

# Chapter Seven

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## Aboriginal Customary Law and the Family

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# Family Law

## Jurisdictional Limitations

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

- parenting disputes involving ex-nuptial children;
- de facto marriage financial and property disputes; and
- child support for ex-nuptial children.

For these purposes Western Australia established its own discrete Family Court exercising combined state and federal jurisdiction in family law matters.<sup>1</sup>

## Traditional Aboriginal Marriage

In its Discussion Paper the Commission examined the concept of traditional Aboriginal marriage and marriage rules that exist under Aboriginal customary law. These rules differ across Aboriginal Australia, but generally an Aboriginal person's moiety or 'skin group' dictates who that person may marry under customary law. Marriage

rules served various purposes in traditional Aboriginal societies including the maintenance of genetic integrity; the assurance of continuing inheritance and performance of ritual (spiritual) obligations to land; the creation of alliances and reciprocal obligations between individuals, families and groups; and the maintenance of traditional economies trading on these familial obligations.<sup>2</sup>

## Promised marriages

Promised marriages are marriages negotiated by kin and take the form of a contract (or at least an exchange of promises) between the families of the betrothed or between the girl's family and the prospective husband. As outlined in the Commission's Discussion Paper, a girl would usually be betrothed as an infant or young child, sometimes to a youth but more often to an older man.<sup>3</sup> Generally gifts are exchanged to establish and maintain the marriage contract until such time as the girl has reached puberty or the families believe that the girl is ready to follow through with confirming the marriage.<sup>4</sup> Sometimes the prospective husband has responsibilities such as providing food to the girl's family during the betrothal period, which may be many years.<sup>5</sup> In other cases the girl may go to live with the prospective husband's clan for a period of time before cohabiting with the husband.<sup>6</sup>

The practice of promised marriage has been the subject of recent controversy in the Northern Territory and is discussed at length in the Commission's Discussion Paper in both the criminal<sup>7</sup> and family law<sup>8</sup> chapters. The Commission's consultations revealed that the practice of promised marriage has considerably declined in

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1. For further elaboration and detailed references, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 331.  
2. Ibid 332.  
3. Ibid. See also ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [224]. It should be noted that a man was not considered ready for marriage until he had undergone 'a substantial portion of [his] initiation process' which would often mean that a prospective husband would be in his late twenties. See Tonkinson R, *The Jigalong Mob: Aboriginal victors of the desert crusade* (California: Cummings Publishing Co., 1974) 47.  
4. Tonkinson R, *The Mardudjara Aborigines: Living the dream in Australia's desert* (New York: Holt, Rinehart and Winston, 1978) 80.  
5. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986). See also Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life, past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 122.  
6. Kimm J, *A Fatal Conjunction: Two laws, two cultures* (Sydney: Federation Press, 2004) 65.  
7. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 217–19 'Aboriginal customary law as the reason or explanation for an offence: promised brides'.  
8. Ibid 332–33 'Promised marriages'; 333–34 'Recognition of promised marriage contracts'; 359–60 'Customary law promised marriages and child sexual abuse'.

Western Australia and, although it is still practised in some remote communities in the Western Desert, promised marriage contracts are not always strictly enforced. For example, a promised marriage can sometimes be avoided where the girl wishes to marry another and the promised husband consents to the match. There have also been cases where a promised bride has eloped with another man and the promised husband has conceded his right to marriage upon payment of compensation. However, it appears that matches other than the promised marriage will generally only be accepted by the community if they adhere strictly to traditional marriage rules.<sup>9</sup>

### Recognition of promised marriage contracts

In its Discussion Paper, the Commission concluded that Australia's international obligations (which require the free and full consent of parties to a marriage and deny legal effect to child betrothals)<sup>10</sup> preclude recognition of non-consensual or underage customary law marriage. Promised marriage contracts which do not meet international law standards are therefore unenforceable. Regardless of the decline in this practice, the Commission accepts that promised marriages between young girls and older men are still a reality in some Aboriginal communities and remains concerned that the imbalance of power relations between the parties to a promised marriage can infringe the rights of a vulnerable girl child to be free from violence and non-consensual sexual relations.

In its Discussion Paper the Commission noted that the mere denial of recognition of a promised marriage contract does little to practically enhance the rights of young Aboriginal girls, who may be the subject of a customary law promise to marry. According to the Human Rights and Equal Opportunity Commission, Australia's obligations at international law require governments to take active measures to prevent non-consensual traditional marriage and non-consensual sexual relations within all marriages.<sup>11</sup> The Commission therefore proposed that the government include, in educative initiatives planned in response to the Gordon Inquiry, information about the freedom of choice in

marriage partners under Australian and international law and education about the criminality of acts of sexual relations with children under the age of 16 regardless of marriage status under Aboriginal customary law.<sup>12</sup>

Responses to this proposal were favourable and the Commission has confirmed its proposal in Recommendation 90 below.<sup>13</sup> In light of a submission from the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Commission has enhanced its recommendation to address education about the legal rights of women and children in the context of family violence and child sexual abuse or neglect, and the legal and related services available to assist them in exercising their rights. This recommendation is discussed later in this chapter under the heading 'Family Violence and the Protection of Aboriginal Women and Children'.<sup>14</sup>

## Recognition of Traditional Aboriginal Marriage

The decline of promised marriages in Aboriginal society (in particular, child betrothals) has undoubtedly resulted in more freedom for Aboriginal people to choose their marriage partners. While this freedom can have negative implications for the maintenance of Aboriginal culture (because marriages more often occur without regard for traditional skin groupings or other marriage rules of relevant clans), there are still a number of Aboriginal adults who marry traditionally, consensually and with regard for customary marriage rules.<sup>15</sup>

As mentioned above, all matters having a connection to marriage (including the dissolution of a marriage) are within the Commonwealth's legislative jurisdiction. However, there are ways in which traditional Aboriginal marriages can be recognised in Western Australia. In its Discussion Paper the Commission considered two methods of recognition of traditional Aboriginal marriages in the context of Western Australian legislative powers:

- equating a traditional marriage to a de facto relationship under Western Australian law; and

9. That is, that the match is not considered a 'wrong way' or 'wrong skin' match. Ibid 333–34.

10. See, for example, the *International Covenant on Civil and Political Rights* Art 23(3); the *International Covenant on Economic, Social and Cultural Rights* Art 10(1); and the *Convention on the Elimination of All Forms of Discrimination Against Women* Art 16(2); *Universal Declaration of Human Rights* Art 16(2).

11. Human Rights and Equal Opportunity Commission, Sex Discrimination Commissioner, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (May 2003) 21.

12. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 334, Proposal 63.

13. See below p 286.

14. Ibid.

15. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 334–35.

## The Commission concluded that Australia's international obligations preclude recognition of non-consensual or underage customary law marriage.

- functional recognition of traditional marriage for particular purposes.

Although in Western Australia the legal benefits of marriage are almost mirrored under laws dealing with de facto relationships, the Commission has discounted this method of recognition of traditional Aboriginal marriages. Where such an approach has been investigated in the past, Aboriginal people have expressed the fundamental objection that to treat a traditional marriage as a de facto relationship would significantly degrade the traditional status and dignity of the union.<sup>16</sup> The Commission has therefore pursued the course of 'functional recognition' recommended by the Australian Law Reform Commission in its 1986 report *The Recognition of Aboriginal Customary Laws*.<sup>17</sup>

### Functional recognition of traditional Aboriginal marriage

Functional recognition involves an examination of the specific legal and social problems that can arise from the failure to recognise traditional Aboriginal marriage as a lawful marriage to ensure that, wherever possible, the benefits, obligations or protections that lawful marriage attracts under Western Australian law are also extended to traditional Aboriginal marriage. The concept of functional recognition has the advantage that it can avoid the recognition or enforcement of aspects of traditional marriage (such as underage marriage) that may infringe basic human rights or international obligations. Another benefit is that functional recognition can recognise traditional marriages that are actually or potentially polygamous, providing protection for all partners of a traditional marriage.<sup>18</sup>

It is not known to what extent polygamy is practised in Western Australian Aboriginal communities today and

the Commission did not receive any submissions on this issue during its community consultations. However, it was noted that in 2003 the Northern Territory Law Reform Committee suggested that relevant legislation and policy be reviewed to take account of traditional Aboriginal polygamous marriages in that jurisdiction.<sup>19</sup> The Commission therefore invited submissions on the extent to which polygamy is practised in Western Australian Aboriginal communities.<sup>20</sup> While the Commission received only two submissions on this issue they were from significant sources. The Department of Indigenous Affairs indicated that they had anecdotal evidence of polygamy being practised in Western Australia<sup>21</sup> and the Aboriginal Legal Service's executive committee (which is made up of 16 Indigenous officers elected from each of the eight former ATSIC regions in Western Australia) advised that polygamy still occurred in Western Australia.<sup>22</sup> The Aboriginal Legal Service submitted that a polygamous marriage would be recognised as a traditional Aboriginal marriage as defined by the Commission in Proposal 64 of its Discussion Paper. The Commission agrees that a polygamous marriage could fall under this definition and that multiple traditional spouses would therefore be treated in the same manner as a single traditional spouse.<sup>23</sup>

### Defining traditional Aboriginal marriage for the purposes of legislative recognition in WA

In research for its Discussion Paper the Commission considered the potential legal and social problems that may arise from the failure to recognise traditional Aboriginal marriage for the purpose of Western Australian laws. It concluded that explicit recognition of Aboriginal traditional marriage would be desirable for

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

17. *Ibid* [257].

18. That is, where a man has more than one wife under traditional law, usually of varying ages: *ibid* [258]–[260]. See also discussion in LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 336.

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

20. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 337, Invitation to Submit 13.

21. Department of Indigenous Affairs (DIA), Submission No. 29 (2 May 2006) 16.

22. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 11.

23. Including in the administration of intestate estates, a matter raised by the Department of Indigenous Affairs in its submission.

the purposes of all written laws in Western Australia.<sup>24</sup> The Commission therefore proposed that a definition of traditional Aboriginal marriage be inserted into s 5 of the *Interpretation Act 1984* (WA).<sup>25</sup> In order to ensure that promised marriages of young teenagers were precluded from recognition, the Commission's proposed definition (which is confirmed in Recommendation 83) restricted recognition of traditional Aboriginal marriage to Aboriginal persons over the age of 18 years.

The recognition of traditional Aboriginal marriage between consenting adults was supported by submissions received by the Commission. The Catholic Social Justice Council 'applauded' the Commission's proposals for endorsing freedom of choice in marriage and for reinforcing the criminality of sexual relations with children.<sup>26</sup> The Department of Indigenous Affairs (DIA) and the Law Society of Western Australia agreed with the wording of the definition and the restriction to persons over the age of 18 years.<sup>27</sup> There was some question, raised in submissions from the Department of the Attorney General and DIA, about how a traditional marriage would be evidenced.<sup>28</sup> DIA suggested that 'recognition by Elders of the relevant community, evidenced through written confirmation by the local Aboriginal organisation, should be given substantial weight in assessing whether a traditional Aboriginal marriage existed'.<sup>29</sup> The Commission has considered this matter and believes that the present formulation of the definition is sufficient to address evidential concerns. Aboriginal persons alleging a traditional Aboriginal marriage must prove that their relationship is a marriage 'according to the customs and traditions of the particular community of Aboriginals with which either person identifies'. The evidence of customs and traditions will vary on a case-by-case basis and will very likely include evidence from community Elders. The Commission also believes that evidence

from members of a community justice group (Recommendation 17) would satisfy the evidential burden.

### Recommendation 83

#### Definition of 'traditional Aboriginal marriage'

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

#### 5. Definitions applicable to written laws

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

In order to properly recognise traditional Aboriginal marriage in Western Australia the Commission also proposed that a new section be inserted into the *Interpretation Act* to ensure that a reference in any Western Australian written law to 'spouse', 'husband', 'wife', 'widow' and 'widower' is taken to include the corresponding partner of a traditional Aboriginal marriage.<sup>30</sup> Because the Commonwealth has already legislated on matters relating to marriage, Western Australia has no jurisdiction to effect change in this area to accommodate traditional Aboriginal marriages in the Family Court of Western Australia. For this reason the above definition of traditional Aboriginal marriage has been held not to apply to the *Family Court Act 1997* (WA) for which the Commonwealth definition of 'marriage'—that is a lawful marriage under the *Marriage Act 1961* (Cth)—otherwise applies. This proposal met with no objection in submissions and has been confirmed by the Commission in the following recommendation.<sup>31</sup>

24. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 337.

25. *Ibid* 337, Proposal 64.

26. Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 4.

27. DIA, Submission No. 29 (2 May 2006) 13; Law Society of Western Australia, Submission No. 36 (16 May 2006) 10.

28. DIA, *ibid*; Department of the Attorney General, Submission No. 34 (11 May 2006) 12. It is noted that the Department of the Attorney General submitted that the 'provisions around de facto marriages are wide enough to take in "traditional Aboriginal marriages" with no modification'. However, this is not in fact the case. While the definition of 'de facto relationship' under the *Interpretation Act 1984* (WA) is quite broad and would (as noted in the Discussion Paper) appear to cover the typical features of a traditional Aboriginal marriage, to qualify as a de facto marriage in the Family Court of Western Australia the relationship must have been in existence for at least two years. That means that partners to a traditional Aboriginal marriage under two years duration would be treated differently to those in a de facto relationship. For this reason the Commission proposed that the *Family Court Act 1997* (WA) be amended to accommodate traditional Aboriginal marriages in the de facto provisions. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 338, Proposal 66, confirmed as Recommendation 85, below p 275.

29. DIA, *ibid* 14.

30. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 337, Proposal 65.

31. This proposal was endorsed by the Law Society of Western Australia, Submission No. 36 (16 May 2006) 10.

## Recommendation 84

### Traditional Aboriginal marriage and other domestic relationships

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

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

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

## Spousal Maintenance and Property Settlement

Although, as mentioned above, the Commonwealth has already legislated on matters of spousal maintenance and property settlement in relation to a lawful marriage under the *Marriage Act 1961* (Cth), Western Australia does possess jurisdiction to deal with spousal maintenance and division of property upon the breakdown of a de facto relationship. In this respect, the 2002 amendments to the *Family Court Act 1997* (WA) have provided for the availability of remedies to separating de facto couples that are of a very similar nature to those provided for married couples.

The Commission is mindful that because traditional Aboriginal marriage is not explicitly recognised in s 13A

of the *Interpretation Act* (which deals with de facto relationships) a traditionally married couple might, in rare circumstances, be denied the remedies available to separating de facto couples under the *Family Court Act*. This is because the *Family Court Act* only applies to de facto unions which have been in existence for at least two years (unless there is a child of the union or other specified circumstances exist). The Commission sought to address this anomaly by proposing that the *Family Court Act* be amended to recognise traditional Aboriginal marriage for the purposes of spousal maintenance and property distribution under Part 5A of the Act.<sup>32</sup> There were no objections to this proposal; the Commission therefore confirms the following recommendation.<sup>33</sup>

## Recommendation 85

### Part 5A of the *Family Court Act 1997* (WA) applies to traditional Aboriginal marriages

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

#### 205U. Application of Part generally

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

32. Ibid 338, Proposal 66.

33. This proposal was endorsed by the Law Society of Western Australia, Submission No. 36 (16 May 2006) 10.

# Care and Custody of Aboriginal Children

Perhaps more than any other area dealt with in this reference, the policies of governments in relation to the care and custody of Aboriginal children have the potential to negatively impact across generations of Aboriginal Western Australians. Recent amendments made to child welfare legislation in Western Australia demonstrate that government is today more sensitive to the cultural needs of Aboriginal children; however, certain assumptions reflecting the dominant Western paradigm of family structure and child-rearing practices remain.

As shown in Chapter Four, kinship systems in Australian Aboriginal societies are constructed differently to those in Western (or European) societies.<sup>1</sup> An important difference can be seen in the structure of the basic family unit. In Western societies the model of the 'nuclear' family unit with parental responsibility resting primarily with the biological parents is the dominant norm. In contrast, the family unit in Aboriginal societies is extended with many relatives, and often whole communities, sharing child-rearing responsibilities with the biological parents. As a result of this, child-rearing practices in Aboriginal Australia are not underwritten by the permanence and stability of a single home that is typical of non-Aboriginal Australian families. It is the Commission's opinion that the unique kinship obligations and child-rearing practices of Aboriginal culture should be recognised in Western Australian legislation dealing with the care and custody of Aboriginal children.<sup>2</sup>

## Aboriginal Child Custody Issues: Guiding Principles

Aboriginal child custody issues may arise in relation to adoption, foster care or short-term placement, and custody or parenting disputes upon the dissolution of a marriage or de facto relationship. The guiding principles which ideally should inform all custody issues in relation

to Aboriginal children are the Aboriginal Child Placement Principle and the 'best interests of the child' principle.

## The Aboriginal Child Placement Principle

The Aboriginal Child Placement Principle (the Principle) outlines an order of preference for the placement of Aboriginal children outside of their immediate family. The order of preference is generally expressed to be: placement within the child's extended family; placement within the child's Aboriginal community; and, failing that, placement with other Aboriginal people.<sup>3</sup> In recent years the Principle has included, as a last resort, placement of an Aboriginal child with a non-Aboriginal person; however, that person must be capable of preserving the child's ongoing affiliation with his or her culture and family.

The Principle was first adopted as Commonwealth government policy in 1980 and has drawn broad support from Aboriginal communities. In its 1986 report on Aboriginal customary laws the ALRC recommended that state and territory legislation dealing with the placement of children should expressly reflect the Principle.<sup>4</sup> The legislative form of the Principle varies from jurisdiction to jurisdiction but each form shares the objective of maintaining an Aboriginal child's cultural connection with its Aboriginal community. Western Australia was the last state to legislatively implement the Principle in its child custody legislation in 2002–2004; although it has apparently been observed as policy in this state since 1984.<sup>5</sup>

## 'Best interests of the child' principle

The 'best interests of the child' principle is the guiding principle of the United Nations *Convention on the Rights of the Child*.<sup>6</sup> It requires that in all actions concerning

1. See 'The role of kinship in Aboriginal society', Chapter Four, above p 66.

2. For further discussion, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 339–40.

3. NSWLRC, *The Aboriginal Child Placement Principle*, Research Report No. 7 (March 1997) 50.

4. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [366].

5. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 341.

6. The requirements of the *Convention on the Rights of the Child* and other conventions outlining Australia's international obligations in relation to children, in general, and Indigenous children, in particular, are discussed in more detail in *ibid* 340.

*The family unit in Aboriginal societies is extended with many relatives, and often whole communities, sharing child-rearing responsibilities with the biological parents.*

children (and in all child welfare and custody legislation) the child's best interests are a primary consideration. However, the best interests of an Aboriginal child may be quite different to those of a non-Aboriginal child and the application of the principle must be informed by relevant cultural considerations.<sup>7</sup>

Because the best interests principle is subjectively applied by administrative decision-makers (and, in relation to court custody proceedings, judges) attention must be paid to the process of application to avoid ethnocentrism.<sup>8</sup> The Commission believes that the involvement of Aboriginal people and Aboriginal organisations in cases involving the placement of an Aboriginal child is imperative to avoid ethnocentric assumptions unnecessarily colouring the decision-making process.<sup>9</sup>

## Adoption

Adoption is the absolute transfer of legal rights to parenting and usually severs all ties with a child's natural family. Adoption is said to be alien to Aboriginal societies, primarily because the extended nature of Aboriginal families precludes the need for adoption.<sup>10</sup> Despite the very few adoptions of Aboriginal children recorded each year, the recent legislative enactment of the Aboriginal Child Placement Principle within the *Adoption Act 1994* (WA) is considered by the Commission to be an important advance.

The legislative form of the Principle in schedule 2A of the *Adoption Act* provides that the first preference for placement of an Aboriginal child is with an Aboriginal person in the child's community 'in accordance with

local customary practice'. The *Adoption Act* also provides in s 16A that the Director General must consult with an Aboriginal child welfare agency regarding the prospective adoption of an Aboriginal child and for an Aboriginal officer of the Department to be 'involved at all relevant times in the adoption process' of an Aboriginal child.

The importance of such consultation in regard to the placement of an Aboriginal child, particularly in determining the best interests of such a child, is emphasised in the Commission's Discussion Paper. However, the Commission considers it equally important that consultation be had with the child's extended family or community, especially in light of the need to establish 'local customary practice' in application of the Aboriginal Child Placement Principle under the *Adoption Act*. The Commission therefore proposed that schedule 2A of the *Adoption Act* be amended to ensure that all reasonable efforts are made to establish the customary practice of the child's community in regard to child placement and that the child's extended family and community are consulted to ensure that, where possible, a placement is made with Aboriginal people who have the correct kin relationship with the child in accordance with Aboriginal customary law.<sup>11</sup>

The Commission received two submissions on this proposal. The Law Society of Western Australia endorsed the proposal as

a step towards ensuring that relevant Aboriginal customary practice is reflected in a child's placement within the Aboriginal community and thus in that sense the child's cultural and psychological development may be maximised.<sup>12</sup>

7. For matters that have been considered relevant by Australian courts to the determination of the best interests of an Aboriginal child, see *ibid* 342.  
8. For example, John Dewar has noted that the 'child-rearing practices regarded as normal and desirable in Indigenous society may be considered aberrant and harmful by dominant conceptions of children's best interests': Dewar J, 'Indigenous Children and Family Law' (1997) 19 *Adelaide Law Review* 217, 230.  
9. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 342.  
10. It should be noted that this is not the case for Torres Strait Islander families where adoption is recognised as a common customary practice. See Ban P, 'Developments in the Legal Recognition of Torres Strait Islander Customary Adoption' (1996) 78(3) *Aboriginal Law Bulletin* 14–15; Ban P, 'Would a Formal Treaty Help Torres Strait Islanders Achieve Legal Recognition of their Customary Adoption Practice?' (2006) 6(19) *Indigenous Law Bulletin* 17.  
11. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 343, Proposal 67.  
12. Law Society of Western Australia, Submission No. 36 (16 May 2006) 11.

In contrast, the submission of the Department for Community Development (DCD)—the agency responsible for adoption services in Western Australia—did not support the proposal. DCD advised the Commission that many of the Aboriginal pregnancies that they deal with and which lead to adoption are ‘hidden’; that is, that the birth mother wants to keep the birth secret and does not want the child placed in her home community.<sup>13</sup> The submission continued:

There are usually very good reasons why this is so and these often relate to serious safety concerns for the child and the mother. Many of the adoptions within Indigenous communities are the subject of conflict and many have the potential for violence and in cases payback.<sup>14</sup>

Although no examples were given to support this statement, the Commission has nonetheless considered this submission carefully. The Commission notes that the *Adoption Act* contains an offence for breach of confidentiality or disclosure of information<sup>15</sup> and that DCD acknowledges that ‘if the birth mother wishes [the birth] to be kept secret from her kin and family, this must be respected’.<sup>16</sup> The Commission recognises that consultation with kin and extended family should not override the wishes of the birth mother to maintain secrecy regarding the birth. The Commission has therefore amended its recommendation to reflect this. Nonetheless, the legislative requirement that regard be had to local customary practice remains and must be satisfied prior to placement of the child.

DCD further argued that the Commission’s proposal would require wider consultation that would delay the adoption process and that this delay would not be in the child’s best interests.<sup>17</sup> The Commission does not accept this argument. As pointed out in the Discussion Paper (and in the DCD submission itself) the Director General has a duty to consult with an Aboriginal child welfare agency regarding the adoption of a particular Aboriginal child.<sup>18</sup> The Commission believes that in order for the Director General, the chosen Aboriginal agency

and the Department to be satisfied that the child is placed ‘in accordance with local customary practice’ as demanded by Schedule 2A of the Act, consultation with extended family must take place where possible. The Commission sees no barrier to making this clear by the following amendment to the *Adoption Act*.

### Recommendation 86

#### Consultation with child’s extended family in consideration of adoption

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

In applying this principle all reasonable efforts must be made to establish the customary practice of the child’s community in regard to child placement. Subject to the birth mother’s signed direction to the contrary, this must include consultations with the child’s extended family and community to ensure that, where possible, a placement is made with Aboriginal people who have the correct kin relationship with the child in accordance with Aboriginal customary law.

## Foster Care and Alternative Child Welfare Placement

The recently proclaimed<sup>19</sup> *Children and Community Services Act 2004* (WA) (CCS Act) was enacted partly in response to the findings of the Gordon Inquiry which reported serious abuse and neglect of children in some Aboriginal communities and highlighted the need for updated child protection legislation.<sup>20</sup> The CCS Act provides for a number of different types of child protection orders<sup>21</sup> and for placement arrangements at the behest of parents where parents cannot adequately provide for their children.<sup>22</sup> The ‘best

13. Department for Community Development, Submission No. 51 (27 June 2006) 3.

14. Ibid.

15. *Adoption Act 1994* (WA) s 127.

16. Department for Community Development, Submission No. 51 (27 June 2006) 3.

17. Ibid.

18. *Adoption Act 1994* (WA) s 16A.

19. Although ss 3 and 102 of the Act were proclaimed in January 2005, the Act only became fully operational on 11 March 2006.

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

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

22. In such circumstances the parents retain legal parental responsibility for the child. Such arrangements will only, however, be made in cases where protection issues exist.

interests of the child' is the determining factor in all arrangements made under the Act<sup>23</sup> and the child has a right to participate in decisions regarding his or her own placement or care.<sup>24</sup>

Division 3 of the CCS Act embraces the Aboriginal Child Placement Principle in relation to arrangements made for the care and protection of Indigenous children.<sup>25</sup> As observed in the Commission's Discussion Paper, the need for such clear statement of principle is not academic. Statistics from June 2004 show that 13.8 per cent of Aboriginal children subject to foster care placements were placed with non-Aboriginal carers.<sup>26</sup> This number is significant; however, as with adoption, the principle of the best interests of the child is the paramount consideration governing the placement of a child under care and protection legislation. In this respect it is important to note that placement within a child's extended family or community may not, for reasons of dysfunction, be in the best interests of a particular child.<sup>27</sup>

During consultations with Aboriginal people, particularly in the Pilbara region, government practices of child placement were severely criticised.<sup>28</sup> In particular, there were complaints that DCD did not sufficiently understand Aboriginal family networks and did not necessarily appreciate the cultural obligations which require that a family member accept care of a child if approached, even where they may not have the financial, physical or emotional resources to care for the child.<sup>29</sup> Further, it was said that laws relating to care arrangements 'involve too much paperwork and insufficient support [including financial support] for Aboriginal people'.<sup>30</sup>



In its Discussion Paper, the Commission observed that placement of Aboriginal children with extended family may be the result of private family intervention and in such cases will not always have been overseen by DCD. In those cases, carers will not necessarily be aware of support services available to them. The Commission therefore proposed that DCD ensure that information is made readily available to Aboriginal communities so that all primary carers (regardless of whether the care arrangements are made by the Department or privately) are aware of the government services and benefits in place to assist them in caring for children.<sup>31</sup>

The Commission received wide support for this proposal.<sup>32</sup> During its return consultations, Aboriginal communities in the Western Desert reiterated the financial burden placed on grandparents in particular in relation to the care of grandchildren.<sup>33</sup> This phenomenon is not confined to the Aboriginal community.<sup>34</sup> Studies have shown that most developed

23. *Children and Community Services Act 2004* (WA) s 8.

24. *Children and Community Services Act 2004* (WA) s 10.

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

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

27. NSWLRC, *The Aboriginal Child Placement Principle*, Research Report No. 7 (March 1997) 169–70. The inability of some communities to care for children was also noted by Aboriginal respondents to the Commission's consultations in the Pilbara. In the Pilbara it was noted that '[r]eference was made to the conditions of drunkenness, drugs and offending in town from which people in the community would wish to remove children or grandchildren. However, the European system did not support such removal': LRCWA, Project No. 94, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 18.

28. See, LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 345.

29. *Ibid.*

30. *Ibid.*

31. *Ibid.*, Proposal 68.

32. Reynold Indich (Jumdingi), Submission No. 4 (16 February 2006); Dr Dawn Casey, Western Australian Museum, Submission No. 24 (1 May 2006); Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006); Department of the Attorney General, Submission No. 34 (11 May 2006); Law Society of Western Australia, Submission No. 36 (16 May 2006); Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006). It should be noted that the proposal was not opposed by the Department for Community Development.

33. In particular in the Commission's return visits: LRCWA, Discussion Paper community consultations – Kalgoorlie, 28 February 2006; Warburton, 27 February 2006.

34. Recent studies have been undertaken across Australia: see Fitzpatrick M, *Australian Issues in Ageing: Grandparents raising grandchildren* (Melbourne: Council of the Ageing, July 2003).

countries are experiencing a rapid rise in the number of grandparents raising grandchildren.<sup>35</sup> A 2004 report on this subject commissioned by the federal Council of the Ageing makes a host of recommendations, including educating grandparents about support services and financial benefits available to them under state and Commonwealth laws. The Commission considers that such information should be made available to all extended family carers, including classificatory kin,<sup>36</sup> and should be delivered in a culturally appropriate manner.

### Recommendation 87

#### Culturally appropriate information about services and benefits for extended family carers

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

## Family Court Custody Disputes

### Family Court processes

In 2001 the Commonwealth's Family Law Pathways Advisory Group recommended various ways of expanding culturally appropriate service delivery in the family law system, including enhanced cultural awareness training for all staff; the development of an Aboriginal employment strategy; the provision of interpreters; the sponsoring of local level Aboriginal community networks; the development of an Aboriginal family law database; the facilitation of research into Aboriginal customary law and family issues; and the development—in partnership with Aboriginal

communities—of narrative therapy and Aboriginal family law conferencing to enhance family dispute resolution. The focus on alternative dispute resolution is particularly crucial in Western Australia where the new *Family Law Rules 2004 (WA)* compel separating couples to participate in primary dispute resolution. In these circumstances, the lack of culturally appropriate dispute resolution services for Aboriginal clients represents a significant problem.

In its Discussion Paper the Commission observed that the government could do more to meet the needs of Aboriginal clients in the Family Court of Western Australia. The Commission indicated its support for the recommendation of the Family Law Pathways Advisory Group and proposed that the Western Australian government seek federal funding in whole or in part for its immediate implementation in the Family Court of Western Australia.<sup>37</sup> The Commission received supportive submissions in respect of this proposal including, importantly, from the Family Court.<sup>38</sup> The Family Court's submission appended a report of an internal committee on the need for, and advantages of, having Aboriginal family liaison officers appointed to the court. The report cited the Commission's proposal with approval and concluded by recommending the appointment of two full-time Aboriginal family liaison officers (one male and one female) based in Perth but resourced to travel to remote areas when necessary.<sup>39</sup> The recommendation of the committee has been internally funded.<sup>40</sup>

The Commission believes that this is a significant and positive step towards enhancing culturally appropriate service delivery in the Family Court of Western Australia and applauds the court's initiative. However, the appointment of Aboriginal family liaison officers will not necessarily meet all the needs identified by the Family Law Pathways Advisory Group or the Commission's Discussion Paper.<sup>41</sup> In particular there are concerns surrounding the lack of Aboriginal language interpreters and Aboriginal counsellors available in the Family Court. The Commission has made specific and independent recommendations about the provision of Aboriginal language interpreting services in Western Australian

35. Ibid 12.

36. The submission of Dr Dawn Casey suggested that 'extended family carers' did not adequately cover classificatory kin. The Commission does not believe that this necessarily changes the recommendation but seeks to make it clear that classificatory kin are included in the Aboriginal cultural concept of extended family: Dr Dawn Casey, Western Australian Museum, Submission No. 24 (1 May 2006).

37. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 346, Proposal 69.

38. Family Court of Western Australia, Submission No. 57 (26 July 2006). See also Department of the Attorney General, Submission No. 34 (11 May 2006); Law Society of Western Australia, Submission No. 36 (16 May 2006).

39. Family Court of Western Australia, *Report of Aboriginal and Torres Strait Islander Family Consultants Committee* (August 2006).

40. Ibid 9.

41. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 346.

courts in Chapter Nine of this Report and it hopes these recommendations will be implemented by the Family Court of Western Australia. In the meantime the Commission confirms its recommendation for full and immediate implementation of Recommendation 23 of the Family Law Pathways Advisory Group's Report *Out of the Maze – Pathways to the Future for Families Experiencing Separation*.<sup>42</sup>

### Recommendation 88

#### Enhance culturally appropriate service delivery in the Family Court of Western Australia

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

## Parenting disputes

The Commission found that, where parenting disputes arise and orders are sought to legally transfer parental responsibility for a child (as opposed to an informal arrangement where the care of a child may be given to a family or community member but legal parental responsibility for that child remains with the birth-parents), Aboriginal people may find themselves at a disadvantage. This is because the system does not explicitly recognise the customary practice of extended family placement; instead, the Commonwealth and state family law Acts are premised upon the concept of the 'nuclear' family where one or both of the child's parents have parental responsibility for the child.<sup>43</sup>

The Family Law Council has recently examined this issue.<sup>44</sup> It highlighted the importance of legal recognition of persons with 'primary parental responsibility' for a child to ascertain whether that person (rather than the biological parents) is entitled to receive applicable family tax benefits or child support and to be able to give consent for medical treatment or to enrol a child in school.<sup>45</sup> The Council recommended that governments (state and federal) investigate the creation of a special legislative procedure for recognition and registration of persons with primary parental responsibility (in particular under relevant customary law) in order to avoid the costly court processes that are currently required to obtain a parenting order.<sup>46</sup>

The Commission strongly supported this recommendation; however, in the interests of maintaining equality in relation to ex-nuptial and nuptial children in Western Australia, the Commission was unwilling to propose that Western Australia unilaterally amend the *Family Court Act 1997* (WA) to establish this procedure unless and until similar amendments are made to its Commonwealth counterpart. Since the publication of the Commission's Discussion Paper, Western Australia has enacted the *Family Legislation Amendment Act 2006* (WA).<sup>47</sup> That Act implements a number of the Family Law Council's recommendations and ensures that the unique Aboriginal kinship obligations and child-rearing practices (such as the involvement of a child's extended family) are recognised by a court when making decisions about parenting of an Aboriginal child.<sup>48</sup> While the Commission is convinced that this will have a beneficial impact on Aboriginal people accessing Family Court services in Western Australia, the creation of a registration procedure for persons with primary parental responsibility remains outstanding.

It appears that this is not simply an issue in Aboriginal families, but also an issue for the wider community. As

42. Family Law Pathways Advisory Group (Cth), *Out of the Maze – Pathways to the Future for Families Experiencing Separation* (August 2001) 91. The full recommendation and accompanying text is reproduced in Buti T & Young L, 'Family Law and Customary Law', *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 143, 165.
43. The Commission notes that there may be other laws in Western Australia that do not take into account the customary practice of extended family placement. For example, the definition of a close relative pursuant to s 35 of the *Criminal Injuries Compensation Act 2003* (WA) may not be wide enough to include people who have cared for a child but are not the biological parents, grandparents or step-parents of the child. The Commission encourages the Western Australian government to consider whether the customary practice of extended family placements should be recognised in other laws and policies.
44. Family Law Council, *Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices: Response to Recommendation 22 of the Pathways Report* (December 2004) 18.
45. This point was also made in the report commissioned by the Council of the Ageing where the high incidence of informal care or guardianship arrangements was noted: see Fitzpatrick M, *Australian Issues in Ageing: Grandparents raising grandchildren* (Melbourne: Council of the Ageing, July 2003) 14.
46. *Ibid*, Recommendation 2.
47. Assented to 4 July 2006.
48. *Family Court Act 1997* (WA) ss 66C(2)(h), 71A, 202(L)(3).



observed earlier, a rapid rise in the number of grandparents raising grandchildren has been reported in Australia, often as a consequence of substance abuse by the child's parents.<sup>49</sup> Grandparents have complained that while they have been given the grandchildren they have no legal guardianship and their position as carers is precarious.<sup>50</sup> Without formal parenting orders they are unable to make everyday decisions concerning the children,<sup>51</sup> yet many are reluctant to undertake formal proceedings in the Family Court for fear of alienating their own children who may also be in need.<sup>52</sup> The cost of such proceedings is also a significant factor.

While the Commission will not—in the interests of maintaining equality between nuptial and ex-nuptial children—propose unilateral amendment of the *Family Court Act 1997* (WA) without similar amendment to the Commonwealth *Family Law Act 1975*, it does believe that this is an issue that should be addressed at the earliest opportunity. The Commission therefore recommends that the Western Australian government

actively promote, at the national level, the cause of functional recognition of non-biological parents who have parental responsibility or primary care for a child, whether of Aboriginal or non-Aboriginal descent. This recommendation aligns with option 2, which precedes Recommendation 2 of the Family Law Council's report on recognition of traditional Aboriginal and Torres Strait Islander child-rearing practices.<sup>53</sup>

#### **Recommendation 89**

##### **Functional recognition of non-biological primary carers**

That the Western Australian government actively promote, at the national level, the cause of functional recognition of non-biological parents who have parental responsibility or primary care for a child, whether of Aboriginal or non-Aboriginal descent.

49. Fitzpatrick M, *Australian Issues in Ageing: Grandparents raising grandchildren* (Melbourne: Council of the Ageing, July 2003) 12.

50. *Ibid* 22.

51. Such as, for example, giving consent to medical procedures, obtaining the child's identification documents, claiming Medicare or health benefits on behalf of the child, and enrolling the child in school.

52. *Ibid* 21–37.

53. Family Law Council, *Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices: Response to Recommendation 22 of the Pathways Report* (December 2004) 19.

# Family Violence and the Protection of Aboriginal Women and Children

## Family Violence and Sexual Abuse in Western Australian Aboriginal Communities

During consultations for this reference, the Commission received a great number of submissions suggesting that family violence and child abuse (including sexual abuse) was of considerable concern to Aboriginal communities, and particularly to Aboriginal women.<sup>1</sup> Over the past two decades the escalating problem of interpersonal or family violence in Aboriginal communities has become increasingly apparent. In 2001 the Western Australian government established a committee, led by Magistrate Sue Gordon, to inquire into the response by government agencies into complaints of family violence and child abuse in Aboriginal communities. In 2002 the Gordon Inquiry published its findings and declared that ‘the statistics paint a frightening picture of what could only be termed an “epidemic” of family violence and child abuse in Aboriginal communities’.<sup>2</sup>

More recently, a great deal of media attention has been paid to the high occurrence of sexually transmitted diseases in young Aboriginal children and of family violence in Western Australian Aboriginal communities.<sup>3</sup> Media claims that customary law permits Aboriginal men to excuse or defend violent domestic behaviour and child abuse have also reappeared.<sup>4</sup> However, as the consultations for this reference and other studies have revealed, Aboriginal women in general do not support these claims and do not consider interpersonal violence or child abuse to be justified, condoned or excused by customary law.<sup>5</sup> This is also the Commission’s position

on the issue. This is not only made clear in the Commission’s Discussion Paper, but is also firmly restated and enlarged upon in Chapter One of this report in the context of challenging the misconceptions upon which these claims are founded.<sup>6</sup>

## Causes of family violence and sexual abuse in Aboriginal communities

When discussing the issue of violence in Aboriginal communities it is important to note that Aboriginal people generally prefer the term ‘family violence’ to domestic violence because it encompasses a much broader range of conduct. The Aboriginal and Torres Strait Islander Social Justice Commissioner has described family violence in the following manner:

Family violence involves any use of force, be it physical or non-physical which is aimed at controlling another family or community member and which undermines that person’s well-being. It can be directed towards an individual, family, community or particular group. Family violence is not limited to physical forms of abuse, and also included cultural and spiritual abuse. There are interconnecting and trans-generational experiences of violence within Indigenous families and communities.<sup>7</sup>

The causes of Aboriginal family violence were examined in the Commission’s Discussion Paper<sup>8</sup> and are also addressed in Chapter One of this Report.<sup>9</sup> Briefly, these include the breakdown of community kinship systems and customary law; alcohol and drug abuse; the effects

1. This accords with the observations of the Department for Community Development’s Office for Women’s Policy which has observed that ‘[a]lmost one in four Indigenous women perceive family violence as a problem in their community’: *Indigenous Women’s Report Card 2005* (August 2005) 57.
2. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into responses by government agencies to complaints of family violence and child abuse in Aboriginal communities* (July 2002) xxiii (Gordon Inquiry).
3. See, for example, Barrass T & Emery R, ‘STD Cases on Rise in Black Children’, *The Australian*, 23 June 2006, 4 where it was revealed that of 708 notifications of sexually transmitted diseases in children under 14 in Western Australia, 554 concerned Aboriginal children.
4. For more detail on these claims, see discussion in Chapter One, above p 18–30.
5. See, LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 357–60.
6. See above pp 18–30.
7. 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.
8. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) Part VII.
9. See above pp 23–24.

of institutionalisation and previous government removal policies; and entrenched poverty.<sup>10</sup> The problem of overcrowding in many Aboriginal households (discussed at length in Part II of the Discussion Paper)<sup>11</sup> has also been recognised as a significant contributing factor to problems of family or interpersonal violence.<sup>12</sup> Overcrowded housing creates the context for such violence because, apart from the obvious stresses such living conditions invite, women and children are unable to remove themselves from contact with violent family members. In its Discussion Paper, the Commission expressed the view that government strategies to prevent Aboriginal family violence can be significantly enhanced by addressing the issue of overcrowding in Aboriginal households.<sup>13</sup> The Commission reiterates that view here.

## Under-reporting of family violence and sexual abuse

In its submission the Office of the Director of Public Prosecutions identified under-reporting of 'intra-Aboriginal offending' as a significant 'cultural' issue.<sup>14</sup> The under-reporting of sexual abuse and family violence occurs in all cultures and communities;<sup>15</sup> however, it is acknowledged that the level of under-reporting by Aboriginal victims may be more pronounced.<sup>16</sup> Some of the reasons for the under-reporting of family violence and sexual abuse by Aboriginal victims are discussed below.

## Distrust and fear of the police

Historically, Aboriginal people have been subject to oppressive treatment by the police. Sharon Payne has asserted that the role of the police in carrying out assimilation policies and removing Aboriginal children has had particular impact on Aboriginal women.<sup>17</sup> Research reports have consistently identified distrust, intimidation and fear of police as a significant reason for the reluctance of Aboriginal people to report sexual and violent offences.<sup>18</sup> Some Aboriginal women and children may also be reluctant to report abuse to the police because they fear that they will be arrested for unpaid fines or outstanding bench warrants.<sup>19</sup> The Gordon Inquiry found that distrust of Western Australia police officers was a 'key barrier' to Aboriginal communities making complaints about family violence and child abuse.<sup>20</sup> Further, Aboriginal women may be deterred from reporting abuse because of past inaction or ineffective responses by police and other government agencies.<sup>21</sup>

## Distrust and fear of the criminal justice system and other government agencies

As the Commission noted in its Discussion Paper, the history of the relationship between Aboriginal people and the criminal justice system is one that has been 'marred by discrimination, over-regulation and unfair treatment'.<sup>22</sup> Aboriginal women have often felt

10. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 350–51.

11. *Ibid* 38–42.

12. As detailed in the supporting evidence to Western Australia's Gordon Inquiry: Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into responses by government agencies to complaints of family violence and child abuse in Aboriginal communities* (July 2002). See also 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.

13. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 351.

14. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 7.

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

16. 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].

17. Payne S, 'Aboriginal Women and the Law' in Easta P & McKillop S (eds), *Women and the Law*, Australian Institute of Criminology Proceedings No. 16 (Canberra, 1993) 69.

18. Atkinson J, 'Violence Against Aboriginal Women: Reconstitution of Community Law – The Way Forward' (2001) 5(11) *Indigenous Law Bulletin* 19. See Keel M, *Family Violence and Sexual Assault in Indigenous Communities: Walking the talk*, Australian Institute of Family Studies, Briefing Paper No. 4 (2004) 7; Victorian Law Reform Commission (VLRC), *Sexual Offences*, Interim Report (2003) [3.24]; 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) [4.7.3]; Keating N, *Review of Services to Victims of Crime and Crown Witnesses Provided by the Officer of the Director of Public Prosecutions for Western Australia* (April 2001) 113; 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) [3.2].

19. Thomas C, 'Sexual Assault: Issues for Aboriginal Women' in Easta P (ed), *Without Consent: Confronting adult sexual violence*, Australian Institute of Criminology Conference Proceedings No. 20 (1993) 141; Keating, *ibid* 113.

20. 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) 207. The Western Australia Police have acknowledged that many Aboriginal people distrust the police: see Western Australia Police, Submission No. 46 (7 June 2006) 3.

21. 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) [3.5].

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

intimidated by the proceedings in court.<sup>23</sup> It has been observed that when Aboriginal women have negative experiences with criminal justice agencies they may discourage other Aboriginal women from making complaints.<sup>24</sup> Fear and mistrust of the criminal justice system and its agencies has been consistently mentioned as one of the reasons Aboriginal women do not report sexual abuse and violence.<sup>25</sup>

Aboriginal women may also be disinclined to report sexual abuse and violence because they fear that their men will be imprisoned.<sup>26</sup> It is generally understood that Aboriginal women want violence and abuse to stop but do not necessarily want their men to be incarcerated.<sup>27</sup> Many women experiencing family violence avoid seeking assistance from authorities for fear that their children might be removed from them. This is particularly a concern amongst Aboriginal women who may view this issue in the context of past government policies supporting the removal of Aboriginal children from their families.<sup>28</sup>

### Lack of police presence

In many remote communities it is probably irrelevant whether the victim is afraid to report the matter to the police because there are simply no police available or no transport to attend the nearest police station.<sup>29</sup> The federal Minister for Indigenous Affairs, Mal Brough, recently highlighted that across central Australia only eight out of 40 Aboriginal communities have some form of police presence.<sup>30</sup> The lack of police presence in many Western Australian Aboriginal communities was

acknowledged when the state government announced its plan to establish a permanent police presence in nine remote locations in response to the Gordon Inquiry.<sup>31</sup>

### Language and communication barriers

The Commission has emphasised throughout this Report and its Discussion Paper that many Aboriginal people face language and communication barriers when dealing with the criminal justice system.<sup>32</sup> A Western Australian report prepared by the Office of the Director of Public Prosecutions has acknowledged the need for interpreters for Aboriginal victims.<sup>33</sup> If an Aboriginal woman is already traumatised because of sexual abuse or violence it is understandable that she may not seek assistance from government agencies if she is unable to adequately speak or understand English.

### Lack of knowledge about legal rights and legal services available

It has also been suggested that some Aboriginal women may be unaware of their legal rights and legal services that are available to them.<sup>34</sup> In particular, Aboriginal women living in remote areas may not be in a position to access these services or exercise their rights under Australian law.<sup>35</sup> This factor has been recently recognised by the Council of Australian Governments which agreed that additional resources should be provided for community legal education to ensure that Aboriginal women are informed of their legal rights,

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23. 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) [4.7.5].
  24. *Ibid* [3.4].
  25. Atkinson J, 'Violence Against Aboriginal Women: Reconstitution of Community Law – The Way Forward' (2001) 5(11) *Indigenous Law Bulletin* 19; Thomas C, 'Sexual Assault: Issues for Aboriginal women' in Easta P (ed), *Without Consent: Confronting adult sexual violence*, Australian Institute of Criminology Conference Proceedings No. 20 (1993) 142; Keel M, *Family Violence and Sexual Assault in Indigenous Communities: Walking the talk*, Australian Institute of Family Studies, Briefing Paper No. 4 (2004) 7; VLRC, *Sexual Offences*, Interim Report (2003) [3.24]; 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.
  26. See Keel, *ibid* 7; Domestic Violence Prevention Unit, *Best Practice Model: For the provision of programs for victims of domestic violence in Western Australia* (June 2000) 12. In some cases there may also be a fear of deaths in custody: see Stanley J, Tomison A & Pocock J, 'Child Abuse and Neglect in Indigenous Australian Communities' (2003) 19 *National Child Protection Clearinghouse, Child Abuse Prevention Issues* 5.
  27. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 352–53.
  28. *Ibid* 352.
  29. Stanley J, Tomison A & Pocock J, 'Child Abuse and Neglect in Indigenous Australian Communities' (2003) 19 *National Child Protection Clearinghouse, Child Abuse Prevention Issues* 5; Dodson M, 'Violence, Dysfunction, Aboriginality', (National Press Club, 11 June 2003) 8.
  30. Smith S, 'Paper reveals sexual abuse, violence in NT Indigenous communities', *Lateline*, Transcript of Interview, 15 May 2006, 2.
  31. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 251. It has similarly been acknowledged by the Commonwealth government by agreeing to provide additional funding for police resources in remote areas. COAG meeting, 14 July 2006 see <<http://www.coag.gov.au/meetings/140706/index.htm#indigenous>>. But this funding is conditional on state and territory governments legislating to ensure that customary law cannot be used to excuse or lessen the seriousness of family violence and sexual abuse.
  32. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 396–416.
  33. Keating N, *Review of Services to Victims of Crime and Crown Witnesses Provided by the Officer of the Director of Public Prosecutions for Western Australia* (April 2001) 112–13.
  34. 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.
  35. Domestic Violence Prevention Unit, *Best Practice Model: For the provision of programs for victims of domestic violence in Western Australia* (June 2000) 12.

and encouraged to report family violence and sexual abuse.<sup>36</sup>

In its Discussion Paper the Commission considered the need for education about the rights and responsibilities of Aboriginal people in the context of promised marriages. Although there is scant evidence pointing to the contemporary practice of promised marriages in Western Australia,<sup>37</sup> in its Discussion Paper the Commission took a strong stance against recognition of such practice.<sup>38</sup> It is the Commission's opinion that Australia's international obligations preclude the recognition of non-consensual or underage customary law marriage and that any such recognition would result in the denial of fundamental human rights to Aboriginal women and children.<sup>39</sup> However, the Commission also noted that the mere denial of recognition by Australian legal authorities would do little to practically enhance the rights of young Aboriginal girls who were the subject of a customary law promise to marry.<sup>40</sup>

Proposal 63 of the Commission's Discussion Paper therefore recommended that educative initiatives planned in response to the Gordon Inquiry<sup>41</sup> include relevant information relating to the requirements under Australian law (and international law) of freedom of choice in marriage partners and the criminality of acts of sexual relations with children under the age of 16 regardless of marriage status under Aboriginal customary law.<sup>42</sup> Submissions showed support for this proposal; however, the Aboriginal and Torres Strait Islander Social Justice Commissioner indicated that the proposal could be usefully widened to highlight the

critical need for community education programmes to be developed with the full participation of Indigenous peoples to inform Indigenous communities about conflicts between customary law, human rights and the general application of the criminal law.<sup>43</sup>

The Commission agrees with this approach and, as well as providing a separate recommendation for educative initiatives in relation to the interaction between Aboriginal customary law and Western Australian criminal law, it has broadened its recommendation in relation to family violence and child sexual relations accordingly.

### Recommendation 90

#### Education about legal rights of women and children and criminality of child sexual abuse

1. That the Western Australian government include in the educative initiatives planned in response to the Gordon Inquiry:
  - (a) information about the requirements under Australian law and international law of freedom of choice in marriage partners and the requirement of informed consent to marriage;
  - (b) information about the criminality of acts of sexual relations with children under the age of 16 regardless of marriage status under Aboriginal customary law; and
  - (c) information about the legal rights of women and children in the context of family violence and child sexual abuse or neglect and about the legal and related services available to assist women and children to exercise these rights.
2. That these initiatives be developed with the full and effective participation of Aboriginal people.

36. COAG meeting, 14 July 2006 see <<http://www.coag.gov.au/meetings/140706/index.htm#indigenous>>. But once again the Commission notes that this funding is conditional on state and territory governments legislating to ensure that customary law cannot be used to excuse or lessen the seriousness of family violence and sexual abuse.

37. See discussion in LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 332–34.

38. *Ibid.*

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

40. *Ibid* 334.

41. Current education and awareness raising strategies proposed in response to the Gordon Inquiry include promoting positive images of women and familial relationships; promoting a belief that Aboriginal people have the ability to change abuse and family violence; reinforcing that the safety of women and children is a priority; promoting the importance of valuing children; and promoting culturally sensitive child protection and protective behaviour and information. See Government of Western Australia, *Putting People First: The Western Australian State Government's Action Plan for Addressing Family Violence and Child Abuse in Aboriginal Communities* (November 2002) 20.

42. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 334, Proposal 63.

43. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 8. The Catholic Social Justice Council also expressed strong support for all of the Commission's 'proposals requiring Aboriginal people to be informed of their legal rights through education': Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006) 2.

## Lack of appropriate support services for Aboriginal victims

The lack of culturally appropriate support services for Aboriginal victims of family violence and sexual abuse has been raised often as a reason for the failure to report crimes of this nature.<sup>44</sup> According to the Department of Indigenous Affairs this was one of the main issues that arose during the project *Breaking the Silence on Sexual Abuse: My body belongs to me*.<sup>45</sup> The Gordon Inquiry also noted that one reason for under-reporting of child abuse in Aboriginal communities was that in remote and rural areas there is minimal contact with child health and welfare workers.<sup>46</sup> The Commission has been advised that there is an urgent need for more Aboriginal victim support workers.<sup>47</sup>

The ability of Aboriginal women to exercise their legal rights is also inhibited by barriers to accessing Aboriginal legal services.<sup>48</sup> Such barriers exist because these services are generally under-funded and because there is a tendency for legal services to represent the alleged perpetrator of the abuse.<sup>49</sup> The Aboriginal and Torres Strait Islander Social Justice Commissioner has stressed that additional resources must be provided to Aboriginal Legal Services and other Indigenous legal service

providers in order to ensure that Aboriginal women have appropriate access to legal services.<sup>50</sup>

## Cultural factors

It has been argued that there may be barriers under customary law that prevent or discourage the victim or their family from informing authorities about violence or abuse.<sup>51</sup> In this context it has been observed that some Aboriginal women may be hesitant in reporting an incident of sexual abuse to a male person.<sup>52</sup> Similarly, Lloyd and Rogers have stated that Aboriginal women may come from a cultural background where 'sexual matters are not referred to in mixed company let alone in the presence of court personnel'.<sup>53</sup> On the other hand, anthropological accounts do not suggest that there were any constraints in traditional Aboriginal societies about discussing matters of a sexual nature.<sup>54</sup> Berndt and Berndt have observed that the 'whole subject of sex is treated frankly, as a normal and natural factor in human life'.<sup>55</sup>

Customary law has also been linked to under-reporting by commentators contending that Aboriginal victims do not speak out about abuse because of the fear of payback or retaliation from the perpetrator or the

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44. Thomas C, 'Sexual Assault: Issues for Aboriginal Women' in Easteal P (ed), *Without Consent: Confronting Adult Sexual Violence*, Australian Institute of Criminology Conference Proceedings No. 20 (1993) 142–43; VLRC, *Sexual Offences*, Interim Report (2003) [3.24]; 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) [4.7.3.2]; Keating N, *Review of Services to Victims of Crime and Crown Witnesses Provided by the Officer of the Director of Public Prosecutions for Western Australia* (April 2001) 113.
  45. Department of Indigenous Affairs, *Breaking the Silence on Sexual Abuse: My body belongs to me* (August 2002) 6.
  46. 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) 40.
  47. Submission No. 55 (30 June 2006) (submission provided in confidence). It has also been observed that the lack of Aboriginal staff working with relevant criminal justice agencies is a barrier for Aboriginal women in accessing the criminal justice system: see Law S, Queensland Office of the Director of Public Prosecutions, *Indigenous Women within the Criminal Justice System Report* (1996) as cited in Keating N, *Review of Services to Victims of Crime and Crown Witnesses Provided by the Officer of the Director of Public Prosecutions for Western Australia* (April 2001) 115.
  48. 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) [4.7.3.2]; 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].
  49. Legal services will generally represent the alleged offender because they come into contact with the accused first. They may then be prevented from representing the victim because there is a conflict of interest.
  50. 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) 13. See Chapter Five 'Aboriginal People and the Criminal Justice System – Programs and Services', above pp 82–96.
  51. 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; Stanley J, Tomison A & Pocock J, 'Child Abuse and Neglect in Indigenous Australian Communities' (2003) 19 *National Child Protection Clearinghouse, Child Abuse Prevention Issues* 5.
  52. Thomas C, 'Sexual Assault: Issues for Aboriginal Women' in Easteal P (ed) *Without Consent: Confronting Adult Sexual Violence*, Australian Institute of Criminology Conference Proceedings No. 20 (1993) 141; 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].
  53. Lloyd J & Rogers N, 'Crossing the Last Frontier: Problems facing Aboriginal women victims of rape in central Australia', in Easteal P (ed) *Without Consent: Confronting adult sexual violence*, Australian Institute of Criminology Conference Proceedings No. 20 (1993) 153. It has also been noted that discussing sexual matters with the opposite sex may be considered shameful in some Aboriginal communities: see Tonkinson M, *Domestic Violence Among Aborigines*, Domestic Violence Task Force Discussion Paper (1985) 299 as cited in Stanley J, Tomison A & Pocock J, 'Child Abuse and Neglect in Indigenous Australian Communities' (2003) 19 *National Child Protection Clearinghouse, Child Abuse Prevention Issues* 14. During her recent interview Rogers referred to a case where a young Aboriginal girl was sexually abused. The victim's grandmother apparently told the police that under Aboriginal law she would not have been able to talk about the incident but that the perpetrator would have been punished: see Jones T, 'Crown Prosecutor Speaks Out About Abuse in Central Australia' *Lateline*, Transcript of Interview, 15 May 2006.
  54. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal Traditional Life Past and Present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 164.
  55. *Ibid* 189–90.

perpetrator's family.<sup>56</sup> In its submission to the Commission's Discussion Paper, the Office of the Director of Public Prosecutions recited comments made by Northern Territory prosecutor Nanette Rogers during a television interview that:

[V]iolence is entrenched in a lot of aspects of Aboriginal society ... Aboriginal society is very punitive, so that if a report is made or a statement made implicating an offender then that potential witness is subject to harassment, intimidation and sometimes physical assault if the offender gets into trouble because of that report or police statement.<sup>57</sup>

The Commission is concerned about the potential for comments of this nature to perpetuate myths about Aboriginal customary law and culture condoning family violence and child abuse.<sup>58</sup> Certainly there are cultural dynamics within close-knit Aboriginal communities that may discourage victims from speaking out; but it must be acknowledged that *any* victim of sexual abuse or violence, whether Aboriginal or not, may be fearful of the perpetrator or their family.<sup>59</sup> Fear, shame and distrust are part of every culture and many women and children who are victims of sexual or physical abuse by family members suffer from these emotions, coupled with the very real concern that the criminal justice system cannot meet their needs or protect them.<sup>60</sup>

Stewart O'Connell (an experienced Northern Territory Aboriginal Legal Service lawyer) has observed that the relevance of culture in the context of Aboriginal family violence is not so much about customary law as the life circumstances of many Aboriginal victims.<sup>61</sup> The appalling state of Aboriginal housing and the extent of

overcrowding have already been mentioned as a significant contributing factor to Aboriginal family violence; but because many Aboriginal people live in close proximity to one another, any fear of retribution (coupled with loyalty to one's family or community) may well be compounded.<sup>62</sup> Fear of reporting violence may also be exacerbated by the lack of appropriate support services for many Aboriginal women:<sup>63</sup> if there is nowhere to seek refuge it is obviously more difficult to overcome fear and report abuse.

The Commission acknowledges that cultural issues may play a part in the under-reporting of sexual and violent offences against Aboriginal women and children. But clearly 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. In its Discussion Paper the Commission underlined the need for Aboriginal women to be able to rely upon the protection of Australian law in relation to family violence.<sup>64</sup> The Commission has made practical recommendations to overcome problems in the criminal justice system that contribute to under-reporting, including cultural awareness training for police, government officers and support staff;<sup>65</sup> improvements to special witness facilities in regional courts;<sup>66</sup> greater access to Aboriginal language interpreters;<sup>67</sup> single-gender juries;<sup>68</sup> and Aboriginal liaison officers in courts to assist Aboriginal witnesses.<sup>69</sup> These are discussed in Chapters Five and Nine. This chapter makes recommendations—which build on those made by the Gordon Inquiry—to address family violence and child abuse issues at the front line in a culturally appropriate way.

56. Stanley J, Tomison A & Pocock J, 'Child Abuse and Neglect in Indigenous Australian Communities' (2003) 19 *National Child Protection Clearinghouse, Child Abuse Prevention Issues* 5. See Keel M, *Family Violence and Sexual Assault in Indigenous Communities: Walking the talk*, Australian Institute of Family Studies, Briefing Paper No. 4 (2004) 7; Keating N, *Review of Services to Victims of Crime and Crown Witnesses Provided by the Officer of the Director of Public Prosecutions for Western Australia* (April 2001) 113.

57. Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 6 citing *Lateline*, Transcript of Interview with Nanette Rogers (15 May 2006).

58. The Commission has addressed these matters in detail in Chapter One of this report: see above pp 18–30.

59. 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.

60. As Gillen J has stated in the context of domestic violence in the United Kingdom: 'Well-founded concerns for their personal safety, fear of the economic costs of separation, financial dependence on the violent partner, a determination to remain in the relationship for the sake of the children and a desire to see their violent partner treated rather than punished may appear to be all perfectly rational reasons why the victim should [fail to report domestic violence]': Justice Gillen, 'Domestic Violence – In What Direction?' (2005) *International Family Law* 194, 195.

61. O'Connell S, 'The Deculturalisation of Indigenous Australia' (unpublished paper, 2006) 8.

62. *Ibid.* See also 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.

63. O'Connell, *ibid.*

64. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 361.

65. See Recommendations 2, 11, 12, 56 & 128.

66. See Recommendation 110.

67. See Recommendation 117 & 120.

68. See Recommendation 41.

69. See Recommendation 127.

*The relevance of culture in the context of Aboriginal family violence is not so much about customary law as the life circumstances of many Aboriginal victims.*

## Addressing Family Violence and Sexual Abuse in Aboriginal Communities

### The need for culturally appropriate responses to family violence and child abuse

As discussed above, certain factors impact upon an Aboriginal woman's decision not to report family violence. Such factors include fear of community reprisal or shame, the relationship and kinship obligations between the victim and the perpetrator of family violence, the complex (and sometimes alien) nature of Western legal processes and historical distrust and fear of police and government authorities all. These factors indicate the need for more culturally appropriate processes for responding to, intervening in and preventing family violence in Aboriginal communities.<sup>70</sup>

In its Discussion Paper the Commission described successful models to prevent family violence, which are already operating in Aboriginal communities in Western Australia. These models rejected a criminogenic approach, instead emphasising family and

community healing.<sup>71</sup> The use of traditional healing methods was supported in submissions from the Aboriginal and Torres Strait Islander Social Justice Commissioner and from Aboriginal people consulted for the reference.<sup>72</sup> Respondents to the Commission's community consultations also argued that non-violent strategies such as shaming, family conferencing and dispute resolution led by Elders or respected community members may be more effective in addressing violent behaviour and rehabilitating offenders than measures under the criminal law.<sup>73</sup> These comments indicate that there is a place for Aboriginal customary law and cultural responses to work in tandem with treatment, prevention and protection strategies provided for under Australian law.<sup>74</sup>

The Commission's research found that the success of family violence intervention and treatment programs will often depend on whether there is significant local Aboriginal involvement in the delivery of the program. The Commission therefore proposed that the Western Australian government actively encourage and resource the development of community-based and community-owned Aboriginal family violence intervention and treatment programs that are designed to respond to the particular conditions and cultural dynamics of the host community.<sup>75</sup>

70. As the *Western Australian Family and Domestic Violence State Strategic Plan 2004–2008* makes clear: 'Family and domestic violence affects women and children of all ages, cultures, backgrounds and life experiences. Thus, it is important that the diversity of individual women's needs and experiences and perceptions are taken into account in developing initiatives in the area of family and domestic violence': 6.

71. See, for example, the Derby Family Violence Prevention Project model, which is highly responsive to the particular needs and cultural sensibilities of its constituent community, discussed in Blagg H, 'A New Way of Doing Justice Business? Community Governance Mechanisms and Sustainable Governance in Western Australia' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 317, 325. This approach was also endorsed by the submission of the Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 15.

72. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 15. The point was also made very clear during the Commission's return consultation visit in Broome: LRCWA, Discussion Paper community consultation – Broome, 7 March 2006; and initial consultations: see LRCWA, *Thematic Summary of Consultations – Manguri*, 4 November 2002; Midland, 16 December 2002; Carnarvon, 30–31 July 2003; and Pilbara, 6–11 April 2003.

73. Dr Brian Steels, Mawarnkarra Health Service Roebourne, consultation (28 April 2006); LRCWA, Project No. 94, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003; Broome, 17–19 August 2003; LRCWA, Discussion Paper community consultation – Broome, 7 March 2006. It should be noted that the submission of the Office of the Director of Public Prosecutions (DPP) argued that 'there is no evidence that the application of customary law within communities actually prevents or avoids abuse' and suggested that 'often community traditions perpetrate abuse'. The DPP supported these allegations with reference to a single newspaper report dealing with Queensland and did not provide any evidence to support these claims from Western Australia (despite, as a prosecuting authority, presumably being in a position to provide such evidence). The Commission's Discussion Paper describes several successful community-owned and community-based programs addressing family violence in Aboriginal communities. It does not in any way suggest that Aboriginal cultural and customary law prevention and treatment strategies are the whole answer to this very complex problem; however, as the DPP's own submission acknowledges, appropriate responses to family violence and abuse in Aboriginal communities must include 'the rejection of criminalisation as the main strategy to deal with family violence'. See Office of the Director of Public Prosecutions, Submission No. 40A (14 June 2006) 5 & 8.

74. It is the Commission's opinion that community justice groups may be an appropriate vehicle for non-violent customary law strategies to address family violence. The requirement that these groups have equal representation of men and women and of family or skin groups will assist in establishing the cultural authority necessary for the success of customary law sanctions, particularly in regard to violence perpetrated against women. Importantly, the existence of these groups will not preclude a victim from seeking redress under Australian law. See Recommendation 17, above pp 112–13.

75. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 353, Proposal 70.

Submissions received both from government agencies and Aboriginal people supported this proposal.<sup>76</sup> In its consultations with Aboriginal communities, respondents stressed that where there was a choice, Aboriginal family violence programs, shelters and refuges were more patronised than non-Aboriginal initiatives.<sup>77</sup> However, as the Commission's Discussion Paper made clear in relation to community governance, different communities have different capacities to address community needs.<sup>78</sup> There are some communities that—for a variety of reasons, many historical—are dysfunctional or have significant internal conflict.<sup>79</sup> In order to enable the establishment of successful community initiatives that respond appropriately to family violence, some communities will therefore require more than encouragement and government resourcing. They will require ongoing support and training to build capacity among individuals to anchor and facilitate delivery of programs and services within the community.<sup>80</sup>

The Commission's initial consultations suggested that, although well-resourced, government-run programs were often ad hoc and faced difficulty establishing credibility and trust within the community.<sup>81</sup> In contrast, Aboriginal people complained that Aboriginal-owned, community-based programs often have to be abandoned after initial establishment grants run out.<sup>82</sup> For some programs significant outcomes may not be able to be demonstrated in the time-period ascribed to the funding; in others, funding may be reallocated

to generic government-run programs. It appears that this may be the case even where a program or facility has been successful in addressing family violence and its underlying causes. The constant need to secure funding by application for grants or tenders is an obvious drain on the limited resources of community programs and is an issue that must be addressed by government.<sup>83</sup>

### Recommendation 91

#### Community-based and community-owned Aboriginal family violence intervention and treatment programs

1. That the Western Australian government actively encourage, support and resource the development of community-based and community-owned Aboriginal family violence intervention and treatment programs that are designed to respond to the particular conditions and cultural dynamics of the host community.
2. That, where community-based and community-owned Aboriginal family violence intervention and treatment programs can demonstrate appropriate outcomes within the host community in a reasonable timeframe, the Western Australian government commit to ongoing resourcing of such programs in preference to generic government-run programs.

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76. Department of Indigenous Affairs, Submission No. 29 (2 May 2006); Department of Corrective Services (WA), Submission No. 31 (4 May 2006); Department of the Attorney General, Submission No. 34 (11 May 2006); Department for Community Development, Submission No. 51 (27 June 2006); Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006); Dr Brian Steels, Mawarnkarra Health Service Aboriginal Corporation, consultation (28 April 2006); LRCWA, Discussion Paper community consultations – Kalgoorlie, 28 February 2006; Broome, 7 March 2006; Fitzroy Crossing, 9 March 2006; Geraldton, 3 April 2006.
77. For example, Aboriginal staff at Thungula Goothada Family Support Legal Centre in Kalgoorlie, which offers culturally appropriate family violence support services, stated that the other programs in the area were not well-patronised by Aboriginal people. This puts significant pressure on Aboriginal-run programs where need is great. LRCWA, Discussion Paper community consultation – Kalgoorlie, 28 February 2006. Similar comments were made in relation to alcohol programs and sobering-up shelters in the mid-west during the Commission's initial consultations.
78. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 425–30. This point was also highlighted in the context of family violence in Department of Corrective Services, Submission No. 31 (4 May 2006) 18.
79. As stated in the Commission's Discussion Paper: 'Most contemporary Aboriginal communities can be said to have emerged through the process of colonisation, dislocation and the amalgamation of tribes or peoples that may have no historical connection. Many Aboriginal people no longer live on their ancestral lands and social organisation within some communities may have only tenuous ties to traditional Aboriginal society. While these factors do not necessarily dilute the force of Aboriginal culture and laws, they may contribute to social conflict or dysfunction and the factionalisation of governing institutions within communities.' LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 427.
80. In its submission the Department of Indigenous Affairs referred to the need for a 'whole-of-life approach' that will 'allow programs to take into account the intergenerational reconciliation that also needs to occur in many communities'. The Commission believes that such an approach requires strong community involvement and that capacity building of individuals is crucial to its success and to carrying the message across generations. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 15.
81. LRCWA, Project No. 94, *Thematic Summaries of Consultations – Meekatharra*, 28 August 2003.
82. A group of women Elders with whom the Commission met in Fitzroy Crossing on 9 March 2006 were bewildered that effective community programs that were in place were under-resourced or unresourced while the Department for Community Development resourced new department-run generic programs. A similar complaint was made by Dr Brian Steels who said: 'When programs are done *with* the community the funding is not ongoing; when they are done *to* the community (ie: by government departments) they don't work': Dr Brian Steels, Mawarnkarra Health Service Aboriginal Corporation, consultation (28 April 2006).
83. Again this complaint was heard from Aboriginal women consulted in Fitzroy Crossing: LRCWA, Discussion Paper community consultation – Fitzroy Crossing, 9 March 2006. It was also heard at other Aboriginal community meetings: LRCWA, Discussion Paper community consultations – Broome, 10 March 2006; Bunbury, 17 March 2006; Kalgoorlie, 28 February 2006; Geraldton, 3 April 2006. See also Dr Brian Steels, Mawarnkarra Health Service Aboriginal Corporation, consultation (28 April 2006).

## Meeting the needs of male perpetrators of family violence

While it is important that community responses to family violence do not deprive Aboriginal women of their ability to seek protection or initiate criminal proceedings under Australian law, many Aboriginal women consulted by the Commission sought alternative responses to family violence that would not see their men imprisoned (the rehabilitative value of which is, at best, tenuous). Although the creation of protection strategies for women and children is a strong feature of the government's Gordon Inquiry response, the Commission's community consultations revealed concern among Aboriginal people that there are not enough family violence initiatives or support mechanisms for men.<sup>84</sup> This issue has also been noted in connection with family violence in the broader community. The Australian Council of the Ageing has stated that:

Violent males are usually ignored by services aimed at protecting and supporting children. In fact there is a lack of support generally for men. If an appropriate response is provided at times of crisis, then the ongoing trauma, cost, the time that the person or family need to resolve their issues and move on are all minimised.<sup>85</sup>

The Commission has noted the concerns of Aboriginal people and other commentators and urges that the needs of male perpetrators (and male victims) of Aboriginal family violence be given due consideration by government. In particular, there is a need for resourcing of men's groups, sobering-up shelters, men-only centres, treatment programs (including for prisoners and those on release from prison for violent offences) and culturally appropriate counselling and education. As highlighted in the Commission's Discussion Paper, the establishment of 24- and 72-hour police restraining orders, which deny men (and sometimes women) access to homes, underline the need for short-term crisis accommodation for men in Aboriginal communities and regional town centres.<sup>86</sup> There is also a need for men-only 'cooling-off' or drop-in centres to allow men immediate access to counselling or activities

on neutral territory to resolve tension that may otherwise lead to family violence.

This is not to say that there are not excellent services already available in some areas. The Men's Outreach Service in Broome, for example, appears to do a wonderful job with very limited funding to provide men in Broome with counselling and a place of temporary refuge. It also provides counselling and other services to men incarcerated in Broome Regional Prison and conducts outreach programs for outlying communities. The problem appears to be a lack of funding to facilitate centres that are open 24 hours a day, especially on weekend nights and pension days when high levels of alcohol are consumed and these services are most needed.<sup>87</sup> In order to properly address Aboriginal family violence and child abuse, better provision and resourcing of men's services in regional town centres and remote communities is required. Ideally, services should be provided in a single location to enable men to access counselling, activities, education, accommodation and treatment in a single visit without referral.

### Recommendation 92

#### **Better provision and resourcing of men's counselling, education, treatment and accommodation services**

1. That the Western Australian government actively pursue the provision of new services, and better resourcing of existing services, for the counselling, education, treatment and short-term crisis accommodation of Aboriginal men in regional town centres and remote communities.
2. That, where possible, such services be provided in the same location to enable men to access counselling, activities, education, accommodation and treatment in a single visit without referral and be resourced to operate on a 24-hour basis.

84. These comments featured both in the initial stages of the reference and on the Commission's return visits to discuss its Discussion Paper and proposals: LRCWA, *Thematic Summary of Consultations – Manguri*, 4 November 2002; *Pilbara*, 6–11 April 2003; *Geraldton*, 26–27 May 2003; *Carnarvon*, 30–31 July 2003; *Bunbury*, 28–29 October 2003; *Albany*, 18 November 2003; LRCWA, Discussion Paper community consultations – Carnarvon, 16 February 2004; Broome, 7 March 2006; Bunbury, 17 March 2006; Geraldton, 3 April 2006.

85. Fitzpatrick M, *Australian Issues in Ageing: Grandparents raising grandchildren* (Melbourne: Council of the Ageing, July 2003) 20.

86. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 357.

87. For example, the Men's Outreach Service in Broome is currently only funded to open from 8.00 am till 4.00 pm six days per week. The Commission also heard that in Geraldton the sobering-up centre is only resourced to open four days per week and not on a Saturday when most drinking and associated violence occurs.

## Ongoing monitoring and evaluation of initiatives

As mentioned earlier, the Gordon Inquiry was established by the Western Australian government in 2001 to inquire into the response by government agencies into complaints of family violence and child abuse in Aboriginal communities. The Gordon Inquiry report described an endemic situation of child abuse in Aboriginal communities and found that the responses to family violence and child abuse were inadequate and in need of urgent reform. In response the government moved quickly to introduce an action plan, *Putting People First*, to implement the recommendations of the Gordon Inquiry.<sup>88</sup>

In its Discussion Paper the Commission indicated its support for the recommendations of the Gordon Inquiry and applauded the state government's willingness to quickly respond to the issue of family violence and child abuse in Aboriginal communities. However, the Commission also noted the observation of Neil Morgan and Joanne Motteram that there is often, in the case of Aboriginal affairs, a significant 'gap between the promises of paper policies and what is happening on the ground'.<sup>89</sup> This is both a product of substantive inequality in service provision between the Aboriginal and non-Aboriginal communities and previous government focus on policy processes rather than policy outcomes. The Commission considers it imperative that the government regularly consult with those responsible for frontline service delivery and with those receiving the benefits of such service to genuinely assess the effectiveness of programs and monitor the changing needs of communities. In addition, programs and government service delivery must be flexible and dynamic on a local level to accommodate cultural differences, to involve established local Aboriginal-run services, and to ensure that the best result is achieved for each community. The Commission therefore proposed that evaluation of government initiatives to address family violence and child abuse in Aboriginal

communities be ongoing with an emphasis on positive, practical outcomes.<sup>90</sup>

Submissions from agencies taking a lead role in the implementation of Gordon Inquiry initiatives were extremely supportive of this proposal.<sup>91</sup> In his submission the Aboriginal and Torres Strait Islander Social Justice Commissioner urged a whole-of-government approach to ensure consistency and coordination in addressing family violence.<sup>92</sup> The Western Australian government has, of course, embraced this approach as a key recommendation of the Gordon Inquiry. However, it has recently identified problems with inter-agency coordination and has sought to address this issue by improving funding arrangements for more coordinated agency responses to family and domestic violence.<sup>93</sup> The Office of the Auditor General for Western Australia (OAG) has also highlighted inadequacies with the central reporting and monitoring of the Gordon Inquiry response *Putting People First* action plan.<sup>94</sup> The OAG's recommendation for the design of an evaluation framework and implementation of authoritative monitoring practices of all Gordon Inquiry initiatives is currently being pursued by the Department of Indigenous Affairs.<sup>95</sup> As yet, there is no indication whether the evaluation framework will adequately emphasise community consultation, outcomes and regional differences as proposed by the Commission. The Commission therefore confirms its recommendation.

### Recommendation 93

#### Ongoing progress reporting and consultative evaluation of family violence initiatives

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

88. Government of Western Australia, *Putting People First: The Western Australian state government's action plan for addressing family violence and child abuse in Aboriginal communities* (November 2002). See discussion in LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 351–52.
89. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, Law Reform Commission of Western Australia, Project No. 94, Background Paper No. 7 (December 2004) 235, 312.
90. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 355, Proposal 71.
91. Department of Indigenous Affairs, Submission No. 29 (2 May 2006); Department of Corrective Services (WA), Submission No. 31 (4 May 2006); Department for Community Development, Submission No. 51 (27 June 2006).
92. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Submission No. 53 (27 June 2006) 15. The whole-of-government approach is also recommended by the Commission in Recommendation 1 of this Report.
93. Family and Domestic violence Unit, Department for Community Development, *Review of the Regional Family and Domestic Violence Committee Model: Final Report* (May 2006).
94. Office of the Auditor General for Western Australia, *Progress with Implementing the Response to the Gordon Inquiry*, Report No. 11 (November 2005).
95. David Waters, Senior Policy Officer, Gordon Implementation Unit, Department of Indigenous Affairs, telephone consultation (27 July 2006).

## Working with Children Check

Since publication of the Commission's Discussion Paper the Working with Children Check (WWCC) regime has come into place in Western Australia.<sup>96</sup> The WWCC is essentially a criminal history record check which anyone involved in child-related work in either a volunteer (more than five days per year) or paid capacity is required to undertake. Child-related work is work where the usual duties involve, or are likely to involve, contact with a child.<sup>97</sup> It includes contact with children in the context of clubs or associations (including of a sporting, cultural or recreational nature) and overnight camps. Parents are exempt from the WWCC regime in most cases of volunteer work if their own child is also participating in the activity.<sup>98</sup> Informal domestic or private arrangements such as babysitting or accommodation with a relative are not subject to the WWCC regime. The term 'relative' includes those people who are considered the child's parent, grandparent, aunt, uncle, sister or brother under Aboriginal customary law;<sup>99</sup> however, parental exemptions only apply to biological or step-parents (and their de facto partners) or legal guardians.

It is the responsibility of anyone working with children to apply for a WWCC. The application process includes filling out an application form and providing identification.<sup>100</sup> Applications are assessed by the Working with Children Screening Unit and successful applicants are issued with a photo identification card that is valid for three years. Only certain criminal records will result in a negative assessment – these include sex offences, homicides (including infanticide), grievous bodily harm, pornography-related offences, kidnapping and killing an unborn child. Additionally, if a person has been charged with a relevant offence but never convicted he or she may also receive a negative assessment.<sup>101</sup>

During its return consultation visits in Fitzroy Crossing the Commission was alerted to issues with the stringency of WWCC requirements in that community. In its written submission, the Kimberley Aboriginal Law



and Culture Centre (KALACC) stated that WWCC requirements impact negatively on Aboriginal people undertaking positive programs for Aboriginal youth, such as community festivals and large organised bush trips where, among other activities, Elders teach youth cultural ways.<sup>102</sup> The emphasis on community-owned processes and initiatives in the Commission's recommendations in this report may mean that more Aboriginal people will require a WWCC. For this reason the Commission has examined the WWCC requirements and assessed the regime's impact on Aboriginal people.

### Identification requirements

The Commission's examination found that the identification requirements to gain a WWCC may be extremely difficult to meet for some Aboriginal people. Currently the WWCC requires that you provide a birth certificate, a passport or a drivers licence, as well as one to three of the following forms of identification: rates notice, Centrelink card, Medicare card, lease agreement, credit card, bank statement with residential address, or a utilities account. As discussed in relation to the laws of succession in Chapter Six above,<sup>103</sup> some Aboriginal people born before 1970 do not have birth certificates because their births were not always officially registered prior to that date. Further, relatively few Aboriginal people, particularly in remote areas, would

96. *Working with Children (Criminal Record Checking) Act 2004 (WA)*. The Act came into operation on 1 January 2006. The WWCC is being phased in over a period of five years.

97. For greater detail see *Working with Children (Criminal Record Checking) Act 2004 (WA)* s 6.

98. This exemption does not, however, apply to overnight camps.

99. *Working with Children (Criminal Record Checking) Act 2004 (WA)* s 4.

100. Applications are lodged through Australia Post Offices and must be lodged in person so that a photograph of the applicant may be taken. Identification will also be verified at lodgement.

101. The circumstances of the person's need for a WWCC is taken into account in the assessment and there is a right of appeal to the State Administrative Tribunal.

102. KALACC has also independently raised this issue with the Working With Children Screening Unit.

103. See discussion under 'Proof of relationship to an Aboriginal deceased', Chapter Six, above pp 237–38.

have passports, many may not have a drivers licence and many may not have a permanent address. Therefore quite a few Aboriginal people could be denied a WWCC on the basis of insufficient identification.

The Commission appreciates the need of the Working with Children Screening Unit to maintain the integrity of identification verification procedures to protect children from potential harm. The Commission understands that the unit will, on a case-by-case basis consider alternative methods of identification where an applicant is unable to furnish the 100 points of identification required for the check.<sup>104</sup> The Commission considers that this is an appropriate response to the circumstances of those Aboriginal people who are affected by the stringent identification requirements of the WWCC.

### Cost and administrative burden of WWCC application

Currently the cost of applying for a WWCC is \$10 for volunteers and \$50 for paid workers.<sup>105</sup> In most cases the cost will be covered by employers, but in others the cost must be borne by the applicant. In its submission KALACC explained that for large cultural festivals—where up to 20 people may be employed in a paid capacity that would involve working with children—the cost of meeting the WWCC requirements may be very high, both in the costs of application and the costs of administration to the body. KALACC submitted that the government should assist community groups and not-for-profit organisations to meet the costs of complying with the legislative requirements.<sup>106</sup>

The Commission agrees with KALACC's submission. Child abuse has been identified by the Gordon Inquiry as a particular problem in Aboriginal communities and, in the Commission's opinion, if the government is serious about addressing these issues it should provide required checks at no cost to staff and volunteers of not-for-profit Aboriginal community organisations and Aboriginal community initiatives such as community justice groups,<sup>107</sup> school truancy patrols, drop-in centres and safe-houses.

## Recommendation 94

### Working with children check

That working with children checks be provided at no cost to staff and volunteers of not-for-profit Aboriginal community organisations and Aboriginal community initiatives such as community justice groups, school truancy patrols, drop-in centres and safe-houses.

## Education and training

The Working with Children Screening Unit has advised the Commission that they have worked closely with the Department for Community Development's Indigenous Policy Directorate and have formed an Indigenous reference group to assist in advising the unit on how the WWCC will affect Aboriginal people.<sup>108</sup> Education strategies and resources aimed at informing Aboriginal people about the need for a WWCC are currently in production.<sup>109</sup> The Commission suggests that consideration be given to producing materials aimed at informing Aboriginal people about the administrative requirements of the WWCC and training relevant people in Aboriginal community organisations to assist people to fill out WWCC applications. It is the Commission's view that some of the administrative barriers to the WWCC for Aboriginal people could be removed by such attention to education and training.

## Restraining orders

During consultations for this reference the appropriateness of the restraining order regime in Western Australia was criticised in relation to its application to Aboriginal people. It was said that many Aboriginal women do not support the removal of men from the family home pursuant to a restraining order because of strong cultural and social obligations to maintain family relationships. A preference was indicated for temporary measures that would deal immediately with family violence by removal of the perpetrator from the home accompanied by ongoing programs that emphasise family healing and behavioural reform.<sup>110</sup>

104. Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, letter to KALACC, 21 March 2006 [sic May] (provided to the Commission by KALACC).

105. The Commission was advised by the Working with Children Screening Unit that where a person is only paid a nominal fee or works on the basis of reimbursement of expenses the \$10 fee will be applied.

106. Kimberley Aboriginal Law and Culture Centre, Submission No. 17 (17 April 2006).

107. See Recommendation 17, above pp 112–13.

108. Anne Oades, Working with Children Screening Unit, email (17 May 2006).

109. These include a video, posters and brochures. Ibid.

110. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 355.

## *Elder abuse encompasses not only physical or sexual violence toward an older person, but also psychological abuse, neglect and financial exploitation.*

In 2004 amendments were made to the *Restraining Orders Act 1997* (WA) to address, among other things, the operational inappropriateness of the restraining order regime in Aboriginal communities. Under the new Part 2, Division 3A of the Act, police may issue a 24- or 72-hour police order imposing

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

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

It is hoped that the powers extended to police by these amendments will assist authorities to take a more positive role in combating family violence by initiating immediate action to separate perpetrators of family violence from their victims in situations where there is evidence of family violence or a reasonably perceived threat of such violence. Because the police order regime is in its infancy the Commission invited submissions on its effectiveness in relation to controlling family violence in Aboriginal communities so that it could consider recommendations for reform in this area.<sup>111</sup>

The Commission received very few submissions on this matter. The Department of Indigenous Affairs noted that without police recording the statistics of ethnicity of family violence victims and offenders it was very difficult to obtain an accurate picture of whether women are being adequately protected by the police order regime.<sup>112</sup> The Commission's consultations in Broome revealed some concern about lack of information and education among Aboriginal people of the new regime; while in Kalgoorlie it was said that

more women were being removed under the regime than men.

It was noted in the Commission's Discussion Paper that the police order provisions are subject to statutory review after two years of operation.<sup>113</sup> This review will likely be conducted sometime in early 2007.<sup>114</sup> Given the poor response to the Commission's invitation for submissions it does not feel justified in recommending changes to the police order regime. However, the Commission is concerned that Aboriginal voices may not be adequately heard in the ministerial review<sup>115</sup> of the regime and therefore strongly recommends that extensive consultation with Aboriginal communities be undertaken as part of the review.

### **Recommendation 95**

#### **Consultation with Aboriginal communities in review of the police order regime**

That, in undertaking the statutory review of Part 2, Division 3A of the *Restraining Orders Act 1997* (WA), the responsible Minister ensure that Aboriginal people are sufficiently consulted to gauge the effectiveness of the police order regime in addressing family violence in Aboriginal communities.

## **Elder abuse**

Another form of family violence is elder abuse. As explained in the Commission's Discussion Paper, elder abuse encompasses not only physical or sexual violence toward an older person, but also psychological abuse, neglect and financial exploitation.<sup>116</sup> Elder abuse may

111. Ibid 357, Invitation to Submit 14.

112. Department of Indigenous Affairs, Submission No. 29 (2 May 2006) 16. This position was supported in discussions with the Aboriginal Legal Service who appeared to be divided about the effectiveness of the regime. The Commission has recommended that police record ethnicity of victims and offenders to overcome this problem: see Recommendation 57, above p 213.

113. *Restraining Orders Act 1997* (WA) s 30I.

114. The amendments were effective from 1 December 2004. Therefore the two-year period will expire on 1 December 2006. The submission of the Western Australia Police suggests that the Department of the Attorney General is currently contracting a consultant to undertake the evaluation of the amendments: see Office of Commissioner of Police, Submission No. 46 (7 June 2006) 15.

115. The Minister responsible for administering the *Restraining Orders Act 1997* (WA) is the Attorney General.

116. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 349.

be committed by an adult or child toward a parent or elderly relative where there is an 'implication of trust, which results in harm to an older person'.<sup>117</sup>

A recent report by the Office of the Public Advocate into the impact of elder abuse in Aboriginal communities in Western Australia has brought the prevalence of elder abuse into greater focus in this state.<sup>118</sup> Although other types of abuse were reported,<sup>119</sup> the Public Advocate found that financial abuse was the most common form of elder abuse reported in consultations with Aboriginal community health workers and community members.<sup>120</sup> It was noted that 'some elderly people, particularly from traditional communities, appear to have no "western" concept of money' and can amass large sums in their accounts from pension payments making them vulnerable when they go to town.<sup>121</sup> It was reported that elderly Aboriginal people living closer to towns are also preyed upon on pension days and in some cases their family members will keep their bank key cards and raid accounts leaving only a small amount of money to cover the elderly person's daily expenses.<sup>122</sup>

The cultural obligation to share is a major factor in understanding the reasons behind the vulnerability of elderly Aboriginal people in relation to financial abuse. As noted in the previous chapter, Aboriginal people have cultural obligations to kin and this can extend to sharing money or assets.<sup>123</sup> As the Public Advocate report explains:

In almost all cases where there are reported incidences of abuse against an older person, kinship is the determining factor of that particular relationship, and it appears the perpetrator has used this relationship to abuse that older person.<sup>124</sup>

Grandparents, in particular grandmothers, have significant cultural obligations toward grandchildren and are often left to care for grandchildren when parents

are unable to because of imprisonment or drug and alcohol abuse. 'In many cases', the Public Advocate reports, grandparents are caring for their adult children as well as their grandchildren and extended family who are itinerant or homeless for varying periods'.<sup>125</sup> This cultural obligation cannot be ignored, but can place significant financial burdens on elderly Aboriginal people and make them more vulnerable to abuse. The Commission has earlier recommended that the Department for Community Development make information available to Aboriginal communities about government benefits available to assist grandparents in their care for grandchildren.<sup>126</sup> However, it is noted by the Public Advocate that in some cases grandparents are

unwilling to claim Centrelink payments for grandchildren in their care, for fear of abuse from the children's parents. Abuse came in the form of physical abuse, psychological abuse, and threats from the parents if their payments were 'cut off', limiting their access to money to purchase alcohol and drugs.<sup>127</sup>

The Public Advocate has recommended 15 strategies for dealing with the issues of mistreatment and abuse of older people in Aboriginal communities. Some of these strategies interact or duplicate some of the recommendations made in this Report. In particular strategies to enhance cultural awareness training among government agencies and service providers, initiatives to enhance cultural authority of Elders; support for grandparents raising grandchildren; and culturally appropriate services for perpetrators of violence are dealt with in this Report. Other strategies of the Public Advocate that are specifically pitched to developing awareness of elder abuse and improving care of elderly Aboriginal people (including by way of appropriate housing and aged care facilities) are strongly supported by the Commission.

117. Australian Network for the Prevention of Elder Abuse (1999) as cited in Office of the Public Advocate, *Mistreatment of Older People in Aboriginal Communities Project* (2005) 11.

118. Office of the Public Advocate, *ibid.*

119. Including physical abuse of older people (although possibly also related to financial abuse); neglect of elderly people in the paid care of a relative; and, infrequently, sexual abuse (which was generally found to occur when the perpetrator is affected by alcohol): *ibid.* 27 & 41–42.

120. *Ibid.* 25.

121. *Ibid.*

122. *Ibid.*

123. See 'Cultural Obligation to Share', Chapter Six, above p 246. See also LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 38 'Obligation to accommodate kin'; 269 'Obligation to care for and support kin'.

124. Office of the Public Advocate, *Mistreatment of Older People in Aboriginal Communities Project* (2005) 29.

125. Office of the Public Advocate, *ibid.*

126. See Recommendation 87, below p 280.

127. Office of the Public Advocate, *Mistreatment of Older People in Aboriginal Communities Project* (2005) 37.

## Other Recommendations that Will Assist in Addressing Family Violence and Child Abuse in Aboriginal Communities

In addition to the recommendations made in this chapter, the Commission has made a number of recommendations that will directly or indirectly assist in addressing family violence and child abuse in Western Australian Aboriginal communities. These include:

### Recommendation 1

#### Whole-of-government approach to service delivery

The Commission believes that improved service delivery by government agencies will assist in dealing with many of the underlying factors which contribute to family violence and sexual offending.

### Recommendations 2, 11, 12, 56 and 128

#### Cultural awareness training for all agencies involved in the criminal justice system

The Commission is of the view that people who work within the criminal justice system should be better informed about Aboriginal law and culture. In the context of family violence and sexual abuse this will assist criminal justice and welfare agencies when dealing with Aboriginal victims.

### Recommendation 3

#### Establish an Office of the Commissioner of Indigenous Affairs

The Commissioner will be required to independently monitor the implementation of the recommendations in this Report including those recommendations that are designed to reduce the level of family violence and sexual abuse in Aboriginal communities.

### Recommendation 5

#### Recognition of customary law to be consistent with international human rights standards

The Commission has recommended that, in all aspects of the recognition process, particular attention should be paid to the rights of women and children and the right not to be subject to inhuman, cruel or unusual treatment or punishment under international law.

### Recommendation 7

#### The development of more culturally appropriate programs and services for Aboriginal people (both victims and offenders) in the criminal justice system

The Commission has recommended that the Western Australian government ensure that there are adequate and accessible culturally appropriate services for victims of family violence and sexual abuse.



#### Recommendation 16

The right of a community council in a discrete Aboriginal community to refuse entry to a person or to ask a person to leave the community

This power could be used to prevent a person who has committed a serious violent or sexual offence from remaining in the community for a specified period of time.

#### Recommendation 17

Establish community justice groups

Community justice groups have the potential to provide Aboriginal people with more effective methods of controlling social and justice issues in their communities. With adequate resources, community justice groups may engage in crime prevention, rehabilitation and diversionary programs and provide support to victims of crime.

#### Recommendation 24

Establish Aboriginal courts

While Aboriginal courts will not necessarily hear cases involving serious sexual abuse these courts have the potential to reduce Aboriginal offending in general. Culturally appropriate court processes may assist in the overall rehabilitation of offenders even where the actual case before the court is not directly related to sexual abuse or serious forms of violence.

#### Recommendations 34, 38 and 39

Allow courts to consider relevant Aboriginal customary law during sentencing and bail proceedings and to be properly informed about customary law from Aboriginal people (both men and women)

These recommendations will enable courts to take into account relevant customary law or cultural issues that will assist in the rehabilitation of an offender. Further, because courts will be informed about Aboriginal law and culture from members of a community justice group, they will receive information about the offender as well as the views of the victim and any relevant community to which the offender or victim belong.

#### Recommendations 41 and 114

Single-gender juries and convening a court with a judicial officer of a particular gender

These recommendations will allow a court to consider any evidence that is gender-restricted if it is necessary in the interests of justice.

#### Recommendation 43

Prosecutorial guidelines

The Commission has recommended the inclusion of a guideline for police and prosecutors that emphasises the importance of protecting Aboriginal victims from violence and sexual abuse. Further, it is recommended that the guidelines include the need to obtain reliable evidence or information about customary law. In the context of false claims that Aboriginal customary law condones family violence or sexual abuse the need for reliable evidence is essential.

#### Recommendation 111

Special witness provisions

This recommendation will assist Aboriginal witnesses in circumstances where for cultural reasons they are unable to give evidence in the normal manner.

#### Recommendations 112 and 113

Power for a court to prohibit reference to or publication of evidence that may be offensive under Aboriginal customary law

These recommendations may also assist witnesses who feel constrained by obligations under customary law when giving evidence about certain matters, including violence or abuse.

#### Recommendation 116

Evidence taken 'on country'

This recommendation is designed to assist Aboriginal witnesses to feel more comfortable about giving evidence to a court.

#### Recommendations 120 and 121

Greater access to Aboriginal language interpreters

These recommendations will assist Aboriginal victims of family violence or abuse to deal with criminal justice agencies without the disadvantages posed by language and communication barriers.

#### Recommendation 125

Evidence in narrative form

Allowing a witness to tell their story uninterrupted by confusing or intimidating questions may assist victims of family violence and sexual abuse to provide more accurate and reliable evidence to courts.

#### Recommendation 127

Aboriginal liaison officers to assist Aboriginal witnesses

Aboriginal liaison officers will provide additional and culturally appropriate support for Aboriginal victims when appearing in court.