets out a formula for the provision of financial support of a child by its separated biological parents. In their background paper to this reference Buti and Young suggest that the scheme, which is premised on the model of the 'nuclear' family, makes little sense in Aboriginal communities where child-rearing is shared, often between parents and members of the child's extended family.<sup>62</sup> As a

consequence, carers in the child's extended family often share the financial responsibility for the child without necessarily being able to offset this cost by child support from the relevant biological parent.<sup>63</sup>

A recent federal government review of the scheme and other child custody issues<sup>64</sup> indicates that the formula will be revisited in the near future. Buti and Young argue that specific input as to the impact of proposed changes to the scheme on Aboriginal families should be sought before the scheme is revised.<sup>65</sup> It is noted that, although Western Australia could independently change the formula applied by the Family Court of Western Australia, it could only do so in respect of unmarried couples. In this regard, as noted earlier, the Commission refuses to propose change that would result in inequality based on marital status.

amendments are made to its Commonwealth counterpart. Having said that, it is noted that the state government's acceptance of Proposal 69 of this Discussion Paper implementing Recommendation 23 of the Family Law Pathways Advisory Group's Report would have a significant effect in reducing the disadvantage that Aboriginal people face in relation to securing court orders for the legal transfer of parental responsibilities to members of a child's extended family or kinship group. This is so because the enhancement of education of Family Court magistrates, judges and other staff, and the provision of specialised Aboriginal counselling services within the Family Court of Western Australia will assist in the facilitation of court orders recognising primary carers other than the child's biological parents.<sup>61</sup>

61. In this regard the Commission takes heed of ATSIC's submission to the Family Law Council's report on *Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices* where it was observed that the Family Court needed to be aware of the complex kinship structures, different child-rearing practices and avoidance rules of the relevant Aboriginal group to make properly informed decisions in relation to the custody of Aboriginal children. Ibid 34.

62. Ibid 40.

63. Although a carer may make a private arrangement for financial support of the child from the child's biological parent without the necessity of engaging the child support scheme through the Family Court: *ibid* 41.

64. House of Representatives, Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the inquiry into child custody arrangements in the event of family separation* (December, 2003).

65. Buti T & Young L, *Family Law and Customary Law*, LRCWA, Project No 94, Background Paper No 4 (August 2004) 42.

# Family Violence and the Protection of Women and Children

Under its Terms of Reference the Commission is required to have regard to all matters of Aboriginal customary law falling within the state legislative jurisdiction, including domestic violence. Domestic violence is defined by the Western Australian Family and Domestic Violence Unit (FDVU) as:

Behaviour which results in physical, sexual and/or psychological damage, forced social isolation, economic deprivation, or behaviour which causes the victim to live in fear.<sup>1</sup>

FDVU notes that the term 'family violence' is preferred to the term 'domestic violence' in Indigenous communities because it 'encapsulates not only the extended nature of Indigenous families, but also the context and range of violence in Indigenous communities'.<sup>2</sup>

The differences between domestic violence in the non-Aboriginal community and its counterpart in the Aboriginal community are significant enough to warrant the distinguishing term 'family violence'. For instance, in contrast to the private or domestic nature of family violence in the non-Aboriginal community, family violence in Aboriginal communities is often played out in the public sphere or in a household with other adult witnesses. In addition, because Aboriginal households often accommodate extended families with a complex web of cultural relations, the perpetrator of family violence may be another family member or relative rather than a spouse or partner (as is usually the case in non-Aboriginal domestic violence).<sup>3</sup> There are also increasingly reported cases of 'elder abuse' in Aboriginal communities whereby a family member (sometimes a child or young adult) is physically violent towards a parent or adult relative. Elder abuse also encompasses

psychological abuse, neglect or financial exploitation of elderly relatives, particularly those who may have dementia or diminished decision-making abilities.<sup>4</sup>

Whilst Aboriginal men are also known to be victims of family violence, Aboriginal women and children are disproportionately represented as victims. As a consequence, the following discussion focuses on the position of women and children in Aboriginal families and examines measures for their protection against family violence.

## Family Violence in Western Australian Aboriginal Communities

During consultations for this reference, the Commission received a great number of submissions that suggested that family violence was of great concern to Aboriginal communities, and particularly to Aboriginal women. Over the past two decades the escalating problem of interpersonal or family violence in Aboriginal communities has become increasingly apparent. In 1996, research undertaken in Western Australia reported alarming statistics showing that Aboriginal women accounted for just under half of all victims of family violence.<sup>5</sup> It was further reported that Aboriginal women were 45 times more likely to be the victim of family violence by a spouse or partner than non-Aboriginal women.<sup>6</sup> The problem appears to be somewhat amplified in regional areas with victimisation rates showing that Aboriginal people are approximately three times more likely to be victims of family violence outside Perth than in the capital city and 40 times more likely to be victims of family violence than their non-Aboriginal neighbours.<sup>7</sup>

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1. Family and Domestic Violence Unit (FDVU), *Western Australian Family and Domestic Violence State Strategic Plan* (2004) 5  
2. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into responses by government agencies to complaints of family violence and child abuse in Aboriginal communities* (July 2002) 518, as cited in *ibid* 36.  
3. Although, it is important to note that in the majority of cases the perpetrator of family violence is an intimate partner of the victim.  
4. The Commission is aware of a research project on issues of elder abuse in Indigenous communities currently being undertaken by the Office of the Public Advocate in Western Australia. The Public Advocate has recruited two Aboriginal project officers to conduct consultations and research on this matter throughout the state with a view to isolating culturally-appropriate (and localised) solutions to these issues. The findings of the research are expected to be released in late 2005.  
5. Ferrante A, Morgan F, Indermaur D & Harding R, *Measuring the Extent of Domestic Violence* (Sydney: Hawkins Press, 1996) 34.  
6. *Ibid*.  
7. SCRGSP, *Overcoming Indigenous Disadvantage: Key Indicators 2003* (November 2003) 3.57. These data were anecdotally confirmed by the Commission's consultative visits to Aboriginal communities throughout Western Australia.

In 2002 the Gordon Inquiry in Western Australia declared that ‘the statistics paint a frightening picture of what could only be termed an “epidemic” of family violence and child abuse in Aboriginal communities’.<sup>8</sup> However, it is important to note that because of the high incidence of non-reporting in matters of domestic or family violence, these statistics may be reasonably conservative. Further, there is evidence that Indigenous women and children suffer repeat victimisation of ‘multiple forms of violence and abuse’<sup>9</sup> such that violence, particularly of the domestic kind, might be at risk of becoming normalised, accepted behaviour in many Indigenous families and communities or that women may see themselves as ‘responsible’ for the violence perpetrated against them.<sup>10</sup> There is also the issue of intergenerational transmission of violent behaviour, which is already proving to be a significant problem and one that will continue the cycle of family violence in Aboriginal communities unless immediately and effectively addressed.

## Causes of Aboriginal Family Violence

A detailed literature review undertaken by Harry Blagg in 1999 identified a number of causes for high rates of violence in Aboriginal communities:

- marginalisation and dispossession;
- loss of land and traditional culture;
- breakdown of community kinship systems and Aboriginal law;
- entrenched poverty;
- racism;
- alcohol and drug abuse;
- the effects of institutionalisation and removal policies;
- the ‘redundancy’ of the traditional Aboriginal male

role and status, compensated for by an aggressive assertion of male rights over women and children.<sup>11</sup>

As Monique Keel suggests in her briefing paper *Family Violence and Sexual Assault in Indigenous Communities*, it is important that these factors be viewed as ‘part of a complex historical picture of disadvantage and oppression rather than as individual, isolated causes of violence’.<sup>12</sup> For instance, there is now abundant research to suggest a significant correlation between alcohol and substance abuse, and family and interpersonal violence in Aboriginal communities.<sup>13</sup> Indeed, recent reports have suggested that 70 to 90 per cent of assaults in Aboriginal communities are committed by offenders under the influence of alcohol or other drugs.<sup>14</sup> However, when viewed in historical perspective, the problem of alcohol abuse in Indigenous communities shows a much bigger picture as an unwanted effect of colonialism (alcohol having been introduced by European ‘settlers’ and often used as payment in lieu of money)<sup>15</sup> and as both an effect and cyclical cause of generational disadvantage, unemployment and poverty.

As discussed above in Part II,<sup>16</sup> the problem of overcrowding in many Aboriginal households has been recognised as a significant contributing factor to problems of family or interpersonal violence within households. Overcrowded housing creates the context for such violence because, apart from the obvious stresses such living conditions invite, women and children are unable to remove themselves from contact with violent family members. The high incidence of sexual assault of women and children<sup>17</sup> occurring as part of a broader picture of regular family violence in Aboriginal communities demonstrates the need for the provision of ‘safe places’ for women and children. As discussed

8. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into responses by government agencies to complaints of family violence and child abuse in Aboriginal communities* (July 2002) xxiii (‘the Gordon Inquiry’).

9. Blagg H, *Crisis Intervention in Family Violence: Summary Report* (Perth: Domestic Violence Prevention Unit, 2000) 12.

10. See Keel M, *Family Violence and Sexual Assault in Indigenous Communities: Walking the talk*, Briefing Paper No 4, Australian Institute of Family Studies (2004) 1–2. This was reported as a significant problem in the Northern Territory, see: Office of Women’s Policy (NT) *Aboriginal Family Violence* (1996) 5, cited in Blagg, *ibid* 9.

11. Blagg H, *Intervening with Adolescents to Prevent Domestic Violence: Phase 2 the Indigenous rural model* (Canberra: National Crime Prevention Unit, 1999) as cited in Blagg H, *Crisis Intervention in Family Violence: Summary Report* (Perth: Domestic Violence Prevention Unit, 2000) 5–6. In respect of this last factor it was said by one Aboriginal respondent at the Commission’s consultations that: ‘Men have been severely damaged by dispossession. Women still have a role and a reason to exist, men don’t. Men have cultural identity issues’.

12. Keel M, *Family Violence and Sexual Assault in Indigenous Communities: Walking the talk*, Briefing Paper No 4, Australian Institute of Family Studies (2004) 8. See also Stanley J, Tomison A & Pocock J, *Child Abuse and Neglect in Indigenous Australian Communities*, Australian Institute of Family Studies, Issues Paper No 19 (2003).

13. Ministerial Council on Drug Strategy (Cth), *National Drug Strategy Aboriginal and Torres Strait Islander Peoples Complementary Action Plan 2003–2006* (August 2003) 8; Bolger A, *Aboriginal Women and Violence* (Darwin: ANU North Australia Research Unit, 1991).

14. SCRGSP, *Overcoming Indigenous Disadvantage: Key Indicators 2003* (November 2003) 8.11.

15. Keel M, *Family Violence and Sexual Assault in Indigenous Communities: Walking the talk*, Briefing Paper No 4, Australian Institute of Family Studies (2004) 8. See also the discussion in Part II ‘Substance Abuse – Alcohol’, above pp 22–26.

16. See above Part II, ‘Housing and Living Conditions’, above pp 35–39.

17. See Keel M, *Family Violence and Sexual Assault in Indigenous Communities: Walking the talk*, Briefing Paper No 4, Australian Institute of Family Studies (2004) 7; Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into Responses by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (July 2002).

*Overcrowded housing creates the context for violence because . . . women and children are unable to remove themselves from contact with violent family members.*

below, following the Gordon Inquiry there has been renewed government commitment to the provision of temporary accommodation for those escaping the effects of family violence; however, the prevention of family violence might also be significantly enhanced by addressing the issue of overcrowding in Aboriginal households.

## Child Abuse and Child Sexual Abuse in Western Australian Aboriginal Communities

Like family violence, because of a high level of non-reporting or non-disclosure, the true extent of child abuse and, in particular, child sexual abuse in Aboriginal communities in Western Australia is unknown. However, statistics of substantiated child protection notifications and anecdotal evidence gathered from consultations with communities suggest that the incidence of child abuse (particularly abuse linked to family violence) is sufficiently high to alert governing authorities to a significant problem in need of immediate attention.

### The Gordon Inquiry

The Gordon Inquiry, led by Magistrate Sue Gordon, was set up by the state government in 2001 to inquire into the response by government agencies into complaints of family violence and child abuse in Western Australian Aboriginal communities. It was prompted by the coronial inquest into the tragic death of a young Aboriginal girl who had suffered as a victim of child sexual abuse and neglect. Following six months of intensive investigation, the report of the Gordon Inquiry was released. In that report an endemic situation of child abuse in Aboriginal communities was described and the responses to family violence and child abuse were found to be inadequate and in need of urgent reform.

The Gordon Inquiry made 197 recommendations and findings focusing on the services of government agencies that most directly address the problems of family violence and child abuse in Western Australia. Key recommendations included the creation of an independent Children's Commissioner and a Deputy Children's Commissioner (Aboriginal) for the protection of children; the development of cultural awareness programs; the skilling of agency staff and teachers to recognise signs or behaviour that may indicate child abuse; the provision of community-based alternative dispute resolution services and offender programs; changes to the processes of courts, victims' services, counselling services and police services; the establishment of a Child Death Review Team; and improved resourcing of community-based services including a 'one stop shop' where Aboriginal people can access a range of services (supported by specialists) to deal with problems that are linked to family violence and child abuse including substance abuse, parenting skills, and health and welfare services.<sup>18</sup>

In respect of the death of the young girl that prompted the Inquiry, it was found that 13 agencies had been involved in the delivery of services to the girl and her family but that these agencies worked in isolation and were often unaware of each other's involvement. This prompted a number of recommendations concerning the implementation of a legislative or policy framework to guide effective collaboration between agencies and the coordination of service delivery.

### Western Australia's Response to the Gordon Inquiry

The findings of the Gordon Inquiry have met with a very positive response from government which has moved quickly to introduce means to implement the recommendations of the report. The government's action plan—*Putting People First*—developed in response to the Gordon Inquiry has committed Western

18. A similar community-controlled healing centre offering various services for victims of family violence was proposed by Rowena Lawrie and Winsome Matthews of the NSW Aboriginal Justice Advisory Council. See: Lawrie R and Matthews W 'Holistic Community Justice: A proposed response to family violence in Aboriginal communities' (2002) 25 (1) *UNSW Law Journal: Forum* 228–32.

Australia to a comprehensive long-term strategy to address the problems of family violence and child abuse in Western Australian Aboriginal communities featuring a 'whole-of-government' response and a significant investment of resources'.<sup>19</sup> As mentioned earlier in this paper,<sup>20</sup> the term 'whole-of-government' is an over-used term in modern politics. However, if meaningfully applied to the resolution of, and response to, issues in Indigenous communities (as targeted in Proposal 1) the whole-of-government approach could work to significantly reduce the incidence of Indigenous disadvantage, violence and abuse. As the case of the death of the young girl that generated the Gordon Inquiry clearly demonstrates, the need for a coordinated and cooperative response by government agencies, particularly in respect of individual case management, is paramount in addressing the problems of family violence and child abuse in Western Australian Aboriginal communities.

An important means of assessing the government's response to the Gordon Inquiry is the establishment of benchmarks and performance measures and regular reporting on the progress of implementation of recommendations. Achieving real outcomes to these important issues is dependent upon a continued, focused commitment by government.



## Addressing Family Violence and Child Abuse in Aboriginal Communities

### The Need for Culturally Appropriate Responses

According to FDVU, many women experiencing family violence avoid seeking assistance from authorities for fear that their children might be removed from them. FDVU notes that this is particularly a concern amongst Aboriginal women, many of whom are 'suspicious of child protection interventions',<sup>21</sup> most likely because of past government policies supporting the removal of Aboriginal children from their families. Keel notes several other reasons for the non-reporting of family violence (and, in particular, sexual violence) by Aboriginal women and the failure to seek assistance from authorities, including

intimidation by authority figures and white people in general; closeness of communities leading to fear of reprisals or shame; the relationship of the [victim] to the perpetrator; unfamiliarity with legal processes; and a fear that the perpetrator will be sent to prison.<sup>22</sup>

Although the under-reporting of sexual violence and domestic violence is also a problem in the broader community,<sup>23</sup> these factors indicate the need for more culturally appropriate processes for responding to, intervening in and preventing family violence in Aboriginal communities.

In a recent report setting out the state's 2004–2008 strategic plan for addressing family and domestic violence in Western Australia, FDVU neatly summarise Blagg's findings from consultative work with Aboriginal people throughout the state on the subject of family violence intervention. It was found that in responding appropriately to the problem of family violence there were 'a number of elements from an Indigenous perspective that need to be understood and respected',<sup>24</sup> including:

- rejection of 'criminalisation' as the main strategy to deal with family violence;

19. Government of Western Australia, *Putting People First: The Western Australian State Government's Action Plan for Addressing Family Violence and Child Abuse in Aboriginal Communities* (2002) 2. See *Gordon Inquiry*, recommendation 131.

20. See above p 44.

21. FDVU, *Western Australian Family and Domestic Violence State Strategic Plan* (2004) 5.

22. Keel M, *Family Violence and Sexual Assault in Indigenous Communities: Walking the talk*, Briefing Paper No 4, Australian Institute of Family Studies (2004) 7.

23. *Ibid.*

24. FDVU, *Western Australian Family and Domestic Violence State Strategic Plan* (2004) 37, referencing Blagg H, *Crisis Intervention in Family Violence: Summary Report* (Perth: Domestic Violence Prevention Unit, 2000).

## Many women experiencing family violence avoid seeking assistance from authorities for fear that their children might be removed from them.

- less reliance on an explicitly feminist analysis and explanation of violence within intimate relationships;
- greater stress on the impact of colonialism, trauma, family dysfunction and alcoholism as primary causes;
- a view which sees male violence less as an expression of patriarchal power than as a compensation for lack of [traditional] status, esteem and value;
- greater stress on the impact of family violence on the family as a whole, rather than just women and children; and
- emphasis on a range of potential perpetrators, including husbands, sons, grandsons and other male kin.<sup>25</sup>

Blagg also found that, as well as intervention strategies to protect family members from violence, Aboriginal people were keen to focus on issues of prevention of family violence by education (particularly of young males) and healing of the family and community as a whole, rather than of perpetrators and victims independently.<sup>26</sup> Blagg stressed the need for intervention strategies that work through, or take advantage of, existing community structures such as street patrols, warden schemes and shelters – coordinated regionally rather than centrally and locally adapted to suit the cultural dynamics of the relevant community.<sup>27</sup> Blagg recommended a comprehensive whole-of-government approach emphasising intervention strategies that maintain the family unit and introduce ‘pathways to healing’.<sup>28</sup> One successful family violence intervention program is outlined in Blagg’s background paper to this reference and is worth setting out in full here.

One of the longest running initiatives in Western Australia is the Derby Family Violence Prevention Project, established in the late 1990s. The project operates in Derby and the Mowanjum Aboriginal Community and has evolved to take into account cultural factors by, for example, having separate young men’s and young women’s spaces and programs and working with close support from local Elders. The project is supported by the local shire and an inter-agency support group, and has had a strong focus on

alcohol issues (the project was initially situated in the sobering-up shelter), as well as on the philosophy of early intervention. The latter is particularly important in the Aboriginal context. Firstly, Aboriginal youths tend to form intensive relationships, often involving violence, earlier than many non-Aboriginal youths (so we may not just be preventing violence in later relationships but also intervening in current ones). Secondly, there are some embedded myths about Aboriginal men’s lawful entitlement to violence (based on a distorted version of Aboriginal law) that need to be challenged early. Thirdly, there are some very damaging cultural practices (that affect adults as well as young people) such as the destructive practice of ‘jealousing’. The LRCWA’s consultations in Derby and Mowanjum revealed a strong sense of ownership of the program locally.<sup>29</sup>

In relation to the success of family violence intervention projects, Blagg stresses the distinction between a *community-based* service (where a non-Aboriginal designed service is simply relocated to a community setting with or without local Aboriginal involvement in service delivery) and a *community-owned* service (where a service is designed and delivered by the local Aboriginal community).<sup>30</sup> The Derby Family Violence Prevention Project model, which is highly responsive to the particular needs and cultural sensibilities of its constituent community, would appear to suggest a good starting point for other community-based and community-owned intervention programs in Western Australia.

### Proposal 70

That the Western Australian government actively encourage and resource the development of community-based and community-owned Aboriginal family violence intervention programs that are designed to respond to the particular conditions and cultural dynamics of the host community.

25. Ibid.

26. Blagg H, *Crisis Intervention in Family Violence: Strategies and Models for Western Australia* (Perth: Domestic Violence Prevention Unit, 2000) 15.

27. Ibid 2. The need to incorporate a stronger community dimension in coordinated responses to family violence in Indigenous communities was a consistent theme in the Commission’s consultations with Aboriginal people for this reference.

28. Blagg H, *Crisis Intervention in Family Violence: Summary Report* (Perth: Domestic Violence Prevention Unit, 2000) 3.

29. Blagg H, *A New Way of Doing Justice Business? Community Governance Mechanisms and Sustainable Governance in Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 13 (footnotes omitted).

30. Ibid 1.

# A New Approach to Addressing Aboriginal Family Violence and Child Abuse

## Western Australia's strategic plans

*The Western Australian Family and Domestic Violence State Strategic Plan 2004–2008* in conjunction with *Putting People First: The Western Australian State Government's Action Plan for Addressing Family Violence and Child Abuse in Aboriginal Communities* invoke the whole-of-government response to the issue of family violence that was recommended by the Gordon Inquiry. The strategic plan, which caters for all cultural backgrounds, emphasises a 'balanced approach' encompassing prevention of family violence (by facilitating community education and public awareness); protection of victims (by developing screening procedures for families that interact with certain government services such as hospitals and family and community services); and provision of services for victims and perpetrators (by developing programs that meet the healing needs of families and communities and rehabilitative needs of perpetrators and increase the number of support options for women and children experiencing family violence).<sup>31</sup> The strategic plan does profess to address problems of Aboriginal family violence; however, the plan's framework still appears to follow the feminist domestic violence model criticised by Blagg in his 2000 report.

Somewhat in contrast to this, the government's action plan in response to the Gordon Inquiry—*Putting People First*—is directed specifically to family violence and child abuse problems in Western Australian Aboriginal communities. This plan details the government's commitment of resources to the expansion of perpetrator and victim counselling programs; family strengthening and healing programs; expanded child protection and sexual assault services; increased Aboriginal support workers in the regions; and

development of community-based, culturally targeted initiatives.

The Commission applauds the state government's willingness to respond to the issue of family violence and child abuse in Aboriginal communities; however, it is important that, in implementing these plans, the government ensures a balanced approach to dealing with the issues. The progress reports on government implementation of *Putting People First* available at the time of writing<sup>32</sup> demonstrate that, at least for the moment, the protection of children as victims of family violence and the detection of (and response to) child sexual abuse is taking precedence over the protection of women in abusive relationships and the institution or resourcing of community-based (and, ideally, community-owned) programs explicitly targeting the prevention of family violence.<sup>33</sup> This is perhaps not surprising given the Gordon Inquiry's overwhelming focus on child sexual abuse issues and the special vulnerability of children; but nonetheless, the alarming statistical evidence of increasing violence against women and the flow-on effects that this has on children (in terms of child abuse, normalisation of violence, encouragement of intergenerational family violence and juvenile offending)<sup>34</sup> in Aboriginal communities warrant an immediate, strong and coordinated response in respect of all aspects of family violence outlined above.

The Commission is also aware that there is often, in the case of Indigenous affairs, a significant 'gap between the promises of paper policies and what is happening on the ground'.<sup>35</sup> This is both a product of substantive inequality between the Aboriginal and non-Aboriginal communities and previous government focus on policy process rather than policy outcomes. In their background paper for this reference, Neil Morgan and Joanne Motteram stress that 'monitoring, benchmarking and evaluation are integral to ensuring that decisions about public expenditure are evidence-led and, most importantly, to transforming the world

31. FDVU, *Western Australian Family and Domestic Violence State Strategic Plan* (2004) 27–32.

32. At the time of writing the Gordon Inquiry response plan *Putting People First*, had been in operation for just over two years.

33. For example, none of the advances on systemic change listed in the first and second implementation progress updates address the issue of family violence as a contributor to or cause of child abuse issues in Aboriginal communities: Government of Western Australia, *First Progress Update on the Implementation of 'Putting People First'* (June 2003) 10–12; *Second Progress Update on the Implementation of 'Putting People First'* (December 2003) 9–11. Further, those elements of the action plan aimed specifically at reducing family violence or protecting adult victims of family violence (such as enhanced temporary accommodation, the provision of community 'safe places' and the development of prevention programs for family violence) appear to be in the consultation or development phase, see: Government of Western Australia, *Gordon Implementation – Regional Update* (February 2004).

34. In relation to juvenile offending, recent studies undertaken by the Australian Institute of Criminology have established a causal relationship between child maltreatment and offending behaviour. See: Stewart A, Dennison S and Waterson E, *Pathways From Child Maltreatment to Juvenile Offending*, Australian Institute of Criminology, Report No 241 (2002).

35. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 133.

*There is often, in the case of Indigenous affairs, a significant 'gap between the promises of paper policies and what is happening on the ground'.*

of paper bullet points in policy documents into concrete achievement' for Indigenous Australians.<sup>36</sup>

The six-monthly reporting requirement attached to *Putting People First* is an important step towards ensuring that the separate government departments carrying responsibility for initiatives are accountable for the money they receive to implement the plan. However, evaluation of these initiatives must be ongoing and, moreover, must be localised with an emphasis on positive practical outcomes. It is imperative that the government regularly consult with those responsible for frontline service delivery and with those receiving the benefits of such service to genuinely assess the effectiveness of programs and monitor the changing needs of communities. In addition, programs and government service delivery must be flexible and dynamic on a local level to accommodate cultural differences, to involve (as Blagg has recommended) established local Aboriginal-run services and to ensure that the best result is achieved for each community. As Libby Carney reports, 'with the abolition of ATSIC and the distribution of Indigenous services into mainstream government departments there is a [legitimate] concern as to whether family violence services will continue to provide the best culturally appropriate services possible to Indigenous women'.<sup>37</sup> The Commission shares this concern.

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That progress reporting and evaluation of programs and initiatives dealing with family violence and child abuse in Aboriginal communities be ongoing with an emphasis on positive, practical outcomes and demonstrate genuine consultation with those responsible for frontline service delivery and adaptation of programs to suit the changing needs and cultural differences of client communities.

#### Restraining orders

During consultations for this reference the appropriateness of the restraining order regime in Western Australia was criticised in relation to its application to Aboriginal people. For example, it was said that:

- Restraining orders do not work for Aboriginal women because they recognise strong cultural and social obligations to maintain family relationships. Many Aboriginal women do not therefore support the permanent removal of their men from the family home.
- Aboriginal women do not always understand that a restraining order, once obtained, must be cancelled before contact with their partner and the effect of orders is not always adequately explained to all parties.
- Restraining orders should not preclude cohabitation of the perpetrator of family violence and the protected person but should impose conditions upon the perpetrator's continual cohabitation with the protected person.
- Many Aboriginal women simply want the ability to temporarily escape a violent situation by removal to a 'safe place' for a period of time or, alternatively, to have the perpetrator of family violence temporarily removed to a place to 'cool off' or 'sober up' before returning to the family home.
- Restraining orders can be effective but more emphasis needs to be placed on family healing and behavioural reform.<sup>38</sup>

Such criticisms have also been recorded by researchers in other studies on family violence in Western Australia.<sup>39</sup>

Since the Commission's consultations with Aboriginal communities, significant emphasis has been placed on

36. Ibid 138. See also Marks G, *The Value of Benchmarking to the Reduction of Indigenous Disadvantage in the Law and Justice Area*, LRCWA, Project No 94, Background Paper No 3 (June 2004).

37. Carney L, 'Indigenous Family Violence: Australia's Business' (2004) 6(1) *Indigenous Law Bulletin* 15, 16.

38. For example, see also LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 19; *Geraldton*, 26–27 May 2003, 17–18; *Carnarvon*, 30–31 July 2003, 6; *Broome* 17–19 August 2003, 29; *Albany*, 18 November 2003, 21; *Fitzroy Crossing*, 3 March 2004, 47.

39. See Blagg H, *Crisis Intervention in Family Violence: Summary Report* (Perth: Domestic Violence Prevention Unit, 2000) 11–12; Wohlan C, *Aboriginal Women's Interests in Customary Law Recognition*, LRCWA, Project No 94, Background Paper No 13 (April 2005) 19.

the development by government of alternative strategies to address family violence in Aboriginal communities in Western Australia. The issues raised above in respect of the operational inappropriateness of restraining orders in Aboriginal communities has been acknowledged and in some part addressed by the 2004 amendments<sup>40</sup> to the *Restraining Orders Act 1997* (WA) (the Act). For example, the amendments oblige courts to take positive steps to ensure that all aspects of a restraining order (including the processes to have an order varied, cancelled or extended) are satisfactorily explained to the parties affected by the order. The amendments also introduce the concept of a short-term order issued by police in cases where family and domestic violence is detected.

Under the new Division 3A of the Act, police may issue a 24- or 72-hour police order imposing

such restraints on the lawful activities and behaviour of a person as the officer considers appropriate to prevent a person —

- (a) committing an act of family and domestic violence;
- or
- (b) behaving in a manner that could reasonably be expected to cause a person to fear that such an act could be committed.

A 24-hour order may be made at the discretion of police without the consent of the person intended to be protected by the order. In the case of the 72-hour order consent is required; although, where a child is at risk of family violence, a welfare officer or guardian may consent to the making of an order.<sup>41</sup> An order cannot be extended by a police officer and another order cannot be made in relation to the same facts.

It has been noted by some commentators that police attitudes to Aboriginal victims of family violence have not always been positive and that the concerns of victims are often trivialised, particularly in cases of repeat callouts.<sup>42</sup> In particular, it has been said that police appear to think that where a woman is unwilling to

make a firm commitment to ending an abusive relationship and is likely to return to her partner after a 'cooling off' period, it is not worth the trouble of pursuing an interim telephone restraining order.<sup>43</sup> There is also some perceived reluctance by police to charging the perpetrators of assault in domestic situations.<sup>44</sup> The Ombudsman recently reported that a number of police officers and support workers interviewed for the 2003 *Investigation into the Police Response to Assault in the Family Home* 'were under the misapprehension that it is the responsibility of the victim to lay charges against the perpetrator' of family violence.<sup>45</sup> The Ombudsman made a series of recommendations to clarify police policy and improve police education in matters of family and domestic violence.

Currently the Western Australian Police Service professes a 'zero tolerance' policy in respect to family violence in Aboriginal communities and has initiated consultative processes to improve response strategies.<sup>46</sup> It is hoped that the powers extended to police by the 2004 amendments will assist authorities to take a more positive role in combating family violence by initiating immediate action to separate perpetrators of family violence from their victims in situations where there is evidence of family violence or a reasonably perceived threat of such violence. The police order system is more efficient and immediate than the telephone order system, which requires police officers to leave the scene of the violence to begin proceedings to obtain the order. The system also puts police, rather than the victim, into the role of complainant and favours the victims of family violence by allowing for the temporary removal of the perpetrator of violence from the family home. This should result in less upheaval for women and children (the usual victims of family violence) who might otherwise be forced to seek refuge elsewhere.

Another advance under the amendments to the Act is the empowerment of police to enter and search premises if family and domestic violence is reasonably

40. *Acts Amendment (Family and Domestic Violence) Act 2004* (WA), proclaimed 23 November 2004 and effective from 1 December 2004.

41. A 72-hour police order is often used to protect a victim of family violence over a weekend so that a full Violence Restraining Order can be applied for through the courts on a Monday.

42. Blagg H, *Crisis Intervention in Family Violence: Summary Report* (Perth: Domestic Violence Prevention Unit, 2000) 24; Ombudsman WA, *An Investigation into the Police Response to Assault in the Family Home* (September 2003) 13–26.

43. Blagg, *ibid*; Department of Justice (DoJ), *Review of Legislation Relating to Domestic Violence*, Final Report (June 2004) 38. An interim telephone restraining order may last for up to 72 hours. According to the DoJ report, the process of securing an interim telephone restraining order is particularly time consuming for police and is in any event unable to immediately address the problem as police are required to leave the scene and return to the station to organise an order through the police communications and the duty magistrate in Perth. Orders often take several hours to be judicially approved and issued and then the perpetrator must be located again to have the orders served.

44. Ombudsman WA, *An Investigation into the Police Response to Assault in the Family Home* (September 2003) 21.

45. *Ibid*.

46. WA Police Service, 'Current Western Australia Police Service Direction in Policy and Programs that Relate to Indigenous Family Violence' (undated), available at <[www.police.wa.gov.au](http://www.police.wa.gov.au)>.

suspected and to arrange for such assistance as is reasonable in the circumstances.<sup>47</sup> This encourages police officers to assume a proactive role, rather than the traditional reactive role, in respect of family violence. Of course, with any extension to police powers there is always the fear that such power might be abused; for this reason the amendments to the Act are subject to statutory review after two years of operation to gauge the effectiveness of the amendments.

#### Invitation to Submit 14

The Commission invites submissions on the effectiveness of the new police order regime in Aboriginal communities in the control of family violence and in securing the immediate protection of Aboriginal women and children.

### Refuges and shelters

Regardless of how effective the new police order regime may be in providing relief to women and children the subject of family violence, there will still be an important role for women's refuges and supported accommodation assistance for those who are in need of longer term accommodation. In some cases, where a restraining order or police order is in place there may still be a risk of violence (or even retaliation) from other males in the household and in these circumstances appropriate accommodation must be available to women and children. Currently there are 35 women's refuges in Western Australia throughout Perth and the main regional centres. The provision of 'safe houses' for women and children in more remote communities remains a pressing issue and one that is a focus of the Department of Community Development under the *Putting People First* plan.

It is hoped that some review of the cultural appropriateness of current temporary accommodation facilities is also conducted under this plan. Consultations with Aboriginal women conducted by Blagg in 1999 suggested that 'refuge policies tend to conform [to] culturally dominant conceptions of the nuclear family'<sup>48</sup> and do not cater for extended Aboriginal families. Clearly there is a need to ensure that women's refuges likely

to cater for Aboriginal women escaping family violence are adequately resourced to enable dependants of victims to also be accommodated.

As important as the provision of women's refuges is, there is also a need for development of shelters that cater for men so that women and children are not always forced to leave the family home to escape violence. In particular, Aboriginal men who are subject to 24- or 72-hour police orders will require temporary accommodation in a men's shelter or sobering-up facility. Ideally, such accommodation facilities should have counselling services available and provide encouragement to men to participate in family violence prevention programs. It appears that work is currently being undertaken in most regions under the auspices of *Putting People First* to develop and properly resource perpetrator programs, community-run night patrols and men's shelters. The success of *Putting People First* will depend upon the enhancement of current community-based initiatives and the development of new facilities for men to assist them to address problems with violence and keep them out of the criminal justice system.

## Family Violence, Child Abuse and Customary Law

### Customary Law is No Excuse for Family Violence

In a 2000 report for the Western Australian Domestic Violence Prevention Unit, Blagg notes that Aboriginal men sometimes excuse violent domestic behaviour by reference to their role of authority under Aboriginal customary law or in their traditional culture.<sup>49</sup> However, as the consultations for this reference and other studies have revealed, Indigenous women in general do not support this claim and do not consider interpersonal violence or child abuse to be justified under customary law.<sup>50</sup> Former Social Justice Commissioner Bill Jonas has commented that:

Indigenous family violence is not normal. And contrary to popular myth, or romanticised notions of Aboriginal culture, or the less predominant but still existing racist stereotypes of 'savagery', it is not culturally

47. With the approval of a senior officer.

48. Blagg H, *Crisis Intervention in Family Violence: Summary Report* (Perth: Domestic Violence Prevention Unit, 2000) 24.

49. *Ibid* 4.

50. *Ibid* and studies cited therein. See also Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into Responses by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (July 2002) 68–71, 'Cultural Issues – Facts and Fallacies': Indeed, Aboriginal women respondents at consultations for this reference argued that men should face Aboriginal justice for violent behaviour in the family context.

acceptable. And it is not part of our systems of customary law. In fact it is the reverse. It is an indication of the fragility of such customary law and a sign of breakdown in traditional governance mechanisms in communities. It is, in short, an indication of community dysfunction.<sup>51</sup>

This view that there is no legitimate basis to claims that family violence is culturally sanctioned under Aboriginal customary law was also stressed by Catherine Wohlan in her background paper for this reference.<sup>52</sup> Women consulted for the background paper shared their concerns for the next generation of young men and women that may be persuaded by these claims that acts of violence against women are culturally sanctioned within their communities. They also raised concerns about use of customary law in the court context as justification or excuse for offences committed against women and children. Wohlan alluded to cases of sexual assault of children and violence against women where evidence was introduced in court suggesting that such behaviour was culturally sanctioned under Aboriginal customary law. She submitted that 'in the court setting, only segments of Aboriginal law are being put forward' often out of cultural context, with the result being that any understanding of customary law in its legitimate form is limited.<sup>53</sup> For these reasons, Wohlan argued that family violence and customary law must be seen as separate matters and that these distortions of customary law and the status of women in Aboriginal society should not be recognised to the detriment of Aboriginal women.<sup>54</sup>

A literature review conducted by the Centre for Anthropological Research at the University of Western Australia for the Gordon Inquiry found that 'cultural context' was an important element in considering whether family violence in Indigenous societies is traditionally sanctioned. The review found that:

[T]he anthropological literature reveals examples of what, on the face of it, might be taken as instances of family violence or abuse. But the literature also shows that such actions are invariably within the sphere of traditional practice, ritual or the operation of customary law. We have found little material that suggests that violence or abuse per se are condoned, or took place with impunity, outside traditionally regulated contexts.<sup>55</sup>

In her book *A Fatal Conjunction: Two Laws, Two Cultures*, Joan Kimm recites a number of examples that indicate that women in traditional Indigenous societies were 'vulnerable to "traditionally regulated" violence' for 'alleged misbehaviour' or 'infringing male law'.<sup>56</sup> However, Wohlan has pointed out that, from an anthropological perspective, few examples of the violence described against Aboriginal women in Kimm's book could be said to have been supported by customary law and that more detail would be required for such a claim to be made out.<sup>57</sup> This lack of cultural evidence appears to have been the reason behind the dismissal of defence evidence of culturally sanctioned violence against women in *Ashley v Materna*. In that case Bailey J commented:

In the absence of evidence as to the obligatory nature of the alleged [customary] law and the consequences for non-compliance, elevation of a morally indefensible practice to the status of 'customary law' to which courts could or should have regard would be to invite ridicule of the courts and make a mockery of the fundamental principle that all people stand equal before the law.<sup>58</sup>

In response to the concerns of Aboriginal women reported to this inquiry and in recognition of the provisions of the United Nations *Convention on the Elimination of All Forms of Discrimination Against Women* and the *Convention on the Rights of the Child*,<sup>59</sup> it is the Commission's position that family and interpersonal violence against women and children cannot be

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51. Jonas W, *Family Violence in Indigenous Communities: Breaking the silence?*, paper delivered at the launch of the University of New South Wales Law Journal Forum, Sydney (25 July 2002) as cited in Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 13.
  52. Wohlan C, *Aboriginal Women's Interests in Customary Law Recognition*, LRCWA, Project No 94, Background Paper No 13 (April 2005) 33–34.
  53. *Ibid* 37.
  54. *Ibid* 1. See also the comments of Megan Davis and Hannah McGlade in regard to distortions of customary law in family and interpersonal violence cases, particularly where women are victims: *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 13–14.
  55. As cited in Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into Responses by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (July 2002) 69.
  56. Kimm J, *A Fatal Conjunction: Two Laws, Two Cultures* (Sydney: The Federation Press, 2004) 46.
  57. Wohlan C, *Aboriginal Women's Interests in Customary Law Recognition*, LRCWA, Project No 94, Background Paper No 13 (April 2005) 20.
  58. *Ashley v Materna* [1997] NTSC 101 (21 August 1997), per Bailey J. There is increasing evidence that courts are beginning to recognise that so-called culturally sanctioned violence against women is unacceptable; see, for example, *R v Woodley, Boonga and Charles* (1994) 76 A Crim R 302 where the Western Australian Court of Criminal Appeal stressed the need to protect Aboriginal women from violence and the need to treat the perpetrators of Aboriginal family violence in the same way as in other sectors of the community.
  59. See the discussion in Part IV, above p 74–75, on the subject of the conflict between Indigenous cultural rights and women's individual rights at international law. Australia's international obligations and the potential of conflict with recognition of certain customary law or cultural practices is also discussed earlier in this Part in relation to the recognition of promised marriage contracts: see above pp 333–34.

## Family and interpersonal violence against women and children cannot be condoned or excused by reference to traditional cultural relationships . . .

condoned or excused by reference to traditional cultural relationships under Aboriginal customary law. The Commission accepts that there will be circumstances where such arguments may legitimately be raised in mitigation of sentence;<sup>60</sup> however, without substantive anthropological evidence and/or Aboriginal women Elders' evidence in support of the defence proposition, courts should view such arguments advanced in mitigation of crimes of violence against Aboriginal women with suspicion. The Commission's proposal for community justice groups (detailed above in Part V)<sup>61</sup> will, when implemented and operational, provide courts with a source of information about relevant customary laws with less potential for male-dominated gender bias.

### Customary Law Promised Marriages and Child Sexual Abuse

The 2002 *Pascoe* case<sup>62</sup> in the Northern Territory is responsible for bringing attention to the continuing practice of promised marriages in some Indigenous communities and the potential of the defence (or mitigating circumstances) of Aboriginal customary law to the charge of carnal knowledge of a child.<sup>63</sup> In *Pascoe*, a 50-year-old man was convicted of carnal knowledge of a 15-year-old girl who was his promised wife (although they had not yet started living together as husband and wife). He was sentenced by the magistrate to 13 months' imprisonment. On appeal to a single judge of the Supreme Court the sentence

was reduced to 24 hours on the basis that Pascoe was ostensibly exercising his conjugal rights. On appeal to the Court of Criminal Appeal, Martin CJ acknowledged that Pascoe was 'participating in a culturally encouraged practice' and that the offence was not 'simply related to sexual gratification'.<sup>64</sup> For this reason he agreed that there were mitigating circumstances to the commission of the offence; however, he stressed that:

Notwithstanding the cultural circumstances surrounding this particular event, the protection given by law to girls under the age of 16 from sexual intercourse is a value of the wider community which prevails over that of this section of the Aboriginal community.<sup>65</sup>

The Court of Criminal Appeal therefore increased Pascoe's sentence to 12 months' imprisonment, suspended after one month.<sup>66</sup> A further appeal to the High Court was refused special leave.

Until very recently the *Criminal Code* of the Northern Territory provided a defence against carnal knowledge offences for Aboriginal 'persons living in a husband and wife relationship according to tribal custom'.<sup>67</sup> There was no age limit specified in the relevant section. In its 1986 report on recognition of Aboriginal customary laws, a majority of the ALRC agreed with the position taken in the *Criminal Code* (NT); however, the ALRC provided the qualification that such a defence should only be available where the defendant can prove on the balance of probabilities that he honestly believed that his traditional wife consented to sexual intercourse.<sup>68</sup>

60. A discussion of the circumstances where Aboriginal customary law may legitimately be taken into account in relation to mitigation of sentence is found under Part V, 'Aboriginal Customary Law as a Reason or Explanation for the Offence', above pp 215–20.

61. See Part V, 'The Commission's Proposal for Community Justice Groups', above pp 133–41.

62. *Pascoe v Hales* [2002] SCC 20112873 (Unreported, Supreme Court Northern Territory, Gallop AJ, 8 October 2002); *Hales v Jamilmira* [2003] NTCA 9 (Unreported, Court of Criminal Appeal, Supreme Court Northern Territory, Martin CJ, Mildren & Riley JJ, 15 April 2003).

63. The *Pascoe* case is discussed in greater detail in the background papers produced for this reference. See: Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 53 & 55; McIntyre G, *Aboriginal Customary Law: Can it be Recognised?*, LRCWA, Project No 94, Background Paper No 9 (February 2005).

64. *Hales v Jamilmira* [2003] NTCA 9 (Unreported, Court of Criminal Appeal, Supreme Court Northern Territory, Martin CJ, Mildren & Riley JJ, 15 April 2003) [25].

65. *Ibid* [26].

66. In a similar (and more recent) case, a traditional Aboriginal man pleaded guilty to one offence of aggravated assault and one offence of having sexual intercourse with a child (who was the defendant's 14-year-old promised wife). The defendant was sentenced to two years' imprisonment to be suspended for a period of two years after serving one month in jail. The sentencing judge acknowledged the seriousness of the offences but also took into account that the defendant considered that the conduct was justified under Aboriginal customary law and the defendant's lack of knowledge that he had committed an offence against the law of the Northern Territory. See *R v CJ* (Unreported, Supreme Court of Northern Territory, SCC 20418849, 11 August 2005 (Martin CJ) available at <[http://www.nt.gov.au/ntsc/doc/sentencing\\_remarks/2005/08/gj\\_20050811.html](http://www.nt.gov.au/ntsc/doc/sentencing_remarks/2005/08/gj_20050811.html)> 7. An appeal against the leniency of the sentence in this case is pending. For further discussion of this case, see 'Sentencing' in Part V, above pp 217–18.

67. *Criminal Code* (NT) s 126 (relevant sub-section now repealed).

68. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) 218, [320].

The Gordon Inquiry heard anecdotal evidence of promised marriages in Western Australia 'providing [cultural] sanction to men to be able to have sexual relations with young girls'<sup>69</sup> of the kind professed in the *Pascoe* case. The Inquiry appears to have discounted this evidence on the basis that, although traditional Aboriginal societies did practise the betrothal of young girls to older men, the promised marriages did not usually take effect until the girls reached puberty and that sexual relations within promised marriages were not condoned until the girl was post-menarche. However, as Kimm has noted, post-menarche girls may be as young as 10 years old and if promised marriage 'entails carnal knowledge of girls below the age of consent',<sup>70</sup> evidence, however anecdotal, of such practice must be taken seriously.

Under s 319(2) of the Western Australian *Criminal Code* a person under the age of 13 years cannot consent to sexual intercourse. For a child between 13 and 16 years it is a defence to certain sexual offences, including sexual intercourse, if the accused person can prove lawful marriage to the child.<sup>71</sup> 'Lawful marriage' is not defined in the *Criminal Code* but under the *Marriage Act 1961* (Cth) a person reaches marriageable age at 18 years or, in exceptional circumstances, at 16 years.<sup>72</sup> There is no provision for legalising marriages where one or both of the parties are under the age of 16 years. There is also no provision recognising customary law or traditional marriages.

In view of the very substantial evidence of child sexual abuse in Western Australian Aboriginal communities, the Commission believes that it would be imprudent to make special provision for a defence in relation to sexual offences against children the subject of a

promised or traditional marriage. In arriving at this conclusion the Commission has considered Australia's international obligations under CROC and is informed by the best interests principle in Article 3(1) of that convention.

The Commission also notes that almost two decades have passed since the publication of the ALRC's report and unlike the Northern Territory, where the practice of promised marriages still remains in some communities,<sup>73</sup> there are few reported instances of this customary practice continuing in Western Australia.<sup>74</sup> Moreover, following the *Pascoe* case in March 2004, the Northern Territory government removed the marriage defence for customary law marriages and any other marriage-type relationship involving girls under the age of 16 years.<sup>75</sup>

It is important to note here that, although the defence of tribal marriage in relation to offences of carnal knowledge existed in the Northern Territory at the time of the *Pascoe* case, the defence was not in fact argued. *Pascoe* had pleaded guilty to the offence and asserted the fact of his promised marriage under customary law in mitigation of sentence. The recognition of Aboriginal customary law by courts in mitigation (or, in certain circumstances, in aggravation) of sentence is supported by the Commission and is the subject of a proposal regarding the development of legislative provisions to regulate the way in which courts are informed about customary law issues in the sentencing process. The nature and scope of proposed legislation in this area is dealt with comprehensively above in Part V 'Aboriginal Customary Law and the Criminal Justice System'.<sup>76</sup>

69. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into Responses by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (July 2002) 69.

70. Kimm J, *A Fatal Conjunction: Two Laws, Two Cultures* (Sydney: The Federation Press, 2004) 64.

71. *Criminal Code* (WA) s 321(10).

72. *Marriage Act 1961* (Cth) ss 11 & 12.

73. In their recent inquiry into Aboriginal customary law the NTLRC reported that promised marriages are no longer practised by many Northern Territory communities and in some were never practised. NTLRC, *Aboriginal Communities and Aboriginal Law in the Northern Territory*, Background Paper No 1 (2003) 26.

74. In his background paper for this reference Greg McIntyre suggests that whilst there are instances of promised marriage in the adult Aboriginal population of Western Australia it is no longer practised in the vast majority of Aboriginal communities in this state. As well, he notes that, in his experience, those adults that were the subject of promised marriages had some choice as to whether to enter the marriage. See McIntyre G, *Aboriginal Customary Law: Can it be recognised?*, LRCWA, Project No 94, Background Paper No 9 (February 2005) 3. As mentioned above, the Commission encountered some reference to continuing practice of promised marriages in remote communities; however, there appears to be some degree of choice accorded to promised marriage partners as to whether they will enter the marriage: see above 'Recognition of promised marriage contracts', pp 333–34.

75. The marriage defence was comprehensively removed from the Code by the *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT), which came into effect on 17 March 2004. The removal of the defence was applauded by members of the Indigenous community, although some critics opposed it on the grounds that it might set a precedent for undermining customary law. See: Anderson A, 'Women's Rights and Culture: An Indigenous woman's perspective of the removal of traditional marriage as a defence under Northern Territory law' (2004) 6 (1) *Indigenous Law Bulletin* 30–31.

76. In particular see pp 212–20.

*It is important that any customary law responses to family violence do not deprive Aboriginal women of their ability to seek protection or initiate criminal proceedings under Australian law.*

## The Need for the Protection of Australian Law

Despite criticism of the effectiveness and cultural appropriateness of available measures for protection against family violence, it is widely recognised by Australian governments and Aboriginal communities that Aboriginal women and children need to be able to rely upon the protection of Australian law. In a submission to the NTLRC's 2003 inquiry into Aboriginal customary law in the Northern Territory, the HREOC Sex Discrimination Commissioner argued that Aboriginal women must not be precluded from accessing 'mainstream law in cases involving violence'.<sup>77</sup> The Commissioner urged an approach that would limit the cases to which customary law can apply in relation to violence against women in recognition of the relative powerlessness of their position, particularly in relation to crimes such as sexual assault and family violence.

The Commission broadly agrees with this approach; however, it is acknowledged that there may be some role for culturally sanctioned, non-violent Aboriginal customary law strategies for dealing with perpetrators of family violence and that such customary law responses could, in certain circumstances, work in tandem with prevention and protection strategies provided for under Australian law.<sup>78</sup> Such customary law responses might include community 'shaming' of perpetrators of family violence or, in respect of repeat or serious offenders, banishment from the community.

It is important that any customary law responses to family violence do not deprive Aboriginal women of their ability to seek protection or initiate criminal proceedings under Australian law. However, many Aboriginal women consulted by the Commission sought alternative responses to family violence that would not

see their men imprisoned (the rehabilitative value of which is, at best, tenuous). An Aboriginal customary law response at first instance, and in less serious cases of family violence, might assist in diverting Aboriginal men from the criminal justice system whilst allowing for increased opportunities for family and community healing. In some cases, as argued by respondents to the Commission's community consultations, it may also be more effective in addressing violent behaviour and rehabilitating offenders than measures under the criminal law.

The community justice groups, proposed by the Commission in Part V above,<sup>79</sup> may be an appropriate vehicle for non-violent customary law strategies to address family violence. The requirement that these groups have equal representation of men and women and of family or skin groups will assist in establishing the cultural authority necessary for the success of customary law sanctions, particularly in regard to violence perpetrated against women. Importantly, the existence of these groups will not preclude a victim from seeking redress under Australian law. The Commission invites submissions on other means of introducing non-violent customary law strategies to address family violence as well as comments on the appropriateness of such strategies and the potential for them to complement existing protection and prevention strategies under Australian law.

### Invitation to Submit 15

The Commission invites submissions on the possibility of introducing non-violent customary law strategies to address family violence in Aboriginal communities and the potential for such strategies to operate in tandem with protection and prevention strategies under Australian law.

77. Human Rights and Equal Opportunity Commission, Sex Discrimination Commissioner, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (May 2003) 29.

78. A strategy also suggested by John Toohey in his background paper to this reference, see: Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004) 12–13.

79. See above pp 133–41.



## No Room for Complacency

In 2004 the Council of Australian Governments (COAG) committed to establishing a national framework for the prevention of family violence and child abuse in Indigenous communities.<sup>80</sup> The framework calls for jurisdictions to work cooperatively to improve how they engage with each other and with Indigenous communities in respect of this important issue. COAG established six principles to guide government action in this area: safety; partnerships; support; strong, resilient families; local solutions; and addressing the causes of family violence and child abuse.

Although the government has for some time indicated in various reports a willingness to address the epidemic of family violence in Western Australian Aboriginal communities, the alarming findings of the 2002 Gordon Inquiry have provided government with the impetus for immediate action. Western Australia therefore appears to be instituting the means for substantive change in each of the areas identified by COAG. It must, however, be recognised that these issues require a long-term commitment by the government and that there is no room for complacency. With continued regular reporting of progress on the implementation of the government's response to the recommendations of the Gordon Inquiry and with the institution of the proposals for reform enumerated in this Part the Commission is confident that substantial gains can be made by Aboriginal communities to address the causes of family violence and child abuse.

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80. Council of Australian Governments, Communiqué, 25 June 2004, Attachment C.