

Chapter One

Challenging Customary Law Myths and Misconceptions

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Challenging Customary Law Myths and Misconceptions

Following the public release in February 2006 of the Commission's Discussion Paper on Aboriginal customary laws, there were a number of media reports that revealed certain misconceptions about the reference and the nature of the proposals contained in the Discussion Paper. These included concerns about equal application of the law and claims that the Commission's proposals would result in two systems of law: one for Aboriginal people and another for non-Aboriginal people.

More recently, and somewhat unrelated to the Commission's reference, the national media has

entertained specious claims that Aboriginal customary law condones violence against women and sexual abuse of children and that Aboriginal people use their cultural traditions as an 'excuse' or 'defence' for such behaviour. These claims are misconceived. Each of these issues was addressed at relevant points in the Discussion Paper; however, in light of the recent media attention the Commission addresses in this chapter these and other issues in order to challenge the myths surrounding Aboriginal customary law and to quash any misconceptions about the Commission's final recommendations.



Non-Discrimination and Equality Before the Law

In its 8 February 2006 editorial, the *West Australian* newspaper claimed that the Commission's proposals 'would create one legal system for Aboriginals and another for others'.¹ The editorial continued:

The law would be fragmented on the basis of race, which implies inbuilt biases that deny equal treatment in contradiction of the doctrine of the rule of law.²

This is a reference to the principle of equality before the law – a pervasive principle of international human rights law and something the Commission addressed in Part IV of its Discussion Paper and in various background papers to the reference.³ At international law the principle of equality (which is inextricably linked with the principle of non-discrimination) is expressed in the *Universal Declaration of Human Rights*⁴ and the *International Covenant on Civil and Political Rights* (ICCPR).⁵ Article 26 of the ICCPR provides that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Does Recognition of Aboriginal Customary Law Breach the Principle of Equality?

By acknowledging difference on the basis of race, recognition of Aboriginal customary law may appear to violate the principle of equality and non-discrimination

articulated by this provision. But this is not the case. The International Court of Justice has held that the principle of equality before the law does not mean that everyone must be treated equally without regard to individual circumstances.⁶ There are some cases where concrete conditions of inequality require nation-states to take affirmative action and discriminate in favour of a minority so that genuine equality may be achieved.⁷ In the past, affirmative action measures have been applied to improve access to individuals' human rights, in particular women, ethnic minorities, indigenous peoples, people with disabilities, and the socially and economically disadvantaged. In each case measures of positive discrimination have been accepted as necessary and legitimate means to justify the ends of substantive or 'actual' equality. Indeed, every Australian government has a suite of agencies, commissions or other bodies tasked with implementing legitimate positive discrimination measures to achieve substantive equality for minority groups or groups that are traditionally disadvantaged.

Formal equality vs substantive equality

The first step to reconciling recognition of Aboriginal customary law with the principle of equality before the law is to understand the difference between 'formal equality' (treating everyone the same regardless of individual circumstances) and 'substantive equality' (treating people differently to achieve *actual* equality). Equality is premised on the concept of fairness, yet an emphasis on formal equality can in practice serve to create or perpetuate *inequality* before the law. The

1. For a detailed discussion of this argument, see 'Two Separate Systems of Law?', below pp 13–17.
2. Editorial, 'Race-based Law Reform Ideas are Fraught with Hazards', *The West Australian*, 8 February 2006, 16. The rule of law is a jurisprudential concept that insists that the law be posited (or made known) and apply equally to all people.
3. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) Pt 4; McIntyre G, 'Aboriginal Customary Law: Can it be recognised?' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 341, 363–66; Davis M & McGlade H, 'International Human Rights Law and the Recognition of Aboriginal Customary Law' in LRCWA, *Aboriginal Customary Laws: Background Papers*, ibid 381, 415–19.
4. Article 7.
5. Article 26. The principle of equality before the law can also be found (in the guise of non-discrimination) in the *Convention on the Elimination of all Forms of Discrimination Against Women* (Articles 1 & 2) and the *International Convention on the Elimination of all Forms of Racial Discrimination* (Article 1(1) as reflected domestically in the *Racial Discrimination Act 1975* (Cth) s 10).
6. *South West Africa Cases (Second Phase)* [1966] ICJ Rep 305 (Tanaka J) as cited in Davis M & McGlade H, 'International Human Rights Law and the Recognition of Aboriginal Customary Law' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 381, 416.
7. Davis & McGlade, ibid 416–17.

following example is helpful in conceptualising the difference between formal and substantive equality.

[I]f there are two people stuck down two different wells, one of them is 5m deep and the other is 10m deep, throwing them both 5m of rope would only accord formal equality. Clearly, formal equality does not achieve fairness. The concept of substantive equality recognises that each person requires a different amount of rope to put them both on a level playing field.⁸

As evidenced by innumerable reports published in the past two decades,⁹ the conditions of disadvantage faced by Aboriginal Australians are appalling and insidious. In 1992, the Council of Australian Governments jointly committed to overcoming entrenched disadvantage in Aboriginal communities and to raising the standards of service delivery and quality of life of Aboriginal Australians.¹⁰ Australian governments therefore accept that Aboriginal Australians are not currently on a level playing field with non-Aboriginal Australians. There are many reasons for this, but most commentators believe that historical factors such as dispossession and exclusion from traditional lands, the impact of past government policies of assimilation and child removal, and the breakdown of cultural authority and traditional law largely explain the present dysfunctional state of many Aboriginal communities.¹¹ Raising the living conditions of

Aboriginal people may therefore not be enough to achieve substantive equality among all Western Australians. For many Aboriginal Australians substantive equality cannot be reached if the underlying causes—that is, the injustices of the past—are not also addressed.

Legitimate differential treatment

In Australia, unequal treatment on the basis of race is permitted under s 8 of the *Racial Discrimination Act 1975* (Cth) where special (remedial) measures are required to address substantive inequality or give individuals or groups equality of access to fundamental human rights and freedoms.¹² For example, this exemption gives Australian governments the authority to provide special services or benefits that are only available to Aboriginal people¹³ or, contrarily, to enact laws that fetter the rights of Aboriginal people in certain



8. Tom Calma, Acting Race Discrimination Commissioner and Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Implications of the *Racial Discrimination Act 1975* with Reference to State and Territory Liquor Licensing Legislation' (Paper presented at the 34th Australasian Liquor Licensing Authorities Conference, Hobart, Tasmania, 26–29 October 2004).
9. See, for example, the regular *Overcoming Indigenous Disadvantage: Key Indicators* reports of the Council of Australian Governments' Steering Committee for the Review of Government Service Provision; the annual *Social Justice Reports* of the Federal Commissioner for Aboriginal and Torres Strait Islander Social Justice; and the report of the Royal Commission into Aboriginal Deaths in Custody among many others.
10. Australian Local Government Association, *National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders* (1992), <<http://www.alga.asn.au/policy/indigenous/nationalCommitment.php>>. As part of this, the Western Australian government has committed to entrenching a policy framework for substantive equality across all government agencies. The policy takes into account the effects of past discrimination against Indigenous peoples, recognises that rights, entitlements, opportunities and access are not equally distributed throughout society and acknowledges that the equal application of rules to unequal groups can have unequal results. Equal Opportunity Commission (WA), Substantive Equality Unit, *The Public Sector Anti-Racism and Equality Program* (undated) 7.
11. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) Parts II and X.
12. This provision reflects Article 1(4) of the *International Convention on the Elimination of All Forms of Racial Discrimination*. For further discussion of this issue, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) Part IV.
13. As discussed in more detail below, such services are required because Aboriginal people in Australia do not access mainstream services and benefits at the same rate as other Australians.

circumstances.¹⁴ However, because special measures are only temporary and the differentiation of rights cannot be maintained once the objectives of substantive equality are achieved,¹⁵ the long-term recognition of Aboriginal customary law on this basis would be difficult to sustain.

International law does nonetheless support the concept of long-term differential treatment based on race. As John Chesterman explains:

[D]iffering treatment of individuals based on racial grounds will not constitute illegal discrimination where that discriminatory treatment is not 'invidious'. The 'reasonable differentiation' principle holds that the treatment of one racial group will not necessarily be discriminatory just because that treatment is different from the treatment received by another racial group.¹⁶

In the words of the United Nations Committee on the Elimination of Racial Discrimination 'a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate'.¹⁷ Essentially, the objectives of the Convention are the removal of racial barriers to the full enjoyment of human rights, the promotion of racial harmony among and within nations, and the achievement of equality, particularly in relation to minorities. In fact, 'the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when states without objective and reasonable justification, fail to treat differently persons whose situations are significantly different'.¹⁸

Why Should We Treat Aboriginal People Differently to All Other Australians?

There are a number of arguments that support the legitimacy of differential treatment for Australia's Aboriginal and Torres Strait Islander peoples. The imperative of substantive equality, discussed above, is a significant reason for differential treatment and one that can stand alone under both international and Australian law. Other compelling reasons are that Aboriginal people, as members of a distinct indigenous culture, have the right to the legal protection necessary to allow their culture to survive and flourish;¹⁹ that the bias and disadvantage experienced by Aboriginal people makes them more unequal than any other social or cultural group in Australia;²⁰ that Aboriginal Australians do not access mainstream services at the same rate as other Australians therefore requiring targeted service provision;²¹ that Aboriginal people are often subject to two laws and may be punished twice for the same offence;²² and that Aboriginal people suffer such underlying systemic discrimination in the criminal justice system that they have become the most disproportionately imprisoned culture in Australia.²³

Perhaps the most persuasive argument supporting differential treatment of Aboriginal people by recognition of certain customary laws and practices is found in Aboriginal peoples' unique status as the original inhabitants of Australia. As one commentator has said:

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14. For example, the by-laws of certain Aboriginal communities in Western Australia restrict or prohibit the consumption of alcohol on community lands, including in a person's place of residence. Although they fetter rights that non-Aboriginal people enjoy, these special measures are understood to benefit an Aboriginal minority by securing advancement of the beneficiaries so that they may enjoy and exercise equally with others their human rights and fundamental freedoms. It should be noted that the wishes and will of the members of the class of people to whom the special measure applies are relevant. See Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 16–17.
 15. Article 1(4) of the *International Convention for the Elimination of all Forms of Racial Discrimination* domestically incorporated by the *Racial Discrimination Act 1975* (Cth) s 8.
 16. Chesterman J, 'Balancing Civil Rights and Indigenous Rights: Is there a problem?' (2002) 8 *Australian Journal of Human Rights* 125, 134.
 17. Committee for the Elimination of Racial Discrimination, General Recommendation XIV, as cited in McIntyre G 'Aboriginal Customary Law: Can it be recognised?' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 341, 365.
 18. *Thlimmenos v Greece* (European Court of Human Rights, 6 April 2000).
 19. Lokan A, 'From Recognition to Reconciliation: The functions of Aboriginal rights law (1999) 23 *Melbourne University Law Review* 65.
 20. There are clear disparities between Aboriginal and non-Aboriginal people across all socio-economic indicators. See the Council of Australian Governments' Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2005* (2005). For a full discussion of Indigenous disadvantage in Western Australia, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) Part II.
 21. It should be noted that Aboriginal people generally receive the same benefits as non-Aboriginal people: however 'specific government programs, not additional income, have been introduced' to better target the needs of Aboriginal people who, because of geographical remoteness or disadvantage, do not have the same access to the mainstream services that other Australians enjoy. See Human Rights and Equal Opportunity Commission, *Face the Facts: Some questions and answers about refugees, migrants and Indigenous peoples in Australia* (August 2005) 30.
 22. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 214.
 23. Hands TL, 'Teaching a New Dog Old Tricks: Recognition of Aboriginal customary law in Western Australia' (2006) 6(17) *Indigenous Law Bulletin* 12–15.

Aboriginal people, as members of a distinct indigenous culture, have the right to the legal protection necessary to allow their culture to survive and flourish.

Recognition of customary law as an original part of the Australian legal system is not equivalent to being sensitive to or making allowances in the Australian legal process for the cultural differences of the various ethnic groups now making up multicultural Australia. In the post-*Mabo* era it is important to understand that legislative and community recognition of customary laws is because those laws are the laws of Aborigines and Torres Strait Islanders as the first people of this country.²⁴

This argument has both legal and moral force. Its legal force stems from Aboriginal peoples' prior possession of the land on which Australia was established and its moral force stems from the way in which this land was unjustly acquired.²⁵ The fact of Aboriginal peoples' prior possession of Australia and the existence of complex Indigenous systems of laws, traditions and customs



were deciding factors in the High Court's recognition of native title in *Mabo v Queensland [No. 2]*.²⁶ Although prior possession cannot be argued as a sole rationale for the recognition of Aboriginal customary law, it does have significant force when combined with the right to substantive equality discussed above. Importantly, the recognition by courts and governments of Indigenous rights to native title over land demonstrates that those aspects of Aboriginal customary law that have survived colonisation and continue in some form to be exercised today are capable of recognition by Australian law.²⁷

Conclusion

As outlined in Chapter Four below, the Commission has proceeded from the starting point that recognition of Aboriginal customary law must work within the framework of existing Western Australian law and also be consistent with international human rights standards.²⁸ In doing so the Commission acknowledges that to a certain extent the recognition of Aboriginal law must be subjugated to the dominant interests of the state and the international community. Some of the recommendations contained in this Report allow for a high degree of internal autonomy in Aboriginal communities.²⁹ Others seek—whether by recognition of difference or by removal of discrimination—to put Aboriginal Western Australians on a level playing field with their non-Aboriginal counterparts.³⁰ Significantly,

24. Rose A, 'Recognition on Indigenous Customary Law: The way ahead' (Speech delivered at the forum on Indigenous Customary Law, Canberra, 18 October 1995) as cited in Davis M & McGlade H, 'International Human Rights Law and the Recognition of Aboriginal Customary Law' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006).
25. Lokan A, 'From Recognition to Reconciliation: The functions of Aboriginal rights law (1999) 23 *Melbourne University Law Review* 65, 71.
26. (1992) 175 CLR 1.
27. Human Rights and Equal Opportunity Commission, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (14 May 2003) 2.
28. For example, recognition of Aboriginal customary law cannot breach the individual rights of women, the right to be free from torture, cruel, inhuman or degrading punishment or treatment or the right to free and informed consent for marriage. Each of these is a right protected under international law and recognised as such throughout the Commission's Discussion Paper and this Report.
29. For example, the Commission's recommendations for substantially self-determining community justice groups (Recommendation 17); for the declaration of discrete functional Aboriginal communities as self-governing bodies under the *Local Government (Financial Assistance) Act 1995* (Cth) (Recommendation 130); and for the reform of Aboriginal community governance mechanisms in Western Australia (Recommendation 131).
30. For example, the Commission's recommendations for compulsory cultural awareness training (Recommendations 2, 11, 12, 56 & 128); the establishment of an independent Commissioner for Indigenous Affairs in Western Australia (Recommendation 3); constitutional recognition of Aboriginal peoples as first Australians (Recommendation 6); recognition of the different circumstances of Aboriginal people living in remote communities by extending the criteria for an extraordinary drivers licence or cancellation of a licence suspension order (Recommendations 13 & 14); the evaluation of diversionary options to ensure Aboriginal people are diverted at the same rate as non-Aboriginal people (Recommendation 51); the removal of discriminatory provisions currently governing the distribution of Aboriginal intestate estates (Recommendation 65); the right to an interpreter in court proceedings (Recommendation 120); and improving local government accountability for expenditure of funds designated for Aboriginal people (Recommendation 129).

every recommendation advanced by the Commission asserts the human rights of Aboriginal Australians to be treated fairly and with due regard to Australia's international obligations.³¹

It should also be pointed out that a considerable number of the Commission's recommendations are applicable to all Western Australians – whether Aboriginal or non-Aboriginal. For example, the Commission's recommendations for improvements to the *Bail Act 1982* (WA) to permit telephone applications for bail, to take into account the financial means of a proposed surety, or to be released on bail to a responsible person will improve the interactions of financially disadvantaged people and juveniles with the criminal justice system; the recommendation that the

written burial instructions of a deceased be observed will allow everyone to stipulate during life the method of disposal of his or her bodily remains after death; the introduction of a right to an interpreter will assist all people who have English as a second language; and the recommendation to permit evidence to be given in narrative form and to upgrade special witness facilities in regional courts will assist people to give evidence in difficult circumstances. These are but a few of the many recommendations contained in this Report that will benefit all Western Australians.³² If implemented, these recommendations will assist in making the legal system in Western Australia more just and accessible and, as a consequence, will allow all Western Australians to enjoy and exercise their human rights and fundamental freedoms equally with others.



31. Australia has ratified almost 900 treaties and is considered bound by the terms of these treaties at international law. However, this does not mean that Australia must observe these treaties at home. Fortunately, the primary international human rights instruments such as the *International Covenant on Civil and Political Rights*, the *International Convention for the Elimination of all Forms of Racial Discrimination* and some provisions of the *International Covenant on Economic, Social and Cultural Rights* have been incorporated into Australian laws such as the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *Disability Discrimination Act 1992* (Cth) and are therefore binding upon Australia. The precepts of the *Universal Declaration of Human Rights*, although not officially binding, have become generally accepted as rules of customary international law; that is, rules that are accepted as binding by a majority of civilised nations. For more detailed discussion in the context of Aboriginal customary law, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 67–76.
32. Recommendations contained in this report that will benefit all Western Australians include: repeal of mandatory sentencing for burglary offences (Recommendation 8); repeal of the offence of unlawful wounding (Recommendation 25); amendments to the defence of duress (Recommendation 27), changes to bail requirements (Recommendations 29, 30, 31 and 33); more readily understandable bail forms and notices (Recommendation 35); culturally sensitive sentencing (Recommendation 36); more flexible sentencing (Recommendation 40); requirements that the accused understand the nature of a guilty plea and its consequences (Recommendation 42); amendment of prosecutorial guidelines (Recommendation 43); restrictions on the use of prior cautions in subsequent court proceedings (Recommendation 45); enhancement of diversion to juvenile justice teams for children (Recommendations 46, 47 and 48); legislative recognition of police criteria for the decision arrest a juvenile (Recommendation 49); more stringent legislative restrictions on interviewing suspects and admissibility of confessions (Recommendation 52); review of move-on laws and the Northbridge Curfew (Recommendations 54 and 55); police recording of ethnicity of victims and alleged offenders (Recommendation 57); update of the Western Australia Police website (Recommendation 58); use of physical restraints on prisoners attending funerals (Recommendation 61); improved transport arrangements for prisoners released from custody (Recommendation 64); faster and less formal proceedings for intestate estates valued at less than \$100,000 (Recommendations 68 and 71); improved means by which objection can be made to a post-mortem examination (Recommendations 75 and 76); expansion of the coronial counselling service to rural areas (Recommendation 77); legislative recognition that the burial instructions of deceased persons be observed (Recommendation 78); improved methods for dealing with burial disputes (Recommendation 79); functional recognition of non-biological primary carers of children (Recommendation 88); funding to upgrade special witness facilities in regional areas (Recommendation 109); improved access to interpreters in court proceedings (Recommendations 119, 120 and 121); legislative recognition that witness' evidence may be given in narrative form (Recommendation 124); and disallowing questions put to witnesses who are vulnerable by reason of their cultural background (Recommendation 125).

Two Separate Systems of Law?

It has been asserted that the Commission's proposals for recognition of Aboriginal customary law will create two separate legal systems in Western Australia: one for Aboriginal people and one for non-Aboriginal people.¹ Following the launch of the Discussion Paper an article in the *West Australian* speculated that:

WA may soon have one legal system for Aboriginals and another for non-Aboriginals after a five-year law reform study called for an overhaul of Aboriginal sentencing.²

This observation is incorrect. The Commission emphasised in its Discussion Paper that any recognition of Aboriginal customary law must occur 'within the existing framework of the Western Australian legal system'³ and that it did not support the establishment of a separate formal legal system for Aboriginal people to the exclusion of Australian law.⁴ Aboriginal people consulted for this reference also did not support a separate state or political system or a separate system of law.⁵ Rather, they sought the right to negotiate their relationship with the governments that represent them, to be involved in decision-making relating to their interests, and to work in partnership with governments to improve the invidious and entrenched conditions of disadvantage that they experience in this country.⁶ These are the rights of every Australian citizen.

In order to dispel any misunderstanding that the recommendations contained in this report will create a separate legal system for Aboriginal people the Commission examines a number of specific areas below.

The Commission's recommendations enable Aboriginal customary law and culture to be recognised *within* the Western Australian legal system because recognition is demanded under general principles of fairness and justice and in order to achieve substantive equality for Indigenous Western Australians.⁷

Sentencing

The Commission has recommended that the *Sentencing Act 1995 (WA)* be amended to provide that the cultural background of an offender is a relevant sentencing factor and further, that when sentencing an Aboriginal person, the court must consider any relevant and known Aboriginal customary law or cultural issues.⁸

On 26 June 2006 the federal Minister for Indigenous Affairs, Mal Brough, announced plans to provide funding to states and territories for the purpose of addressing child abuse and violence in Indigenous communities. This funding was offered on condition that the states and territories legislate to remove any reference in sentencing legislation to the cultural background of an offender and legislate to prevent any consideration of arguments that a crime was 'justified, authorised or required under customary law or cultural practice'.⁹ This announcement occurred in the wake of numerous media reports about the extent of sexual abuse and violence against children and women in Aboriginal communities. The relevance of Aboriginal customary law and culture to these issues is discussed separately

1. Editorial, 'Race-based Law Reform Ideas are Fraught with Hazards', *The West Australian*, 8 February 2006, 16. The Commission received only one submission arguing that its proposals would create separate legal systems, see Marsh B, Submission No. 5 (8 February 2006).
2. Spencer B, 'Courts to Recognise Tribal Punishment', *The West Australian*, 7 February 2006, 1.
3. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 64.
4. The Law Council of Australia expressly supported this conclusion: see Law Council of Australia, Submission No. 41 (29 May 2006) 7.
5. This was made clear by the Commission in its Discussion Paper: LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 55 & 421. Moreover, in the face of the geographical dispersion and cultural diversity of Australian Aboriginal peoples, Indigenous leaders have recognised that while rights to land and resources are important, secession as an expression of self-determination is somewhat unrealistic in Australia. Dr William Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002 (2002)* ch 2, <<http://www.hreoc.gov.au/social%5Fjustice/sjreport%5F02/chapter2.html#2.3>>.
6. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 421.
7. For a detailed discussion of the principle of equality, see above pp 8–9.
8. See Recommendations 36, below p 173; Recommendation 38, below pp 183. These recommendations are also applicable to the *Young Offenders Act 1994 (WA)*.
9. Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities, *Safer Kids, Safer Communities* (26 June 2006) <http://www.atsia.gov.au/media/media06/4606-_attach.aspx>. It has also been stated that the Commonwealth will remove the reference to the cultural background of an offender under s 16A of the *Crimes Act 1914 (Cth)*. The Commission notes that this approach is contrary to the recommendations contained in the recently published Australian Law Reform Commission (ALRC) report that deals with the sentencing of federal offenders: see ALRC, *Same Crime, Same Time: Sentencing of federal offenders*, Final Report No. 103 (June 2006) [29.45] and Recommendation 29-1.

below. One justification for the federal government's approach is the view that there should be one law for all. Mal Brough reportedly stated that the consideration of Aboriginal customary law during sentencing means 'one group of Australians are treated unequally to everybody else'.¹⁰

The Commission strongly disagrees with this statement. As argued by the Law Council of Australia, preventing courts from taking into account Aboriginal customary law will not achieve equality: it will further disadvantage Aboriginal people.¹¹

General sentencing principles

In order to fully appreciate the nature and effect of the Commission's recommendations in relation to sentencing it is necessary to understand general sentencing law and principles. Sentencing occurs at the stage of the criminal justice process when an offender has been convicted of a crime. Therefore, the offender has either been found by the court to be criminally responsible or admitted to being criminally responsible for the relevant offence.¹² At the end of the sentencing process the court is required to impose a penalty.

In general terms, when determining the appropriate penalty, a sentencing court is required to take into account the statutory penalty for the offence, various sentencing principles and any relevant factors.¹³ Included among the relevant factors are the personal circumstances and background of the offender. Every offender is different and therefore in any given case different matters may be relevant to the determination of the appropriate sentence. Factors that may be connected to an offender's personal circumstances and background include loss of employment, mental or physical health problems, family situation, prior sexual or physical abuse, drug addiction, loss of reputation and financial position. The list is potentially endless. In some cases these factors may explain why the offence took place or they may be relevant to assist the court in determining the most appropriate penalty.

The Australian Law Reform Commission (ALRC) has recently reaffirmed the importance of 'individualised justice' in its report dealing with the sentencing of federal offenders:

The principle of individualised justice requires the court to impose a sentence that is just and appropriate in all the circumstances of the particular case. Courts have consistently recognised the importance of this sentencing principle. For example, in *Kable v Director of Public Prosecutions*, Mahoney ACJ stated that 'if justice is not individual, it is nothing'. Individualised justice can be attained only if a judicial officer possesses a broad sentencing discretion that enables him or her to consider and balance multiple facts and circumstances when sentencing an offender.¹⁴

The ALRC recommended that federal legislation should include as one of the 'fundamental principles' of sentencing that 'a sentence should take into consideration all circumstances of the individual case, in so far as they are relevant and known to the court'.¹⁵

The relevance of Aboriginal customary law and culture

The mere fact that an offender belongs to a particular ethnic group or race is *not* a relevant sentencing factor. As stated by the Commission in its Discussion Paper, 'an Aboriginal person cannot be sentenced more leniently or more harshly just because he or she is Aboriginal'.¹⁶ For the purpose of comparison, a sentencing court cannot sentence an offender differently just because the offender is female. However, there are some facts or circumstances that may arise because an offender is Aboriginal in the same way that there are facts that arise because an offender is female.¹⁷ For example, courts may legitimately take into account the fact that a female offender is pregnant or breastfeeding.

For a number of years courts have taken into account relevant Aboriginal customary law or cultural considerations during sentencing.¹⁸ Customary law or other cultural issues may be relevant to explain why

10. Karvelas P, 'Excuse of Tribal Law to be Axed', *The Australian*, 23 May 2006, 1.

11. Law Council of Australia, *Recognition of Cultural Factors in Sentencing*, Submission to Council of Australian Governments (10 July 2006) 16–17.

12. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 202.

13. For a more detailed discussion of sentencing principles, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 202; ALRC, *Same Crime, Same Time: Sentencing of federal offenders*, Final Report No. 103 (June 2006) Chapters 5 & 6.

14. ALRC, *ibid* [5.21].

15. *Ibid* [5.28], Recommendation 5-1.

16. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 203.

17. The ALRC observed that the circumstances of a female offender may well be different to those of a male offender: see ALRC, *Same Crime, Same Time: Sentencing of federal offenders*, Final Report No. 103 (June 2006) [29.17].

18. For a detailed discussion of the types of factors that have been taken into account see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 204–208.

the offender committed the offence, to mitigate punishment because the offender has already been punished under customary law, or to provide information to the court about the best way to rehabilitate an offender. Non-Aboriginal offenders are equally permitted to explain why they committed the offence, to explain that they have already suffered some form of punishment,¹⁹ or to provide relevant information about their prospects of rehabilitation.

The Commission is of the view that permitting Aboriginal people to have reference to relevant customary law or other cultural issues is necessary in order to achieve justice. This conclusion is best demonstrated by a practical example. Assume that a non-Aboriginal man has been charged with driving under suspension. This offender informs the court that he drove in order to take his sick child to hospital. This circumstance would be taken into account when deciding the appropriate penalty. In comparison, assume that an Aboriginal man who lives in a remote area drove while under suspension in order to attend a funeral. The funeral was for a woman who was considered to be his 'mother' under kinship structures. From a non-Aboriginal perspective the deceased would be seen as a more distant relative. Failure to attend this funeral could constitute a violation of the man's customary law and cultural obligations. If customary law and cultural issues could not be taken into account during sentencing then this Aboriginal accused would only be able to explain that he drove because he had to go to a funeral of a relative. He would not be able to rely on the significance of attending the funeral under customary law or the consequences of not attending. Therefore, the non-Aboriginal offender is able to put forward his reason for committing an offence but the Aboriginal offender is restricted to a diluted version of the true circumstances.



Permitting Aboriginal people to present evidence of any relevant Aboriginal customary law or other cultural factor does not discriminate against non-Aboriginal people because non-Aboriginal people are also entitled to present their full social, religious and family background during sentencing proceedings. As stated recently by Senator Chris Evans:

All Australians, when convicted of a crime, are entitled to make a plea on the basis of mitigating factors to be considered in sentencing. To remove reference to Aboriginal customary law as a factor to be considered in mitigation would simply limit [sic] Indigenous Australians the rights that other Australians enjoy.²⁰

It has been observed that the rule that all people should be treated equally before the law does not mean that all people, irrespective of the individual circumstances of the case, must receive the same punishment.²¹ The Commission is of the view that any legislative changes preventing Aboriginal people from relying on cultural or customary law factors could be discriminatory against Aboriginal people and would not provide Aboriginal people will 'equal' treatment before the law.²²

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19. See for example *R v Daezt; R v Wilson* [2003] NSWCCA 216, [62] (James J; Tobias JA and Hulme J concurring) where it was stated that 'a sentencing court, in determining what sentence it should impose on an offender, can properly take into account that the offender has already suffered some serious loss or detriment as a result of having committed the offence. This is so, even where the detriment the offender has suffered has taken the form of extra-curial punishment by private persons exacting retribution or revenge for the commission of the offence. In sentencing the offender the court takes into account what extra-curial punishment the offender has suffered, because the court is required to take into account all material facts and is required to ensure that the punishment the offender receives is what in all the circumstances is an appropriate punishment and not an excessive punishment'.
20. Evans C, 'Time to Bust Brough's Myths' (Address to the Canberra South Branch of the Australian Labor Party, 19 June 2006) 5.
21. Chesterman J, 'Balancing Civil Rights and Indigenous Rights: Is there a problem?' (2002) 8 *Australian Journal of Human Rights* 125, 142. As Chesterman points out, mandatory sentencing regimes in fact challenge the rule of law because they do not allow individual differences to be taken into account.
22. This view is supported by the Law Council of Australia: see The Law Council of Australia, Submission No. 41 (29 May 2006) 20. The Commission understands that the Human Rights and Equal Opportunity Commission will monitor the Commonwealth's proposal and any changes made to determine if they breach the *Racial Discrimination Act 1975* (Cth). See 'Rights Body Monitors Indigenous Package', *ABC News Online*, 27 June 2006, <<http://www.abc.net.au/news/newsitems/200606/s1672761.htm>>.

Aboriginal Courts

The Commission has recommended that Aboriginal courts be established in Western Australia.²³ The various models of Aboriginal courts currently operating in Australia involve Aboriginal Elders or other respected Aboriginal persons in the sentencing process. At first glance the establishment of Aboriginal courts may appear to create two separate criminal justice systems. However, in reality this is not the case because Aboriginal courts apply the same laws and sentencing principles as any other court.²⁴

Aboriginal courts do not impose customary law punishments

In Western Australia an adult Aboriginal offender who is being dealt with by an Aboriginal court will be subject to the *Sentencing Act 1995* (WA) and a juvenile Aboriginal offender will be subject to the *Young Offenders Act 1994* (WA). Although an Aboriginal court may take into account customary law or other cultural issues (in the same way that other courts are able to do so) an Aboriginal court cannot impose customary law punishments. The penalty imposed by an Aboriginal court can only be a sentence that is available under the relevant legislation.²⁵

Aboriginal courts are not controlled by Aboriginal Elders

The essential difference between an Aboriginal court and any other court is the involvement of Aboriginal Elders and other respected Aboriginal persons. The role of Elders is primarily to advise the court and in some cases Elders may speak to the accused (about the consequences of their behaviour) in a culturally appropriate manner. In some cases Elders may advise the court about the most appropriate penalty but Aboriginal courts are still presided over by a judicial officer and it is the judicial officer who has the final say about what sentence is imposed.²⁶ Further, both the

defence and the prosecution have the same right to appeal against the sentence as in any other sentencing court.

As the Commission observed in its Discussion Paper, many Aboriginal people are alienated from the criminal justice system. The reasons for this alienation include language and communication barriers;²⁷ distrust resulting from past mistreatment and discrimination by criminal justice agencies;²⁸ and the lack of Aboriginal people working in the criminal justice system.²⁹ Recently, a magistrate in Queensland observed that the Murri Aboriginal Court in Townsville

does not provide any benefit to an indigenous defendant over a white defendant. It provides many of the benefits that non-indigenous people have had over a period of time and recognises that the indigenous defendant, in many respects, deserves more time and input from their own people.³⁰

Aboriginal courts have the potential to reduce the barriers between Aboriginal people and criminal justice agencies. The involvement of Aboriginal people in the process in addition to changes to court procedures (such as the language used and the physical layout of the court) creates a more meaningful and effective court process.

Criminal Responsibility

In its Discussion Paper the Commission considered whether there should be a separate general defence of customary law for Aboriginal people. Such a defence could relieve an Aboriginal person from criminal responsibility if it could be shown that the conduct giving rise to the offence was required or permitted under customary law. The Commission rejected the introduction of a general customary law defence because it would apply to all offences. The Commission concluded that a general customary law defence would create two different notions of criminal responsibility and would not provide equal protection under the law for Aboriginal people.³¹

23. See Recommendation 24, below p 136.

24. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 155.

25. For example, under s 39 of the *Sentencing Act 1995* (WA) the penalty could be a conditional release order, fine, community based order, intensive supervision order, suspended imprisonment, conditional suspended imprisonment or imprisonment.

26. The Commission rejected the introduction of Aboriginal-controlled courts where Aboriginal Elders could decide the punishment: see discussion under 'Aboriginal-Controlled Courts', below p 124.

27. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 99.

28. *Ibid* 94 & 99.

29. *Ibid* 104.

30. Opening of the Murri Court at Townsville, Transcript of Proceedings, 2 March 2006, 3.

31. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 158–59. The Commission also concluded that there should not be a partial defence of customary law applicable to homicide offences: see discussion under 'Criminal Responsibility – Partial defence to homicide', below p 138. The Commission has concluded that specific defences may be appropriate in certain circumstances: see for example, exemptions from customary harvesting and a specific defence for trespass, below p 139.

Road Traffic Offences

The Commission has recommended that the criteria for an application for an extraordinary drivers licence and for an application to cancel a licence suspension order be extended to take into account customary law and cultural obligations.³² The Commission believes that these recommendations are justified because the existing legislative criteria do not reflect the circumstances of many Aboriginal people in this state. In general terms, a person who is disqualified from driving can apply for an extraordinary licence on the grounds that it is necessary for the applicant or a member of the applicant's family to attend to medical treatment or employment. As mentioned earlier, some Aboriginal people (especially those living in remote areas where there are no other feasible transport options) may need to drive for the purpose of attending a funeral or other cultural ceremonies. Kinship obligations may also require Aboriginal people to drive other people for these purposes.³³ Rather than creating a separate defence for Aboriginal people who drive without a licence,³⁴ the Commission has concluded that it is more appropriate to extend the general provisions in order that they are reflective of the circumstances of Aboriginal people and not just the circumstances of non-Aboriginal people. This is consistent with the



principle of substantive equality: to recognise relevant differences in order to provide equal treatment.

Community Justice Groups

The Commission has recommended the establishment of community justice groups.³⁵ One possible role for community justice groups in a discrete Aboriginal community³⁶ would be to set community rules and community sanctions. In its submission the Office of the Director of Public Prosecutions (DPP) argued that enabling community justice groups to set community rules and sanctions would create 'two coexistent legitimate systems of criminal law'.³⁷ The Commission rejects this argument: community rules and sanctions are not laws. There is only one system of criminal law in Western Australia and the Commission's recommendations in relation to community justice groups do not provide for separate rules or laws that operate to the exclusion of Western Australian criminal law. Under the Commission's recommendations, relevant criminal justice agencies (such as the police, the DPP and the courts) will have the same ability to deal with breaches of the criminal law as they do now.

Conclusion

The Commission strongly rejects the argument that its recommendations for recognition of Aboriginal customary law and culture within the Western Australian legal system will create two separate systems of law. This argument is misconceived because it is based on the assumption that the principle of equality before the law requires everyone to be treated in exactly the same manner. As has been explained above, that is not the way that the legal system operates; it permits, at appropriate stages and within the strict framework of the law, the consideration of individual circumstances and matters relevant to the commission of an offence. If the legal system was to ignore individual circumstances, injustice for many more Australians would be the result.

32. See Recommendations 13 & 14, below pp 95–96.

33. For a discussion of Aboriginal kinship, see 'The role of kinship in Aboriginal society', Chapter Four, below p 66.

34. This was suggested by the Aboriginal Legal Service in their submission: see Aboriginal Legal Service, Submission No. 35 (12 May 2006) 10. For further discussion, see below p 95.

35. See Recommendation 17, below pp 112–113.

36. That is, an Aboriginal community with identifiable physical boundaries.

37. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 3.

Family Violence and Sexual Abuse

In May 2006 Nanette Rogers, a Northern Territory prosecutor, publicised the details of a number of cases involving sexual abuse against children in Indigenous communities in central Australia. The shocking nature of these cases, in particular the age of the victims, sparked a frenzied media and political debate about the link between Aboriginal customary law and sexual and violent offending in Aboriginal communities.¹ As an example of the theme in many newspaper articles, it was reported in *The Australian* that 'Aboriginal culture was to blame for endemic levels of sexual violence against children in central Australia'.²

Comments made in the media and by politicians have revealed a number of misconceptions about the relationship between Aboriginal customary law and violence and sexual abuse. These misconceptions include: that Aboriginal customary law condones or authorises sexual abuse or violence; that Aboriginal male Elders and other leaders are the main perpetrators of abuse; that courts allow Aboriginal men to use customary law as an excuse for violent or sexual offences; that customary law is the principal reason for under-reporting of offences against Aboriginal victims; and that Aboriginal men and women do not do enough about this abuse and are therefore complicit in it because of their silence.

Because of the intense media and political attention, the Commission considers that it is essential here to address some of the misinformation surrounding the relationship between Aboriginal customary law and issues of violence and sexual abuse. The federal government's response to this debate has made clarification of these misconceptions more urgent and important.

The Federal Government's Response

It is apparent from the response by the federal Minister for Indigenous Affairs that he subscribes to the view that family violence and sexual abuse in Aboriginal communities can be blamed on Aboriginal customary law.³ During the media debate, Mal Brough revealed the Commonwealth government's proposal to provide funding to states and territories for Indigenous communities on condition that state and territory laws were amended to prevent sentencing courts from considering Aboriginal customary law. He stated that:

Aboriginal offenders would no longer be able to 'hide behind' customary law to get reduced sentences for violent crimes under a proposal to crack down on rampant physical and sexual abuse in indigenous communities.⁴

The federal Minister also convened a national summit to deal with the crisis. At this summit there was consensus among Australian leaders that 'customary law in no way justifies, authorises or requires violence or sexual abuse against women and children'.⁵ At a meeting of the Council of Australian Governments (COAG) on 14 July 2006 all state and territory governments agreed to ensure, if necessary by legislative amendment, that Aboriginal customary law or cultural practices cannot be used to excuse, justify, authorise, require or lessen the seriousness of violence or sexual abuse.⁶

Bearing in mind the response of the Commonwealth government and given the recent focus on the level of violence and abuse in Aboriginal communities, some

1. Jones T, 'Crown Prosecutor Speaks Out About Abuse in Central Australia' *Lateline*, Transcript of Interview, 15 May 2006.
2. Kearney S & Wilson A, 'Raping Children Part of Men's Business', *The Australian*, 16 May 2006.
3. In contrast, the Western Australian Attorney General, Jim McGinty, has stated that 'Aboriginal customary law has never been used to excuse or condone serious criminal offending such as assaults on women and children ... It is simply not part of Aboriginal law nor is it part of European law': see 'Brough "Desperate" on Indigenous Issues: McGinty' *National Indigenous Times*, 5 July 2006.
4. Karvelas P, 'Excuse of Tribal Law to be Axed', *The Australian*, 23 May 2006, 1.
5. Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities, *Safer Kids, Safer Communities* (26 June 2006) see <http://www.atsia.gov.au/media/media06/4606_attach.aspx>.
6. COAG meeting, 14 July 2006: see <<http://www.coag.gov.au/meetings/140706/index.htm#indigenous>>.

The Commission strongly supports measures to reduce the unacceptable level of violence and abuse in Aboriginal communities.

may consider that the extent of the problem has only just been discovered.⁷ It has been well documented that Aboriginal women and children are victims of violence and sexual abuse at a much higher rate than non-Aboriginal women and children.⁸ In its Discussion Paper the Commission observed that Aboriginal women are 45 times more likely than non-Aboriginal women to be the victim of family violence committed by a spouse or partner.⁹ In 2002 the Gordon Inquiry in Western Australia concluded that the 'statistics paint a frightening picture of what could only be termed an "epidemic" of family violence and child abuse in Aboriginal communities'.¹⁰ Since at least the 1980s there have been numerous reports about the extent, causes and possible solutions to violence and sexual abuse in Aboriginal communities.¹¹

When commenting on the federal Minister's response of calling a national summit, Senator Chris Evans revealed there was a national 'crisis summit' in 2003 and at this summit \$37 million was earmarked for Aboriginal family violence programs.¹² As recently as 2004 COAG stated that all 'governments agree that preventing family violence and child abuse in indigenous families is a priority for action that requires a national effort'.¹³ The *National Framework on Indigenous Family Violence and Child Protection* was launched and underlined the need for *partnerships* between governments and Aboriginal communities to achieve its objectives.¹⁴

The Commission strongly supports measures to reduce the unacceptable level of violence and abuse in Aboriginal communities. However, the Commission's approach to this issue differs from that recently expressed by the federal government and the COAG resolution. It is the Commission's belief that permitting the criminal justice system to have regard to relevant aspects of Aboriginal customary law has the potential to reduce rates of violent and sexual offences.

Customary Law Does Not Condone Family Violence or Sexual Abuse

In its Discussion Paper, the Commission concluded that Aboriginal customary law should be viewed in its broadest sense and should not be limited to only those traditional laws that have remained unaltered since colonisation.¹⁵ Aboriginal customary law governs all aspects of Aboriginal life and continues to evolve and adapt to changing circumstances. While evidence concerning sexual assault and violence in traditional Aboriginal societies may shed some light on the acceptability or otherwise of sexual abuse and violence under Aboriginal customary law, the Commission considers that it is far more important to take into account customary law and culture in its contemporary context.

7. The *National Indigenous Times* reported that although it was implied that the issues raised by Dr Nanette Rogers were 'new and shocking' these issues are not new and 'Aboriginal people have been screaming about family violence for decades. They have been ignored': see 'Aboriginal Culture on Trial', *National Indigenous Times*, 1 June 2006.
8. See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001–2006* (June 2006) 6; Keel M, *Family Violence and Sexual Assault in Indigenous Communities: Walking the talk*, Australian Institute of Family Studies, Briefing Paper No. 4 (2004) 2 & 5; Stanley J, Tomison A & Pocock J, 'Child Abuse and Neglect in Indigenous Australian Communities', National Child Protection Clearinghouse, Issues Paper No. 19 (2003), 1; Fitzgerald T, *Cape York Justice Study Report* (November 2001) 88.
9. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 349.
10. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (July 2002) xxii. For a discussion of the findings and recommendations of the Gordon Inquiry and the governments response, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 351–52 and discussion under 'Addressing Family Violence and Sexual Abuse in Aboriginal Communities – Ongoing monitoring and evaluation of initiatives', Chapter Seven, below p 292.
11. Evans C, 'Time to Bust Brough's Myths' (Address to the Canberra South Branch of the Australian Labor Party, 19 June 2006) 1.
12. Evans, *ibid*. According to Senator Evans only five million dollars of that money has been spent. It has also been reported that the federal Department of Family and Community Services and Indigenous Affairs have not provided any funding for programs that 'target family violence on the ground' since 2004: see 'Aboriginal Culture on Trial', *National Indigenous Times*, 1 June 2006.
13. COAG communiqué, 25 June 2004.
14. *Ibid*.
15. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 49–54. See also the discussion under 'What Constitutes Customary Law', Chapter Four', below pp 64–65.

The historical position

The Gordon Inquiry commissioned an independent literature review to determine the extent, if any, that customary law excused or condoned child abuse or family violence in traditional Aboriginal societies. The review concluded that family violence and child abuse is not traditionally sanctioned in Aboriginal communities. Rather, examples of customary law sanctioned violence were limited to punishment which is 'governed by strict rules and regulations'.¹⁶ Similarly, Memmott et al have observed that:

Prior to colonial contact, most fighting was structured in traditional Aboriginal societies and occurred at special places. Fighting behaviour was controlled by elders and senior adults, and was carried out according to social rules in response to specified offences.¹⁷

The Commission has discussed in detail in its Discussion Paper and in this Report the nature and extent of traditional physical punishments.¹⁸ While some traditional punishments may be characterised as violent, it is necessary in the context of the current debate to distinguish family violence and sexual abuse from traditional punishments.¹⁹

In relation to the traditional practice of promised brides, the Commission observed in its Discussion Paper that there are few reported instances of this practice continuing in Western Australia.²⁰ The Gordon Inquiry observed that in the past Aboriginal girls may be promised at a young age but that sexual intercourse was not permitted until the girl had reached puberty.²¹ The Commission has also been informed that customary law 'actively prohibits adult men from having any sexual

contact with pre-pubescent girls'.²² In addition, it has been reported that under Aboriginal law if a man engaged in sexual relations with a young girl who was not his promised wife then he would be punished severely.²³ At the same time the Commission acknowledges that there is anthropological research suggesting that in some traditional Aboriginal societies sexual conduct with young people during initiation may have taken place.²⁴

When considering traditional practices it is important to understand that childhood in traditional Aboriginal societies ended at puberty or initiation.²⁵ Thus, the term 'child' from an Aboriginal perspective may be used to refer to a person who has not yet reached puberty or undergone initiation.²⁶ In the context of promised brides in traditional Aboriginal societies, a girl was considered to be a woman after puberty. It has been observed that the system of promised brides is

not a system aimed at providing young women for the sexual gratification of old men. It is a very complex system that has many practical aspects. The obvious ones are to prevent 'inbreeding', to provide a system of custodianship to land, information and ceremonies and to ensure that women and children are cared for by a mature man who can protect and provide for them. It is one of the most common systems of social organisation in the world.²⁷

While acknowledging that sexual relationships with post-pubescent girls was permitted under traditional law as part of the promised bride system, the Commission is not aware of any anthropological evidence suggesting that sexual abuse of very young children and infants was ever condoned under traditional law. To the contrary, it has been stated that sexual assault against

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16. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (2002) 70.
 17. Memmott P, Stacey R, Chambers Commission and Keys C, *Violence in Indigenous Communities* (Canberra: Crime Prevention Branch Commonwealth Attorney General, 2001) 23. The Australian Law Reform Commission also observed that under Aboriginal customary law if there was violence by a husband against his wife, her family may intervene to protect her, see ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [318].
 18. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 163–172, and see discussion under 'Consent – Traditional Aboriginal punishments', Chapter Five, below pp 141–43.
 19. For further discussion about traditional punishment, see below p 28.
 20. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 360.
 21. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (2002) 69.
 22. Stewart O'Connell, Submission No. 54 (10 July 2006) 2.
 23. Including being speared or put to death: Sex Discrimination Commissioner of the Human Rights and Equal Opportunity Commission, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (May 2003) [4.3].
 24. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal Traditional Life Past and Present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 181. It has recently been reported that anthropological studies indicate that initiation practices may involve sexual abuse of male children: see also Pearson C, 'Law of Diminishing Abuse', *The Australian*, 27 May 2006. For further discussion about initiation practices under customary law, see 'Criminal Responsibility – Traditional initiation practices', Chapter Five, below pp 143–45.
 25. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 187.
 26. For example, during the Commission's return consultation visit to Geraldton on 7 March 2006 it was told that even at 60 years of age an Aboriginal man could be referred to as a 'boy' if he had not undergone initiation.
 27. Stewart O'Connell, Submission No. 54 (10 July 2006) 3.

children was virtually unheard of in traditional Aboriginal society.²⁸

In relation to sexual assault generally there has been reference in anthropological studies to sexual behaviour in traditional Aboriginal societies that would today be considered sexual assault.²⁹ But it has also been observed that there were strict rules governing sexual relationships, in particular, the prohibition of sexual relations with particular relatives or kin.³⁰ In a recent letter to the editor of *The Australian*, a 70-year-old Aboriginal woman from the Western Desert explained that:

Sexual relationships were strictly regulated and could occur only in the context of prescribed kinship and generational relations. There never was a sexual free-for-all whereby initiated men could abuse or molest women, much less children and infants.³¹

It is also apparent that, under Aboriginal customary law, sanctions were imposed for certain forms of sexual abuse and violence. The Australian Law Reform Commission has observed that under Aboriginal customary law if there was violence by a husband against his wife, her family may intervene to protect her.³² Anthropological accounts also reveal that in traditional societies a person would be punished for hurting a child and that it was rare for a child to be physically abused.³³ It has been reported that accounts from

traditional Aboriginal women indicate that incestuous sexual assaults were contrary to customary law and that a man could be 'put to death for rape or speared in the thigh'.³⁴ Similarly, in her background paper for this reference, Kathryn Trees was told by Aboriginal people in Roebourne that, in the past, if an Aboriginal man had abused a child he would have been speared by the Elders.³⁵

The contemporary position

Numerous studies have concluded that family violence and sexual abuse within Aboriginal communities is caused by a multitude of factors. These factors include dispossession; an accumulation of inter-generational violence and trauma; the effects of past policies removing Aboriginal children from their families; institutionalisation; poor self-esteem resulting from racism and discrimination; social and economic disadvantages, such as overcrowded housing, unemployment, poor health, lack of education and poverty; alcohol and substance abuse; the influx of pornography into remote Indigenous communities; the loss of traditional status for Aboriginal men; and the breakdown of customary law and traditional authority structures.³⁶ The need to address these underlying factors has been recognised by all Australian governments at a recent COAG meeting.³⁷

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28. Stanley J, Kovacs K, Tomison A & Cripps K, 'Child Abuse and Family Violence in Aboriginal Communities – Exploring Child Sexual Abuse in Western Australia' (Paper prepared by the National Child Protection Clearinghouse for the Western Australian Government Inquiry into Responses by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities, May 2002) 31.
 29. See Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal Traditional Life Past and Present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 189–90 where it was noted that there was a practice of 'wife swapping' which technically did not require the consent of the wife but that in practice the issue of consent was not always significant because the wife would have been brought up to expect this to happen and to consider that it was her duty.
 30. Berndt & Berndt, *ibid* 336–37; Elkin AP, *The Australian Aborigines*, (Sydney: Angus and Robertson, 5th ed., 1976) 144.
 31. Mona Ngitji Ngitji Tur, Letter to the Editor, 'I'm a Western Desert Woman and I Want to be Heard', *The Australian*, 20–21 May 2006, 16.
 32. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [318]. Diane Bell has observed that under Aboriginal customary law there were 'customary punishments that women could apply to violent men': see Bell D, 'Intraracial Rape Revisited: On forging a feminist future beyond factions and frightening politics' (1991) 14 *Women's Studies International Forum* 385, 389.
 33. Queensland Government, Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (March 2000) [4.8.3].
 34. Lloyd J & Rogers N, 'Crossing the Last Frontier: Problems facing Aboriginal women victims of rape in central Australia' in Eastaer P (ed.), *Without Consent: Confronting adult sexual violence*, Australian Institute of Criminology Conference Proceedings No. 20 (1993)150–51. Similarly, during the recent interview Dr Nanette Rogers referred to a case where a young Aboriginal girl had been sexually abused. The victim's grandmother told the police that under traditional Aboriginal law the perpetrator would have been punished: Jones T, 'Crown Prosecutor Speaks Out About Abuse in Central Australia' *Lateline*, Transcript of Interview, 15 May 2006.
 35. Trees K, 'Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – A Case Study' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 213, 225.
 36. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 350–51; Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal Communities* (2002) 56 and Chapter 4. See also, for a selection of reports and articles that deal with one or more of these underlying causes, Stanley J, Tomison A & Pocock J, 'Child Abuse and Neglect in Indigenous Australian Communities', National Child Protection Clearinghouse, Issues Paper No. 19 (2003) 5, 12, 13, 14; Carney L, 'Indigenous Family Violence – Australia's Business' (2004) 6(1) *Indigenous Law Bulletin* 15. Atkinson J, 'Violence Against Aboriginal Women: Reconstitution of community law – the way forward' (2001) 5(11) *Indigenous Law Bulletin* 19, 21; Keel M, *Family Violence and Sexual Assault in Indigenous Communities: Walking the talk*, Australian Institute of Family Studies, Briefing Paper No. 4 (2004), 7; Blagg H, *Crisis Intervention in Aboriginal Family Violence: Summary Report* (Perth: Domestic Violence Prevention Unit, 2000) 5–6; Memmott P, Stacey R, Chambers Commission & Keys C, *Violence in Indigenous Communities* (Canberra: Crime Prevention Branch Commonwealth Attorney General, 2001) 10–31; Fitzgerald T, *Cape York Justice Study Report* (November 2001) 88–105; Queensland Government, Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (March 2000) Chapter 2 and [3.5].
 37. COAG meeting, 14 July 2006, <<http://www.coag.gov.au/meetings/140706/index.htm#indigenous>>.

It is abundantly clear that the majority of these causes are not linked to Aboriginal customary law. The relevance of Aboriginal customary law is not that it contributes to the abuse, but rather that it is the destruction of Aboriginal customary law and the breakdown of traditional forms of maintaining order and control that has impacted upon the extent of violence and sexual abuse in Aboriginal communities.³⁸ It has been observed that in response to the recent public debate Aboriginal women and men have clearly condemned any suggestion that violence, child abuse and sexual assault are part of Indigenous culture.³⁹ The Aboriginal and Torres Strait Islander Social Justice Commissioner has emphatically stated that

Aboriginal customary law does not condone family violence and abuse, and cannot be relied upon to excuse such behaviour. Perpetrators of violence and abuse do not respect customary law and are not behaving in accordance with it.⁴⁰

Following consultations with Aboriginal people in Western Australia and extensive research, the Commission found that family violence and sexual abuse cannot be condoned or excused by reference to customary law.⁴¹ Importantly, the Commission emphasised that there has never been a customary law or cultural defence (that would exonerate an accused from criminal responsibility) in Western Australia.⁴²

Responding to the Commission's Discussion Paper, the Office of the Director of Public Prosecutions (DPP) argued that because there is no evidence of any case where traditional Aboriginal law has responded to sexual abuse, customary law should not be recognised and

relied upon as part of the solution to family violence and sexual abuse.⁴³ The Commission is not aware of any case in contemporary Aboriginal society where the perpetrator of sexual abuse has been punished under customary law but this does not mean that such cases do not exist.⁴⁴ It should also be acknowledged that traditional Aboriginal law may not have developed adequate responses to family violence and sexual abuse because this type of behaviour did not occur or did not occur to the same extent in traditional Aboriginal societies as it does now.⁴⁵ The Sex Discrimination Commissioner of the Human Rights and Equal Opportunity Commission has argued that it is necessary to strengthen both Aboriginal customary law and mainstream responses to family violence.⁴⁶ The Commission agrees: Aboriginal people should be encouraged to develop cultural or customary law responses to family violence and sexual abuse. At the same time, Aboriginal victims of family violence and sexual abuse should have full access to mainstream criminal justice responses.

Aboriginal Elders Should Not Be Stereotyped as Offenders

It has been suggested during the recent media debate that child sexual abuse in Aboriginal communities is largely committed by Aboriginal male Elders and other male leaders.⁴⁷ In response to this Senator Evans has stated that:

Indigenous women's voices have been prominent in the recent debate but we should also be careful not to forget about Indigenous men: most Aboriginal men

38. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001–2006* (June 2006) 109. See also Evans C, 'Time to Bust Brough's Myths' (Address to the Canberra South Branch, Australian Labor Party, 19 June 2006) 4.

39. Evans, *ibid* 1.

40. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001–2006* (June 2006) 10. A similar statement was made by Professor Michael Dodson in a speech in 2003: see Dodson M, 'Violence Dysfunction Aboriginality' (National Press Club, 11 June 2003) 2. See also Sex Discrimination Commissioner of the Human Rights and Equal Opportunity Commission, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal customary law in the Northern Territory* (May 2003) [4.2.]

41. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 356–57 & 359.

42. *Ibid* 158 & 218.

43. The Office of the Director of Public Prosecutions, Submission No. 40B (13 July 2006) 5. The Western Australia Police have also suggested to the Commission that customary law does not protect women and children from violence and sexual abuse: Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 3.

44. For examples of customary law responses to sexual assault and violence in traditional Aboriginal societies, see discussion under 'The historical position', above pp 20–21.

45. Sex Discrimination Commissioner of the Human Rights and Equal Opportunity Commission, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (May 2003) [4.2.]

46. *Ibid* [6]. In its Discussion Paper the Commission invited submissions on the possibility of introducing non-violent customary law strategies to address family violence: see Invitation to Submit 15, LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 361.

47. Sproull R, 'Local Leaders Accused of Abuse', *The Australian*, 18 May 2006, 4. Despite the heading of this article the story goes on to say that the alleged perpetrators of the abuse 'include local leaders'.

abhor violence and child abuse. It is important not to stereotype Indigenous men as perpetrators.⁴⁸

Without reference to any statistical or other evidence, the DPP has claimed that it is often Aboriginal Elders and leaders who perpetrate the abuse.⁴⁹ The Commission does not accept that this argument is valid. During the Commission's consultations with Aboriginal people across the state there were only a few observations by Aboriginal people that Elders or leaders were sometimes responsible for sexual abuse.⁵⁰ In the report *Violence in Indigenous Communities* Memmott et al referred to research that suggested sexual abuse of young children in some remote communities was being largely committed by adolescent boys.⁵¹ Of course, just as there are examples of 'respected' members of the non-Aboriginal community being responsible for family violence and sexual abuse there will also be examples where Elders or leaders are responsible for this type of offending.

The Aboriginal and Torres Strait Islander Social Justice Commissioner has observed that the recent public debate is 'demonising Indigenous men and typecasting us all as violent and abusive and as perpetrators of abuse'.⁵² He also argued that stereotyping Aboriginal men as the perpetrators of abuse may actually increase their sense of disempowerment and lack of self-esteem.⁵³ These are matters that may negatively impact on Aboriginal offending and will further undermine efforts to enhance appropriate governance measures in Aboriginal communities. Given the negative effect that these stereotypes may have (and in the absence of any concrete evidence to support them) the Commission warns against assuming that the perpetrators of abuse are primarily Aboriginal Elders and leaders.

Customary Law as an Excuse for Violence and Abuse

It has been suggested during the recent debate that courts allow Aboriginal men to rely on customary law to excuse family violence and sexual abuse. The Northern Territory case *R v GJ*⁵⁴ has been repeatedly relied on to 'prove' this claim. In *R v GJ* a 55-year-old Aboriginal male Elder pleaded guilty to an offence of having sexual intercourse with a child and an offence of aggravated assault. The accused contended that he was entitled to have sex with the 14-year-old child because she was his promised wife and similarly that he was entitled to assault her as punishment for allegedly having sex with a young boy in the community.⁵⁵ The inflammatory claims in the media that this man was charged with rape are not correct.⁵⁶ The offence required proof that the accused engaged in the relevant sexual conduct with a child under the age of 16 years. The prosecution did not charge the accused with an offence that required proof that the victim did not consent.

In the context of this discussion it is very important to recognise that the accused pleaded guilty. He did not rely on any type of 'cultural defence'. A successful defence results in an acquittal. This man admitted that he was criminally responsible for his actions against the victim. The only issue in this case was determining the appropriate sentence. Martin CJ sentenced the accused to two years' imprisonment to be suspended after serving one month. Martin CJ took into account that the accused believed his actions were justified (although not required) under Aboriginal law and, importantly, that the accused did not know that his actions were contrary to Northern Territory law. The

48. Evans C, 'Time to Bust Brough's Myths' (Address to the Canberra South Branch of the Australian Labor Party, 19 June 2006) 4.

49. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 4–5.

50. The Commission was told by one community member in Geraldton that Elders were the main problem in relation to violence and sexual abuse in that area: see submissions received at LRCWA, Discussion Paper community consultation – Geraldton, 7 March 2006. See also LRCWA, Project No. 94, *Thematic Summary of Consultations – Midland*, 16 December 2002, 40; *Broome*, 17–19 August 2003, 30; *Wiluna*, 27 August 2003, 26.

51. Memmott P, Stacey R, Chambers C & Keys C, *Violence in Indigenous Communities* (Canberra: Crime Prevention Branch Commonwealth Attorney General, 2001) 41. This was also mentioned by Kathryn Trees in her background paper for this reference. During her research in Roebourne several people told her that children are sometimes responsible for the sexual abuse of other children: see Trees K, 'Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – A Case Study' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 213, 226.

52. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001–2006* (June 2006) 27–28 (emphasis omitted).

53. *Ibid.*

54. (Unreported, Supreme Court of the Northern Territory (Yarralin) SCC 20418849, Martin CJ, 11 August 2005).

55. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 217.

56. Merritt C, 'I Got it Wrong on Tribal Rape Sentence', *The Australian*, 24 May 2006, 1. In addition to the use of the word 'rape' in the title, this article also quotes Mal Brough using the word 'rape'. Even an article in the *National Indigenous Times* reported that the accused was convicted of raping his promised wife: see 'Black Law Breakdown', *National Indigenous Times*, Issue 106, 1 June 2006.



lawyer who represented the accused has presented an interesting perspective on this case. He explained that the sentencing judge convened the court at the Yarralin community and listened to evidence from Elders, through a female Indigenous interpreter and that:

The sight of the old man being carted away in a police wagon was more powerful to the community than any time he actually served. They got the message. The men understood that they would have to consider their responses to the breakdown of traditional law more carefully and in a way that did not conflict with NT law.⁵⁷

The prosecution appealed to the Northern Territory Court of Criminal Appeal on the basis that the sentence imposed was manifestly inadequate.⁵⁸ The prosecution did not argue that the sentencing judge had made an error when he took into account customary law issues.

Rather, it was argued that the sentence was so inadequate that the judge either failed to give sufficient weight to the seriousness of the offences or gave too much weight to the customary law issues.⁵⁹ Mildren J stated that 'there is no doubt that an Aboriginal person who commits a crime because he is acting in accordance with traditional Aboriginal law is less morally culpable because of that fact'.⁶⁰ In the circumstances of this case Mildren J held that because the offender was not actually required to have sex with the child under customary law less weight should be given to the fact that the conduct was seen by the offender to be acceptable.⁶¹ The sentence was increased to three years and 11 months' imprisonment to be suspended after serving 18 months' imprisonment.⁶² The original sentencing judge, Martin CJ, subsequently admitted that he made an error in imposing a sentence which required only one month in jail.⁶³ He did not say that he made an error in considering Aboriginal customary law. The mistake related to the actual sentence imposed and therefore the weight that was given to cultural considerations.⁶⁴ The lawyer who represented the accused in *R v GJ* (and who worked at an Aboriginal Legal Service in the Northern Territory for over 10 years) has stated that as far as he is aware Aboriginal customary law has only been relied upon in the Northern Territory as mitigation for an offence of having sexual relations with a child in two cases.⁶⁵ The Commission is not aware of any such case in Western Australia.

In a *Lateline* interview, Nanette Rogers referred to a number of horrific cases where very young Aboriginal children have been sexually abused.⁶⁶ One case apparently involved the sexual assault of a two-year-old child and in another case the victim was only seven months old. While the Commission does not know the

57. Stewart O'Connell, Submission No. 54 (10 July 2006) 5–6.

58. *R v GJ* [2005] NTCCA 20, [4].

59. *Ibid* [5] (Mildren J; Riley J and Southwood J concurring).

60. *Ibid* [30] (Mildren J; Riley J and Southwood J concurring).

61. *Ibid*.

62. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 217–18.

63. Merritt C, 'I Got it Wrong on Tribal Rape Sentence', *The Australian*, 24 May 2006, 1.

64. Since the publication of the Commission's Discussion Paper the accused sought leave to appeal against this sentence to the High Court. Leave to appeal was refused because the High Court did not consider that an appeal would succeed in reducing the sentence imposed. Kirby J did, however, state that relevant Aboriginal customary law issues, if proved, are important in the context of the general criminal law: see *GJ v The Queen* [2006] HCATrans 252 (19 May 2006) 15.

65. Stewart O'Connell, Submission No. 54 (10 July 2006) 3. The Commission assumes that the other case is *Hales v Jamilmira* [2003] NTCA 9 which is referred to in the Commission's Discussion Paper: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 218. Although the accused in this case pleaded guilty to an offence of having sexual relations with a child, at the time it was a defence under the *Criminal Code* (NT) if the parties were traditionally married. Following this case, in 2003, Northern Territory government amended the *Criminal Code* to remove the defence based upon a traditional marriage and to increase the maximum penalty for the offence. In *R v GJ* [2005] NTCCA 20, [33], Mildren J observed that the changes to the law in this regard were a response to the outcome in *Hales v Jamilmira*. The removal of this defence in the Northern Territory has been welcomed by Aboriginal women: see Lloyd J, Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Welcomes State and Territory Legislation that will Protect Aboriginal Children from Abuse' (2004) 6(1) *Indigenous Law Bulletin* 28; Anderson A, 'Women's Rights and Culture: An Indigenous woman's perspective on the removal of traditional marriage as a defence under Northern Territory law' (2004) 6(1) *Indigenous Law Bulletin* 30, 31.

66. Jones T, 'Crown Prosecutor Speaks Out About Abuse in Central Australia' *Lateline*, Transcript of Interview, 15 May 2006.

It is vital that courts are properly informed about what is acceptable under customary law and that this information is presented by both men and women.

details of the parties involved in these examples, it is aware of two very similar cases dealt with by the Northern Territory Court of Criminal Appeal. In *R v Riley*⁶⁷ the court heard an appeal against the leniency of the sentence imposed upon an Aboriginal man for sexual offences against a two-year-old victim. The court increased the sentence from six years' imprisonment to a sentence of eight years' imprisonment.⁶⁸ In this case Martin CJ stated that there 'is no suggestion that the respondent's crimes are in any way related to traditional Aboriginal law or culture'.⁶⁹ He also stated that:

In many Aboriginal communities crimes of violence, including sexual violence, against women and children are prevalent. The victims frequently live in deprived and dysfunctional circumstances without significant support. They are particularly vulnerable. Such victims are entitled to look to the courts for protection against these types of crimes.⁷⁰

In *R v Inkamala*⁷¹ the Northern Territory Court of Criminal Appeal heard an appeal against the leniency of a sentence of four years' imprisonment given to an 18-year-old Aboriginal male for committing sexual offences against a seven-month-old baby. It was also stated in this case that there was no link between the crime and traditional Aboriginal law or culture.⁷² Martin CJ held that the sentence imposed was 'so manifestly inadequate as to shock the public conscience and demonstrate error'.⁷³ The sentence was increased to nine years' imprisonment.

It was acknowledged by the Commission in its Discussion Paper that at times some Aboriginal men (or their defence counsel) have argued that certain violent or sexual behaviour is condoned under Aboriginal customary law.⁷⁴ Michael Dodson has observed that '[s]ome of our perpetrators of abuse and their apologists corrupt these ties and our culture in a blatant and desperate attempt to excuse their abusive behaviour'.⁷⁵ The Commission concluded that today, especially in Western Australia, courts are far less inclined to accept these types of arguments.⁷⁶ Although some Aboriginal offenders have argued that customary law excuses family violence and sexual abuse, this does not mean that it is culturally sanctioned and nor does it mean that courts have generally accepted these arguments.

Even if there are still isolated cases where Aboriginal people or their defence counsel argue that violence or sexual abuse of women and children is culturally sanctioned, a blanket ban on the reception of evidence about customary law is not the solution. Instead, it is vital that courts are properly informed about what is acceptable under customary law and that this information is presented by both men and women. As Catherine Wohlan stated in her background paper for this reference, when Aboriginal customary law has been argued as an excuse for violence against women it has been rare for the views of Aboriginal women to be considered by the courts.⁷⁷ As highlighted by Lloyd and Rogers, in these types of situations the prosecution

67. [2006] NTCCA 10.

68. Ibid [27] (Martin CJ; Thomas J concurring).

69. Ibid [15].

70. Ibid [17].

71. [2006] NTCCA 11.

72. Ibid [5] (Martin CJ).

73. Ibid [18].

74. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 221. The Gordon Inquiry was also informed during its community consultations that some Aboriginal men who had been charged with family violence and child abuse have argued that their behaviour was sanctioned under Aboriginal customary law. Yet it was noted by the Gordon Inquiry that no actual criminal cases in Western Australia were found that supported these claims: see Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (2002) 68.

75. Dodson M, 'Violence Dysfunction Aboriginality' (National Press Club, 11 June 2003) 3.

76. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 217. Recently, the Law Council of Australia has argued that there is 'no evidence that courts have permitted manipulation of 'cultural background' or customary law': see Law Council of Australia, *Recognition of Cultural Factors in Sentencing*, Submission to Council of Australian Governments (10 July 2006) 17.

77. Wohlan C, 'Aboriginal Women's Interests in Customary Law Recognition' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94, Background Paper No. 13 (April 2005) 507, 528.

has not called evidence to ensure that Aboriginal women's views about customary law are heard. They claimed that:

The prosecution's inaction makes them complicit in distorting the notions of Aboriginal culture and reinforces the commonly-held belief that sexual assault within the Aboriginal community is not a serious offence.⁷⁸

The Commission also observed in its Discussion Paper that in many cases the information presented to courts about Aboriginal customary law has been adduced by the accused person's lawyer without corroboration.⁷⁹ The Commission concluded that it is inappropriate for a court sentencing an Aboriginal offender to be informed about relevant customary law issues solely from defence counsel.⁸⁰ The Commission was told repeatedly by Aboriginal people during its consultations that it was vital that Aboriginal people were directly involved in advising courts in order to dispel any myths that customary law condones violence and sexual abuse of women and children.⁸¹ For this reason, the Commission has recommended that courts must consider any relevant information presented by members of an Aboriginal community justice group.⁸² Because these groups will require gender balance and equal representation from all relevant groups within the Aboriginal community, courts or other agencies within the criminal justice system (such as police and the DPP) will have access to the views of Aboriginal women about customary law and other cultural issues.

The Under-Reporting of Family Violence and Sexual Abuse

In its Discussion Paper the Commission acknowledged the high level of non-reporting of family violence and sexual abuse in Aboriginal communities.⁸³ The under-

reporting of sexual abuse and family violence is not confined to Aboriginal people,⁸⁴ although the level of under-reporting by Aboriginal victims may be more pronounced. Many of the reasons that Aboriginal victims do not report sexual or violent offences are common to all cultures and communities. Certainly there are explanations for under-reporting that are closely linked to the life circumstances of Aboriginal people; however, few of these explanations are specifically related to Aboriginal culture or customary law. During the recent media debate it has been implied that one of the main reasons that Aboriginal victims do not speak out about abuse is because of the fear of customary law payback or retaliation from the perpetrator and/or the perpetrator's family.⁸⁵ In the Commission's view the focus on customary law in this context is unjustified because any victim of sexual abuse or violence, whether Aboriginal or not, may be fearful of the consequences if he or she reports the incident.⁸⁶

In Chapter Seven the Commission considers in detail the reasons for the reluctance of many Aboriginal victims to report family violence and sexual abuse. These reasons include fear and distrust of the police, the criminal justice system and other government agencies; lack of police presence in many remote communities; language and communication barriers; lack of knowledge about legal rights and services available; lack of appropriate services for Aboriginal victims; and certain aspects of Aboriginal culture that may discourage some Aboriginal people from disclosing abuse. While the Commission acknowledges that cultural issues may play a part in the under-reporting of sexual and violent offences against Aboriginal women and children, it is clear that there are numerous other and arguably more compelling reasons why Aboriginal women and children do not speak out about the abuse to government justice and welfare agencies.

78. Lloyd J & Rogers N, 'Crossing the Last Frontier: Problems facing Aboriginal women victims of rape in central Australia', in Eastale P (ed), *Without Consent: Confronting adult sexual violence*, Australian Institute of Criminology Conference Proceedings No. 20 (1993)155. Diane Bell has similarly criticised the prosecution for failing to call evidence from Aboriginal women: see Bell D, 'Intracultural Rape Revisited: On forging a feminist future beyond factions and frightening politics' (1991) 14 *Women's Studies International Forum* 385, 403.

79. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 222.

80. *Ibid.*

81. *Ibid* 221.

82. See Recommendation 39, below p 184.

83. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 351. The Commission notes that *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* estimated that in Queensland 88 per cent of rape cases were unreported in Aboriginal communities: see Queensland Government, Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (March 2000) [3.4].

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

85. Jones, T, 'Crown Prosecutor Speaks Out About Abuse in Central Australia' *Lateline*, Transcript of Interview, 15 May 2006, 1

86. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001–2006* (June 2006) 108.

The Role of Aboriginal Women

The Commission accepts that there is an element of 'silence' within some Indigenous communities about the issue of violence and, in particular, sexual abuse.⁸⁷ It has been interpreted that this silence means that Aboriginal women do not protect their children and are incapable of appropriately responding to abuse.⁸⁸ This view is unjustified. As Chris Evans has argued, the recent public debate has 'been completely lopsided: it would have you believe that Indigenous people are standing idly by while the violence and abuse unfolds around them'.⁸⁹

Aboriginal people, in particular women, have for some time increasingly been bringing the issue of abuse out in the open and seeking support from governments. In 2004 Monique Keel observed that:

Over the past 15 years, the voices of Indigenous and non-Indigenous activists and academics have been far from silent. Indigenous women in particular have been raising their voices in solidarity to demand that governments no longer turn a blind eye to family violence.⁹⁰

In 2000 the Department of Indigenous Affairs commenced the project *Breaking the Silence on Sexual Abuse: My body belongs to me*.⁹¹ This project culminated in a video presented by Aboriginal actors and awareness-raising sessions with Aboriginal people, community organisations and government workers. What is important to acknowledge in the context of this chapter is that the project was a response to 'calls for assistance' from Aboriginal communities, in particular Aboriginal women concerned about the extent of sexual abuse in their communities and the 'apparent

lack of government action'.⁹² The Gordon Inquiry in Western Australia was also initiated by Aboriginal people.⁹³ In 2002 Aboriginal women Elders from Broome held a bush meeting as a result of increasing concern about child abuse in their communities. They formed the Peninsula Women's Group and developed strategies to respond to child abuse. These strategies included educating women about how to recognise signs of child abuse, designing literature for children and considering options for offenders such as removal from the community.⁹⁴ Recently, the media has reported the appalling extent of social disadvantage, violence and child abuse in Halls Creek. In many of these reports it was noted that Aboriginal Elders and leaders from that area were seeking assistance and disclosing the extent of the abuse.⁹⁵ Even during the interview with Nanette Rogers, which ignited this debate, it was observed that when the grandmother of a young victim became aware of the abuse she took the young girl to the police and reported the incident.⁹⁶

There are many examples of Aboriginal people working in their communities to address violence and abuse.⁹⁷



87. Stanley J, Tomison A & Pocock J, 'Child Abuse and Neglect in Indigenous Australian Communities', National Child Protection Clearinghouse, Issues Paper No. 19 (2003) 2.
88. Office of the Director of Public Prosecutions, Submission No. 40B (13 July 2006) 3.
89. Evans C, 'Time to Bust Brough's Myths' (Address to the Canberra South Branch of the Australian Labor Party, 19 June 2006) 7.
90. See Keel M, *Family Violence and Sexual Assault in Indigenous Communities: Walking the talk*, Australian Institute of Family Studies, Briefing Paper No. 4 (2004) 2. It was observed in the Cape York Justice Study that for many years Aboriginal women and more recently Aboriginal men have been speaking out about violence and abuse in their communities: see Fitzgerald T, *Cape York Justice Study Report* (November 2001) 95.
91. Department of Indigenous Affairs, *Breaking the Silence on Sexual Abuse: My body belongs to me* (August 2002).
92. *Ibid* 2–3. It was observed that this project has encouraged non-Aboriginal people to talk about the issue with Aboriginal communities.
93. WA Social Justice Network Forum, *Enough is Enough! In Defence of Aboriginal Culture* (Curtin University, Bentley, 17 July 2006).
94. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 114.
95. See for example Pennells S, 'Push to Create New "Stolen Generation"', *The West Australian*, 11 March 2006, 1; Strutt J, 'Remove Children at Risk: ALS Chief', *The West Australian*, 13 March 2006, 1; Pennells S, 'We Ignore Shame on our Doorstep', *The West Australian*, 3 April 2006, 9; Pennells S, 'Plan to Take Halls Creek Kids', *The West Australian*, 20 April 2006, 3; Strutt J, 'Build Halls Creek Hostel Now: MLC', *The West Australian*, 6 July 2006, 12.
96. Jones T, 'Crown Prosecutor Speaks Out About Abuse in Central Australia' *Lateline*, Transcript of Interview, 15 May 2006.
97. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 114 & 353. See also Mugford J & Nelson D, 'Violence Prevention in Practice: Australian award-winning programs' Australian Institute of Criminology (1996) 26 which refers to *Atunypa Wiru Minyma Uwankaraku Good Protection for All Women* project in the Northern Territory. This project commenced in 1994 in response to concerns about a lack of response to violence against women and it was stated that this project had, among other things, led to an increase in the number of reports to police; Stewart O'Connell, Submission No. 54 (10 July 2006) 14; New South Wales Aboriginal Justice Advisory Council, *Holistic Community Justice: A proposed response to Aboriginal family violence* (2001) 3–4.

The Commission believes that these people should be acknowledged and encouraged. As argued above, Aboriginal Elders and leaders should not be stereotyped as the perpetrators of the abuse. Similarly, Aboriginal women (and other Aboriginal men) should not be considered solely responsible for any silence or inaction that surrounds the issue.

The Commission's Recommendations Do Not Condone Violence

Recognition of traditional punishments

Separately from family violence and sexual abuse there are instances where Aboriginal women (as well as Aboriginal men) may be subject to traditional physical punishment and, further, both Aboriginal women and men may be responsible for the administration of that punishment.⁹⁸ Traditional punishments can be distinguished from family violence and sexual abuse: traditional punishment is sanctioned under Aboriginal law whereas family violence and sexual abuse is not.

A typical argument against recognition of Aboriginal customary law is that traditional punishments, such as spearing and other ritual forms of punishment, may contravene prohibitions against torture or cruel, inhuman and degrading treatment or punishment under Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR) and the provisions of *International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (ICAT). The Commission observed in its Discussion Paper

that tribal punishments will not always meet the standard of intention to inflict cruelty and humiliation required by ICAT and that what is cruel, inhuman or degrading treatment or punishment can be determined from a cultural perspective.⁹⁹ Traditional punishments, in particular when they are imposed with the consent of the person being punished, may not necessarily breach international human rights standards.

As a threshold test for the recognition of Aboriginal customary law the Commission has repeatedly emphasised the need to consider international human rights standards. Where Aboriginal customary laws conflict with these standards the human rights of the individual, including women and children, must prevail.¹⁰⁰ This is made indisputably clear in Recommendation 5 of this Report.¹⁰¹

Recognition of customary law in sentencing

In its submission on the Commission's Discussion Paper the Indigenous Women's Congress asserted that in order to protect the rights of Aboriginal women and children 'customary law should not be used as a defence or mitigating factor in relation to violent crimes'.¹⁰² There has never been a defence in this state based on customary law. The Commission has rejected the inclusion of any general defence or partial defence of customary law that could be used to argue that a person was not criminally responsible for a violent or sexual crime.¹⁰³

Nonetheless, the Commission has recommended that sentencing courts must consider any relevant and known Aboriginal customary law or cultural issues when

98. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 218.

99. *Ibid* 74 & 170–71.

100. Women and children have the right under international law to be free from violence: see Sex Discrimination Commissioner of the Human Rights and Equal Opportunity Commission, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (May 2003) [2.1] and Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001–2006* (June 2006) 11. Both these reports state that the right to freedom from violence is implicit in the right to freedom from discrimination.

101. In Chapter Four the Commission has recommended that the recognition of Aboriginal customary law must be consistent with international human rights standards and should be determined on a case-by-case basis. Further, the Commission recommends that particular attention should be paid to the rights of women and children: see Recommendation 5, below p 69. This approach has been supported in various submissions: see p 69. See also Sex Discrimination Commissioner of the Human Rights and Equal Opportunity Commission, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (May 2003) [4.2]; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001–2006* (June 2006) 10.

102. Indigenous Women's Congress, Submission No. 49 (15 June 2006) 1.

103. See discussion under 'Defences Based on Aboriginal Customary Law', Chapter Five, below pp 137–39. The Commission also rejected any defence based on ignorance of the law because it concluded that such a defence could enable the argument by an Aboriginal person that they were unaware of committing an offence against Australian law because the relevant conduct was considered acceptable under customary law. For example, if such a defence existed then this could have been relied upon to excuse the accused in *R v GJ* from full criminal responsibility: see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 217–18; 'Ignorance of the Law', below p 149.

deciding the appropriate penalty to be imposed upon an Aboriginal offender.¹⁰⁴ The Aboriginal and Torres Strait Islander Social Justice Commissioner has argued that the case-by-case approach (as recommended by the Commission) is preferable to ‘imposing a legislative uniform ban’.¹⁰⁵ Similarly, the Commission concluded in its Discussion Paper that because of the discretionary nature of sentencing, courts are able to balance Aboriginal customary law and international human rights standards that require the protection of women and children.

The Commission’s recommendation in respect of sentencing does not permit a court or any other criminal justice agency (such as the police) to order, encourage or facilitate the infliction of unlawful violence.¹⁰⁶ Courts have consistently held that when taking into account the fact that an Aboriginal person has been or will be subject to physical punishment under traditional law the court is not condoning the behaviour. Instead, courts do and should recognise that if traditional punishment is not taken into account then injustice may result because the offender receives ‘double’ or excessive punishment for the offence.¹⁰⁷ Any blanket ban on courts considering Aboriginal customary law will mean that the very real issue of double punishment will be overlooked. Further, Aboriginal women have been subject to traditional punishments such as spearing¹⁰⁸ and, therefore, an absolute ban on taking customary law into account during sentencing will mean that they will be prevented from relying on any argument concerning double punishment. This will only serve to further disadvantage some Aboriginal women.

It has also been asserted that if Aboriginal customary law cannot be taken into account during sentencing proceedings the criminal justice system will be precluded from considering the positive aspects of customary law and the potential for customary law to be utilised to rehabilitate and heal Aboriginal offenders and communities.¹⁰⁹ This approach is endorsed by the Western Australian Indigenous Women’s Congress which highlighted in its submission that where Aboriginal customary law ‘is sensitively applied it can have a healing influence on the Indigenous participants and families involved’.¹¹⁰

The Commission’s Approach to Family Violence and Sexual Abuse

The need to empower Aboriginal women and strengthen their cultural authority (as well as that of Aboriginal men) is central to any holistic approach to Indigenous violent and sexual offending.¹¹¹ Many commentators have argued that Aboriginal people must be given the opportunity to develop their own solutions to family violence and sexual abuse.¹¹² A literature review of the best practice models to reduce child abuse and family violence has observed that:

The underlying theme of the majority of programs considered in the literature is the importance for greater involvement and ownership by Indigenous community members in child protection and anti-violence policy, program design and implementation, and the importance of working within existing family and community networks, and respecting and utilising traditional belief systems.¹¹³

104. See Recommendation 38, below p 183.

105. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001–2006* (June 2006) 12.

106. As to what constitutes unlawful violence, see discussion under ‘Consent’, below pp 139–48.

107. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 213–14.

108. For examples in Western Australia, see *R v Friday* (Unreported, Supreme Court of Western Australia, SC No. 146/1999, Templeman J, 11 & 13 October 1999); *R v Thompson* (Unreported, Supreme Court of Western Australia, SC No. 199/2000, Roberts-Smith J, 19 & 20 February 2001); *R v Jackman* (Unreported, Supreme Court of Western Australia, SC No. 250/2002, Murray J, 15 May 2003) as referred to in Williams V, ‘The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law’ in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 1, 15–19.

109. Evans C, ‘Time to Bust Brough’s Myths’ (Address to the Canberra South Branch of the Australian Labor Party, 19 June 2006) 6.

110. Indigenous Women’s Congress, Submission No. 49 (15 June 2006) 1.

111. See Lloyd J & Rogers N, ‘Crossing the Last Frontier: Problems facing Aboriginal women victims of rape in central Australia’, in Eastale P (ed), *Without Consent: Confronting adult sexual violence*, Australian Institute of Criminology Conference Proceedings No. 20 (1993) 162; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001–2006* (June 2006) 10.

112. See for example Atkinson J, ‘Violence Against Aboriginal Women: Reconstitution of community law – the way forward’ 5(11) *Indigenous Law Bulletin* 19, 21; Carney L, ‘Indigenous Family Violence – Australia’s Business’ (2004) 6(1) *Indigenous Law Bulletin* 15, 16; Wright H, ‘Hand in Hand to a Safer Future: Indigenous family violence and community justice groups’ (2004) 6(1) *Indigenous Law Bulletin* 17, 18; Memmott P, Stacey R, Chambers Commission & Keys C, *Violence in Indigenous Communities* (Canberra: Crime Prevention Branch Commonwealth Attorney General, 2001) 80; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001–2006* (June 2006) 7; Stanley J, Tomison A & Pocock J, ‘Child Abuse and Neglect in Indigenous Australian Communities’, National Child Protection Clearinghouse, Issues Paper No. 19 (2003), 24.

113. Queensland Government, *Meeting Challenges, Making Choices: Evaluation report* (September 2005) 52.

The Commission is of the view that the Western Australian government should provide assistance to Aboriginal communities to develop their own responses and solutions to family violence and sexual abuse. That is not to say that Aboriginal communities should do it alone. The government must provide ongoing resources and support for community-based initiatives. One of the Commission's central recommendations is the establishment of community justice groups.¹¹⁴ A potential role for community justice groups is to develop crime prevention initiatives and rehabilitative programs. In Queensland it has been observed that community justice groups are 'playing an increasingly important role in reducing Indigenous family violence, through supporting women and their families, and working with the offenders'.¹¹⁵ Examples of strategies employed by community justice groups include the provision of support to women when dealing with the criminal justice system; education and awareness initiatives within their communities about the rights of Aboriginal women and any relevant support services; and the use of traditional sanctions such as banishment to an outstation and shaming.¹¹⁶ In order to ensure that the

views and needs of Aboriginal women are considered the Commission has recommended that community justice groups must have an equal number of men and women.¹¹⁷

Many of the Commission's recommendations have the potential to reduce the level of sexual and violent offending within Aboriginal communities and assist the criminal justice system to bring the perpetrators of this abuse to justice. However, the Commission's reference is not about sexual abuse and violence; it is about Aboriginal customary law and culture. The difficult issues surrounding sexual abuse and violence and the failure of the criminal justice system to adequately protect Aboriginal women and children must be addressed. To this end the Commission has made a number of recommendations that assist Aboriginal victims in the criminal justice system.¹¹⁸ The recent debate has ignored the positive and the many non-contentious aspects of Aboriginal law and culture. It has also ignored the importance of recognising Aboriginal customary law for the wellbeing and enhancement of Aboriginal people in this state.

114. See Recommendation 17, pp 112–113.

115. Wright H, 'Hand in Hand to a Safer Future: Indigenous family violence and community justice groups' (2004) 6(1) *Indigenous Law Bulletin* 17, 17.

116. *Ibid.*

117. The Sex Discrimination Commissioner of the Human Rights and Equal Opportunity Commission has previously emphasised the importance of ensuring when considering the recognition of Aboriginal customary law the views of Aboriginal women are taken into account: see Sex Discrimination Commissioner of the Human Rights and Equal Opportunity Commission, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal customary law in the Northern Territory* (May 2003) [3.3].

118. See discussion under 'Other Recommendations that Will Assist in Addressing Family Violence and Child Abuse in Aboriginal Communities', Chapter Seven, below p 297.